Neutral Citation: [2015] IEHC 800

THE HIGH COURT

CIRCUIT APPEAL

[2014 No. 173 CA]

BETWEEN

DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

PLAINTIFF/ RESPONDENT

AND

WEST WOOD CLUB LIMITED

DEFENDANT/ APPELLANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered 17th day of December 2015.

Introduction

1. This is an appeal from a ruling in the Circuit Court (Her Honour Judge Linnane) on a preliminary issue as to the jurisdiction of that court to consider issues relating to State aid in the context of a claim for the payment of commercial rates.

2. The plaintiff/respondent (hereafter "the plaintiff") has issued three civil bills against the defendant/appellant (hereafter "the defendant") claiming arrears of commercial rates, for the years 2011 to 2013, in respect of a leisure premises operated by the defendant. In each case, the defendant has pleaded *inter alia* that the plaintiff is operating leisure facilities in competition with it; that the funding received by the plaintiff from commercial rates and from other State sources constitutes an unlawful form of State aid, contrary to EU law, and that the rates are therefore unenforceable. The defendant has also counterclaimed for damages – this is said to be on the basis that the court considering the claim for rates might feel obliged to give a decree in favour of the plaintiff, but should ameliorate the effect of the unlawful actions of the plaintiff by awarding damages against it in the same amount as the rates claim.

3. The primary arguments of the defendant are summarised as follows:

> (a) The receipt of rates by the plaintiff from the defendant, the receipt of State grants from the Exchequer and the subsequent expenditure of that income on leisure centres owned and operated by the plaintiff in competition with the privately owned and non-State subsidised leisure centres operated by the defendant amounts to unlawful state aid, and
>
> (b) The exemption granted by the plaintiff to its own leisure centres for rates for the years in question, when such leisure centres were in competition with the defendant's leisure centres, amounts to a breach of the competition rules of the Treaties taken in conjunction with the obligation on the State and State entities under Article 4(3) of the Treaty on the Functioning of the European Union ("TFEU") not to enact any measure which could jeopardise the achievement of the objectives of the Treaties (which include the non-distortion of competition).

4. The plaintiff contended that the Circuit Court did not have jurisdiction to entertain this argument. Having heard submissions on the issue, the learned Circuit judge ruled in favour of the plaintiff. The order as drawn up recites a finding that she had *"no jurisdiction to consider the points raised regarding State aid in the defendant's defence".*

5. This appeal is, therefore, confined purely to the issue of jurisdiction.

The defence and counterclaim

6. The defence as pleaded raised a variety of issues. The matters relevant to the determination of this appeal can be summarised as follows.

7. The defendant pleads that the plaintiff is involved in the supply of services and the promotion of premises similar to and in competition with its own. It claims that the plaintiff and the companies through which it engages in this activity are *"undertakings"* within the meaning of European competition and State aid law, and that they are in a dominant position in the market. It is alleged that the plaintiff has treated the defendant's premises differently to its own.

8. The defendant pleads that the plaintiff is:

> a) in breach of and/or acting contrary to ss. 4 and 5 of the Competition Act 2002;
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> b) in breach of and/or acting contrary to Article 102 TFEU;
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> c) in breach of and/or acting contrary to Article 106 TFEU;
>
> d) in breach of and/or acting contrary to Articles 107 – 109 TFEU; and
>
> e) in breach of and/or acting contrary to Article 4 TFEU.

9. It is pleaded that receipt by the plaintiff of commercial rates, Government grants and money from the Local Government Fund distorts or threatens to distort the market, affecting trade between member states and thereby amounting to unlawful State aid. It is

specifically pleaded that the monies collected in respect of rates are disbursed by the plaintiff in support of its own leisure facilities, which are in direct competition with those of the defendant. The defendant also alleges that the plaintiff's facilities enjoy relief from tax.

10. Complaint is made that the alleged State aid has not been notified to the European Commission, as required by Article 108 TFEU.

11. The defendant pleads that the prohibition on State aid has direct effect, and that national courts are thereby obliged to provide whatever remedies are appropriate in the circumstances. The Circuit Court is also a *"Competition Authority"* within the meaning of the Modernisation Regulation, and has obligations in that role. In this case, the appropriate remedy would be relief from the rates liability and/or damages at least equal to the rates to be collected.

The Treaty provisions
12. Article 4 imposes a general obligation on Member States to take any appropriate measures to ensure fulfilment of their Treaty obligations for the achievement of the Union's objectives.

13. Chapter 1 of Title VII deals with the rules on competition. Section 1 sets out rules applying to undertakings.

14. Article 102 requires Member States to prohibit abuse of a dominant position.

15. Article 106(1) reads as follows:

> *"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."*

16. Section 2 of the Chapter relates to aids granted by States. Article 107(1) sets out the general principle.

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

17. Sub-articles (2) and (3) of Article 107 provide that certain forms of State aid are, or may be, deemed to be compatible with the internal market.

18. Article 108 requires the Commission to keep under review all systems of aid existing in Member States. If it decides that a particular form of aid is not compatible with the internal market, it is to determine whether the aid should be abolished or altered. Article 108(3) requires that the Commission be informed of any plans to grant or alter aid.

The plaintiff's objection
19. The plaintiff raised a preliminary objection as to the jurisdiction of the Circuit Court to consider the issues pleaded in the defence and counterclaim. In a written submission to that court, the objection was framed in the following terms:

> *"The Plaintiff submits that this Honourable Court does not have the Jurisdiction to hear, determine or adjudicate on matters of European or Domestic Competition law, whether the plaintiff is an undertaking for the purpose of European competition and/or State Aid law, whether commercial rates payable to the Plaintiff are State Aid or Unlawful State Aid, whether the Plaintiff is in a Dominant position in the market, issues which affect trade between member states; and whether the Plaintiff is in breach of or acting contrary to Article(s) 4, 102, 106, 107 – 109 of the Treaty on the Functioning of the European Union (TFEU) as alleged by the defence and counterclaim…"*

20. The case made by the plaintiff in the Circuit Court was that the issues raised by the defendant were in reality issues of competition law. It was contended that Irish law had designated the High Court as the Court with jurisdiction to determine disputes about such matters. Reference was made to s.3(1) of the Competition Act, 1991, which defined the word *"court"* as meaning the High Court or, in the case of an appeal, the Supreme Court, and to rule 4(1) of O. 63B of the Rules of the Superior Courts, which provides that competition proceedings shall be heard in the Competition List of the High Court.

21. It was argued that, by virtue of the relevant Treaty provisions, the European Commission is the body conferred with exclusive authority to determine what is, and what is not, State aid. The defendant has made no complaint to the Commission in relation to rates.

22. The plaintiff relied upon the decision of the Supreme Court in *Arklow Holidays Ltd v. An Bord Pleanála* [2012] 2 I.R. 99 and on the High Court judgments in *Ryanair Limited v. Revenue Commissioners* [2013] IEHC 327, *The Minister for Justice, Equality and Law Reform & anor. v. The Director of the Equality Tribunal* [2009] IEHC 72 and *Martin v. An Bord Pleanála* [2002] 2 I.R. 655.

23. The plaintiff argued that it was obliged by the provisions of the Poor Relief (Ireland) Act 1838 to levy rates. If the defendant had wished to challenge the validity of the rate in respect of any of the years in question it should have moved by way of judicial review.

24. In response, the defendant pointed out that the Competition Act 1991 had been repealed and replaced by the Competition Act 2002, which defined "court", where used without qualification, as meaning the District Court, the Circuit Court or the High Court as appropriate. However, the defendant maintained that in any event the case did not relate to the Competition Act, but to State aid.

25. It was submitted that O.63B was a purely administrative provision, relating only to cases brought in the High Court, which could have no effect on the jurisdiction of the Circuit Court.

26. The proposition that the European Commission was the only body that could determine what was or was not State aid was contested. It was accepted that only the Commission could pronounce upon the compatibility of a particular State aid with the Treaty. However, it was argued that this issue was the only aspect where it had exclusive jurisdiction.

The defendant's submissions in the appeal
27. It is submitted that the Circuit Court, like every court in the land, is obliged to give effect to EU law.

28. The defendant relies on the following passage from Kelly on The Irish Constitution (4th ed. 2003) in relation to the supremacy of

EU law:

> *"Save for one isolated and inconclusive instance dealing with abortion, the Irish courts have unhesitatingly acknowledged the supremacy of Community law. In addition, the case law shows that the Irish courts have adopted Marleasing principles to ensure that national law is interpreted in a manner compatible with Community law, even where this may mean that some occasional violence is done to national legislation.*
>
> *[…]*
>
> *The conventional view is, of course, that where there is a conflict between the provisions of the Constitution and Community law itself, the latter takes precedence by virtue of the doctrine of supremacy which has just been discussed. This is not only the view of the Court of Justice, but has also been emphatically endorsed by both the High Court and the Supreme Court."*

29. The defendant says that it is well-established that the State aid rules in Article 107 have direct effect. The prohibition imposed by Article 108(3) on the implementation of a new aid prior to notification to, and assessment by, the Commission of that aid was also held to have direct effect in *Case 6/64 Costa v. ENEL* [1964] ECR 585.

30. It is submitted that it is a fundamental rule, developed throughout the jurisprudence of the EU, that in such circumstances national courts must give remedies for individuals who are adversely affected by a breach of EU rules and that rules of national law which may stand in the way of such remedies must be set aside. The case of Case C-213/89, *R v Secretary of State for Transport, ex parte Factortame Limited (Factortame I)* [1990] ECR 2433 is relied upon.

31. In *Factortame* the Court of Justice said:

> *"19. In accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law (see, most recently, the judgments of 10 July 1980 in Case 811/79 Ariete SpA v Amministrazione delle finanze dello Stato [1980] ECR 2545 and Case 826/79 Mireco v Amministrazione delle finanze dello Stato [1980] ECR 2559).*
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> *20. The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (judgment of 9 March 1978 in Simmenthal, cited above, paragraphs 22 and 23).*
>
> *21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."*

32. The Court of Justice further developed this principle in *Case C-6/90* and *C-9/90 Francovich v Italian Republic* [1991] ECR I-5357 where it was held that in order to give full effect to individuals' rights, and protect against breaches of EU law, individuals had to be entitled to assert a right to damages before national courts. Para. 36

> *"A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law…"*

33. The defendant makes reference to paragraphs in Bellamy & Child, European Community Law of Competition.

> *"In Case C-198/01 Consorzio Industrie Siammiseri [2003] ECR I-8055 the Court of Justice held that the primacy of Community law requires any provision of national law which contravenes a Community rule to be disapplied, regardless of whether it was adopted before or after that rule. Further, the duty to disapply such national legislation is owed not only by national courts but by all organs of the State, including administrative authorities."*

34. Dealing specifically with State aid, Bellamy & Child point out at pg. 1589 – 1591 that

> *"In FNCEPA [1991] ECR I-5505 the Court of Justice stated that its judgment is Boussac [1990] ECR I-307 did not affect the principle, established by its previous case law, that national courts are obliged to order recovery of aid which has been granted in contravention of the requirements of Article [108(3)], and do not have jurisdiction themselves to declare aids to be compatible with the common market."*

35. Explaining the *Boussac* case. The authors state:

> *"The Court of Justice contrasted the different roles of the Commission and the courts of Member States: the former has the exclusive role of deciding whether aids are compatible with the Treaty, whereas the latter have the duty to protect the rights of individuals in a case where there has been a breach of Article [108(3)]. The prohibition on implementing the aid before it is approved is thus absolute… Even if the Commission subsequently decides that the aid is compatible with the common market, that cannot validate a posteriori measure taken in breach of Article [108(3)]. … National courts are obliged, therefore, to give effect to individual rights under this provision and must provide remedies, according to national procedural rules, for a failure to notify a new aid. National courts are obliged to provide for all appropriate remedies which may include declarations, repayment of aids illegally granted, interim relief and possibly also damages against the national administration arising from the illegal grant of aids. … In affording remedies, however, the national courts should keep in mind the objective of safeguarding the rights of individuals by neutralising the effects of the aid on competitors of the recipient undertakings. The courts should avoid ordering measures which would have the effect of extending the circle of aid recipients and thus increasing the effects of that aid rather than eliminating those effects."*

36. It is submitted that the role and obligations of a national court in these circumstances had been described in *Case C- 39/94 SFEI v. La Poste* [1996] ECR I-3547 as *"a duty to provide protection in final judgment it gives in… a case against the consequences of unlawfully implementation of the aid"* and as an obligation to provide *permanent remedies for the effect of the unlawful implementation."* The case of Case C- 354/90 FNCEPA [1991] ECR I-5505 is cited as authority for the proposition that there is an obligation to take the steps necessary to "nullify the effects of the breach."

37. The defendant accepts that if the national court is satisfied that the aid in question is a State aid, it has no jurisdiction to decide whether or not the aid is compatible with the Treaty. That is the exclusive function of the European Commission. However, if the aid has not been notified to the Commission, the court must, it is submitted, devise whatever remedy is necessary to nullify the effect of the breach. This is so even if the appropriate remedy is not one that normally falls within the procedures of the Court dealing with the matter, since the principle imposes a duty on national courts at all levels.

38. It is submitted that in this case, the State aid has been financed in part by the rates levied by the plaintiff. It is alleged that it is apparent from a consideration of the plaintiff's accounts that a very substantial contribution is made to its income by rates, out of which it finances the operation of facilities such as swimming pools and leisure centres. The argument is made that an appropriate remedy, to nullify the effects of the illegal State aid, would be an order of the Court for restitution of the rates levied on the defendant.

39. The case of *Case C-53/00 Ferring v. ACOSS* [2001] ECR I-9067 is cited as an example of a case where the claimants in the national court sought a repayment of the tax imposed, rather than a retrospective imposition of tax on their competitors. The French government argued that the remedy sought could not be granted by the national court. This argument was rejected by the ECJ on the basis that the reimbursement of the tax would represent an efficient means of restoring the status quo, and would eliminate the distortion of competition which had resulted from the differential imposition of tax.

40. It is submitted that this approach was supported by Advocate General Jacobs in *Case C-126/01 Ministre de l'économie, des finances et de l'industrie v. Gemo*, 30th April, 2002

> *"43. It follows from that case-law that one of several consequences of the violation of the last sentence of Article 88(3) EC [Now Article 108(3)] is the invalidity of the measures giving effect to the aid and that the sanction of invalidity is as important as for example the sanction of the recovery of the aid.*
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> *44. Under the principle of procedural autonomy it is then in my view for the national legal order to determine precisely which national measures are affected by that invalidity and what consequences that invalidity has for example for the refund of charges collected on the basis of the measures concerned. The only limitations on that autonomy are the principle of equivalence and the principle of effectiveness.*
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> *45. It seems to me that a national court which wishes under its national law to order the refund of charges collected on the basis of a law adopted in violation of Article 88(3) EC [Now Article 108(3)] does not violate any of those principles but furthers the effectiveness of Community law."*

41. It is submitted by the defendant that if the Circuit Court (or any court) is satisfied that there is a State aid to the relevant Councils in respect of the operation of the swimming pools and leisure centres which compete with the similar operations of the defendant, and that such State aid has not been notified to the Commission, then the Circuit Court is obliged to treat the State aid as unlawful. The appropriate remedy is the cancellation of the charges in question, which would further the effectiveness of Community law and provide the appropriate remedy for the rights of the individual undertaking which have been adversely affected.

42. It is submitted that the Circuit Court has full jurisdiction to entertain the EU State Aid and EU competition law points relied upon by the defendant, and accordingly to dismiss the plaintiff's claim.

Submissions on behalf of the plaintiff

43. The plaintiff's position appears to have altered somewhat since the matter was argued in the Circuit Court. It now accepts that the Circuit Court has jurisdiction to deal with certain matters under the provisions of the Competition Act 2002. However, the submission now is that State aid is not a matter of competition law covered by that Act, and that the Circuit Court has not been conferred with jurisdiction to consider State aid issues.

44. Reliance is placed on the following passage from *Dunleavy's Competition Law: A Practitioner's Guide* (Bloomsbury, 2010) at p. 773:

> *"Article 107(1) does not have direct effect so a national court cannot declare that an existing aid is contrary to the Treaty. However a national court will have to apply and interpret Article 107(1) in determining whether a particular measure is State aid. As well as the possibility of making a reference to the Court of Justice under Article 267 TFEU, a national court can ask the Commission for an opinion as to whether a measure constitutes State aid."*

45. It is submitted that this passage means that the defendant should have sought a ruling on the issue from the Commission. The plaintiff says that "it cannot be in dispute" that the Commission has the exclusive power to determine what is, and what is not, State aid. The effort to have the issue adjudicated upon in the Circuit Court amounts to an abuse of process.

46. The plaintiff contends that the rates were properly determined by it in its capacity as local authority, in accordance with the legislation. The proper method of challenge to their lawfulness would be by way of judicial review in the High Court. No such challenge has been brought, and indeed the defendant has not in these proceedings queried the right of the plaintiff to make the rates or to collect them. Rather, its complaint is about how they are disbursed. The rates must therefore be deemed to be valid and lawful.

47. The plaintiff refers to the decision of the Supreme Court in *Arklow Holidays Limited v. An Bord Pleanála* [2012] 2 I.R. 99. In that case, the applicant had taken unsuccessful judicial review proceedings in respect of the grant of permission by a local authority for a development. An appeal before the Board then proceeded, and it too gave permission for the development. Further judicial review proceedings taken by the applicant, in which various EU law issues were raised, were dismissed in the High Court, which ruled that the issues could have been raised in the prior proceedings. The rule in *Henderson v Henderson* (1843) 3 Hare 100 was therefore applied.

48. On appeal it was argued by the applicant *inter alia* that, given the supremacy of European law, it should not have been prevented from raising an EU law point on the basis of the *Henderson v Henderson* rule. Application of that rule was said to amount to a breach of the duty of the court to ensure compliance with the provisions of EU law.

49. Giving the judgment of the Court, Finnegan J. accepted that the rule in question was a procedural one. He continued:

> *"It is well settled that rights arising under European law can be subject to domestic procedural rules provided that the same are no less favourable than those governing actions seeking similar reliefs at domestic law and provided that they do not render the exercise of European law rights virtually impossible. The domestic procedural rules must not offend against the principles of equivalence and effectiveness: Administrazione delle Finanze dello Stato v Ariete (C-811/79) [1980] E.C.R. 2545, Francovich and Others (C-6/90) [1991] E.C.R. I-5357, McNamara v An Bord Pleanála [1998] 3 I.R. 453."*

50. The Court went on to hold that application of the rule in Henderson v Henderson was not inconsistent with the policies of the EU legislation sought to be relied upon. Further, it did not infringe either the principle of effectiveness or the principle of equivalence.

51. The plaintiff relies upon the judgment of Charleton J. in *The Minister for Justice, Equality and Law Reform & Anor v. The Director of the Equality Tribunal* [2009] IEHC 72 for the proposition that where a claim is made under EU law, it must be made in the appropriate forum under national law. The case concerned a question as to the jurisdiction of the Tribunal to find that policy based on a rule embodied in a statutory instrument was inconsistent with the Employment Equality Acts and the relevant Directives. Charleton J. referred to the principle that courts and administrative bodies are obliged to construe national legislation in the light of the European legislation in which it had its origin. However, he went on, that obligation did not extend to re-writing the national legislation, to implying into it a provision that was not there or to doing violence to its express language.

52. Having referred to the ECJ decision in *Case C-268/06 Impact v Minister for Agriculture and Food* [2008] ECR I-2483 and quoted the passages concerning the obligations of a specialised tribunal to hear and determine claims arising in respect of a period when the transposing legislation was not in force, Charleton J. continued:

> *"8. There is no principle of European law which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented at national level and that this situation is to be remedied by the re-ordering in ideal form of national legislation. The limit of jurisdiction is of primary importance to the exercise of authority, whether the court be one established as an administrative body, or is one of the courts under the Constitution. In the event that a view emerges that national legislation has not properly implemented European legislation, this is no more than an opinion. The respondent does not have the authority to make a binding legal declaration of inconsistency or insufficiency on a comparison of European and national legislation. The High Court has that power as this has been expressly reserved to it by Article 34 of the Constitution. The respondent is bound by [the statutory instrument]."*

53. He concluded that the correct response of the tribunal to the complaints received by it was to point out that by legislation it could not seek to remedy the matter. The complainants would then have been aware that their only remedy was to seek a declaration from the High Court.

54. The plaintiff says that this is apposite because the defendant is asking the Circuit Court to adjudicate on matters far in excess of its jurisdiction.

55. In relation to the defendant's counterclaim, the plaintiff relies upon the decision of the Court of Justice in *Case C-39/94 SFEI v La Poste* [1996] ECR I-3547. In that case the Court held that, since Article 108(3) does not place any obligations on the recipient of State aid, there could be no right under EU law to make a claim for damages against a recipient. It is a matter for national law to determine whether, in a given set of circumstances, a right to damages arises.

The Commission Handbook

56. The handbook on the enforcement of EU State aid law by national courts, published by the European Commission in 2010, deals in some detail with the role of those courts. This section commences with the statement that

> *"The first issue facing national courts and potential claimants when applying [Articles 107 and 108] of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty."*

57. It goes on to observe that the ECJ has "explicitly stated" that national courts have powers to interpret the notion of State aid. A number of judgments are referred to, the most recent of which was *C-368/04 Transalpine Ölleitung in Österreich* [2006] ECR I-9957.

58. In that case the Court of Justice had the following to say about national courts:

> *"37. It is common ground that, as regards the supervision of Member States' compliance with their obligations under Articles 87 EC and 88 EC [Now Articles 107 and 108], the national courts and the Commission fulfil complementary and separate roles (see Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 41, and van Calster and Others, cited above, paragraph 74).*
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> *38. Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88(3) [Now Article 108(3)]of the Treaty is infringed (van Calster and Others, paragraph 75).*
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> *39. A national court may have cause to interpret the concept of aid contained in Article 87(1) [Now Article 107(1)] of the Treaty in order to determine whether a State measure has been introduced in disregard of Article 88(3) [Now Article 108(3)] (Case C-345/02 Pearle and Others [2004] ECR I-7139, paragraph 31). Thus it is for that court to verify, inter alia, whether the measure at issue constitutes an advantage and whether it is selective, that is to say whether it favours certain undertakings or certain producers within the meaning of Article 87(1) EC [Now Article 107(1)].*
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> *40. Secondly, it must be pointed out that an aid measure within the meaning of Article 87(1) EC [Now Article 107(1)] which is put into effect in infringement of the obligations arising from Article 88(3) EC [Now Article 108(3)] is unlawful (see Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French State [1991] ECR I-5505, paragraph 17, and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Distribution Casino France and Others [2005] ECR I-9481, paragraph 30. See also the definition of unlawful aid in Article 1(f) of Regulation No 659/1999…*

45. In that regard, and since there is no Community legislation on the subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness) (see Case C-300/04 Eman and Sevinger [2006] ECR I-8055, paragraph 67, and Joined Cases C-392/04 and C-422/04 i-21 Germany and Arcor [2006] ECR I-8559, paragraph 57)...

51. In addition, it should be noted that, in the cases in the main proceedings, the applications for grant of the unlawful aid measure, namely the partial rebate on energy taxes, may be likened to applications for partial exemption from those taxes. As is clear from case-law, businesses liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that contribution (see Case C-390/98 Banks [2001] ECR I-6117, paragraph 80; Joined Cases C-430/99 and C-431/99 Sea-Land Service and Nedlloyd Lijnen [2002] ECR I-5235, paragraph 47; Distribution Casino France and Others, paragraph 42, and Air Liquide Industries Belgium, paragraph 43).

52. Having been called upon to analyse the disputed measure in order to ascertain whether it corresponded to the definition of aid referred to in Article 87(1) EC [Now Article 107(1)], the national court should, in principle, have available to it all the facts enabling it to assess whether the measure which it proposes to adopt ensures that the rights of individuals are safeguarded by neutralising the effects of the aid on competitors of the recipient undertakings, while taking Community law fully into consideration and avoiding adoption of a measure which would have the sole effect of extending the circle of recipients of that aid."

59. The handbook goes on to note that national courts may ask for an opinion from the Commission if in doubt as to the qualification of State aid (in addition to the right to refer a question to the Court of Justice).

60. It is the exclusive role of the Commission to examine the compatibility of proposed aid measures with the internal market, based on criteria laid down in the Treaty. National courts do not have power to pronounce on compatibility. However, they may be asked to protect the rights of individuals in certain situations. One is where the aid has not been notified to the Commission as required by the Treaty. Another is where the Member State commenced implementation of the aid before getting Commission approval. A third arises where the Commission has determined that aid granted unlawfully was incompatible with the market, and the Member State is required to recover it.

61. Amongst the remedies available to a competitor or other third party affected by unlawful State aid is the prevention of the payment of the aid, where there has been a breach of Article 108(3). There may also be a claim for damages, although it is noted that this is usually directed at the State authority granting the aid, rather than at the recipient of the aid. A claim against the latter will only succeed if substantive national law permits it – there is no Community law basis for such a claim. The handbook provides guidance for the assessment of such cases.

62. The handbook notes that where national courts are obliged to enforce State aid rules to protect the rights of individuals, national procedural rules apply subject to the requirement that a) such rules are not less favourable than those governing claims under domestic law and b) they do not render excessively difficult or practically impossible the exercise of the rights conferred by Community law. If either of these principles would be violated, the national court must disapply the national procedural rule.

63. Finally, it is important to note the section on standing issues in tax cases. In relation to these, the handbook has this to say:

"72. The principle of effectiveness has a direct impact on the standing of possible claimants before national courts under Article [108(3)] of the Treaty. In this respect, Community law requires that national rules on legal standing do not undermine the right to effective judicial protection. National rules cannot therefore limit legal standing only to the competitors of the beneficiary…

73. The jurisprudence cited in paragraph 72 is particularly relevant for State aid granted in the form of exemptions from taxes and other financial liabilities. In such cases, it is not uncommon for persons who do not benefit from the same exemption to challenge their own tax burden based on Article [108(3)] of the Treaty.

74. However, based on the jurisprudence of the Community courts, third party tax payers may only rely on the standstill payment where their own tax payment forms an integral part of the unlawful State aid measure. This is the case where, under the relevant national rules, the tax revenue is reserved exclusively for funding the unlawful State aid and has a direct impact on the amount of State aid granted in violation of Article [108(3)] of the Treaty.

75. If exemptions have been granted from general taxes, these criteria are usually not met. An undertaking liable to pay such taxes therefore cannot generally claim that someone else's tax exemption is unlawful under Article [108(3)] of the Treaty. It also results from settled case law that extending an illegal tax exemption to the claimant is no appropriate remedy for breaches of Article [108(3)] of the Treaty. Such a measure would not eliminate the anticompetitive effects of unlawful aid, but on the contrary, strengthen them."

64. The authorities referred to in the footnotes of the paragraphs quoted are as follows: Case C-174/02 Streekgewest [2005] ECR I-85, Case C-487/06 British Aggregates Association v Commission [2008] ECR I-10505, Joined Cases C-393/06 and C-41/05 Air Liquide Industries Belgium [2006] ECR I-5293, Joined Cases C- 266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 Casino France and Others [2005] ECR I-9481.

Discussion

65. It seems to me that in principle, any party defending a claim in civil proceedings is entitled to put in issue the lawfulness of the plaintiff's claim, whether that involves asserting that the claim is not made in a lawful manner, or that the monies claimed or other reliefs sought are not lawfully due or cannot lawfully be granted. That proposition is of course subject to certain limitations. Thus, for example, it would not be open to a defendant in a rates collection case in the District or Circuit Court to argue that the rate had not been validly made. Those courts do not, as a matter of national law, have jurisdiction to determine that issue. However, a defendant who says that the specific claim brought against them amounts to a breach of their rights must be entitled to make that case.

66. If this is correct, the entitlement to make the case cannot depend upon the forum in which the plaintiff brings the claim. The issue is not, therefore, whether the defendant has chosen the correct forum in which to raise the argument. It is whether or not the

making of an order against it would be a breach of its rights.

67. A defendant would be entitled to rely upon Constitutional principles or upon national legislation, if applicable, to defeat a claim of any nature made against it in any forum. Having regard to the authorities, the right to invoke the protection of EU law cannot be made subject to more restrictive rules, and the defendant cannot be compelled to institute separate proceedings to vindicate any applicable rights. The defendant is, therefore, entitled to make the argument that the rates sought to be collected from it are a species of unlawful State aid which affects its interests.

68. Having said that, my view would be that the authorities summarised above establish that the following principles apply to such a case:

a. The Circuit Court has jurisdiction to determine whether the rates amount to State aid.

b. The Circuit Court does not, however, have jurisdiction to determine the compatibility of the aid (if it is found to be such) with the internal market.

c. As a matter of fact, it seems to be common case that if it is State aid, it has not been notified to the Commission and to that extent a finding of a breach of Article 108(3) of the Treaty would follow.

d. However, the court must bear in mind that where the issue relates to the payment of a tax, the obligation to notify the Commission can only be relied upon by the taxpayer if their own tax payment forms an integral part of the unlawful aid.

e. If the exemption of the plaintiff's own enterprises is established, and was unlawful, it is not a remedy for that particular illegality to grant exemption to the defendant – that would only compound the breach of the rules.

f. Separate considerations seem to apply to the counterclaim as framed in these proceedings. EU law does not require that damages be available as against the recipient of unlawful State aid. Therefore the question of damages is governed by national law, including national rules as to the monetary jurisdiction of different courts. It may be that the counterclaim could, at least to some extent, be described as being against the plaintiff in its capacity as collector of the rates rather than as recipient, but the defendant has not particularised its general claim that the rates, combined with other State funding, amount to State aid. The obligation on national courts to provide a remedy for a breach of EU law does not, it seems to me, extend to breaching national procedural rules (here, rules relating to jurisdiction) where that is not necessary under the principles of equivalence and effectiveness.

g. The defendant's claim exceeds the jurisdiction of the Circuit Court in relation to damages. While an argument may be open that under national rules the monetary limit does not apply to a counterclaim, this issue was not addressed before me and I am proceeding on the basis that, in the normal course of events, the limit does apply. My view, therefore, would be that the Circuit Court does not have jurisdiction to entertain the counterclaim.

69. The above represents my view of the issue as presented in this appeal. However, I am conscious of the fact that it is a Circuit appeal, with no further appeal open, and that it may be considered undesirable for the High Court to make a final determination of legal issues of such significance for both local authorities and rate-payers. I am therefore prepared, if either or both of the parties wish it, to state a case. In making this suggestion I have had regard to the decision of the Supreme Court in *Irish Life and Permanent plc. v. Dunne & Dunphy* [2015] IESC 46.

70. If neither party wants to pursue this option I would propose to allow the appeal and to remit the matter for hearing by the Circuit Court in the light of this judgment.