THE HIGH COURT

A. THE AER LINGUS PROCEEDINGS

Record No. 2013/7517P

Between:

AER LINGUS LIMITED

Plaintiff

– and –

THE MINISTER FOR FINANCE,

THE REVENUE COMMISSIONERS,

IRELAND AND THE ATTORNEY GENERAL

Defendants

Record No. 2013/3287P

Between:

THE MINISTER FOR FINANCE AND IRELAND

Plaintiffs

– and –

AER LINGUS LIMITED

Defendant

B. THE AER LINGUS/AER ARANN PROCEEDINGS

Record No. 2013/3288P

Between:

THE MINISTER FOR FINANCE AND IRELAND

Plaintiffs

– and –

AER LINGUS LIMITED and COMHFHORBAIRT (GAILLIMH)

TRADING AS AER ARANN

Defendants

C. THE AER ARANN PROCEEDINGS

Record No. 2013/3285P

Between:

THE MINISTER FOR FINANCE AND IRELAND

Plaintiffs

– and –

COMHFHORBAIRT (GAILLIMH)

TRADING AS AER ARANN

Defendant

D. THE RYANAIR PROCEEDINGS

Record No. 2013/3286P

Between:

MINISTER FOR FINANCE AND IRELAND

Plaintiffs

– and –

RYANAIR LIMITED

Defendant

Record No. 2012/6736P

Between:

RYANAIR LIMITED

Plaintiff

– and –

THE REVENUE COMMISSIONERS, IRELAND,

THE ATTORNEY GENERAL AND THE MINISTER FOR FINANCE

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 17th April, 2018.

I

Background

(i) *The Parties*.

1. The parties to the various proceedings scarcely require introduction. The State parties are well-known. Each of Aer Lingus and Ryanair is a prominent commercial airline incorporated in Ireland. The involvement of Aer Arann perhaps requires a little more explanation. An Irish airline operator that now trades as Stobart Air, at all relevant times for the purposes of the proceedings to which it is party it had a franchise agreement with Aer Lingus pursuant to which Aer Arann operated certain of Aer Lingus' domestic regional services; it is therefore a co-defendant together with Aer Lingus in the Aer Lingus/Aer Arann State aid recovery proceedings.

(ii) *The Facts*.

2. It is necessary to outline certain of the background facts.

a. Introduction of Tax and Investigation by European Commission.

3. All of the above-entitled proceedings arise because of s.55(2)(b) of the Finance (No. 2) Act 2008. The effect of s.55(2)(b) was to levy from airline operators a tax of €2 per departing passenger in the case of flights to a destination no more than 300km from Dublin Airport, and a tax of €10 per departing passenger for all other flights (the 'differentiated air travel tax'). All flights to destinations within the State fell within the €2 tax band. Outside the State, the only destinations covered by the €2 tax band were Northern Ireland, the western side of Great Britain, and the Isle of Man.

4. Sometime after the commencement of the differentiated air travel tax, the tax became the subject of two separate investigations by the European Commission, it seems following on complaint being made by Ryanair that the tax was contrary to the Treaty provisions on the freedom to provide services, Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (O.J. L293, 31.10.2008, 3), and an unlawful State aid to the benefit of Aer Arann.

b. Letter of Formal Notice and Related Events.

5. On 18th March 2010, the European Commission issued a letter of formal notice to Ireland, in which it took the position that the differentiated air travel tax breached Article 56 TFEU and Regulation 1008/2008. (A letter of formal notice is a preliminary step by the European Commission pursuant to Article 260 TFEU in infringement proceedings against a Member State. In general, if the European Commission is satisfied with the response by a Member State to such a letter of formal notice – because the Member State indicates that it intends to amend national legislative provisions in order to remedy any such breach – the Commission will typically then 'close its file' on the matter).

6. Following on from the European Commission's letter of formal notice, the differentiated air travel tax was replaced, by s.48 of the Finance Act 2011, with a single rate €3 tax applicable from 1st March, 2011, to every departure of a passenger from an airport within Ireland, regardless of distance travelled. Thereafter, on 16th June 2011, the European Commission announced by Press Release IP/11/734 ("*Irish air travel tax: Commission welcomes overhaul of discriminatory charges; closes infringement case*") that it had closed its investigation of the onetime differentiated travel tax.

c. State Aid.

7. On 25th July 2012, the European Commission, following investigation, issued a State aid decision addressed to Ireland, stating its view that, by virtue of the €2 tax remitted by certain airline operators pursuant to s.55(2)(b), as opposed to the €10 tax remitted by other airline operators, Ireland had put into effect a State aid in breach of Art.108(3) TFEU which, the Commission contended, was incompatible with the internal market. In the decision the European Commission contended that the unlawful aid arose by virtue of the lower tax being remitted by some airline operators (who were therefore deemed to be beneficiaries of the allegedly unlawful State aid). Following on the issuance of this decision each of Aer Lingus and Ryanair issued separate applications for annulment of same. They were each successful before the General Court. However, on appeal by the European Commission to the Court of Justice, that court, on 21st December, 2016, set aside the General Court's judgments and upheld the State aid decision, affirming that the State aid to be recovered from the relevant airline operators amounts to the difference between the lower rate of the air travel tax and the standard rate of €10 levied on each passenger (so a net €8 per passenger).

d. The Restitution Proceedings.

1. *Aer Lingus*.

8. On 19th July, 2013, Aer Lingus issued the above-entitled proceedings (Record No 2013/7517P) together with a statement of claim seeking repayment of the unlawfully paid tax at the upper rate during the relevant period when the unlawful differentiated tax was imposed from 30th March 2009 to 1st March 2011. In particular Aer Lingus claims that the differentiated travel tax imposed by s.55(2)(b) of the Act of 2008 was unlawful in that it imposed a higher tax on the operation of intra-Union air transport services than on domestic services. To that end, Aer Lingus claims that s.55(2)(b) of the Act of 2008 breached its rights under the TFEU, the Charter of Fundamental Rights of the European Union, the Constitution and Regulation 1008/2008. Further or alternatively, Aer Lingus claims for loss and damage consequent upon the said alleged breaches, including *Francovich* damages.

2. *Ryanair*.

9. On 9th July, 2012, Ryanair instituted its restitution proceedings by way of plenary summons. In those proceedings, Ryanair seeks damages, including *Francovich* damages allegedly caused by the differentiated travel tax paid during the period between 30th March,

2009, and 1st March, 2011 (to which Ryanair gives the shorthand phrase 'the period of differential rate') and restitution of the said differentiated travel tax on the basis that it constituted (i) an unjustifiable interference with the property rights of Ryanair in breach of Arts. 40.3.2 and 43 of the Constitution, (ii) an unjustified breach of Regulation 1008/2008, (iii) an unjustified breach of Ryanair's rights to the free movement of service under Art.49 (for the period until December 2009) and Art.56 TFEU (for the period thereafter), and (iv) an unjustified interference with Ryanair's right to conduct a business and/or property under Art.16 and/or Art.17(1) of the Charter of Fundamental Rights of the European Union.

3. *Aer Arann*.

10. On 6th October, 2015, Aer Arann entered into a settlement agreement with (*inter alia*) the Minister for Finance and Ireland. Certain aspects of the settlement agreement fall to be considered hereafter.

e. The State Aid Recovery Proceedings.

1. *Overview.*

11. By plenary summonses dated 3rd April, 2013, so about nine months after the State aid decision had been addressed to Ireland, the State parties issued three sets of proceedings, one against Aer Lingus alone, one against Aer Lingus jointly with Aer Arann, and one against Ryanair, each seeking recovery of the unlawful State aid identified in the decision of the European Commission.

2. *Ryanair*.

12. By statement of claim delivered on 23rd May, 2013, Ireland seeks recovery from Ryanair of the unlawful State aid identified in the Commission decision. In the defence and counterclaim to the State aid recovery proceedings, Ryanair denies that it is liable to make payment in respect of the State aid because it has a defence of set-off arising from the State's breach of Ryanair's constitutional and directly effective European Union law rights. Ryanair claims that it is entitled to recovery of the differentiated travel tax paid to the state thoughout the period of differential rate and/or to damages, including *Francovich* damages.

f. The Position as Regards Aer Arann.

1. *Overview*.

13. Aer Arann's proceedings present with certain features that are not a part of the Aer Lingus or Ryanair proceedings. The most significant of these features concern (i) Aer Arann's intended examinership defence and (ii) its settlement of its restitution proceedings.

2. *Examinership Defence*.

14. Aer Arann entered into examinership on or about 26th August, 2010, and a scheme of arrangement was approved by the High Court on or about 5th November, 2010. Under cl.6.3 of that scheme of arrangement, it was provided that no creditor, or party claiming to be a creditor, should have any right, interest or claim of any description whatsoever against Aer Arann, irrespective of when same was due or payable, where same arose out of or was connected with any contract, engagement, circumstance, event, act, obligation, liability or omission prior to 26th August 2010 (save as provided in the scheme).

15. In circumstances where no provision was made under the High Court-approved scheme for any debt relating to a liability, actual or contingent, in regard to the differentiated travel tax, or any unlawful State aid constituted thereby, Aer Arann contends that the State parties are estopped and/or barred by statute/law from seeking to benefit from what it contends is their own error, to the detriment of Aer Arann, by now seeking to be re-paid the sums claimed in respect of any unlawful State aid alleged to have been received by Aer Arann prior to its exit from examinership. This was referred to at the hearing of the within motions as the 'examinership defence' and the interaction of European Union law and Irish examinership law in this regard may yet be one of several issues in the within proceedings that will require a reference to the Court of Justice in due course.

3. *Settlement Agreement*.

16. On 6th October, 2015, Aer Arann entered into a settlement agreement with (*inter alia*) the Minister for Finance and Ireland. In that settlement agreement, Aer Arann agreed to strike out its restitution proceedings (*Comhfhorbairt (Gaillimh) t/a Aer Arann v. Minister for Finance and ors* (Record No. 2014/3349 P)) and to amend its pleadings in its sole State aid recovery proceedings (*Minister for Finance and anor v. Comhfhorbairt (Gaillimh) t/a Aer Arann* (Record No. 2013/3285P)) and in the joint Aer Lingus/Aer Arann State aid recovery proceedings (*Minister for Finance and anor v. Aer Lingus Ltd and Comhfhorbairt (Gaillimh) t/a Aer Arann* (Record No. 2013/3288P)). A dispute has arisen as to whether the amended defence which Aer Arann now seeks to in each of the State aid recovery proceedings complies with Aer Arann's obligations under the settlement agreement.

II

Some Preliminary Points of European Union Law

17. It is useful for the court at this early point in its judgment to make some preliminary observations concerning certain aspects of European Union law that seem to it to be of relevance to, and which have informed its determination of, the within applications, especially the applications for modular trial and the application by Aer Arran as to how the hearing of matters pertaining to it might be sequenced. Thus:

> (1) Art.16(3) of Council Regulation (EU) 2015/1589 of 13th July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (O.J. L248, 24.09.2015, p.9) requires that member states of the European Union must recover State aid "*without delay*".
>
> (2) the key date for assessing compliance with the European Commission's decision of 25th July, 2012, is the deadline therein. Article 5 of that decision provided that the recovery must be "*immediate and effective*" and gave Ireland four months to achieve same. That date has long passed.
>
> (3) as is clear from the decision of the Court of Justice in *Mediaset SpA v. Ministero dello Sviluppo economico* (Case C-69/13), para. 23, such decisions "*are binding on all the organs of the State to which they are addressed, including the courts of that State*".

(4) the court notes and acknowledges

(a) its obligation, as identified by the Court of Justice in *Scott SA and Kimberly Clark SAS v. Ville d'Orléans* (Case C-210/09), para. 29, "*to ensure that the decision ordering the recovery of the unlawful aid is fully effective and achieves an outcome consistent with the objective pursued by that decision, namely to ensure that funds corresponding to the aid that has already been reimbursed are not once again made available to the aid recipient, even provisionally*", and

(b) the duty of cooperation identified by the Court of Justice in Mediaset, para. 29, whereby "*application of the European Union competition rules is based on an obligation of cooperation in good faith between the national courts, on the one hand, and the Commission and the European Union Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty on the Functioning of the European Union. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty*".

(5) it is not in the public interest that Ireland should become the subject of any infringement procedure, with the potential for fines which such a procedure entails (which fines would be payable from public funds that could better be spent on public services).

(6) if a court is considering two courses of action, one of which appears compatible with European Union law and one of which has the potential to place Ireland in breach of European Union law, a court will naturally incline to the approach that appears compatible with European Union law.

(7) there is a real concern presenting in the context of the applications for a modular trial that so to proceed would not be consistent with the principle of effectiveness identified in *Scott and Kimberly Clark.*

III

Non-State Party Motions Remaining for Consideration

(i) *Motions Resolved and Remaining*.

18. As touched upon previously above, a variety of motions concerning the amendment of pleadings were the subject of agreement between the parties by the time they got to court and will be the subject of agreed forms of order by the court. The motions now remaining are described below. Shortly put, each of the airlines seeks a modular trial with a liability/quantum split, with Aer Arann seeking certain further reliefs concerning the amendment of its pleadings and the sequencing of how matters are tried.

(ii) *Aer Lingus*.

19. By notice of motion dated 25th October, 2017, Aer Lingus seeks, inter alia, the following reliefs in its restitution proceedings (Record No. 2013/7517P):

"2. An Order pursuant to O.25, r.1 and/or O.34, r.2 and/or O.36, r.9 of the Rules of the Superior Courts, as amended, and/or the inherent jurisdiction of the Court for separate, modular trials of the issues of liability (first module) and quantum (second module), with the following issues of liability being tried in the first module:

a. Whether, during the relevant period, s.55(2)(b) of the Finance Act (No 2) 2008 was in breach of the following provisions and, consequently, was unlawful and invalid:

i. Regulation (EC) No 1008/2008;

ii. Article 49 of the Treaty establishing the European Community and/or Article 56 of the Treaty on the Functioning of the European Union (TFEU);

iii. Aer Lingus' right to conduct a business and/or property rights under Article 16 and/or 17 of the Charter of Fundamental Rights of the European Union;

iv. Articles 40.3.2 and 43 of the Constitution of Ireland.

b. Whether Aer Lingus is entitled to restitution or repayment of the sums unlawfully levied under s.55(2)(b) of the Finance Act (No 2) 2008, including a determination of the relevance and the effect, if any, of the findings in the [European] Commission's Decision 2013/199/EU of 25 July 2012 on State aid Case S.A.29064 – Differentiated air travel rates implemented by Ireland (OJ 2013 L 119, p.30) and the judgment of the Court of Justice of 21 December 2016 Aer Lingus v. Commission (Joined Cases C-164/15P and 165/15P ECLI:EU:C:2016:990).

c. Whether the breaches at paragraph 1(a) to (c) above were sufficiently serious breaches of EU law giving rise to Francovich damages and whether Aer Lingus is entitled to damages in respect of any of the breaches at paragraph 1 above.

d. Whether by promulgating and/or bringing into law and/or enforcing the differentiated air travel tax in s.55(3(b) of the Finance Act (No 2) 2008 and by failing to notify same to the European Commission and observe the stand-still obligation the State parties committed a breach of EU law, namely of Article 107(1) and Articles 108(3) TFEU.

e. Whether the breach at paragraph 2(d) above is a sufficiently serious breach of EU law giving rise to Francovich damages and whether Aer Lingus is entitled to damages in that regard."

20. By notice of motion of 25th October, 2017, *inter alia*, like relief is sought by Aer Lingus in the Aer Lingus State aid recovery

proceedings (Record No. 2013/3287P).

21. By notice of motion of 25th October, 2017, *inter alia*, like relief is sought by Aer Lingus in the joint Aer Lingus/Aer Arann State aid recovery proceedings (Record No. 2013/3288P).

(iii) *Ryanair*.

22. By notice of motion dated 24th October, 2017, Ryanair seeks, *inter alia*, the following reliefs in its restitution proceedings (Record No. 2012/6736P):

> *"1. An order pursuant to (i) Order 25, Rule 1 and/or (ii) Order 34, Rule 2 and/or (iii) Order 36, Rule 9 of the Superior Court Rules (as amended) and/or pursuant to this Honourable Court's inherent jurisdiction directing a modular trial of the issues in the above entitled proceedings in the following manner:*
>
> *Module 1*
>
> *(1) Whether, during the relevant period, section 55(2)(b) of the Finance Act (No 2) 2008 was in breach of the following provisions and, consequently, was unlawful and invalid:*
>
> *a. Regulation (EC) No 1008/2008;*
>
> *b. Article 49 of the Treaty establishing the European Community and/or Article 56 of the Treaty on the Functioning of the European Union (TFEU);*
>
> *c. Ryanair's right to conduct a business and/or property rights under Article 16 and/or 17 of the Charter of Fundamental Rights of the European Union;*
>
> *d. Articles 40.3.2 and 43 of the Constitution of Ireland.*
>
> *(2) Whether Ryanair is entitled to restitution or repayment of the sums unlawfully levied under s.55(2)(b) of the Finance Act (No 2) 2008 including a determination of the relevance and the effect, if any, of the findings in the Commission's Decision 2013/199/EU of 25 July 2012 on State aid Case SA 29064 – Differentiated air travel rates implemented by Ireland (OJ 2013) L 119, p.30) and the judgment of the Court of Justice of 21 December 2016 Ryanair and Aer Lingus v. Commission (Joined Cases C-164/15 P and 165/15 P ECLI:EU:C:2016:990).*
>
> *(3) Whether the breaches at paragraph (1)(a) to (c) above were sufficiently serious breaches of EU law giving rise to Francovich damages and whether Ryanair is entitled to damages in respect of any of the breaches at paragraph 1 above.*
>
> *(4) Whether by promulgating and/or bringing into law and/or enforcing the differentiated air travel tax in section 55(2) (b) of the Finance Act (No 2) 2008 and by failing to notify same to the European Commission and observe the stand-still obligation, the State committed a breach of EU law, namely of Article 107(1) and Articles 108(3) TFEU.*
>
> *(5) Whether the breach at paragraph (4) above is a sufficiently serious breach of EU law giving rise to Francovich damages and whether Ryanair is entitled to damages in that regard.*
>
> *Module 2 (Loss and Damages)*
>
> *(1) All heads of loss and damages dependent on and/or that survive the outcome of Module 1. Such pre-trial directions as this Honourable Court deems appropriate".*

(iv) *Aer Arann Motions*.

23. By (identical) notices of motion of 26th October, 2017, Aer Arann seeks the following principal reliefs in respect of each of the remaining proceedings to which it is party:

> *"1. An Order pursuant to Order 63B rule 6(b)(v) and/or Order 28 rule 1 of the Rules of the Superior Courts 1986 (as amended) for leave to amend its defence and Counterclaim in accordance with the Draft appended hereto.*
>
> *2. An Order pursuant to Order 63B rule 5 and/or Order 63B rule 6 and/or Order 36 rule 9 of the Rules of the Superior Courts 1986 (as amended) and/or under the inherent jurisdiction of this Honourable Court directing:-*
>
> *(a) That these proceedings be listed for trial subsequent to the delivery by this Honourable Court of its judgments in, or, in the alternative, subsequent to the trial by this Honourable Court, of the actions listed in the Schedule hereto;*
>
> *(b) Further and/or in the alternative, that the issues between the parties be tried in a particular sequence on a modular basis, including that the trial of the Examinership Defence…be tried subsequent to the trial of the remainder of the issues pleaded therein (the Examinership Defence being relevant only in the event that this Honourable Cour should find such other defences to afford no answer to the Plaintiff's claims herein)".*

IV

State Party Motions Remaining for Consideration

(i) *Aer Lingus Restitution Proceedings*.

24. By notice of motion dated 28th July, 2017, the State-party defendants to the Aer Lingus restitution proceedings (Record No. 2013/7517P) seek, *inter alia*, the following reliefs:

> *"1. An Order pursuant to Order 39, rule 58(2)(b) of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Plaintiff to deliver to the Defendants herein any expert report(s) commissioned in order to quantify the sums to which the Plaintiff claims to be owed in the proceedings herein, by way of (a) restitution or repayment of taxes paid and/or (b) other alleged loss and damage, including Francovich damages;*
>
> *2. An Order setting the date by which the Plaintiff is to provide the Defendants herein with the said report quantifying the sums to which the Plaintiff claims to be owed;*
>
> *3. An Order pursuant to Order 39, rule 58(2)(b)(iii) of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Plaintiff to identify the background material(s) supplied by the Plaintiff to any such expert or experts and the methodology for selecting such material;*
>
> *4. An Order pursuant to Order 39, rule 58(2)(b)(iii) of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, setting the date by which the Plaintiff is to provide the Defendants herein with an affidavit quantifying, in monetary terms, the extent to which the Plaintiff passed on to its passengers the financial burden of the air travel tax created by section 55 of the Finance (No 2) Act 2008".*

(ii) *Aer Lingus State Aid Recovery Proceedings*.

25. By notice of motion dated 28th July, 2017, the State parties in the State aid proceedings (Record No. 2013/3287P) seek, *inter alia*, the following reliefs:

> *"1. An Order pursuant to Order 39, rule 58(2)(b) and/or Order 63B, rule 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Defendant to deliver to the Plaintiffs herein any expert report(s) commissioned in order to quantify the sums to which the Defendant claims to be owed under its Counterclaim in the proceedings herein;*
>
> *2. An Order setting the date by which the Defendant is to provide the Plaintiffs herein with the said report quantifying the sums to which the Defendant claims to be owed under its Counterclaim;*
>
> *3. An Order pursuant to Order 39, rule 58(2)(b)(iii) and/or Order 63B, rule 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Defendant to identify the background material(s) supplied by the Defendant to any such expert or experts and the methodology for selecting such material;*
>
> *4. An Order pursuant to Order 39, rule 58(2)(b)(iii) and/or Order 63B, rule 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, setting the date by which the Defendant is to provide the Plaintiffs herein with an affidavit quantifying, in monetary terms, the extent to which the Defendant passed on to its passengers the financial burden of the air travel tax created by section 55 of the Finance (No 2) Act 2008".*

(iii) *Ryanair Restitution Proceedings*.

26. By notice of motion dated 28th July, 2017, the State-party defendants to the Ryanair restitution proceedings (Record No. 2012/6736P) seek, *inter alia*, the following reliefs:

> *"1. An Order pursuant to Order 39 rule 58(2)(b) of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Plaintiff to deliver to the Defendants herein any expert report(s) commissioned in order to quantify the sums to which the Plaintiff claims to be owed in the proceedings herein, by way of (a) restitution or repayment of taxes paid and/or (b) other alleged loss and damage, including Francovich damages;*
>
> *2. An Order setting the date by which the Plaintiff is to provide the Defendants herein with the said report quantifying the sums to which the Plaintiff claims to be owed;*
>
> *3. An Order pursuant to Order 39 rule 58(2)(b)(ii) of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Plaintiff to identify the background material(s) supplied by the Plaintiff to any such expert or experts and the methodology for selecting such material;*
>
> *4. An Order pursuant to Order 39 rule 58(2)(b)(iii) of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, setting the date by which the Plaintiff is to provide the Defendants herein with an affidavit quantifying, in monetary terms, the extent to which the Plaintiff passed on to its passengers the financial burden of the air travel tax created by section 55 of the Finance (No. 2) Act 2008".*

(iv) *Ryanair State Aid Recovery Proceedings*.

27. By notice of motion dated 28th July, 2017, the State parties in the State aid proceedings (Record No. 2013/3286P) seek, *inter alia*, the following reliefs:

> *"1. An Order pursuant to Order 39 rule 58(2)(b) and/or Order 63B, rule 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Defendant to deliver to the Plaintiffs herein any expert report(s) commissioned in order to quantify the sums to which the Defendant claims to be owed under its Counterclaim in the proceedings herein.*
>
> *2. An Order setting the date by which the Defendant is to provide the Plaintiffs herein with the said report quantifying the sums to which the Defendant claims to be owed under its Counterclaim.*

3. An Order pursuant to Order 39 rule 58(2)(b)(iii) and/or Order 63B, rule 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, directing the Defendant to identify the background material(s) supplied by the Defendant to any such expert or experts and the methodology for selecting such material.

4. An Order pursuant to Order 39 rule 58(2)(b)(iii) and/or Order 63B, rule 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court, setting the date by which the Defendant is to provide the Plaintiffs herein with an affidavit quantifying, in monetary terms, the extent to which the Defendant passed on to its passengers the financial burden of the air travel tax created by section 55 of the Finance (No. 2) Act 2008".

V

Modularisation

A. *The Figures Involved*.

28. It is perhaps useful in approaching this aspect of the applications now before the court to recall what is being sought in the repayment/restitution proceedings. Those proceedings involve enormous claims for damages against the State for amounts between €100-200m. Exactly how much is at stake is difficult to know because, for example, of the relative sparsity of detail in the pleadings to this point. That is not to say that there is any deficiency in the pleadings, but that sparsity of detail does present a difficulty when it comes to reaching an informed decision as to whether the court should depart from a unitary trial into a modular form of proceedings. So, for example, if the court looks to Ryanair's pleadings (which are more extensive than those of Aer Lingus in this regard), in particular to Ryanair's Replies to Notice for Particulars, Question No. 8 and the Reply to same read as follows:

> *"8…[P]lease specify, as regards the flights in respect of which the Plaintiff was subject to the impugned air travel tax between 31st March 2009 and 1st March 2011, what proportion of the Plaintiff's passengers were subject to the lower rate of air travel tax (€2).*
>
> *…The Plaintiff replies below, providing not only the proportion of the Plaintiff's passengers subject to the €2 rate but also that of the Plaintiff's passengers subject to the €10 rate.*

Destination Category from Dublin Airport 2009 (30 March to 31 December) 2010 (1 January to 31 December) 2011 (1 January to 28 February) Totals

Number Number Number

<300km within the State (€2 rate) 283,488 x €2 = €566,976 220,341 x €2 = €440,682 12,833 x 2 = €25,666 516,662 (€1,033,324)

<300km outside the State 435,639 x €2 = €871,278 487,881 x €2 = €975,762 79,487 x €2 = €158,974 1,003,007 (€2,006,014)

>300km within the EU (€10 rate) 3,725,643 x €10 = €37,256,430 4,046,577 x €10 = €40,465,770 531.263 x €10 = €5,312,630 8,303,484 (€83,034,830)

>300km outside the EU (€10 rate) 37,775 x €10 = €377,550 32,547 x €10 = €325,470 5,963 x €10 = €59,630 76,265 (€762,650)

Total of the above passenger numbers 4,482,525 (€39,072,234) 4,787,346

(€42,207,684) 629,546

(€5,556,900) 9,899,417 (€86,836,818)

[Shading added]."

29. As mentioned, Aer Lingus has not furnished the type of 'number-crunching' exercise that is set out above, and the 'number-crunching' done above is of interest. If, for example, the court looks to the more lightly-shaded categories and if one remembers that the impugned tax was not a tax which provided that 'flights terminating in Ireland are subject to a €2 tax' but rather a tax which provided that 'flights terminating within 300 kilometres of Dublin Airport are subject to a €2 tax (and €10 if terminating further afield)', it is notable that the amount paid over as tax is greater for flights that terminated outside the State. Moving on to the more darkly-shaded categories, the figure for outside the European Union each year is a very small amount, relatively speaking. These aspects of the furnished figures are of interest for two reasons. First, when it comes, for example, to the issue of discrimination, it will be relevant that the impact of the impugned tax on Ryanair appears, on the pleadings to this time, to have been greater on flights outside the State, even at the €2 rate. The idea that the court could decide the key issues that will be before it at the main stage of the proceedings without having the benefit of a detailed interrogation of the applicable facts and figures is just one example, though a very important example of the type of difficulties that could arise if the court were to elect to proceed other than by way of unitary trial.

B. *Passing-On Defence*.

30. The passing-on defence is one that is well-established in European Union law. Indeed, the court turns later below to *Weber's Wine World* (Case C-147/01) in which the Court of Justice makes clear that when a court is looking at unlawfully imposed taxes, it must always look at the issue of passing-on. The difficulty that this presents in the context of the within proceedings is that the court has before it no proper identification of any passing-on. Thus it has no idea whether all, some or none of the impugned tax has been passed on. That is, of course, quite remarkable as Art.23(1) of Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) provides as follows (O.J. L293, 31.10.2008, 3):

> *"1. Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the Internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at*

the time of publication. In addition to the indication of the final price, at least the following shall be specified:

(a) air fare or air rate;

(b) taxes;

(c) airport charges; and

(d) other charges, surcharges or fees, such as those related to security or fuel;

where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis."

31. When the court looks to the discovery that has taken place thus far in the within proceedings, it sees, in certain cases, €0 for the taxes and charges, in other cases a figure for taxes and charges. So for the airlines to identify where the taxes were not passed on would seem to be a fairly rudimentary accounting exercise whereby they would go through the tickets and identify the factual position. It may be that 'behind the scenes' they have done this. If they have, the relevant detail has not been disclosed to the State which is still in the position that it does not know whether or not the taxes have been passed on and, if so, in what proportions. Counsel for the airlines sought at the hearing of the within applications to advance the case that the calculation of damages will be a long and protracted exercise (if, of course, it arises to be done at all). But that is a line of submission which the court does not consider that counsel can convincingly make, if indeed it can properly be made, without any evidential basis; and it is not an issue that can be decided in principle.

C. *Other Matters Not Pleaded in Detail*.

32. In addition to the applicable financial detail arising in the passing-on context, there are other aspects of the case that have not been pleaded in much detail, e.g., the nature of the respective airlines', with the repeated suggestion that the operating model of Ryanair is well-known to all. It is true that on a practical level the court as a consumer has a sense of the difference between the respective offerings of Ryanair and Aer Lingus (and, respectfully, it has no knowledge of the Aer Arann offering). But this case will not be decided on any such sense on the part of the court, it will be decided on the facts and figures placed in evidence as to e.g., seating policies and income. Those facts and figures are not before the court at this time. And that want of detail makes it very difficult to arrive at an informed decision that the court can, given the case presenting, depart from a unitary trial arrangement and opt for a modular form of proceeding.

D. *Want of Clarity in Modular Arrangements Sought*.

33. There was a cloudiness to the proposed modular arrangements urged upon the court by the non-State parties, with counsel on their feet suggesting what might be added to Module 1 (and differing in their suggestions). So, for example, as the court understood matters: counsel for Aer Lingus suggested that the liability of Aer Lingus and Aer Arann would go into Module 1 and that passing-on could also go into Module 1; counsel for Ryanair likewise thought that passing-on could go into Module 1 but seemed to consider that the constitutional issue could go into Module 2; and both counsel agreed that Module 2 would be used to 'mop up' anything not caught in Module 1 (an approach which seems implicitly to acknowledge that there is a want of clarity at this time as to what would go into Module 1, and a complete want of precision as Module 2). If an applicant comes to court claiming that there is a utility in separating out various parts of a case into modular segments, it is reasonable for the other parties (and the court) to expect that such applicant will be able to (and will) identify with precision in its application what parts are to be separated out and why each part is to be so separated. There has been a failing in this regard in the case at hand. Moreover, no clear (let alone quantified) saving of time and/or costs has been identified so far as proceeding by way of modular trial is concerned, albeit that general claims as to such savings have been made.

E. *White and McCann*.

34. In its judgment in *White v. The Bar Council of Ireland* [2016] IEHC 283, para. 23, the court distils from applicable case-law various principles that are of relevance in the context of an application for a modular trial, the court observing, as follows, at point no. [7] of those principles, by reference to *McCann v. Desmond* [2010] 4 IR 554, 558:

"A court in determining whether or not to order a modular trial can usefully ask itself the following four questions: (i) are the issues to be tried by way of preliminary module readily capable of determination in isolation from the other issues in dispute between the parties? (ii) has a clear saving in the time of the court and the costs that the parties might have to bear been identified? (iii) would a modular order result in any prejudice to the parties? (iv) is the motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues?"

35. The court turns now to consider each of the issues identified in the just-quoted text.

36. *(i) Are the issues to be tried by way of preliminary module readily capable of determination in isolation from the other issues in dispute between the parties*?

1. Legality of s.55(2)(b) of the Finance Act (No 2) 2008?

37. It is contended that the issue of the legality of s.55(2)(b) of the Finance Act (No 2) 2008, by reference to constitutional and/or European Union law, is a matter that could be tried in a first module concerned with liability (with quantum falling to be dealt with in the second module). At first glance, this may seem sensible; on closer inspection, it is in fact impermissible.

38. When looking at the constitutionality of a measure which is alleged (as here) to transgress the property provisions of the Constitution, the court must look at a number of different matters, including the impact of the allegedly unconstitutional measure on the person claiming to have been affected by same. Then the court must look at the proportionality of the measure, the aims sought to be achieved, the means of attaining, and whether there was a less onerous way of attaining those aims. Those are not matters that fall to be determined in the abstract. As to the claim that s.55(2)(b) contravenes the equality provisions of the Constitution, what cases such as *An Blascaod Mór Teoranta v. Minister for Arts, Heritage, Gaelteacht and the Islands* [2000] 1 ILRM 401 and like cases point to is that there must always be a comparator, i.e. such a claim cannot be decided in the abstract. In the within proceedings, the court is effectively being invited to proceed in the abstract as the decision as to legality would not be grounded in facts and numbers. It is impermissible at law to try the form of constitutional question raised in the absence of knowing what is the

loss allegedly caused, how was it caused, what were the constituent parts of the loss. Moreover, the court cannot undertake an analysis of the proportionality of the tax without knowing the facts as to the alleged unlawful impact of the tax.

39. When it comes to the European Union law dimension, the court has been referred, *inter alia*, to the decision of the Court of Justice in *Viacom Outdoor Srl v Giotto Immobilier SARL* (Case C-134/03) and the discrete exception that exists in European Union law whereby an allegedly discriminatory tax may be deemed acceptable because of its modest impact. That modest impact has to be considered by reference to the persons upon whom such tax is imposed, here Ryanair and Aer Lingus. In fairness, the court has seen the Ryanair figures in relation to the tax; however, the court knows nothing about the income of Ryanair, the cost of the flights, the (dis-) proportionality between the tax and the income or any other aspect of Ryanair's business. And Ryanair is at the head of the class when it comes to providing any tax-related information, with Aer Lingus, thus far, lagging notably in this regard. With regard to the issue of discrimination – a very live issue – the case made by the airlines, and indeed the point identified by the European Commission in its Letter of Formal Notice was the discriminatory aspect of the tax. And if one returns to the Ryanair figures (as set out in the table above), one of the points relevant to the issue of discrimination will be where the tax impacts more on flights outside Ireland and whether that is discriminatory; the State will contend that it is not. So again it is very important to understand the actual impact of the tax on a particular airline when approaching the issue of discrimination.

2. Restitution or repayment of sums unlawfully levied?

40. It is contended, *inter alia*, that the airlines are entitled to restitution or repayment of any such sums as were unlawfully levied under s.55(2)(b) of the Finance Act (No 2) 2008. Central to this issue is the issue of passing on which will involve an economic analysis of what in fact has occurred. In this regard the court recalls the following observation of the Court of Justice in *Weber's Wine World*, para.94:

> *"A Member State may resist repayment to the trader of a charge levied though not due…where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter. It follows that, if the burden of the charge has been passed on only in part, the national authorities are required to repay the amount not passed on".*

41. The effect of the foregoing is that if there is what might be styled an 'open and shut' case where a charge was never passed on (and so always absorbed) the position would be relatively straightforward. But in the majority of cases the tax likely will have been passed on in whole or in part, and when a court comes to address the question 'Should there be restitution or not?', it will not be approaching that question in the abstract; it will be addressing the concrete question of 'How much is this plaintiff entitled to, if anything, in relation to this unlawfully levied tax?' and it will be answering that question in concrete terms. And in that is perhaps the strongest reason why the main trial of the within proceedings should not be split, because the mainstay of the claims against the State concern taxes of which repayment is now sought. And that will require the court to get into 'nitty gritty' of issues, such as how much of the taxes got passed, how much (if any) should now be repaid and the related issue of whether the State aid dimension of matters has neutralised any discrimination.

3. *Francovich* Damages.

42. It is claimed that the alleged breaches of European Union law are such as to yield a liability for the State in terms of *Francovich* damages. To bring such a claim home, it will be necessary for the non-State parties to establish that (i) the provision of law at issue was intended to benefit persons and that it was intended that people could rely on same, (ii) the breach was sufficiently serious, and (iii) causation. What seems to be proposed is that the court would focus solely on item (ii) in the course of Module 1. That is an approach which the court respectfully considers to be unworkable. For example, one of the things that the airlines is going to assert is 'Even where the tax was passed on, we still suffered loss in terms of reduced ticket sales.' But the issue of diminution in passenger numbers is a causation issue. It cannot be assumed that the mere existence or imposition of a tax caused a loss. That causation must be proved and it must be proved as part of the *Francovich* limb of matters.

4. State Aid.

43. Pursuant to the State aid decision, the airlines are seeking the payment to them of several million euro. The State parties maintain that this claim results from a flawed analysis which (i) overlooks the need to attain a position of non-discrimination, and (ii) entails an inherent circularity because, it is alleged, an obligation to repay by the airlines cannot ground an action for damages. To some extent the immediate heat has gone out of this limb of matters because of the escrow payment arrangements that have been or are being entered into by the airlines. However, that does not have the consequence that suddenly modular proceedings become unobjectionable, let alone desirable. This is because a modular trial would still present with the deficiencies and difficulties that the court has identified above.

44. *(ii) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified*?

45. One notable feature of the within application is the relative lateness with which it is being brought. It would be fair to say that the general experience when it comes to modular trial applications is that they are brought at a relatively early stage when discovery has not been made or there is an ongoing row concerning discovery. That this should be so makes sense: why would one go to all the time, trouble and expense of full discovery without resolving what nature of trial is to occur? As any fair-minded analysis of the within proceedings will show, they have hitherto been beset with issues as to discovery (with multiple applications, judgments, rulings, stays, etc., arising in this regard and no party garnering roses for the manner in which it has discharged its discovery applications). Thankfully, an end appears to have been reached to this aspect of matters, save as regards the appeal to the Court of Appeal on the triangulation issue, and even that looks likely to be adjudicated upon this side of the summer vacation. Having reached (or almost reached) the point where discovery has been fully and finally closed out as an issue, it seems to the court that it would be regressive, even foolish to squander what has now been gained in this regard by effectively hitting the 'pause button' on the quantification side of matters. So rather than modularisation offering a clear saving in terms of time and cost, it would involve a squandering of time previously expended (and it is the experience of the court that time squandered typically results in an overall squandering or increase of costs).

46. The court is mindful too that these are remarkably complicated proceedings, raising such an abundance of legal issues and involving so many millions of euro that it is, frankly, inconceivable that whatever judgment the High Court reaches at the end of the day will not be the subject of appeal by one or more of the parties to one or other (perhaps even both) appellate courts. Moreover, it is common case between the parties that there will be a number of questions that will almost certainly need to be referred to the Court of Justice pursuant to Article 267 TFEU in the course of the proceedings (which references will require that all of the relevant facts be apprised to the Court of Justice). The airlines appear to be of the view that such references would not be required during any liability module but that may or may not be so. What seems to the court 'is so' is that by slicing the proceedings into a modular trial, the process of any appeals and references would be rendered unnecessarily complicated and yield unnecessary delays of several

years in getting fully through the trial stage of the proceedings. It seems to the court to be greatly preferable that the proceedings move through the High Court in a unitary manner, with all references that require to be made to the Court of Justice being made in the course of that unitary trial, a final end-judgment being reached by the High Court, and the parties then moving on to the (inevitable) appeal stage, with an appellate court able to focus on an end-judgment from the High Court that has been informed by all of the answers received from the Court of Justice and which seeks to address all of the issues that the parties have raised in the course of the proceedings.

47. *(iii) Would a modular order result in any prejudice to the parties*?

48. It seems to the court that, not least for the reasons identified at items A to D of this Part of the court's judgment, there would be manifest injustice to the State parties in being forced to meet what is, by any standard, a series of enormous claims without the airlines having particularised their cases, told the court what their claimed losses are, and without the court being able to deal with all issues in a unitary fashion.

49. *(iv) Is the motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues*?

50. Ultimately all motions tend to be devices to suit to assist a moving party; parties do not generally come to court prompted by an unselfish spirit of benevolence towards their opponents. So what is truly at issue in this regard is whether there is something underhand or untoward in the nature of the applications being made. The court does not see that any of the airlines has acted in any way in a manner that could remotely be described as underhand or untoward. They are each seeking to advance their respective interests and ultimately to win their respective cases and they are fully entitled so to do. But in terms of genuinely assisting the litigation by helping to resolve the issues presenting, it will be clear from the court's observations in the preceding pages, most notably in the context of Question (ii) above, that the court considers, for the reasons stated, that to split the unitary trial of the within proceedings into modular segments would frustrate an efficient and timely resolution of the various issues presenting.

F. *Some Applicable Case-Law*.

51. The court turns briefly to consider some case-law applicable to the issue of whether or not to go for modular trial.

(i) *Weber's Wine World*.

52. The court has already touched upon this case previously above. It was a case that arose out of Austrian proceedings in which a claim was being made for the repayment of a duty on alcoholic beverages that had been declared incompatible with European Union law. In the course of its judgment, the Court of Justice observed, inter alia, as follows:

> *"86 The Court has already held that a national legislature may not, subsequent to a judgment of the Court from which it follows that certain legislation is incompatible with the Treaty, adopt a procedural rule which specifically reduces the possibilities of bringing proceedings for recovery of taxes which were levied though not due under that legislation…*
>
> *…*
>
> *88 As regards the duty on alcoholic beverages, it should be borne in mind that the Court held at paragraph 50 of the EKW judgment that Article 3(2) of Directive 92/12 precludes the maintenance of that duty.*
>
> *…*
>
> *93 The Court has consistently held that individuals are entitled to obtain repayment of charges levied in a Member State in breach of Community provisions. That right is the consequence and the complement of the rights conferred on individuals by Community provisions as interpreted by the Court. The Member State in question is therefore required, in principle, to repay charges levied in breach of Community law…*
>
> *94 According to the case-law, there is only one exception to that obligation to make repayment. A Member State may resist repayment to the trader of a charge levied though not due only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter. It follows that, if the burden of the charge has been passed on only in part, the national authorities are required to repay the amount not passed on…*
>
> *95 As that exception is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person.*
>
> *96 Thus, at paragraph 17 of Bianco and Girard [Joined Cases 331/85, 376/85, 378/85]…the Court held, in particular, that even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court, which is free to assess the evidence adduced before it.*
>
> *97 The Court stated at paragraph 20 of Bianco and Girard that it is quite probable, depending on the nature of the market, that the charge has been passed on. However, the numerous factors which determine commercial strategy vary from one case to another so that it is virtually impossible to determine how they each affect the passing on of the charge.*
>
> *98 The Court has also held that, even where it is established that the burden of the charge levied though not due has been passed on in whole or in part to third parties, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment…*
>
> *99 Even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of his sales…*

100 Accordingly, the existence and the degree of unjust enrichment which repayment of a charge which was levied though not due from the aspect of Community law entails for a taxable person can be established only following an economic analysis in which all the relevant circumstances are taken into account."

53. What the above-quoted paragraphs show is that any court tasked with a consideration of the issue of restitution and/or damages must carry out an economic assessment and look at all the different circumstances, a task that the court struggles to see can properly be achieved and certainly cannot as effectively be achieved by way of the proposed modular trial.

(ii) *Viacom Outdoor Srl v. Giotto Immobilier SARL*

(Case C-190/02)

54. The court has been referred to the Order made by the Court of Justice in the above-titled proceedings. (No judgment issued because the court refused to accept the questions posed). The questions posed were raised in proceedings arising out of a contract between Viacom and Giotto. According to the order for reference, Viacom summoned Giotto to appear before the Italian courts seeking an order for payment of a fairly trivial sum (€1,000+) for advertising services supplied to the defendant plus €500+ by way of damages and interest. Giotto disputed Viacom's claims, on the ground that the amount claimed included a communal advertising tax and certain related duties and charges payable. In the course of its order, the Court of Justice indicated, *inter alia*, as follows:

"13 It is necessary to ascertain, after hearing the parties referred to in Article 20 of the EC Statute of the Court of Justice, whether the order for reference contains the necessary elements to enable the Court to give an interpretation of Community law which will be helpful to the referring court.

14 In this connection it must be recalled that the information provided in orders for reference do not serve merely to enable the Court to give helpful answers, but also to enable the governments of the Member States and other interested parties to submit observations in accordance with Article 20 of the EC Statute of the Court of Justice…It is the Court's duty to ensure that that possibility is safeguarded….

15 The Court has consistently held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary for the referring court to define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based…

16 The Court has also stressed that it is important for the national court to state the precise reasons which caused it to raise the question of the interpretation of Community law and to consider it necessary to refer questions to the Court for a preliminary ruling….Thus, the Court has held that it is essential for the national court at least to give some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute…

17 …[T]he order for reference does not contain sufficient information to satisfy those requirements.

18 In particular, the items challenged as being capable of constituting customs duties or charges having equivalent effect within the meaning of Article 23 EC, or restrictions within the meaning of Article 49 EC, or abuse of a dominant position within the meaning of Articles 82 EC and 86 EC, or State aid within the meaning of Article 87 EC, are described by the referring court as a 'communal tax on advertising' or 'duties and charges' payable to the commune of Genoa. However, no indication is given as to the conditions governing payment of the abovementioned tax, duties and charges.

19 Thus, owing to the imprecise description of the event giving rise to the tax, it cannot be determined whether it would be imposed when goods cross a border between Member States…or whether it would be liable to prohibit or impede more the activities of a service provider or recipient established in a Member State other than Italy….

20 Similarly, in the absence of information as regards the person liable to pay those amounts, it is not possible to ascertain the economic operator whose provision of services or access thereto might be hindered. Nor, given the absence of any description of the general context of the legislation called in question, is it possible to formulate useful observations as to the possibility of an overriding reason of general interest relating, for example, to financial, planning or other matters, which might warrant the alleged obstacle.

21 As regards the application of the rules of competition, in the absence of information concerning the body entrusted by the law with managing bill-posting in the communes and its structure and financing, it cannot be determined, first, whether it is an 'undertaking' within the meaning of the relevant Community provisions on competition; secondly, whether, as stated by the referring court, that entity is a service of 'general economic interest' within the meaning of Article 86 EC; thirdly, whether the rates of duty applied may constitute an abuse of a dominant position within the meaning of Article 81 EC…and fourthly, whether its financing is in breach of the Community rules on State aid…

22 In the absence of sufficient particulars, it is not possible to discern the specific problem of interpretation which might be raised in relation to each of the provisions of Community law in respect of which the national court seeks an interpretation. The need for precision with regard to the factual and legislative context applies especially in the area of competition, which is characterised by complex factual and legal situations…

23 It is true that the referring court has appended to its order various procedural documents, including several acts and regulations relating to bill-posting.

24 It should be recalled, however, that it is for the referring court to explain, in the order for reference, the factual and legislative context of the dispute in the main proceedings, the reasons which have led the court to raise the question of the interpretation of certain provisions of Community law in particular, and the connection which it establishes between those provisions and the national law applicable to the case…".

55. In proceedings in which it is common case between the parties that there will be a number of questions that will almost certainly need to be referred to the Court of Justice pursuant to Article 267 TFEU, the court is, of course, especially aware of the above-mentioned requirements and, for the reasons stated in the preceding pages, considers that were it to proceed by way of modular trial, that modularisation could present very real issues as regards the making of those references. The best way of avoiding those difficulties and also securing the overall efficiencies in the despatch of the within proceedings which the court has referenced

previously above is, it seems to the court, to proceed by way of unitary trial.

(iii) *In re. Art 26 and in the matter of*

Part V of the Planning and Development Bill, 1999

[2000] 2 IR 321

56. In these proceedings, Part V of the Planning and Development Bill 1999 was referred to the Supreme Court by Uachtarán na hÉireann pursuant to Art.26 of the Bunreacht. The reason the case is of interest in the context of the within proceedings is because of the particular responsibilities which the court has touched upon previously above when it comes to its assessing alleged transgressions of property rights, the Supreme Court observing, *inter alia*, as follows, at 348:

> *"It is no doubt the case that the individual citizen challenges the constitutional validity of legislation which purports to delimit or regulate the property rights undertakes the burden of establishing that the legislation in question constitutes an unjust attack on those rights within the meaning of Article 40….The challenge typically arises…as it has done here, in circumstances where the State contends that the legislation is required by the exigencies of the common good. In such cases, it is inevitable that there will be an inquiry as to whether, objectively viewed, it could be regarded as so required and as to whether the restrictions or delimitations effected of the property rights of individual citizens (including the plaintiff in cases other than references under Article 26) are reasonably proportionate to the ends sought to be achieved."*

57. So, as the court touched upon previously above, when it comes to look at an issue of proportionality it is required to assess the impact on the property rights of individuals. Here what Aer Lingus and Ryanair would have the court do is assess the issue of proportionality without regard to actual loss suffered. That the court cannot do: it must understand what the actual loss is.

(iv) *Phaestos Ltd v. Ho*

[2012] EWHC 635 (TCC)

58. In *Phaestos*, the defendant doctors were retained by the claimant companies in a long-standing employment relationship. In December 2008, the defendants were dismissed on grounds of redundancy and breaches of contract. The parties commenced various proceedings against each other, which were consolidated in June 2011. The claimants sought split trials of liability and quantum. The defendants opposed the split and contended that it was difficult for the court to make a decision on whether or not liability should be split from quantum unless and until the parties had provided proper particulars of what their losses actually were.

59. Akenhead J., in the High Court of England and Wales, refused to split the trial of liability and quantum, holding that (i) it would not be acceptable to allow a party that had been pursuing a very large claim against two individuals to continue to withhold proper particularisation of their quantum claim, and (ii) unless and until there was proper particularisation, it would be very difficult for the court to make any decision on whether to split liability and quantum, observing, *inter alia*, as follows:

> *"36. I certainly at this stage am not prepared to split liability and quantum. It does seem to me that it is important that both parties, but in particular the Claimants, get on with pleading their quantum case in a way that is comprehensive and comprehensible. It is simply not acceptable to the Court to allow a party that is pursuing a very large claim against two individuals to continue to withhold proper particularisation of their quantum claim. Unless and until they do, then it is very difficult for the Court to make any decision on whether to split liability and quantum. There is very little evidence as such being put forward by either side as to how difficult or expensive it is going to be to defer or not to defer, as the case may be."*

60. As it was in *Phaestos*, so it is here, with the level of particularisation thus far being such as to provide the court with additional reason as to why it would not be proper or prudent to modularise the trial of the proceedings in the manner contended for by the airlines.

VI

Directions Motions

(i) *Some Fundamental Difficulties Presenting*.

61. The directions sought by the State parties in their motions have been set out previously above. However, the State parties' applications in this regard appear to the court, with respect, to involve a couple of fundamental errors of approach on the part of the State parties:

> – first, it is important to recall that what the airlines seek is restitution of the €8 per passenger that was imposed by way of unlawful tax. The State parties intend to defend that claim in part by the unjust enrichment argument but, in bringing these motions, what the State parties are in effect seeking to achieve is to have the airlines do the work of the State parties for them, *i.e.* to calculate what an unjust enrichment deduction would be like if the State was entitled to same.
>
> – second, the State parties, with respect, appear in the substance of what is sought via the directions motions to confuse the concepts of particularisation and discovery. Essentially what they are seeking to do is to have the airlines engage in particularisation that is not particularisation of the airlines' claims but, in effect, particularisation at one remove of the unjust enrichment defence that the State parties have raised.

62. Viewed so, it can be seen that the directions motions are unusual. They are more unusual still when one considers the extent to which the State parties now stand in possession of information on which the airlines' respective expert reports will be based (and there is a standing offer from Ryanair that within five months of the issuance of the within judgment, it will furnish a completed experts' report to the State parties). So instead of getting on with the job and interrogating the information of which they now stand possessed so as to enable them to mount their unjust enrichment defence, the State parties are in effect seeking to have the airlines produce the information that would enable the State parties to mount that defence. In this regard, the court found the following exchange between court and counsel for Aer Lingus helpful as an exploration of what the State parties are in effect seeking of the airlines by way of their directions motions:

"COURT: Is what you're saying though not a bit like…handing in all kinds of medical reports and then saying 'But I'm not going to tell you if I'm suing for a broken leg or a broken arm'?

COUNSEL: No, I don't think so, Judge, because in a medical case for example, if I said I broke my neck I would issue a statement of claim saying I broke my neck and when I come to trial I'll decide whether I will call any expert witnesses to say I broke my neck and, if so, I'll decide whether I'll call a general practitioner or an orthopaedic surgeon or a radiologist and I'll decide in the normal course of events. But, here, we have a situation where the equivalent of saying 'I broke my neck' is saying 'I was required to pay €8 per passenger which I shouldn't have had to pay'. So I'm telling them what my claim is. But they then, in order to defend themselves, say 'Well, we'd like to mount this defence of unjust enrichment'. It's like them saying to the plaintiff who broke their neck 'Well, maybe you had a genetic weakness in your cervical spine which caused your neck to break spontaneously quite independently of this accident' and now I'm coming to court and I'm asking you, Judge, to compel this plaintiff who wants to make a claim on one basis to go off and get experts, to produce reports and swear affidavits as to whether or not there's a genetic weakness in my neck and whether or not my neck fractured perhaps because of some spontaneous fracture….It's quite a different exercise and they don't really know what they want to do or what the basis for it is."

63. It seems to the court that counsel's response in the above-quoted extract from the transcript of the hearings rather neatly encapsulates the fundamental difficulty presenting at the heart of the directions applications, and it is a difficulty that the State parties, despite the eloquence of their argument, never managed to overcome in their oral or written submissions.

(ii) *Different Rules Relied Upon*.

64. The airlines have sought to make much of the fact that the directions motions have been brought in reliance on different rules of court to those which it was originally intended to rely upon in this regard, i.e. O39, r.58(2)(b) and O.63B, r.5, RSC, as opposed to O.19, r.7, RSC. The court sees nothing in this other than that the State parties consider the rules now relied upon afford the best basis on which to seek the orders now sought.

(iii) *Unusualness of Orders Sought*.

65. Whether the abovementioned rules provide any basis for the orders now sought is a matter to which the court returns later below, but certainly the basis for what is being sought does not alter the unusualness (touched upon previously above) of what is being sought of the court by the State parties, which is, in effect, a mandatory injunction whereby the court will afford one side (the State parties) a 'dig out' by ordering that their opponents produce something akin to evidence that the State parties can then rely upon. Such an order, to put matters at their very mildest, would involve the court entering into what is uncharted territory as regards the conduct of litigation in Ireland. Nor is it even clear to the court that what the State parties seek goes to the point with which they are in fact concerned: they want the court to direct the delivery of any expert reports commissioned to quantify the sums to which the respective airlines claim to be owed but that is a relatively simple sum (No. of Relevant Passengers x €8), the calculation of which does not go to the passing on, *etc*. issues regarding which the State parties have manifested such concern. Moreover, while reports may have been commissioned, that does not mean that they have been completed, yet it is now being sought that the court will order release of such report on unspecified conditions as to, *e.g.*, whether the disclosed report becomes evidence, whether its contents contain admissions, and whether such report(s) can be relied upon in the main trial of the proceedings.

66. The State parties also seek an order directing their opponents to identify the background materials supplied to the experts who prepare the reports and the methodology deployed in the selection of same. But, with respect, the State parties have received the relevant materials (and doubtless more on top of same) as part of the discovery process; getting into the issue of what precise materials are selected for the compilation of a report cannot but get into the realm of the privileged relationship between the airlines and their advisors. As to the court's making an order setting a date by which the State parties must be provided with affidavit evidence quantifying in monetary terms the extent to which they passed on the financial burden of the air travel tax, (i) it seems notable that what is being sought in this regard is an affidavit, not an expert report, (ii) it is not at all clear as to who would swear such an affidavit, (iii) the request for such an order seems to proceed on the basis that, or require the court to assume that, the relevant expert reports are going to address the issue of unjust enrichment, and they may not, (iv) there is a question-mark over the jurisdictional basis on which the court can in any event compel a plaintiff to provide an affidavit quantifying a matter (undue enrichment) on which a defendant wants to rely upon by way defence, and (v) when it comes to quantifying the extent to which there was (if there was) passing on, that is no simple matter, in truth it boils down to a question of opinion, yet what is being sought appears to be the swearing of an affidavit as to fact.

(iv) *Some Difficulties with the Rules Relied Upon*.

67. Turning to the particular rules of the Rules of the Superior Courts on which the State parties seek to rely, O.39, r.58(2)(b) follows on the provision in r.58(1) that "Expert evidence shall be restricted to that which is reasonably required to enable the court to determine the proceedings" and makes general provision as regards expert evidence, stating, inter alia, that

"(2) A judge may…

(b) on the application of a party by motion on notice to the other party or parties,

make any of the following orders or give any of the following directions as to expert evidence…

(i) requiring each party intending or proposing to offer expert evidence to identify –
(a) the field in which expert evidence is required; and

(b) where practicable, the name of the proposed expert;

(ii) determining the fields of expertise in which, or the proposed experts by whom, evidence may be given at trial;

(iii) fixing the time or times at which a report setting out the key elements of the evidence of each expert intended or proposed to be offered by each party shall be delivered to each other party concerned or exchanged and in default of such order being made, the provisions of sub-rules (1) to (5) inclusive of rule 46 shall apply to every such report…".

68. All of these are fairly standard orders that one gets in the run-up to a trial. There is nothing in O.39, r.58(2)(b) that justifies the type of intrusive mandatory order that is being sought by the State parties in the within application.

69. As for O.63B, r.5, RSC, it simply makes the following general provision under the overall heading "*Pre-trial procedure*":

> *"A judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Competition List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."*

70. There are perhaps two notable aspects to O.63B, r.5, RSC. First, it does not make innovative provision for the manner in which the court is to proceed. It merely allows for what might be called the 'usual' directions for the conduct of proceedings, not for an unusual direction of the type now sought by the State parties. Second, for the court to intervene pursuant to O.63B, r.5, RSC, the court must satisfy itself that the intervention would be "*just, expeditious and likely to minimise the cost of…proceedings.*" Forcing a party to quantify a defence on which its opponent seeks to rely does not seem to the court to be just; and even if it could be said that the directions would result in some reduction of costs to the State parties, that would be bought at what seems to the court to be an unjustifiable increase of costs to their opponents.

71. As to the notion that the expert reports are not needed solely for the purposes of quantum but also go to issues such as proportionality and discrimination, this appeared to the court to be an ancillary line of argument. The State parties, it seemed to the court, want access to the expert reports predominantly because the State parties are, as counsel for Aer Lingus put it at one point in the hearings, 'trying to get a handle on quantum if unjust enrichment is allowed by way of defence'. The court has addressed the quantum side of matters extensively in the within judgment. It would simply add that the contentions made as to proportionality and discrimination do not seem to present without difficulty. For example, if the State aid decision treats the test of proportionality as having been failed, does it not follow that the State, not having challenged the State aid decision, is bound by that finding? And can it properly be asserted that one is in *de minimis* territory when one has regard to the underlying facts of the within case? The court neither seeks to answer these questions nor to close out any (if any) further consideration of same at hearing. For the purposes of the within application, suffice it to note that when the court has regard to the primary thrust of the State parties' application and when it bears in mind that it is presented with what is, in any event, an unusual application, it is not persuaded that the points raised as to proportionality and discrimination offer a basis, either in themselves or combined with the quantum point, for acceding to the directions applications made by the State parties.

VII

Aer Arann Motions

(i) *Overview*.

72. Before proceeding to the mainstay of the Aer Arann motions, it is useful to recount a little of the trading history of Aer Arann. It was established in 1970 to provide an 'island-hopping' service, essentially between Galway and the Aran Islands. In 2002, it began additional services to the United Kingdom and the Channel Islands and subsequently extended its routes into France. In 2010, it combined with Aer Lingus to form Aer Lingus Regional under what was essentially a form of franchise agreement whereby Aer Arann operated a number of planes and routes branded in Aer Lingus colours (the effect being that a party going to Dublin Airport and getting on what looked like an Aer Lingus Regional aircraft was in fact boarding an Aer Arann craft piloted and staffed by Aer Arann crew).

73. On 26th August, 2010 an examiner was appointed to Aer Arann. The normal process of examinership then took place and ultimately a British logistics company (the Stobart Group) emerged as the preferred investor. On 10th November, 2010, Aer Arann exited its examinership under a new ownership structure underwritten and supported by the Stobart Group in circumstances where, the court is advised, so far as the investors were concerned, there was no expectation or understanding that there could be a pre-examinership liability in relation to State aid. As a consequence, the European Commission decision of 25th July, 2012, which directed the recovery of €8 per passenger came as a shock to Aer Arann and its investors. The position that Aer Arann takes before this Court is that, insofar as the recovery relates to the period up to 10th November, 2010, its liability in this regard has essentially been extinguished as a result of the scheme of arrangement proposed by the examiner and approved by the court (the State parties take a different view). In respect of the post-examinership liability, Aer Arann has an amendment which it seeks to be allowed to introduce into the case whereby it seeks to raise a set-off defence in respect of the State aid liability (and it is a defence only, not a separate counterclaim).

74. Essentially there are two State aid recovery actions against Aer Arann, one against Aer Arann in its own right and the other jointly against Aer Arann and Aer Lingus. Aer Arann initially followed the lead of Aer Lingus as regards those proceedings. Thus it lodged defences and counterclaims in both proceedings and it thereafter instituted its own restitution proceedings. When the proceedings reached the discovery stage the State parties sought extensive discovery against Aer Arann in respect of all of these matters and it sought to require Aer Arann and the other airlines to provide expert reports. The cost estimate of the expert reports alone (to Aer Arann) was in the region of €¼m. This was financially very onerous for Aer Arann and it took the decision to abandon the restitution action and the counterclaims in return for being absolved from the need to provide expert reports and also the very extensive discovery that had been sought.

75. At the time of writing, Aer Lingus, in the joint action with Aer Arann, has: continued to seek to set advance or set off of its claims for repayment against that joint liability; and also sought to defend the joint claim on the basis that Aer Arann was the operator of the airlines and is liable under the applicable franchise agreement. As between Aer Lingus and Aer Arann there has not yet been notice of intention to claim contribution or indemnity. But Aer Arann's view is that, notwithstanding the provisions of the franchise agreement, any apportionment of post-examinership liability should be apportioned between Aer Arann and Aer Lingus, and hence there is or will be an issue between Aer Arann and Aer Lingus in this regard that will require to be resolved.

76. The issue of *Francovich* damages is live between the State parties and the airlines other than Aer Arann. Curtailing Aer Arann from making an equitable set-off argument would, Aer Arann contends, be unjust where, if, for the sake of argument, Aer Lingus and Ryanair succeeded in their damages claim, Aer Arann could not refer to that possible determination and seek the equitable set-off. That could yield the potentially unfair situation where Aer Lingus would be able to avail of set-off but its similarly placed joint defendant could not. Justice would seem better served by allowing the trial judge, after hearing all the evidence, to decide the merits of the Aer Arann set-off argument, rather than barring Aer Arann from making that argument even before evidence has been heard.

(ii) Amendments Proposed.

77. There are two sets of Aer Arann motions (one set in the 'sole' proceedings (2013/3285P) and one set in the 'joint' proceedings (2013/3288P)). For the sake of convenience and in the interest of brevity, the court proposes to deal with the sole proceedings only, buts its conclusions obviously apply across both sets of motions.

78. The detail of the motions has been recited previously above. As to the proposed amended defences, the court understands that the only amendments with which it needs concern itself at this time are those in paras. 7, 9, 10, 24 and 26(ii), viz:

> *"7. At all material times, Aer Arann was entitled at law to set off, by way of defence to any action initiated by the Plaintiffs for the recovery of any unlawful state aid said to have been constituted by the invalid tax, or the differentiated measures implemented thereby, the amount of the invalid tax remitted by it, in respect of the flights the subject matter of these proceedings, up to the total of the Plaintiff's claims made herein, irrespective of whether or not it had ever initiated the Aer Arann Restitution Proceedings and/or asserted the Counterclaim originally pleaded herein.*
>
> *…*
>
> *9. The Settlement Agreement did not bar the right of Aer Arann to plead, by way of defence in these proceedings, the right of set off pleaded at Paragraph 5 above, nor the right of Aer Arann to rely on such findings of fact and law, relevant to the invalidity of the text and the right of those require to remit the invalid tax, to set off the resultant restitution obligations of the Plaintiffs against any unlawful state aid repayment obligations of those required to remit the invalid tax , as this Honourable Court should reach in the Third Party Restitution proceedings.*
>
> *10. Aer Arann reserves the right to make application to this Honourable Court, if necessary, to postpone the trial of these proceedings, or to stay any findings and/or judgment in favour of the Plaintiffs with regard to the illegal state aid repayment obligations of Aer Arann, pending the final determination of the Third Party Restitution Proceedings.*
>
> *…*
>
> *24. Further, i In circumstances where the higher rate tax was also liable to be repaid by Ireland simultaneously to those airline operators which had remitted it, as Aer Arann pleads herein, and as claimed by Aer Arann, Aer Lingus Limited and Ryanair Limited in the restitution proceedings referred to at Paragraph 5 above, the relief sought in the within proceedings, in particular:*
>
> > *(i) infringes the principles of legal certainty, effectiveness and good administration;*
> >
> > *(ii) is disproportionate and a breach of the principle of equal treatment;*
> >
> > *(iii) operates as an additional and retrospective tax on Aer Arann, and thereby unlawfully penalises Aer Arann rather than restoring the situation prior to the grant of the alleged aid; and*
> >
> > *(iv) is contrary to the principles of legal certainty, effectiveness and good administration.*
>
> *…*
>
> *26. Paragraph 9 of the Statement of Claim is admitted, save that the obligations pleaded:-*
>
> > *(i) are subject to the entitlement of Aer Arann to rely on the matters pleaded at Paragraph 24 above by way of a valid defence at law to the Plaintiff's claims herein;*
> >
> > *(ii) are subject to the right of Aer Arann to set off its entitlements in respect [of] its rights to repayment of the invalid tax actually remitted by it, in respect of the flights the subject matter of these proceedings, pursuant to Section 55(2)(b) of the 2008 Act;*
> >
> > *(iii) do not, by reason of the matters pleaded at Paragraphs 12-14 above, oblige the Second Named Plaintiff to recover from the Defendant the said State Aid in so far as the same is attributable to any period pre-dating 5 November 2010, being the date upon which the Defendant exited examinership."*

[Underline in original].

79. These various amendments are essentially seeking to assert, by way of defence, a right to set-off any restitution entitlements which it would otherwise have in respect of the unlawful tax. That right of set-off was not in the original Defence in the way in which it is now framed, it is clearly something that could have been in the Defence at the outset, and it is not directed merely to the differential between the €2 and €10, but extends to the entirety of the tax remitted by Aer Arann. So, Aer Arann claims, it is a different form of pleading to that which had been included in the restitution action or in the counterclaim beforehand and hence a form of defence/pleading that is not caught by the settlement agreement, because the settlement agreement provided for the striking out of the restitution claim and the striking out of the counterclaim *as framed*. The State parties object to the proposed amendments being allowed at this time because, they maintain, the amendments relate to claims that are statute-barred and/or not permissible under the terms of the Settlement Agreement. Thus, Mr O'Sullivan, an Assistant Principal in the Department of Finance, avers, *inter alia*, as follows, in an affidavit sworn regarding Aer Arann's applications:

> *"14. In addition to the Recovery Proceedings, I say that in 2014, Aer Arann instituted its own proceedings against the State challenging the legality of the tax and claiming a right of restitution in respect of tax paid…*
>
> *15. However, on 6 October 2015 Aer Arann entered into a compromise agreement with the State in respect of the Aer Arann Restitution Proceedings. As part of the Settlement Agreement, Aer Arann agreed to strike out the Aer Arann Restitution Proceedings and to amend its Defences and strike out its counterclaims in both the Aer Arann Recovery Proceedings.*

16. I say the purpose and effect of this compromise agreement was to relieve Aer Arann from its obligations to make discovery and deliver expert reports in the said proceedings, which discovery and expert reports had been the subject of correspondence between the parties. On 15 July 2014 the Chief State Solicitor's Office wrote to Aer Arann concerning discovery in the Aer Arann restitution proceedings. In that letter…the State called on Aer Arann to adduce as soon as possible any expert reports on which it proposed to rely to establish its loss and damage, together with evidence of the documents supplied to the relevant expert. By letters dated 21 July and 30 July 14 2014 the State made a similar request in the Aer Arann Recovery Proceedings…

17. In addition, on 25 July 2014 the State issued a motion in the Aer Arann restitution proceedings seeking to compel Aer Arann to provide the same information. The motion was not heard before the court, since Aer Arann agreed to provide the information requested.

…

C. The Application for Leave to Amend Aer Arann's Pleadings

23. I say and believe and am advised that the principles governing the amendment of pleadings are more appropriately a matter for legal submission. However, in an effort to assist the court, I make the following observations in respect of the applications in both the Aer Arann State Aid Recovery Proceedings and the Aer Lingus and Aer Arann State Aid Recovery Proceedings.

24. …Aer Arann has sought leave to amend the Aer Arran Defence and Counterclaim in the State Aid Recovery Proceedings and the Aer Lingus and Aer Arann State Aid Recovery Proceedings in order to give effect to a Settlement Agreement entered into between the parties on 5 October 2015.

25. As part of that agreement Aer Arann agreed to strike out the Aer Arann restitution proceedings commenced in 2014 in their entirety and to strike out paragraphs 28 to 37 of its Amended Defences and Counterclaims and Reliefs 1 to 5 inclusive of the Amended Counterclaims in the Aer Arann State Aid Recovery Proceedings.

26. In essence that agreement provided that Aer Arann would strike out its pleas to the effect that it was only obliged to repay the State Aid identified in the Commission's Decision to the extent that it had retained the benefit of that aid and further that any order permitting the State to recover the said aid had to be subject to Aer Arann's claim to restitution.

27. Accordingly, insofar as the proposed amendments give effect to the Settlement Agreement the State does not oppose such amendments in either set of proceedings.

28. Nor does the State oppose amendments clarifying Aer Arann's defence in respect of examinership.

29. However, Aer Arran now also seeks to make further amendments to its Defences which are not in any way related to the terms of the Settlement Agreement. Specifically, Aer Arann seeks to introduce a new pleas whereby it would be entitled to assert a right to set off as a defence to the State's recovery claims. This plea is found at paragraphs 7, 9, 10, 24 and 26(ii).

30. It follows that if the proposed amendments were permitted, it would allow Aer Arann to (a) challenge the validity of the tax or the differentiated rates of ATT applied under s.55(2)(b) of the Finance Act (No 2) 2006 in order to establish that it enjoyed a right of restitution in respect of tax remitted by it or to benefit from another airline's challenge to validity of the tax in circumstances where Aer Arann withdrew any such challenge (b) to argue that the State's right of recovery in respect of the State aid is subject to Aer Arann's right to restitution for tax unlawfully imposed and (c) collaterally challenge the lawfulness of the Commission Decision.

31. For reasons which will be outlined in more detail in legal submissions to the Court, the State opposes any such amendments on the basis that they are clearly prohibited by the terms of the Settlement and moreover are statute barred.

32. Moreover, if these opposed pleas were now accepted, I am advised that there will be a necessity for discovery, further particularisation and expert evidence. This will result in further cost and delay in the within State Aid recovery proceedings."

80. In deciding whether are not to allow the opposed pleas, the court has been referred principally to the decision of the High Court (Clarke J.) in *Woori Bank & anor v. KDB Ireland Ltd* [2006] IEHC 156, which decision concerned an application made by KDB to amend its defence, and provides as good a summary as any of the applicable law, Clarke J., as he then was, observing as follows under the heading "*The Law*":

"3.1 The Supreme Court has recently addressed the question of amendment of pleadings in Croke v. Waterford Crystal Limited [2005] 2 I.R. 383. In the course of his judgment (speaking for the court) Geoghegan J. indicated that there had been an over emphasis in a number of cases on an obligation to give good reasons for having to amend the pleadings. In that context it may be said that some doubt was cast upon Shepperton Investment Company Limited v. Comcast Limited (1975) Ltd (Unreported, High Court, Barron J. December 21st 1992); McFadden v. Dundalk and Dowdallshill Coursing Club Limited (Unreported, Supreme Court, April 22nd, 1994); and Palamos Properties v. Brooks (1996) 3 I.R. 597 insofar as those cases may have placed a significant weight upon the absence of a good reason for the case having not being properly pleaded in the first place. In expressing that view the court reaffirmed O'Leary v. Minister for Transport Energy and Communications [2001] 1 ILRM 132 and held that the principal consideration in an amendment application was to the effect that pleadings should be amended so as to ensure that the real questions of controversy between the parties should be determined in the litigation. That principle is, of course, subject to the limitation that amendments should not be made where to allow same would cause prejudice to the other party. This latter fact is, in turn, subject to the limitation that where it is possible to deal with the prejudice in a fair and just manner by means other than excluding the party from relying upon the matters sought to be pleaded (such as by an appropriate order for costs) then the amendment should be allowed and the prejudice dealt with in the appropriate way.

3.2 In addressing the question of prejudice it is, of course, important to recollect that a party does not require any

leave of the court to formulate its pleading (whether of claim or defence), in any manner it chooses in the first place. A party has a very wide discretion as to the manner in which it may plead its case or its response. Insofar as there are limitations, same stem from the rules of court which permit aspects of pleadings to be struck out in the unusual and limited circumstances where the pleadings may be found to be inappropriate by being, for example, vexatious, scandalous or disclosing no cause of action. Subject to those limitations a party is at large as to how it pleads. Where a party fails to include an appropriate plea it may be placed in a position of requiring a court order to amend. However the starting point for a consideration of whether to allow the amendment should be to have regard to the fact that the party could have included the plea in the first place without requiring any leave from the court. Prejudice needs to be seen against that background. The prejudice that needs to be established must be a prejudice which stems from the fact that the proceedings have progressed on one basis and are now sought to be altered. The prejudice must stem, therefore, from the fact of the belated alteration in the pleadings rather than the presence (if allowed) of the amendment itself. Such prejudice can, in principle, arise in one of two ways."

81. Essentially an amendment is generally to be permitted if it identifies a matter truly in dispute between the parties and if there is no prejudice arising from the amendment being allowed. Prejudice, of course, can mean a number of matters. It can, for example, include logistical prejudice, though given the success of the State parties in persuading the court to go with a unitary trial, it does not now seem likely that the within matter will come on for hearing until sometime in the late-spring/early-summer of 2019; so there can be no logistical prejudice in terms of any (if any) additional discovery and/or any pleadings that fall now to be done.

82. A question arises whether, in any event, there will be much by way of additional discovery to be done if the proposed amendments are allowed (and they will be). The only relevant issue that can arise in the circumstances is the amount of the tax, which is a straightforward issue and the amount of any tax passed on. Those are very discrete issues. There may be an issue about a small tranche of time at the beginning but that again is a discrete matter that can be addressed in correspondence. As to the possibility that Aer Arann might seek to rely on an earlier agreement reached in the context of discontinued proceedings to bar a discovery request in the context of the within proceedings, that proposition need merely be stated to see that it could not hold true. And in this case it will doubly not hold true because counsel for Aer Arann has assured the court that any such agreement will not in fact be relied on as a basis for objecting to discovery. As to the possibility that there may be some additional costs incurred in relation to any such discovery, the court can remedy that by making an order for the relevant costs of discovery against Aer Arann. (In truth, the general approach in amendment applications is that if a difficulty relating to costs can be addressed by an order for costs, then that is the way to proceed). As to any non-payment of the escrow amount (if any; the finalisation of the escrow arrangements was in a state of some flux at hearing), the court respectfully does not see that this is relevant to an amendment application. And insofar as the pace of any discovery to be effected is concerned, Aer Arann has indicated a willingness to give an undertaking to deal with discovery promptly if such undertaking is required.

83. Insofar as it is argued on behalf of the State parties that Aer Arann's set-off is bound to fail, whether for some of the legal reasons that have been touted before the court at hearing and/or because it is caught by the terms of the settlement agreement, it seems to the court that the merits of those arguments are not for the court to adjudicate upon in what is but an application for leave to amend. If the State parties are to contend (and it seems that they will contend) that a claim that could have been, but was not, included in previous proceedings was intended to be barred by the settlement agreement, then essentially the issues that arise for adjudication are whether (a) the continuance of the claim is barred under the agreement or, for example, (b) is some form of abuse of process (and no argument as to abuse of process has properly been advanced to this point). Those are matters in respect of which legal argument will arise to be made, and are not matters which, to the court's mind, are appropriately canvassed within the parameters of an application to amend. As indeed is the issue of whether Aer Arann is engaged in some form of collateral challenge to the decision of the European Commission. These are matters to be pleaded by way of reply by the State parties if the amendments which it is proposed to make are allowed to be made (and, as mentioned, they will be allowed).

84. As regards the raising of an issue that is bound to fail, the court recalls in this regard para. 5 of the judgment in *Woori*, at which Clarke J. observes as follows:

"5.1 In Hynes v. The Western Health Board and Another (Unreported, High Court, Clarke J. 8th March, 2006) I considered the authorities in relation to the jointure of a party where the case against that party might be statute barred and came to the following view (at p. 8):-

"3.4 I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that the defendant concerned intends to rely upon the statute.

3.5 However I am also of the view that O'Reilly v. Granville is authority for the proposition that the court should not enter into an enquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant (or, as here, where a defendant having been joined seeks by a similar procedural motion to have the earlier order set aside). On that aspect of the matter the only question which the court should ask itself on such an application is as to whether the claim as against the defendant concerned is clearly statute barred. If there is [any?] doubt whatsoever about that fact, then the defendant should be joined, if it is otherwise appropriate so to do, and the issue of the claim being or not being statute barred should be dealt with in the ordinary way as appropriate to the circumstances of the case including, if so appropriate, by means of a preliminary issue".

5.2 It seems to me that a similar approach should be adopted by the court in respect of an amendment to pleadings whether of claim or of defence. The underlying principle must be the same. Just as a significant factor in the jurisprudence reviewed in Hynes, which favours the proposition that the court should lean towards joining a defendant, is the fact that the defendant could have been joined without leave had the plaintiff named the defendant in the proceedings as originally issued, similarly a party can include whatever materials they choose in a pleading subject only to the overriding jurisdiction of the court to strike out elements of the pleading which are inappropriate.

Therefore the court should lean in favour of allowing an amendment if, in the words of Hynes, it is otherwise appropriate so to do, unless it is manifest that the issue sought to be raised by the amended pleading must necessarily fail. The court should not, on a procedural motion to amend, enter into the merits or otherwise of the issue sought to be raised save to the extent of asking itself whether the issue which would be required to be tried as a result of the amended pleading is one which must necessarily fail from the perspective of the party seeking the amendment."

85. In effect, what Clarke J. does is (i) applies what might be styled the *Croke* principles to the 'bound to fail/statute-barred' argument (and there seems little practical difference between the statute-barred and contractually-barred scenario that arises under

a settlement agreement), and (ii) concludes that except in a very clear case, this is a substantive argument to be postponed to the trial of the main action.

(iii) Sequencing of Issues.

86. Aer Arann seeks that the recovery action against it be postponed until after the restitution actions brought by Aer Lingus and Ryanair are decided (or at least until after they are heard). This would involve postponing the decision on the State aid recovery which, for the reasons set out by the court in its preliminary observations concerning European Union law appear to it to be contrary to European Union law and thus cannot be allowed. It seems in any event to be entirely premature to address the sequencing of issues at trial at this time.

VIII

Conclusion

87. For the reasons stated previously above, the court respectfully (a) declines to accede to the applications for a modular trial and will proceed instead by way of unitary trial, (b) declines to accede to the State parties' directions applications, (c) accedes to Aer Arann's amendments applications but declines to engage in the sequencing of the trial as contemplated by Aer Arann. Finally, the court intends to bring this case on for hearing as early as possible in the first half of 2019. Though the court considers it very unlikely that the case will be ready to be brought on sooner, if matters proceed more quickly than expected between the parties, it can also be heard in late-2018.