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"State Aid in the Courts"

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STATE AID IN THE COURTS

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A lecture given at a joint Faculty of Advocates/UKSALA seminar, held in Edinburgh, on 2 February 2015

Parliament Hall, pictured above, is the seat of the Court of Session and the home of the Faculty of Advocates. In this Hall, in 1706, the Scottish Parliament debated the Articles of Union. Those Articles created a single market on this island[1].

[1] For the proposition that the Union legislation of 1707 created an "Anglo-Scottish common market", see *Lord Gray's Motion* 2000 SC (HL) 46, 55 per Lord Hope of Craighead. It has been observed that Article VI guaranteed free access to markets, not uniformity in the conditions applicable to the particular markets associated with the different parts of the UK: in *Imperial Tobacco, Petitioner* 2012 SC 297, paras. 40 per the Lord President (Hamilton), 156 per Lord Reeed, 216 per Lord Brodie, (on appeal 2013 SC (UKSC) 153).

The Commissioners who negotiated the Articles of Union recognised that state action was liable to distort the single market. Article VI of the Treaty of Union provides[2]:-

> "THAT all parts of the United Kingdom for ever, from and after the Union, shall have the same Allowances, Encouragements, and Drawbacks, and be under the same Prohibitions, Restrictions, and Regulations of Trade, and lyable to the same Customs and Duties on Import and Export;"

That short Article perhaps does no more than hint at issues which take up whole Chapters of the Treaty governing the functioning of that larger single market to which we now belong – but it is not, perhaps, too fanciful to see in the words "Allowances" and "Encouragements" an acknowledgment, in prototype, of the kinds of issues which are dealt with in Articles 107 and 108 TFEU under the law of State aid.

I speak to you not as a State aid lawyer, but as an advocate practising in the field of public law, with an interest, therefore, in the relationship between the courts and other state institutions. My principal qualification for speaking at this conference is my involvement, as counsel, in the most interesting State aid case to have come before the Scottish courts – the *Cloburn Quarry* case[3]. What I have to say is directed to the nuts and bolts of how State aid law issues may arise in the national courts and, in a conference aimed at non-specialists as well as specialists, I hope the latter will forgive me if much of what I have to say is commonplace.

In order to set the role of the national courts in context, particularly for the non-specialist, I need to describe in brief, albeit with a degree of simplification, the basic

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[2] Article VI was relied on, unsuccessfully, in *Imperial Tobacco, Petitioner* 2010 SLT 1203 and 2012 SC 297, on appeal 2013 SC (UKSC) 153 and in *Scotch Whisky Association v. Lord Advocate* 2013 SLT 776, paras. 14-25.

[3] *Cloburn Quarry Co Ltd v. HMRC* 2013 SLT 843, 2014 SLT 303. The issues were also canvassed in separate proceedings in Lanark Sheriff Court, brought under section 73M of the Debtors (Scotland) Act 1987.

structure of State aid law and the role of the Commission in the enforcement of State aid law.

Article 107(1) TFEU provides that "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market". Article 107(2) then specifies certain types of aid which are compatible with the internal market; and Article 107(3) provides that certain types of aid may be compatible with the internal market.

It will be evident that two sorts of question may arise from this scheme: firstly, is the measure or action State aid within Article 107(1)? And, secondly, if it is State aid within Article 107(1), is it nevertheless compatible with the internal market? It is the Commission's responsibility to determine whether or not an aid is compatible with the internal market[4]. National authorities – and national courts - have no power to consider that question. However, as we shall see, national courts may be called upon to decide whether or not a measure constitutes unlawful State aid as defined in Article 107(1).

Article 108 sets out the mechanics, and the procedures are further amplified by the Procedure Regulation, Regulation 659/1999. Article 108(3) provides:-

> "The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

The procedure, in summary, is as follows:-

[4] This general rule is subject to: (i) the power of the Council to decide that aid shall be considered to be compatible with the internal market in derogation from the provisions of Article 107 or from the regulations provided for in Article 109 in exceptional circumstances; and (ii) the power of General Court, and the CJEU, to review the Commission's decision.

(1) The Commission must be informed of any plan to grant new aid or to alter existing aid[5] unless the aid is covered by an exemption.

(2) The Commission must consider whether the proposed aid is compatible with the internal market. If the Commission considers that the aid is not compatible with the internal market, then it must initiate the procedure provided for in Article 108(2).

(3) The procedure to be followed by the Commission is set out in the Procedure Regulation. The Commission carries out a preliminary examination. If the Commission finds that the notified measure does not constitute aid, or that there is no doubt that the measure is compatible with the common market, it records that finding in a decision[6]. If, though, the Commission finds that doubts are raised as to the compatibility of the aid with the common market, it initiates the formal investigation procedure under Article 108(2) and Article 6 of the Procedural Regulation[7]. I will mention that again, because the opening of a formal investigation has relevance for proceedings in the national courts.

The last sentence of Article 108(3) TFEU is important. It prohibits the Member State from putting the proposed measure into effect until the procedure before the Commission has resulted in a final decision[8]. This is the so-called standstill clause or standstill obligation, and it is of great significance for the role of national Courts. Let me summarise the significance of the standstill obligation in this way:-

(1) It is unlawful for a Member State to grant a new aid or to alter an existing aid, unless a relevant exemption applies, without notifying that aid to the Commission.

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[5] Article 108(3) TFEU; Procedural Regulation, Article 2.
[6] Procedure Regulation, Articles 4(2), (3).
[7] Procedure Regulation, Article 4(4).
[8] Article 108(3) TFEU; Procedure Regulation, Article 3.

(2) After a plan to grant a new aid or alter an existing aid has been notified, it is unlawful for the Member State to put the proposed measure into effect until the Commission has reached a final decision. So the standstill obligation continues to apply during the Commission's investigation and right up until its final approval decision[9].

(3) Even if the Commission ultimately decides that the aid is compatible with the internal market, that does not retrospectively validate an aid which was introduced prematurely and unlawfully in breach of the standstill clause[10], although the finding that the aid is compatible with the internal market will have potential implications for remedy[11].

Article 108(3) gives rise to directly effective individual rights for parties who have been affected by the unlawful aid – such as competitors of the beneficiary of the aid. These affected parties may enforce their rights under EU law by bringing legal action before the national courts. As the Commission has said, "Dealing with such legal actions, and thus protecting competitor's rights under Article 108(3) of the Treaty is one of the most important roles of the national courts in the State aid field"[12]. Because we are concerned with rights in EU law, these rights may be enforced in the national courts irrespective of the organ of the Member State which has been responsible for the aid[13]. The responsibility of national courts in that regard protects the jurisdiction of the Commission to supervise aid and its compatibility with the internal market. More fundamentally, it protects the rights of individuals who are affected by unlawful aid implemented in breach of the standstill clause, in circumstances where the Commission's investigation may take some time.

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[9] Case C-39/94 *SFEI* [1996] ECR I-3547, para. 39.
[10] Case C-368/04 *Transalpine Olleitung* [2006] ECR I-9957, paras. 41-43; Case C-199/06 *CELF* [2008] ER I-469, para. 40.
[11] Case C-199/06 *CELF I* [2008] ECR I-469, paras. 51-53; Case C-384/07 *Wienstrom* [2008] ECR I-10393, para. 28.
[12] Commission notice on the enforcement of State aid law by national courts, 2009/C 85/01, para. 24.
[13] A provision in an Act of the Scottish Parliament or a measure which is an act or failure to act of the Scottish Government is ultra vires insofar as it may be incompatible with EU law: Scotland Act 1998, sections 29, 57. By reason of the direct effect and supremacy of EU law, the rights may be enforced against any public authority, and, indeed, in respect of Acts of the UK Parliament.

Let me make this point concrete. Suppose that the state grants an aid which favours certain undertakings or the production of certain goods. If that aid has not been notified to the Commission, then, unless the aid is covered by an exemption, it is unlawful and a competitor which does not have the benefit of that aid may bring proceedings in the national courts. Equally, even if the aid has been notified to the Commission, if that aid has been put into effect before the Commission has issued a decision, a competitor may take proceedings in the national courts. In order to adjudicate on the claim, the national court may have to decide whether or not the measure is in fact an aid which is unlawful under the Treaty. If it is unlawful, the national court must enforce the competitor's rights.

There is one other situation in which the national courts may come to be seized of an issue of State aid law – namely where the Commission has issued a decision directed to the Member State ordering it to recover unlawful or misused aid[14]. Where the Commission has in its possession information regarding unlawful aid, it is obliged to examine the matter[15]. If, having gone through the necessary procedure, the Commission issues a negative decision, the Commission is, generally speaking, required to order the Member State to recover the aid[16]. Likewise, in a case of misused aid – where the aid has been approved by the Commission, but the beneficiary has used it in contravention of the Commission's approval decision – the Commission may open a formal investigation procedure[17] and, if it issues a negative decision, must, generally speaking, order the Member State to recover the aid[18]. The decision ordering recovery of the aid is directed to the Member State, which is obliged to comply with the decision. It is binding on all the organs of the State, including the courts.[19]. The relevant organ of the Member State may have mechanisms for recovering the aid without troubling the national courts. But it may be that the relevant organ of the State will require to raise proceedings in the

[14] Article 108(2) TFEU.
[15] Procedure Regulation, Article 10(1).
[16] Procedure Regulation, Article 14(1).
[17] Procedure Regulation, Article 16.
[18] Procedure Regulation, Article 14(1) with Article 16.
[19] Article 288 TFEU; Case 294/85 *Albako v. BALM* [1987] ECR 2345, plara. 17.

national courts against the recipient of the aid in question, in order to recover the aid in accordance with the Commission's decision[20].

To summarise then, the national courts may be seized of a State aid issue in the following circumstances:-

(1) Where it is alleged that a measure is unlawful State aid because it has been implemented without notification to the Commission or before the Commission has issued a decision following such a notification – ie in breach of the standstill obligation.

(2) Where the Commission has issued a decision directing the Member State to recover unlawful or misused aid. In such circumstances, the national court may be called upon to give effect to that decision.

It will be evident from the outline which I have given that State aid issues may end up in the European Courts in various ways - annulment proceedings directed against a decision of the Commission under Article 263 TFEU, proceedings against the Commission for failure to act under Article 265 TFEU, proceedings against the Member State in respect of a failure to comply with a final negative or conditional decision of the Commission under Article 108(2) TFEU. And, of course, a national court seized of a State aid issue may seek a preliminary ruling from the Court of Justice under Article 267 TFEU.

It follows from all of this that, at the same time as proceedings in the national court, the Commission may be engaged in procedure relating to the same matter, and, indeed, that there may be proceedings in the General Court or the Court of Justice. In the national proceedings, questions of a sist or stay to await the outcome of

[20] Eg *DTI v. British Aerospace plc* [1991] 1 CMLR 16.

events at EU level may arise. But in a case which is based on the standstill obligation, the court will require to balance its duty of sincere co-operation – which may suggest a sist to await a decision from the EU institutions[21] – with its responsibility to enforce Article 108(3). Reconciling these two considerations may, at least, require the national court to consider whether or not to grant an interim order pending the outcome of proceedings at EU level[22].

The Commission has issued a very useful notice on the enforcement of State aid law by the national courts. The Commission has also issued a Notice on implementation of decisions ordering Member State to recover unlawful and incompatible State aid, which contains some additional comment from the Commission in relation to litigation in the national courts in that context. These documents only express the Commission's views, of course, which may or may not be correct, but for the practical litigator they provide a very helpful way into the issues. And they are useful tools for communicating the basics to a court which may or may not have a background in State aid law.

The Enforcement Notice identifies the following remedies which, in the Commission's view, may be available before national courts in order to enforce the standstill obligation.

(1) Preventing the payment of unlawful aid;
(2) Recovery of unlawful aid;
(3) Recovery of illegality interest;
(4) Damages for competitors and other third parties; and
(5) Interim measures.

The precise form of the remedies available, and the procedural rules which apply are matters for national law, subject to the standard EU requirements of equivalence and effectiveness. So, for example, domestic rules on standing must not undermine the

[21] Cp Case C-344/98 *Masterfoods v. HM Ice-Cream* [2000] ECR I-11369.
[22] See K. Bacon, *European Union Law of State Aid,* 2nd edn, para. 20.49.

right to effective judicial protection of those who have rights conferred by EU law[23]. And other procedural rules – such as the rules on the burden of proof and the rules on recovery of documentation – must not be applied in such a manner as to render excessively difficult or practically impossible the exercise of the rights conferred by Community law[24].

Let me offer some comments, from the perspective of our domestic law, on the remedies identified by the Commission in the Enforcement Notice. I will use Scottish terminology, but I hope that what I have to say will be reasonably self-explanatory to those who are not Scots lawyers. The key underlying point is that, in a case where aid has been implemented in breach of the standstill obligation, the national court is obliged to draw all the appropriate conclusions from the unlawfulness of the aid in question, and to grant such remedies as are appropriate in the circumstances.

(a) Orders preventing the grant or payment of unlawful aid.

As the Commission observes, the "national courts' obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings. … Very often, the claimant will seek to challenge the validity of the national act granting the unlawful State aid. In such cases, preventing the unlawful payment will usually be the logical consequence of finding that the granting act is invalid"[25].

If an aid scheme has been enacted, but not yet implemented, the claimant may seek declaratory remedies, and reduction (ie an order setting aside the scheme). If it is anticipated that the scheme may be implemented, orders might also be sought seeking to interdict implementation. Equally, a specific grant of aid, if it has not yet occurred, may be the subject of a challenge with a view to preventing the aid being granted. The case may proceed by way of an application to the supervisory jurisdiction of the Court of Session – a petition for judicial review - under Chapter 58

[23] Case C-174/02 *Streekgewest,* para. 18.
[24] Case C-526/04 *Laboratoires Boiron,* paras. 55, 57.
[25] Enforcement Notice, para. 29.

of the Rules of Court. A practical cautionary point – although at present there is no statutory time limit for such proceedings, it is anticipated that the three month time limit introduced by the Courts Reform (Scotland) Act will come into force later this year.

By way of example, in *R v. Commissioners of Customs and Excise v. Lunn Poly*[26], judicial review proceedings were successfully brought seeking a declaration that the provisions in the Finance Act 1997 relating to travel insurance and which provided for variable rates of Insurance Premium Tax, constituted unlawful state aid. But the challenge may also be to an individual grant which is alleged to be a State aid.

My favourite example is the unsuccessful attempt by the John Paul Getty Trust[27] to prevent assistance being given by the National Heritage Memorial Fund to the V & A and the National Galleries of Scotland for the purchase of Canova's Three Graces – pictured below in the National Gallery of Scotland.

[26] [1999] 1 CMLR 1357; see also *R v. Attorney General ex parte ICI* [1987] 1 CMLR 72.
[27] *R v. Secretary of State for National Heritage ex parte John Paul Getty Trust,* Court of Appeal, 27 October 1994.

The point may arise for determination in other ways. For example, in *University of Sussex v. Customs & Excise Commissioners* [2001] STC 1495, the University took a State aid point in the context of proceedings before the VAT and Duties Tribunal about the differential time limits for late claims for input tax between payment traders and repayment traders. And in the *Cloburn Quarries* case, although the principal challenge to tax enforcement measures taken by HMRC was by way of a judicial review of summary warrants, the State aid point was also taken in a statutory summary application under the Debtors (Scotland) Act 1987 challenging the validity of an arrestment, which resulted in a two day debate before Sheriff Nikki Stewart in Lanark Sheriff Court.

(b) Orders requiring repayment of unlawful aid which has already been granted

In principle, a finding that aid has been granted in breach of the standstill obligation should, generally, result in its repayment under the procedural rules of national law[28]. The granting authority itself could advance a claim to recover the aid – it would be obliged to do so following a decision of the Commission[29], but could in principle do so in advance of such a decision on the basis that the grant of the aid was unlawful. Such proceedings could proceed simply as an action for payment. In a recent judicial review, a third party which sought to advance a challenge on the basis of a breach of the standstill obligation coupled its claim for declaratory and reductive relief with a claim for an order directed against the public authority requiring it to recover the aid[30].

In limited circumstances, there may be a defence to recovery. The Commission may not order recovery of aid if this would be contrary to a general principle of EU law[31], such as legitimate expectations and legal certainty, and the Commission has suggested that similar grounds could be advanced in defence to proceedings seeking recovery in the national courts[32]. The circumstances in which such grounds could be successfully advanced are limited[33]. If recovery is sought pursuant a Commission recovery order, the defender might seek to bring a collateral challenge to the validity of the Commission's decision, but only if he could not have challenged the decision in an application for annulment under Article 263[34]. On the other hand, if the Commission has approved the aid before the national court has issued its decision, the national court is no longer under an EU obligation to order repayment[35]. The correct remedies will be the payment of interest by the recipient for the period

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[28] Case C-39/94 *SFEI* [1996] ECR I-3547, paras 68-70; Case C-390/98 *Banks* [2001] ECR I-6117, para. 75.
[29] E.g. *DTI v. British Aerospace* [1991/1 CMLR 16; see generally K Bacon, *European Union Law of State Aid, 2nd edn.,* para. 20.23.
[30] Such a claim was advanced in *R (Sky Blue Sports & Leisure Ltd) v. Coventry City Council* [2014] EWHC 2089 (Admin), but the Court held that there was no unlawful State aid.
[31] Procedure Regulation, Article 14(1).
[32] Enforcement Notice, paras. 32-33.
[33] See K. Bacon, *European Union Law of State Aid,* 2nd edn, paras. 20.20, 18.120-135.
[34] See K. Bacon, op. cit., paras. 20.46-47.
[35] Case C-199/06 *CELF,* paras 45, 46, 55. There may still be an obligation under national law, albeit that it would be open to the Member State then to reinstate the aid.

during which it had the benefit of aid unlawfully disbursed, and compensation for competitors for damager caused by the premature payment of aid[36].

(c) Recovery of interest

In circumstances where an entity has had the benefit of aid granted unlawfully in breach of the standstill obligation, the undue advantage which it has secured comprises not only the principal amount, but also interest on that amount during the period when it has benefited from the aid. Accordingly, interest falls to be paid in respect of that period. In circumstances where the recovery is ordered by the Commission, this is specified by the Procedural Regulation[37].

(d) Damages

In various cases, the European Court has stated that competitors of the recipient of unlawful State aid may have a claim for damages against the Member State on *Francovich* grounds[38]. The Commission in its Enforcement Notice states that such claims "can be particularly important for the claimant, since, contrary to actions aimed at mere recovery, a successful damages action provides the claimant with direct financial compensation for suffered loss"[39]. The difficulties in quantifying loss should not be underestimated; and it appears that there has been no successful reported case in the UK. The competitor has no claim under EU law against the beneficiary of the aid. Although EU law does not prevent national law from permitting such claims also to be advanced, it would appear that English law, at least, does not recognise any such cause of action[40].

(e) Interim measures

The threshold question in any proceedings in the national courts relying on the standstill obligation will be whether the measure is or is not a State aid. If it is a State

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[36] K. Bacon, op. cit., para. 20.16.
[37] Implementing Regulation, Article 11; Procedure Regulation, Article 14(2).
[38] Case C-199/06 *CELF,* paras. 53, 55; Case C-368/04 *Transalpine Olleitung in Osterreich,* para. 56.
[39] Enforcement Notice, para. 43.
[40] *Betws Anthracite v. DSK Anthrazit Ibbenburen* [2004] 1 CMLR 14.

aid and it is not covered by any relevant exemption, then it is unlawful and the Court must give effect to that finding of unlawfulness. But the question of whether a measure is or is not a State aid (or, indeed, whether an exemption applies) may be controversial. As part of their responsibility under Article 108(3), national courts are obliged to take interim measures where that is appropriate to safeguard the rights of individuals and the effectiveness of the Treaty. This will be the case whether the national court intends to determine the substantive question itself, or sists the proceedings pending procedure by the EU institutions or a request for a preliminary ruling.

As the Commission has observed[41]:

> "The power of national courts to adopt interim measures can be of central importance to interested parties where fast relief is required. Because of their ability to act swiftly against unlawful aid, their proximity and the variety of measures available to them, national courts are very well placed to take interim measures where unlawful aid has already been paid or is about to be paid."

> "[T]here may … be circumstances in which the final judgment for the national court is delayed. In such cases, the obligation to protect the individual rights under Article [108(3)] of the Treaty requires the national court to use all interim measures available to it under the applicable national procedural framework to at least terminate the anti-competitive effects of the aid on a provisional basis ("interim recovery"). The application of national rules in this context is subject to the requirements of equivalence and effectiveness"[42]

So, for example, in the context of judicial review proceedings challenging an aid measure, the Court could be invited to suspend a measure ad interim and/or to grant interim interdict against its implementation. In deciding whether or not to grant an interim order, the Court should, no doubt, apply its ordinary rules – which in Scots law would involve the Court asking itself, firstly, whether or not there is a prima facie case, and, secondly, where the balance of convenience lies. But in considering the

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[41] Commission notice on the enforcement of Stat aid law by national courts, 2009/C 85/01, para. 57.
[42] Ibid., para. 60.

balance of convenience, the Court would require to give appropriate weight to its responsibilities under Article 108(3).

If the aid has already been granted and the claim is one seeking an order for repayment, the Court may be obliged to consider other provisional and protective remedies. The Commission has expressed the view that:-

> "Where … the national judge has reached a reasonable prima facie conviction that the measure at stake involves unlawful State aid, the most expedient remedy will, in the Commission's view and subject to national procedural law, be to order the unlawful aid and the illegality interest to be put on a blocked account until the substance of the matter is resolved"[43]

How might this be achieved in the Scottish context? It may be that an appropriate interim order could be fashioned in reliance on the powers of the Court of Session under section 47(2) of the Court of Session Act 1988 to grant interim orders in relation to the subject-matter of the cause. In proceedings at the instance of the public authority seeking repayment, an arrestment on the dependence, which in the ordinary case of an arrestment in the hands of the defender's bank, as the Scots lawyers in the audience will know, will result in the funds being placed in a suspense account pending further order of the court.

When the domestic court is considering the question of interim remedies, the status of any proceedings before the Commission under Article 108 may be significant. In particular, if the Commission has initiated the formal investigation procedure, the national court requires to give full weight to that circumstance. In effect, the national court may require to treat this as sufficient to satisfy it that there is a prima facie case. This was explained in a recent case, Case C-284/12 *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH*[44].

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[43] Ibid., para. 61; see also para. 62.

[44] See paras. 34-44. The Advocate General in terms stated that the institution of a formal investigation by the Commission "must be regarded as at least sufficient to satisfy the condition relating to the establishment of a prima facie case with a view to adopting a provisional measure. ..."

The *Cloburn Quarry* case

The *Cloburn Quarry* case provides a practical illustration of some of the points which I have been making – in particular, of the complex interaction between domestic litigation and proceedings at EU level. Because the matter is still live, I do not propose to comment on the substance of arguments, but I can from public sources outline the history, which I will do in a slightly simplified fashion.

The case concerned Aggregates Levy, a tax introduced by the Finance Act 2001. The statutory scheme is subject to exemptions. An exemption from tax, or the benefit of a reduced tax rate as compared with a competitor, is capable of being a State aid. Even if the exemption is a State aid, though, that does not follow that a taxpayer who is subject to the charge or to higher rate can resist payment. Indeed, the ordinary rule is to the contrary. An undertaking which has been taxed at a higher rate than its competitor may not, generally, impugn the validity of the higher rate which it is required to pay, though it may have standing to challenge the lawfulness of the exemption or lower rate which its competitor enjoys[45]. There are exceptions to this general rule –in particular the situation illustrated by the *Boiron* case, where the imposition of a tax or charge on one group of undertakings, but not on another, is the very means by which aid is granted to the non-taxed group[46].

The substantive issues, so far as relevant, in the *Cloburn Quarry* case were and are: (1) whether or not the exemptions constituted State aid; (2) whether or not the Aggregates Levy falls within the *Boiron* exception; and (3) what the consequences of that are in relation to the enforceability of the tax against a taxpayer who is subject to the Levy. Shortly after the Levy was introduced, the British Aggregates Association brought a judicial review in the Administrative Court in London inter alia on State aid grounds. Moses J held that the exemptions to the Levy did not constitute State aid.

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[45] This is Bacon's view (loc. cit., para. 20.10), though the Commission in its Enforcement Notice suggests otherwise (para. 75). It may be that the correct analysis is that the competitor would, semble, have standing according to domestic law, to bring a judicial review application: see *Axa General Insurance Ltd, Petitioners* 2012 SC (UKSC) 122.

[46] Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paras. 30-40.

The BAA appealed. The UK notified the Levy to the Commission, which issued a decision to the effect that the Levy did not constitute aid. The BAA challenged that decision in the Court of First Instance and the appeal proceedings in England were stayed. The CFI rejected that challenge. The BAA appealed to the Court of Justice, which set aside the decision of the CFI and remitted the case to the General Court for reconsideration. In 2012, the General Court annulled the Commission decision and remitted the matter to the Commission to reconsider the position. One might remark on the timescale.

In light of the decision of the General Court, Cloburn Quarry Ltd, a company involved in the production of aggregates, declined to pay the Levy but offered to put the relevant sum on joint deposit. HMRC obtained a summary warrant[47] for the unpaid Levy from the sheriff at Lanark and served a charge[48]. The taxpayer brought a petition for judicial review of the summary warrant and charge inter alia on the basis of State aid law. The case appeared in the vacation court, on a motion for interim orders. These were refused. Lord Boyd took the view that there was no prima facie case that the UK was acting unlawfully in levying the tax such as to justify interim orders and, in any event, that the balance of convenience was against the petitioners[49]. The petitioners appealed.

HMRC served an arrestment in the hands of the taxpayer's bank[50]. The taxpayer challenged those arrestments by way of a summary application to the sheriff under the Debtors (Scotland) Act 1987. The challenge proceeded on the basis that the enforcement of the tax was unlawful by reason of EU law. Sheriff Nikki Stewart at Lanark heard a two day debate on the relevant law but, ultimately, decided to sist the proceedings before her pending the decision in the judicial review proceedings in the Court of Session and the Court of Appeal.

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[47] Summary warrant procedure is a process available to HMRC in Scotland, under which HMRC may apply to the sheriff ex parte and obtain a warrant which has the effect of a decree upon which execution may follow.

[48] A formal demand for payment, which is the precursor to further enforcement action.

[49] 2013 SLT 843.

[50] An arrestment prohibits the bank from paying the relevant sum, if available, to the debtor/customer; in practice, the bank will place the relevant sums in a suspense account.

You will recall that, in Europe, the General Court had quashed the Commission's decision to the effect that there was no State aid. The Commission, on revisiting the question, decided to institute the formal investigation procedure, on the basis of a preliminary view that certain of the exemptions from the Levy constituted State aid. This was a significant change of circumstance. The UK Government acknowledged that, in light of the Commission decision, it would have to suspend the effect of the exemptions identified by the Commission (and indeed it has brought forward legislation to achieve that). The UK Government did not, though, accept that this affected the obligation of non-exempt taxpayers to continue to pay the Levy meantime.

In light of the material change of circumstances, the Inner House remitted the judicial review petition back to the Outer House. HMRC indicated their intention to seek a further summary warrant in relation to the Levy due in respect of another tax period, and the taxpayer renewed its application for interim orders seeking to prevent enforcement of the Levy at a hearing before Lord Burns[51]. Lord Burns rejected the application on the basis that the petitioners had not established a *prima facie* case that the case was one to which the Boiron exception applied, but stated that, had he taken a different view on that point, he would have granted the order. The petitioners appealed that decision. Before the Inner House, the case was sisted to await the Commission's decision – and, as I understand it, enforcement proceedings in England & Wales have also been stayed to await the Commission's decision[52].

This history illustrates the complex interplay between national proceedings and proceedings by the Commission and the EU Courts. It provides an example of the significance of the standstill obligation as the basis for domestic proceedings; and the potential materiality of the opening by the Commission of a formal investigation.

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[51] 2014 SLT 303.
[52] *HMRC v. Torrington Stone Ltd* [2014] EWHC 2567 (QB).

And so let me leave you with a picture of some decorative aggregates. Thank you for your attention.

WHAT IS STATE AID?

Michael Howlin Q.C.

1. Why ask?

There are at least three reasons.

(1) First, it is possible for a practitioner to devote so much of his time and effort to making sure that his clients stick within the four walls of the GBER (General Block Exemption Regulation)[53] and all the copious "soft law" guidance given by the Commission that he loses contact with the hard law that lies beyond those limits. It is therefore always a good idea to refresh one's memory from time to time by returning *ad fontes*.

(2) Secondly, now that I have mentioned soft law, it happens to be the case that the Commission is in the midst of a consultation process about the meaning of state aid[54], with a view to updating its guidance, so the question is a hot topic.

(3) Thirdly, in connection with that consultation the Commission has published a draft Communication on the notion of State aid which can be seen, in loose terms, as being in the nature of an unofficial codification of the law: but it is never safe to rely upon a codification alone, without reference to precisely what it is that is being codified.

2. What does the question mean?

You can look at the meaning of state aid through a wide-angle lens or a telephoto lens.

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[53] Commission Regulation (EU) No 651/2014 of 17 July 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. This supersedes the original GBER (Commission Regulation (EC) No 800/2008).

[54] See the "Draft Commission Notice on the notion of state aid pursuant to Article 107(1) TFEU" (2014).

2.1 The wide-angle lens will take in all the elements which are set out in Article 107(1) of the TFEU, so it will capture all the key concepts set out in the Treaty wording:

> "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2.2 The broad view would therefore have to encompass the meaning of:

(1) aid;

(2) granted by a Member State;

(3) or through State resources;

(4) in any form whatsoever;

(5) which distorts or threatens to distort competition;

(6) by favouring certain undertakings;

(7) or the production of certain goods;

(8) and affects trade between Member States.

2.3 You will all know that examining this list of issues gives rise to specific questions such as:

(1) In what capacity must the Member State be acting (because Article 107(1) does not apply where the grantor is acting "by exercising public power" or "in its capacity as a public authority")?

(2) In particular, in sectors such as social security and health care, how do you determine whether the grantor ***is*** acting in its capacity as a public authority?

(3) What about where the State is funding infrastructure?

(4) In what circumstances is aid granted by an entity below State level to be imputed to the State?

(5) How do you identify "State" resources?

(6) What is an "undertaking"?

(7) How do you distinguish between a general aid scheme and a scheme favours "certain" undertakings or the production of "certain" goods?

And of course this list of issues is not exhaustive.

2.4 The telephoto lens will not capture all of those issues. It will capture essentially the question: What is aid? I propose to use the telephoto lens and to remind you of what you already know about the central notion of "aid".

3. The basic concept

3.1 It is obvious that any sort of grant made directly or indirectly from state resources is aid. That is because the grant is, in the language of the case-law, an economic benefit which an undertaking would not have obtained under normal market conditions. Another way of putting it is to say that the key element is the wholly or partly gratuitous nature of the state intervention. Once this is appreciated, then it follows that the gratuitous intervention does not even have to take the form of a cash grant.

3.2 All of this can be taken from Case C-39/94 ***Syndicat Français de l'Express International (SFEI) and Others v La Poste and Others*** [1996] ECR I - 3547.

In fact the ***SFEI*** judgment is so instructive that I propose to use it as source-book for much of what I want to say in this part of my talk.

(1) In France, the Post Office (*La Poste*) was under ministerial control. The Post Office in turn controlled, directly or indirectly, a number of companies, including Chronopost and Société Française de Messagerie Internationale ("SFMI"). Chronopost dealt with express mail delivery within France whilst SFMI dealt with express deliveries abroad.

(2) In 1986, the responsible minister gave instructions for Chronopost's business to be run mainly by SFMI and for the Post Office's resources to be used for that purpose. As a consequence of those instructions, the Post Office provided SFMI with **logistical** assistance, by making its post offices and some of its staff available for the collection, sorting, transport and distribution of letters and parcels to customers, and with **commercial** assistance in the form of advertising, canvassing and advising customers[55]. The French State considered that none of this amounted to State aid, so it did not notify the arrangement to the Commission under what was then Article 88 EEC.

(3) This arrangement narked SFEI, which was an association of international courier companies that included FedEx and UPS. In particular, SFEI claimed that the Post Office's services were provided "in return for payment of abnormally low consideration" and on "unusually favourable terms of payment".

(4) SFEI sued the Post Office, Chronopost, and SFMI in the *Tribunal de Commerce* in Paris[56], seeking (i) a declaration that the above

[55] It was the claimants' unchallenged position that the logistical assistance consisted in making available to SFMI the use of the postal infrastructure comprising 300,000 members of staff, 73,000 daily postal rounds, 16,835 buildings, 50,000 vehicles, 300 railway carriages and 22 aeroplanes and in granting privileged customer clearance procedures, all in return for "unusually favourable terms of payment".

[56] One of the strange aspects of the case is the fact that, before it raised proceedings in Paris, SFEI had already made an unsuccessful "State aid" complaint to the Commission. However, having formally rejected that complaint, the Commission then commenced an enquiry of its own into the

arrangements constituted State aid within the meaning of the Treaty, (ii) an order requiring the Post Office to suspend further aid, (iii) an order requiring Chronopost and SFMI to repay to the Post Office all the unlawful State aid received (over FF 2 billion) and (iv) damages (FF 219 million).

(5) The crucial thing for present purposes is that, in order to determine the litigation, the French Court had to decide, in the first place, whether the arrangements complained of constituted State aid within the meaning of the Treaty. (It was not required to decide, and indeed had no power do decide, whether the aid - if it was aid - was compatible with the internal market, because that was a decision for the Commission, not for national courts.)

(6) The *Tribunal de Commerce* referred a raft of questions to the (then) ECJ for a preliminary ruling under what was then Article 177 EEC. Many of the questions concerned the respective *rôles* of national courts on the one hand, and the Commission on the other hand, in determining whether an intervention did constitute State aid and in providing remedies. That is for somebody else to speak about. What concerns me is one particular question aimed at ascertaining whether the arrangement complained of was capable of constituting State aid.

(7) Perhaps unsurprisingly, the ECJ answered that question in the affirmative. It is worth seeing how it approached the issues involved and how it proceeded from the general to the particular.

> "58 The aim of Article 92 of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain

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arrangements that had been complained of. At the time of the French court proceedings the Commission's enquiry was still in progress but was being hindered by a certain lack of co-operation from the French government.

products (see Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR 1-877, paragraph 12, and Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 26). The concept of aid thus encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, ***mitigate the charges which are normally included in the budget of an undertaking*** and which, ***without therefore being subsidies in the strict sense of the word***, are of the ***same character and have the same effect*** (see Case C-387/92 *Banco Exterior de España,* cited above, paragraph 13).

59 It follows from the foregoing considerations that the supply of goods or services on preferential terms is capable of constituting State aid (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 28, and Case C-56/93 *Belgium* v *Commission* [1996] ECR 1-723' paragraph 10) I - 3595

60 Accordingly, in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient[57]

[57] I say "the recipient" but of course there can be both direct and indirect recipients and it may be that only the latter obtain such an advantage: that may enough to trigger the definition of "aid". Case C-403/10 P ***Mediaset SpA v Commission*** [2011] ECR I - 117 illustrates this. An Italian law designed to substitute digital for analogue television provided for users to receive subsidies to purchase or rent digital terrestrial decoders. There was no subsidy for the purchase or rental of digital satellite decoders. The Commission adopted a decision that the subsidy constituted State aid because its effect was to confer a benefit on broadcasters of terrestrial television. Two such broadcasters, Mediaset and Sky Italia, challenged that decision unsuccessfully in the General Court. In its judgment the Court dealt with the concept of an "indirect beneficiary" and held that: "[A]n advantage granted to certain natural or legal persons who are not necessarily undertakings may constitute an indirect advantage, and hence State aid, for other natural or legal persons who are undertakings." This judgment was upheld on appeal to the CJEU, which put the matter more elegantly: "[A] national measure which discriminates between undertakings, in the sense that it is liable to place some of them at an advantage compared with others, is to be regarded as ***selective*** and ***therefore*** as constituting State aid within the meaning of Article 87(1) EC. That is the case, for instance, where a measure subsidises the purchase by consumers of a product which is used by an undertaking for the provision of a service while the purchase of the product used by another undertaking for the provision of a similar service is not subsidised" (emphasis added). The words emphasised show that the "selectivity" criterion, instead of being treated as a distinct element of Article 107(1), can sometimes leech out into the very definition of "aid".

undertaking receives an ***economic advantage*** which it would ***not*** have obtained ***under normal market conditions***.

61 In examining that question, it is for the national court to determine what is normal remuneration for the services in question. Such a determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided" (emphasis added).

3.3 Another way in which the State can confer an advantage on an undertaking is by mitigating the charges which would normally fall on that undertaking. Indeed, in the case-law there is a mantra to the effect that "the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking." This formulation can be traced back at least to Case C-387/92 ***Banco Exterior de España*** [1994] ECR I - 877.

(1) A good example is the ***Kimberley Clark*** case (Case C-241/94 ***France v Commission*** ECR I - 4551). Kimberley Clark was planning to restructure the production line and the products at one of its plants in France, a process which involved reducing its workforce. Under French law, the company was required to implement a so-called "*plan social*[58]" which was going to cost it just over FF 109 million.

(2) So far so good, but the company entered into an agreement with a State organisation called the *Fonds National de l'Emploi* ("FNE") whereby about 25 per cent. of the FF109 million was to be borne by the FNE.

(3) This was State aid because the effect of the intervention by the FNE was to relieve the company of part of the burden of funding its redundancy costs.

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[58] Hopelessly mistranslated in the English version of the report as a "social plan", whatever that is supposed to mean.

(4) As it happens, the true interest of this case lies in an aspect of State aid with which I am not dealing in this talk, namely, the question whether the aid, in the language of Article 107(1) "favour[s] ***certain*** undertakings or the production of ***certain*** goods" (my emphasis). The French government had argued that this part of the Article 107(1) test was not satisfied because the legislation and guidelines under which the FNE contributed to restructuring costs applied to all businesses of a certain size and was therefore an intervention of a general nature. However, the French government also agreed that, in practice, the FNE could depart from its own guidelines, whilst the Commission's (apparently unchallenged) evidence was that the FNE enjoys a degree of latitude which enabled it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which the assistance was provided.

(5) Under these circumstances, the Court found[59] that: "[T]he system under which the FNE contributes to measures accompanying social plans is liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of [what was then] Article 92(1) of the Treaty."

4. The private investor principle

4.1 You will see from the passages that I have emphasised in the ***SFEI*** judgment that in considering whether a particular state intervention constitutes State aid one must consider not only its character but also its "effect"[60]. This is necessary in order to determine whether its effect is to ***mitigate the charges which are normally included in the budget of an undertaking.*** And here,

[59] Para. 24.

[60] "Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects": Joined Cases C-71/09 P,C-73/09 P and C-76/09 P ***Comitato "Venezia vuol vivere" v Commission*** [2011] ECR I - 4727.

perhaps the key word is "normally", because in proceeding, as I said earlier, from the general to the particular, the Court went on to identify the question whether the recipient has "receive[d] an ***economic advantage*** which it would ***not*** have obtained ***under normal market conditions"***.

4.2 As you will all be aware, the notion of "mitigating charges" refers both to the mitigation (or even the complete absence) of the consideration which a commercial entity would normally have to pay in order to obtain goods and services and to the mitigation of charges which are normally incumbent on a trading entity, including - but by no means restricted to - charges imposed by the State in various forms, such as taxation or social security contributions.

4.3 I will touch briefly on the mitigation of charges later. Right now I want to concentrate on the crucial concept of "normal market conditions", or rather, I propose to treat that expression as a mere bridge leading to the truly crucial concept of the "market economy operator" or "market economy investor principle". The concept is particularly relevant to investments (whether of loans or of equity) by the State in an undertaking which it controls and the question which it raises is whether, in similar circumstances, a private investor (often referred to as a "prudent" private investor) of comparable size operating in normal conditions of a market economy would have made the investment in question.

4.4 The starting point for this tract of case-law may well have been a piece of soft law in the form of a document which the Commission sent to Member States on 17 September 1984 explaining its general standpoint with regard to public holdings in company capital in the light of what was then Article 92 EEC[61]. The document stated:

> "3.3 [...] [T]here is State aid where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions.

[61] Bulletin EC 9-1984, available on the Commission's "Europa" website.

This is the case:

(i) where the financial position of the company, and particularly the structure and volume of its debts, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested ... "[62].

4.5 The Commission's view found its way into the case-law the very next year, when the ECJ delivered its judgment in Joined Cases 296 & 318/82 ***Leeuwarder Papierwarenfabriek BV*** [1985] ECR 809.

(1) Here, a Dutch company manufacturing cardboard boxes and packaging materials and its holding company were in persistent financial difficulties. An equity stake in the holding company was acquired by a regional development body which was owned by the Dutch State but financed by loans from the financial markets. The loans were guaranteed by the State and the use to which they were put was subject to State authorisation.

(2) The Commission issued a decision finding that the injection of equity capital was state aid. In the preamble to the decision, the eighth recital stated that:

> "The prohibition laid down in Article 92(1) applies to injections of capital both by the central government itself and by regional authorities or other public agencies under the central Government's authority",

whilst the ninth recital stated that:

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[62] For another indication of the Commission's concern with this type of aid, or perhaps more accurately with its ability to police it, see the latest iteration of the "Transparency Directive" - Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified Version), OJ L 318/17; 17.11.2006 - particularly recitals (5) and (6) and Article 1(1)

> "[T]he financial structure of the firm, which urgently needed to carry out replacement investments, and the over-capacity in the paperboard-processing industry, constituted handicaps indicating that the firm would probably have been unable to raise on the capital markets the funds essential to its survival"

and the tenth recital stated that:

> "[T]he situation on the market is question provides no reasonable grounds for hope that a firm urgently needing large-scale restructuring could generate sufficient cash flow to finance the replacement investment necessary, even if it received the proposed assistance".

(3) The Kingdom of the Netherlands and the holding company both challenged the decision on a number of grounds, which included an argument that the Commission had failed to state adequate reasons for the "State aid" part of its decision. The Court rejected that part of the challenge[63]. Having repeated the above recitals, it went on to say:

> "20 [...] In this case it was the absence of the possibility of raising finance on the private capital market which indicated the contributions in question amounted to aid in the light of three factors, namely the financial structure of the undertaking, its urgent need for replacement investments and the over-capacity in the paperboard-processing industry", all making it "unlikely that the undertaking would be able to raise on the private capital markets the funds essential to its survival".

(4) This approach by the Court thus amounted to an endorsement of the "private investor" principle.

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[63] In looking at the case you must remember that, when the Court reviews the adequacy of the reasons given for a decision taken by a Community authority, this may involve considering not only whether the decision adequately sets out the factual basis upon which it proceeds but also whether, given that factual basis, the decision is also well-founded in law.

4.6 Of course, the private investor principle is not restricted to injections of equity capital. It also covers the making of loans (soft loans being an obvious target) and the provision of guarantees[64]. There is also an extension of the principle to the so-called "private vendor test", where a public body sells an asset. The private vendor test was foreshadowed in the ***Van der Kooy*** judgment cited in ***SFEI***, above ("[T]he supply of goods ... on preferential terms is capable of constituting State aid"). The thrust of the test involves assessing whether a private vendor, under normal market conditions, could have obtained the same or a better price. This emerges from a series of recent judgments, culminating in the "***Burgenland***" case. Although this case has been determined by the CJEU in Joined Cases C-214/12 and C-223/12 ***Land Burgenland v Commission*** (ECLI:EU:C:2013:682), it is more instructive to consider the lengthier and more fully-reasoned decision of the General Court in the original litigation: Joined Cases T-268/08 and T-281/08 - (ECLI:EU:T:2012:90).

(1) The factual and legal background to ***Burgenland*** is messy but the essential point for present purposes is that in 2006 the province of Burgenland privatised a distressed bank, HYPO Bank Burgenland AG ("BB"), following a process in which it invited offers, attracted bids and

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[64] In State guarantee cases, the question (unsurprisingly) is whether in the circumstances a private entity would have provided a guarantee at all and, if so, whether it would have done so on the same terms. See, in general, ***Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees*** (OJ C 155/10; 20.6.2008), in which the Commission stated: "The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State." The accuracy of that formulation was apparently accepted without question by the General Court in Case C-275/10 ***Residex v Gemeente Rotterdam*** [2011] ECR I - 13043. Case T-154/10 ***France v Commission*** (20 September 2012) is an interesting case of State aid by way of an ***implied*** guarantee. The French State had restructured La Poste as an "*EPIC*" (*établissement public à caractère industriel et commercial*) under State control. Being an *EPIC*, La Poste was not incorporated as a limited company and, in the event of its becoming unable to pay its debts, it was subject to special insolvency procedures which differed from those which applied to limited companies. In particular , its creditors' claims would not be extinguished. The Commission held that this meant that creditors had the benefit of an ***implied*** - and indeed unlimited - guarantee from the State: the State was the guarantor of last resort. In adopting this view, the Commission relied in part on the judgment of the French *Conseil d'Etat* in one of the *Crédit Lyonnais* cases to the effect that "there was a State guarantee for this establishment which derived ***without any express legislative provision*** from the very fact that it was a publicly-owned establishment"(my emphasis). Its decision was upheld by the General Court.

sold the bank to the second highest bidder (called "GRAWE" for short) instead of to the highest bidder (the "Consortium"). The Commission issued a decision finding that this, and other aspects of the transaction, constituted State aid and it was this decision that was challenged in the General Court. One of the arguments advanced by Burgenland and the Austrian Republic was that, in treating the higher of the two bids as the touchstone for determining the presence of State aid, rather than relying on independent valuations of the market price, the Commission had committed a manifest error of "appreciation" which rendered its decision unlawful. So that argument was the gateway for the Court's consideration of this particular State aid issue.

(2) The Court found that there was no manifest error. In particular, it held as follows.

> "69 [I]t must be noted that the market price of an undertaking, which generally depends on the interplay of supply and demand, corresponds to the highest price that a private investor operating in normal competitive conditions would be prepared to pay for that undertaking (see, to that effect, Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 80, and the case-law cited in paragraph 48 above).
>
> 70 When a public authority intends to sell an undertaking belonging to it and makes use of an open, transparent and unconditional tender procedure to do that, it can therefore be presumed that the market price corresponds to the highest offer, provided that it is established, firstly [*sic*], that that offer is binding and credible and, secondly, that the taking into account of economic factors other than the price is not justified, such as the off-balance-sheet risks existing between the offers. Therefore, the Commission does not commit a manifest error of assessment

in concluding that the aid element can be assessed from the market price, which in principle itself depends on the offers actually made in a tender procedure.

71 In those circumstances, it cannot be complained that the Commission did not take account of the independent studies, referred to in ... the contested decision, which are said to support the applicants' argument that the price offered by GRAWE for the purchase of BB is consistent with the market price.

72 Reliance on such studies for the purpose of determining BB's market price would only make sense if no tender procedure with a view to the sale of BB was carried out or, possibly, if it was concluded that the tender procedure set up was not open, transparent and unconditional."

(3) As for determining whether the highest bid is credible, the Court seems to have impliedly accepted the Commission's view that a bid is not credible "where it is obvious that the sale to the highest bidder is not realisable, which means in the present case examining firstly [*sic - rursus*] ... the economic soundness of the Consortium and secondly the probability that the Consortium would not eventually obtain the required permission from the ... Austrian authority responsible for the supervision of financial markets... [65]".

4.7 One interesting point about the ***Burgenland*** judgment is that it indirectly endorses[66] the Commission's practice regarding state aid in privatisations, as set out in its ***23rd Report on Competition Policy 1993***[67].

[65] See para. 22.
[66] I say "indirectly" endorses, because in fact the General Court found (at para. 67) that: "[T]here is no need to rule on the legal significance of the *XXIIIrd Report on Competition Policy* ... "
[67] Paragraph 403.

"• A competitive tender must be held that is open to all comers, transparent and not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain businesses;

• The company/assets must be sold to the highest bidder; and

• Bidders must be given enough time and information to carry out a proper valuation of the assets as the basis for their bid. "

The thing to bear in mind about these criteria is that what the Commission is doing here is seeking to identify conditions which, if satisfied, will tend to demonstrate the absence of State aid. However, it does not follow that if one or more of those conditions are not satisfied there must necessarily be State aid. As the General Court put it in ***Burgenland***[68]: "[T]he guidelines set out in the report are intended only to specify the cases in which it is ***presumed*** that privatisation measures enisaged by the Member States do not contain an aid element ... " (my emphasis).

4.8 As already mentioned in passing, the private investor principle also applies - unsurprisingly - to investments by way of loan finance or other forms of debt. But it applies not only to the provision of such finance but also to writing it off in whole or in part or to implementing a debt-to-equity conversion. Indeed, in this context we now speak of the "market economy creditor principle" or the "private creditor principle". Thus in its ***Olympic Airways*** judgment (Case T-68/03 ***Olympiaki Aeroporia Ypiresies v Commission*** [2007] ECR II - 2911) the CFI (as it then was) held:

"283 With regard ... to the private creditor criterion ... it should be borne in mind that, according to case-law, the mere fact that payment facilities are accorded in a discretionary manner by a public creditor is not sufficient to characterise such facilities as State aid. The payment facilities accorded must also be clearly greater than those which would

[68] Para. 63.

have been accorded by a private creditor in a comparable situation in regard to his debtor, having regard, in particular, to the size of the debt, the legal remedies available to the public creditor, the chances that the debtor's situation will recover if he is allowed to continue to operate and to the risks to the creditor of seeing his losses increase in the latter case (see the judgment in Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 30; the Opinion of Advocate General Mischo in Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, points 34 to 37; and the judgment in Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 95)."

4.9 In a relatively recent (and complex) decision[69] the Commission has usefully summarised the case-law on the private creditor principle in rather less abstract and more approachable language.

"(188) According to Court case-law, in such situations [meaning where public debt is being partially forgiven - in this case to pave the way for the privatisation of distressed state-owned companies] the Commission must apply the private creditor rule, i.e. in order to determine whether the reduction of some of the debts owed by a firm in difficulty to a public-law body constitutes state aid, it must compare that body to a private creditor seeking to recover amounts owed to it by a debtor in financial difficulty.

(189) However, according to case-law, when a company facing a significant deterioration in its financial situation proposes an agreement or series of agreements for debt restructuring to its creditors with a view to remedying the situation and avoiding bankruptcy, each creditor must take its decision in the light of the amount offered to it under the proposed agreement on the one hand, and the amount it expects to be able to recover in the event of the company's liquidation on the other.

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[69] Commission Decision on the State Aid No C 40/2008 implemented by Poland for PZL Hydral S.A (C (2010) 5406 Final; 4.8.3010) (Public version).

Its decision is influenced by number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any collateral it may hold, its assessment of the likelihood of the company being restored to viability and the risks of its losses increasing in the event of this not taking place and the amount it would receive in the event of liquidation. If it turned out, for example, that in the event of the company being liquidated, the realisation value of its assets sufficed only to cover mortgage and preferential claims, ordinary claims would have no value. In these circumstances, acceptance by an ordinary creditor of the cancellation of a major part of its claim would not really be a sacrifice."

4.9 The private investor principle has developed numerous refinements which I can do no more than hint at here. For example:

(1) Where the State, in making the intervention, is acting both as a public body (applying public policy considerations) and as a private investor, it is only the "private investor" considerations that are relevant to the analysis of the question whether the investment amounts to State aid. For a step-by-step enunciation of this area of the law, see the recent decision of the CJEU in Case C/124/10 P ***Commission v EDF*** (5 June 2012), particularly at paragraphs 75 to 81 of the judgment, which concludes with the proposition that: "The applicability of the private investor test ultimately depends, therefore, on the Member State concerned having conferred, in its capacity as shareholder[70] and not in its capacity as public authority, an economic advantage on an undertaking belonging to it[71]."

(2) In Case T-296/97 ***Alitalia v Commission*** [2000] ECR II-3871 the TFI (as it then was) held that where a transaction is carried out under the same

[70] "[A]s a shareholder", not because the CJEU is now restricting the doctrine to equity cases but because this happened to be a "shareholder" case.

[71] This distinction is not new. See, for example, Joined Cases C-278/92 to C-280/92 ***Spain v Commission*** [1994] ECR I - 4103 and Case C-334/99 ***Germany v Commission*** [2003] ECR I -1139.

terms and conditions (and therefore with the same level of risks and rewards) by public and private operators who are in a comparable position (a "*pari passu*" transaction), it can normally be inferred that such a transaction is in line with market conditions. Reasoning *a contrario*, the Commission deduces from this that: "If public bodies and private operators who are in a comparable situation take part in the same transaction at the same time but under different terms and conditions, this normally indicates that the intervention of the public body is not in line with market conditions[72]."

5. Taxation and State aid

5.1 The relationship between taxation (or for that matter social security contributions) and State aid is a minefield. Fortunately (for me), the issues generated by tax cases generally turn on the question whether the measure in question is (or is not) of a general nature, and therefore falls (or does not fall) outside the scope of Article 107, and I am not dealing with those issues here.

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[72] Draft Commission Notice, paragraph 88. See also the fleshing out of the "*pari passu*" test in paragraphs 89 and 90.

DEVOLUTION, TAX AND STATE AID

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OUTLINE OF PRESENTATION

1. Devolved territories must comply with EU law, including State aid rules

- Article 4(2) TEU imposes an obligation on the Union to respect the fundamental political and constitutional structures of the Member States as regards *"regional and local self-government"*.

- How tax powers are devolved to regional authorities in a Member State is exclusively an issue for the constitutional arrangements within each State: Case C-428/07 *Horvath* [2009] ECR I-6355, para 49.

- Each Member State must ensure that EU law is implemented correctly within its entire territory, irrespective of the internal division of powers. This means that a region exercising its own constitutional powers must do so in a manner which is consistent with EU law, including State aid rules.

- When legislative powers concerning taxation are devolved, and this can lead to variation between tax rates within a Member State, unlawful State aid may arise. This is because the different levels could amount to selectivity.

2. Tax measures may be selective, and constitute unlawful State aid under Article 107(1) TFEU

- Direct taxation schemes have been held to constitute State aid by the Court of Justice, insofar as they confer an advantage only on certain undertakings at national level (that is, they are selective): for an early example, see Case 173/73 *Italy v Commission* [1974] 709.

- For a regional tax regime, this question of "general" or "selective" is of particular importance.

- The notion of the "reference framework" facilitates the identification of a "normal" rate of taxation, as against any different or selective rate. The selective nature of a regional tax measure, therefore, is based on a comparison between the tax treatment advantages afforded to certain entities, on the one hand, and that granted to other entities in the rest of the "reference framework", on the other hand.

- Selectivity can be material or geographical: this presentation deals only with geographical selectivity.

3. Tax regimes are not regionally selective where a region constitutes its own reference framework in circumstances where it has institutional, procedural and economic autonomy (the *Azores* criteria)

- A "sufficiently autonomous" regional authority can, itself, comprise the correct reference framework for the assessment of whether or not a tax measure is geographically selective.

- (1) ***Azores*** case: Case C-88/03 *Portugal v Commission* [2006] ECR I-7115 (and Opinion of AG Geelhoed)

    - **Institutional autonomy**. The measure must have been taken by a regional authority which has, from a constitutional point of view, a political and administrative status separate from that of central government (*Azores*, para 67).

    - **Procedural autonomy**. The measure must have been adopted without direct intervention of central government as to its content.

    - **Economic autonomy**. The financial consequences of a reduction from the national tax rate for undertakings in the region must not be "off-set" by aid or subsidies from other regions or central government.

- (2) ***Rioja*** cases: Joined Cases C-428/06 to C-434/06 *Uni*ón *General de Trabajadores de la Rioja* [2008] ECR I-6747 (and Opinion of AG Kokott)

    - Clarification: a finding that a regional authority does not meet the criterion of economic autonomy suggests that there is compensation, that is to say, a causal relationship between a tax measure adopted by the regional authority and the amounts transferred by central government (*Rioja,* paras 107-110). Compensation may be explicit or disguised (*Rioja,* para 137).

- (3) ***Gibraltar*** cases: Joined Cases T-211/04 and T-215/04 *Government of Gibraltar and United Kingdom v Commission* [2008] ECR II-3745 (appeal to ECJ as Joined Cases C-106/09 P and 107/09 P, but the CFI's findings on geographical selectivity were not disturbed (and see Opinion of AG Jääskinen)).

    - CFI held the Gibraltar authorities "sufficiently autonomous", applying the *Azores* criteria.

    - As regards economic autonomy, CFI rejected contentions that there were financial transfers from the United Kingdom "off-setting" any revenue reduction from the imposition of the tax measure (e.g. UK financing of Gibraltar Social Insurance Fund (Pensions of Spanish nationals working in Gibraltar before border between Spain and Gibraltar closed in 1969); certain development aid; financing for SMEs in UK and Gibraltar; and subsidising of Gibraltar's airport by MOD).

4. Taxation by Scottish and Northern Irish governments is not a regionally selective and, therefore, unlawful State aid, provided that the Azores criteria are met

- Scotland:

    - Current: two sources of revenue under the control of the Scottish Parliament: local taxes (council tax and business tax), in respect of its responsibilities for local government; and the power to impose a Scottish Variable Rate (SVR) of income tax (amending the basic rate by up to 3p in the pound). SVR had been referred to by AG Geelhoed as an example of economic autonomy, because of the 'no compensatory reimbursement or subisdy mechanism' (*Azores* Opinion, para 38).

    - Future: The Scotland Act 2012 devolved three further powers: the power to set a Scottish rate of income tax (SRIT) from April 2016; to introduce taxes on land transctions; and on waste disposal from landfill (replacing the UK wide taxes Stamp Duty Land Tax and Landfill Tax from April 2015). The 2012 Act also provides powers for new taxes to be created in Scotland and for additional taxes to be devolved, subject to certain criteria.

    - Potential problems with any aggregates levy (material selectivity).

- Northern Ireland:

    - The Corporation Tax (Northern Ireland) Bill progressing through UK Parliament (General Election 2015 promise). NI likely to reduce its corporation tax rate to around 12.5% (Irish rate) (21% for UK). As regards the third criteria of economic autonomy, the position is uncertain (as it would likely also be with Scotland). The Northern Ireland Executive receives funding via the Stormont Block Grant from UK Treasury. To prevent any causal link or compensation as regards the tax rate reduction and transferred UK grant, the size of the grant will be reduced: estimated annual cuts of around £3-400 million.

Conclusion

(1) The ECJ has balanced two important principles: respecting (1) autonomy Member States confer on regional authorities; and (2) effectiveness of EU law, by requiring strict criteria to be met by such regions so that State aid rules are not circumvented (see AG Kokott (*Rioja*) and Judge Lenaerts in his article “The law of the European Union and the exercise by regions of their tax powers” (public on-line access)).

(2) Will this acknowledgment of the role of internal constitutional arrangements have effects at the EU level beyond State aid law?

State Aid – The Scottish Government Perspective

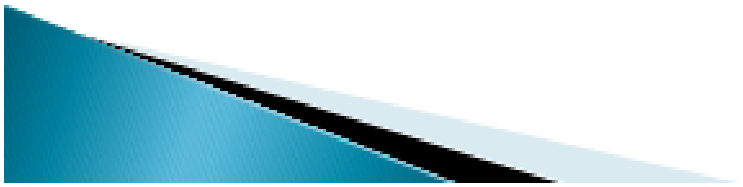
Emma McClintock
Scottish Government – State Aid Unit

State Aid Unit

- Provide advice and analysis across Government and the wider public sector
- Advice, awareness raising, liaison with DBIS/UKRep
- Advice to any body with the authority to grant public funding
- Do not normally advise grant recipients
- We only advise public bodies, but work with their external partners where appropriate
- Support bodies when notifying measures to EC or handling complaints

State Aid Unit

- State aid is reserved – UK policy led by DBIS State Aid Branch in Whitehall
- Devolved Administrations have own State aid units to manage compliance locally
- In England this compliance is managed by individual public bodies – LAs, DECC, DfT
- UK State aid network
- Unit focus is to implement State Aid Modernisation (SAM)
- Smith Commission



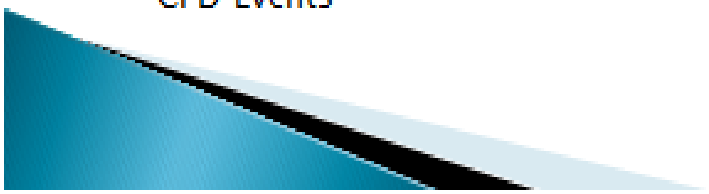
Communication with the EC

There are several avenues open to enable us to communicate with the Commission:

- Contacts at Scotland House
- Informal discussion (non-conversation)
- Notification/complaints via BIS and UKREP
- Case management at UK level
- GBER Q&A portal

State Aid Modernisation (SAM)

- Aim to put 90% of aid through GBER
- Big focus on transparency
  - All aid above €500k needs to be reported
  - Member State central website required
  - All annual spend to be reported per GBER article
- Unit improved communication with stakeholders
  - User friendly website
  - Factsheets
  - Quarterly newsletter
  - CPD Events



Notifying Aid Measures

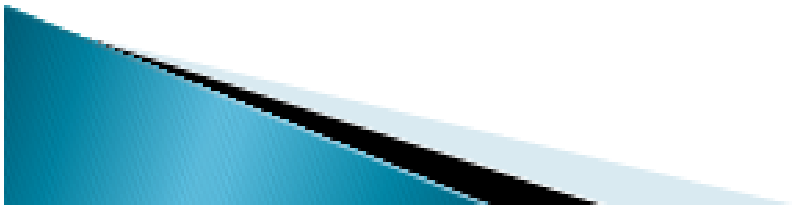
- GBER/ABER schemes –
  - Liaise with stakeholders
  - Identify relevant articles
  - Notify on sector specific basis eg) local authority, Scottish Enterprise, Highlands Islands and Enterprise, SG
  - SANI2

Notifying Aid Measures

- Full notification process:
  - Pre-notification- EC advice on how to strengthen case for next stage
  - Full notification - timescale approx 6-9 months

  (eg. Remote Islands contracts for difference)

- No aid position - do not encourage notifying for legal certainty



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