

# State Aid

In 12 jurisdictions worldwide

*Contributing editor*  
**Ulrich Soltész**



2015

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# State Aid 2015

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# United Kingdom

Isabel Taylor and Nele Dhondt

Slaughter and May

## Overview

### 1 Outline your jurisdiction's state aid policy and track record of compliance and enforcement.

The UK government places significant importance on compliance with the state aid rules. Public bodies are encouraged, where possible, to design assistance in a way that does not involve state aid. According to guidance issued by the Department of Business, Innovation and Skills (BIS), if state aid cannot be avoided, the preference is for an existing approved mechanism to be used (rather than seeking separate approval). As a result, most UK notifications involve general aid schemes established under general statutory powers.

Overall, the UK has a good record of compliance with state aid rules. The Directorate-General for Competition's (DG Comp's) case database indicates that, in the past 10 years, 25 formal investigations were opened into aid provided or proposed by the UK. The European Commission only issued negative decisions with recovery in five cases (Case C37/2006, Aid for modernisation of fishing vessels; Case C38/2006, Fish factory improvement scheme; Case C39/2006, First time shareholders scheme for fishing vessels; Case C55/2007, Support to BT Group plc; and Case SA.34775, British aggregates levy), three of which related to aid granted to the fishing industry in the UK. The Commission also took one negative decision without recovery (Case C13/2005, Investments of Shetland Leasing and Property Developments Ltd in Shetland Islands).

The UK has not been subject to any infringement procedures for non-compliance with a recovery order in the last 10 years.

### 2 Which national authorities monitor compliance with state aid rules and have primary responsibility for dealing with the European Commission on state aid matters?

At the national level, a designated unit within BIS has general responsibility for monitoring compliance with state aid rules. It issues detailed guidance and provides advice on these rules to other government departments, but also to local governments and other organisations using public funding. It has primary responsibility for dealing with the European Commission on state aid matters including notification of any aid that requires Commission approval.

Other central government departments may also have their own state aid teams; in particular:

- the Department for the Environment, Food and Rural Affairs;
- the Department for Transport;
- the Department for Communities and Local Government; and
- HM Treasury.

In Scotland and Wales, the devolved authorities (the Scottish Executive and the Welsh Assembly) are responsible for compliance with state aid rules where they (or authorities they are accountable for) are granting the aid (such as regional aid). In Northern Ireland, state aid policy, including advice on compliance with the rules, is coordinated by the Department for Enterprise, Trade and Investment. Each of these authorities have their own state aid teams.

The Competition and Markets Authority does not have a standing role in relation to state aid, although in the context of aid measures during the financial crisis one of its predecessor bodies, the Office of Fair Trading, was asked to carry out assessments of the impact of aid on competition.

### 3 Which bodies are primarily in charge of granting aid and receiving aid applications?

Responsibility for the day-to-day administration of state aid schemes is devolved and a wide variety of bodies grant aid in the UK, including government departments (eg, BIS), devolved governments (eg, the Scottish Executive), regional development agencies and non-departmental bodies. However, notifications to and dealings with the European Commission are centralised.

### 4 Describe the general procedural and substantive framework.

The general procedural and substantive framework is set out, at a high level, in guidance notes issued by BIS, which are primarily directed at authorities seeking to give aid (see above). Any public body wishing to grant aid is encouraged to seek advice on state aid compatibility as early as possible. BIS provides a 'state aid assessment form' for public bodies intending to fund a scheme, which can be submitted to BIS for further advice.

General guidance on how to handle public funds is set out in HM Treasury's guidance 'Managing Public Money'.

### 5 Identify and describe the main national legislation implementing European state aid rules.

The UK has not enacted any specific legislation to implement European state aid rules. However, the European Communities Act 1972 (as amended) provides general authority for the application and enforcement of EU law in the UK, including the state aid rules. Section 2(1) of this Act states that:

*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies.*

Section 2(2) provides for the adoption of secondary legislation (such as orders, rules or regulations) to implement any EU obligations of the UK, which includes the implementation of directives. Section 2(4) provides for future legislation to be interpreted in the light of section 2 of the Act. Section 3 provides for questions of EU law to be determined in accordance with decisions of the European courts.

## Programmes

### 6 What are the most significant national schemes in place that have been approved by the Commission or that qualify for block exemptions?

The most significant national schemes in place include:

- the Regional Growth Fund, which is worth over £3.2 billion for the five years from 2011-12 to 2016-17 and supports eligible projects and programmes that also raise private sector investment to create economic growth and sustainable employment;

- the Enterprise Capital Funds Scheme which, by combining public and private investment into investment funds, aims to improve access to risk capital for small and medium-sized enterprises (SMEs) throughout the UK. This scheme has an estimated budget of £300 million. There are also the Enterprise Investment Scheme (EIS) and the Venture Capital Trusts Scheme (VCT). The EIS and the VCT are both designed to help small, higher-risk trading companies raise finance by offering a range of tax reliefs to investors who (directly or indirectly) purchase new shares in those companies. The estimated value of the tax incentives of these aid schemes amounts to £2.3 billion in total (during April 2012 to April 2017);
- the Innovate UK (Technology Strategy Board) Research, Development and Innovation scheme. Under this block-exempted scheme, the Technology Strategy Board provides support to business investments in research and development. The total budget for the scheme has been estimated at £600 million per annum for the period January 2015–December 2020. HM Treasury also provides tax relief for research and development businesses (eg, under the ‘R&D Tax Credit for SMEs’ and ‘Vaccines Research Relief’ schemes with the estimated loss of tax revenue stemming from the tax incentives of these two aid schemes amounting to £2.26 billion in total). Many research and development schemes also operate on a regional basis, such as the English Research, Development and Innovation State Aid scheme 2014–2020; and the Scottish Enterprise Research, Development and Innovation Scheme 2014–2020; and
- major environment-oriented schemes including:
  - the Green Deal scheme, which entails public support of £600 million to be granted between 2013 and 2018 in the context of the UK’s ‘Green Deal’ policy (the central UK government policy for improving the energy efficiency of buildings);
  - the Renewable Heat Incentive Scheme, which supports industry, businesses and public sector organisations investing in, and promoting renewable heat and has an overall budget of £1.3 billion (this scheme was extended to the domestic sector in 2014);
  - the Renewable Obligation Scheme, which incentivises deployment of large-scale renewable electricity generation through a market-based instrument. The scheme will close to new generators on 31 March 2017; and
  - the Natural England Management Agreement Scheme, which focuses on Sites of Special Scientific Interest. The scheme is managed by Natural England and has an overall notified budget of £250 million and runs from November 2013 to December 2018.

## 7 Are there any specific rules in place on the implementation of the General Block Exemption Regulation (GBER)?

BIS has issued specific guidance on the new GBER (dated July 2014) setting out the main provisions of this regulation. It does not, however, include any (reference to) rules specifically designed to implement the GBER.

Specifically on transparency, the BIS guidance notes that the GBER includes new provisions requiring that member states publish details of individual aid awards online by 1 July 2016 at the latest.

### Public ownership and SGEI

## 8 Do state aid implications concerning public undertakings, public holdings in company capital and public-private partnerships play a significant role in your country?

There are a wide range of public structures, private structures and partnerships in the UK, and the government has shareholdings in a number of commercial undertakings.

The BIS publication ‘State aid: Frequently Asked Questions’ includes guidance on how to ensure that public private joint ventures and public-private partnerships do not raise state aid issues.

## 9 Are there any specific national rules on services of general economic interest?

There are no specific national rules on SGEI. However, BIS published guidance on SGEI support in 2009. Amongst other things, this indicates that UK authorities will normally subject contracts for the provision of ‘economic activity’ public services to competitive tender.

According to DG Comp’s case database, in the past five years there have only been four notified UK cases relating to aid with SGEI as a primary objective, suggesting that SGEI aid is relatively unusual in this jurisdiction.

In comparison, there have been nine such cases in relation to France and 13 in relation to Italy.

For example, the UK government has granted SGEI support (following Commission approval) for the Post Office to maintain a network of post offices beyond its optimal commercial size, in order to make available specified SGEIs.

### Considerations for aid recipients

## 10 Is there a legal right for businesses to obtain state aid or is the granting of aid completely within the authorities’ discretion?

There is no general right for businesses to obtain state aid. The granting of aid is within the discretion of the authorities and subject to the terms of a particular scheme (if one applies).

## 11 What are the main criteria the national authorities will consider before making an award?

The criteria that UK authorities will consider before making an award vary, and are specific to each scheme. The criteria will typically be made clear in a framework document or on the website of the administering institution.

## 12 What are the main strategic considerations and best practices for successful applications for aid?

Applicants for aid measures are normally expected to demonstrate, as part of their application, that they meet the eligibility conditions of the scheme (eg, to demonstrate that they are an SME). It is therefore important that any applications for public funding show clearly that the relevant criteria are met. BIS advises private organisations to contact the relevant funding body (ie, the administering institution) in order to establish how to apply for aid.

## 13 How may unsuccessful applicants challenge national authorities’ refusal to grant aid?

Unsuccessful applicants may be able to challenge an authority’s refusal to grant aid by instigating judicial review proceedings. If the applicant has suffered loss then, in certain limited circumstances, a damages action against the authority in the civil courts might also be an option. For more details on these proceedings see questions 20–22.

## 14 To what extent is the aid recipient involved in the EU investigation and notification process?

There are no formal rights for the aid recipient to be involved in the EU investigation or notification process, but from a practical point of view the relevant public authority may be willing to engage with the recipient, particularly in ad hoc aid cases. This is particularly the case where the applicant holds particular information or expertise that is necessary to progress a notification or to address questions from the Commission.

### Strategic considerations for competitors

## 15 To which national bodies should competitors address complaints about state aid?

Other than the courts, there are no national bodies with a specific role to consider complaints about state aid.

BIS guidance indicates that competitors should address such complaints directly to the European Commission using the Commission’s online complaints form.

## 16 How can competitors find out about possible illegal or incompatible aid from official sources? What publicity is given to the granting of aid?

There is no consolidated publication of aid measures in the UK.

Specific information on aid schemes can be found on the websites of the relevant funding bodies (eg, BIS, HM Treasury and the Technology Strategy Board). The UK Parliament’s website also consolidates material on the government business support schemes and measures (eg, research papers and select committee reports).

## 17 Give details of any legislation that gives competitors access to documents on state aid granted to beneficiaries?

The Freedom of Information Act 2000 (FOIA) provides a general right to access information held by public authorities (including government



departments, local authorities, educational institutions, and publicly owned companies). It applies to all public authorities in England, Wales and Northern Ireland. The Freedom of Information (Scotland) Act 2002 introduced similar provisions for Scotland. If these authorities grant aid to beneficiaries, competitors could in principle use the FOIA to gain access to documents in the authorities' files.

However, the FOIA does not provide an absolute right to access information. The authority is not required to disclose the information requested if one or more of a list of specific exemptions applies. There are absolute exemptions (where the only question is whether the exemption applies) and qualified exemptions (where there is a duty to disclose unless the public interest test applies).

An example of an absolute exemption is where information is accessible by other means (section 21). An example of a qualified exemption is where information constitutes a trade secret or its disclosure would, or would be likely to, prejudice the commercial interests of any person (section 43).

The Information Commissioner, for example, considered the latter exemption in relation to financial details contained in a European Commission document relating to state aid to the Post Office. BIS had refused to provide some of the information to the complainant relying on the section 43 exemption. The Information Commissioner held that the majority of the relevant information fell within the scope of the exemption, as the information held by BIS included information about the Post Office's business model and commercial network. This information was held to be capable of giving competitors a competitive advantage if it was disclosed. The Information Commissioner further held that ordering disclosure of the information would damage the trust the Post Office, and the trust other businesses had in BIS, and may hinder the provision of confidential information to BIS in the future. However, the exemption was found only to apply to part of the requested information. BIS was therefore obliged to disclose the remaining, non-confidential information.

#### **18 What other publicly available sources can help competitors obtain information about possible illegal or incompatible aid?**

Other publicly available sources that may help competitors obtain information about possible illegal or incompatible aid include prospectuses, annual reports of aided companies and trade magazines.

#### **19 Apart from complaints to the national authorities and petitions to national and EU courts, how else may complainants counter illegal or incompatible aid?**

Apart from complaints to the European Commission and petitions to national and EU courts, complainants could also consider indirect methods of raising the profile of a state aid issue, including, for example, raising it with their local member of parliament.

#### **Private enforcement in national courts**

#### **20 Which courts will hear private complaints against the award of state aid? Who has standing to bring an action?**

The competent courts in England and Wales to hear private complaints in relation to state aid are the High Court (or the County Court) for private damages actions and the Administrative Court (a specialist section of the High Court) for judicial review of decisions by public authorities. In Scotland, claims should be brought before the Court of Session, and in Northern Ireland, before the High Court of Northern Ireland. Given the differences between the law of England and Wales; Scotland; and Northern Ireland, the remainder of this response focuses on the procedural rules in England and Wales.

Standing in judicial review proceedings in England and Wales is accorded to anyone who is able to show 'sufficient interest' in the matter to which the claim relates. Case law has confirmed that a competitor can be regarded as having sufficient interest to challenge a state aid decision (eg, *R v Attorney-General ex parte ICI*, (1985) 1 CMLR 588 (Div Ct) and (1987) 1 CMLR 72 (CA)). A judicial review claim may only be brought with the permission of the High Court. An application for permission to apply for judicial review must be made promptly and in any event within three months from the date on which grounds for the application first arose (Civil Procedure Rules 54.5).

There is no specific test of standing to bring a damages claim in the High Court.

#### **21 What are the available grounds for bringing a private enforcement action?**

The available grounds for bringing a private enforcement action are:

- judicial review (under section 31 of the Senior Courts Act 1981). The main judicial review grounds are (*Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374, at 410):
  - illegality (ie, the action or inaction of the public body is incompatible with EU law and therefore ultra vires);
  - irrationality; and
  - procedural unfairness; and
- an action for damages for breach by the UK of EU law (although damages have not been awarded on this basis in a state aid case to date). This is known as a *Francovich* claim following the leading case on the liability of member states to individuals for breach of EU law in certain limited circumstances (joined cases C-6/90 and C-9/90, *Francovich and Others v Italian Republic* (1991) ECR I-5357), which was applied in the English Court of Appeal in *Secretary of State for Employment v Mann* ((1997) ICR 209) (for more on these conditions, see question 29).

Judicial review lies against any person or body that performs public duties or public functions, such as state and local authorities. The principal remedies are the remedies of quashing, prohibiting and mandatory orders. For example, a quashing order could be used to quash a decision already taken by the authority to grant the unlawful aid. In addition or instead of these remedies, applicants may also seek a declaration of unlawfulness, an injunction or both.

As a matter of procedure, claims for damages on the basis of the *Francovich* case law may be brought by way of judicial review (as opposed to on a standalone basis before the civil courts), if they are brought as part of a challenge to the authority's decision (section 31(4), Senior Courts Act 1981 and Civil Procedure Rules 54.3(2)).

#### **22 Who defends an action challenging the legality of state aid? How may defendants defeat a challenge?**

Judicial review of a decision by a public authority in relation to state aid or an action for damages against such an authority will be defended by that authority, and not the aid beneficiary.

There is currently no basis under English law for a competitor to bring a damages action against the aid beneficiary. This point was considered by the High Court in a case of alleged misuse of approved aid (*Betws Anthracite Ltd v DSK Anthrazit Ibbenburen BmbH* (2003) EWHC 2403). In line with case law of the ECJ (Case C-39/94, *SFEI v LaPoste* (1996) ECR I-3547) the High Court held that the claimant, a British anthracite supplier, had no cause of action under EU law against the defendant, a state aid recipient in Germany. Although no English law cause of action (such as an action for damages under tort law) was pleaded, the judge added that he thought there was none.

#### **23 Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? What is the national courts' track record for enforcement?**

There have been relatively few cases before the national courts in the UK. A 2009 update of the study commissioned by the European Commission in 2006 on the enforcement of state aid at national level found, against the general trend, that enforcement activity in the UK had even declined compared to activity in 2006. The study also found that many of the cases that did exist were in the field of tax, and that for the most part state aid arguments were employed as catch-all or sweep-up arguments in the context of other disputes. Cases based purely on state aid arguments were rare. As to whether there were potential deficiencies in the UK legal system in enforcing state aid law, it concluded that it was difficult to come to firm conclusions, given the relative lack of cases in this area.

It appears that declarations of unlawfulness have been made to date by the UK courts on two occasions only, both of which involved discriminatory tax treatments (*R v Attorney-General, ex parte ICI* (1985) 1 CMLR 588 (Div Ct); (1987) 1 CMLR 72 (CA) and *R v Commissioner for Customs and Excise, ex parte Lunn Poly* (1998) EuLR 438 (Div Ct); (1999) EuLR 653 (CA)).

There do not appear to have been any cases in which private parties were awarded damages against the state for breach of state aid rules.

### Update and trends

The DG Comp's State aid Scoreboard indicates that the UK is one of the member states that granted slightly less non-crisis aid (as a proportion of GDP) in the period 2011–2013 compared to the period 2008–2010. This is in line with the overall trend, as the majority of member states granted less non-crisis aid in the period 2011–2013 than in 2008–2010. According to the State aid Scoreboard (which tracks non-crisis state aid excluding subsidies to railways), the total amount of aid granted or earmarked by the UK in 2013 amounted to 0.2 per cent of GDP (as compared to 0.3 per cent of GDP in 2012). The total amount of such aid in the EU as a whole that same year amounted to 0.5 per cent of GDP.

During the period 2011–2013, the main category of non-crisis aid in the UK was aid for horizontal objectives (including block-exempted aid), followed by sectoral aid (including sectoral development aid,

rescue and restructuring and closure aid). This is more or less in line with the overall EU trend where aid for horizontal objectives also topped the list but was followed by agricultural sector aid. The main categories of 'horizontal aid' granted by the UK were:

- environmental aid (including energy saving);
- aid for SMEs (including risk capital); and
- research and development aid (including innovation).

The main categories of 'horizontal aid' for the 'EU-28' during the same period were:

- environmental aid (including energy saving);
- regional development aid; and
- research and development aid (including innovation).

In addition, as indicated above, there have been very few occasions on which the UK has been subject to recovery orders. Of those cases, only one was brought before the English courts: the *British Aerospace* case. For further details on this case, see question 31.

#### 24 Is there a mechanism under your jurisdiction's rules of procedure that allows national courts to refer a question on state aid to the Commission and to stay proceedings?

There is no mechanism under the rules of procedure in England and Wales that allows national courts to refer a state aid question to the European Commission. However, the English courts have the ability to stay national proceedings pending the outcome of Commission proceedings (subject to any EU law obligations – see Case C284/12 *Deutsche Lufthansa v Flughafen Frankfurt-Hahn*). In addition, under the general national procedural rules, the Commission is able to participate in national court proceedings in relation to the application and interpretation of state aid rules as *amicus curiae*, *intervener* or *interested party*.

#### 25 Which party bears the burden of proof? How easy is it to discharge?

In a judicial review case, the burden of proof rests on the applicant. The claimant also bears the burden of proof in an action for damages in relation to the alleged breach, as well as in respect of the damages (see question 29). In both judicial review and damages actions, the standard of proof that has to be discharged is the 'balance of probabilities' test, that is the court must be satisfied that the occurrence of the event was more likely than not.

#### 26 What is the role of economic evidence in the decision-making process?

The role of economic evidence in court proceedings will depend on the facts of each case. For example, in *R v Attorney-General, ex parte ICI* ((1985) 1 CMLR 588 (Div Ct); (1987) 1 CMLR 72 (CA)), both the High Court and the Court of Appeal discussed at length evidence given by an economic expert given the importance of the expert's valuation for the government action under review.

#### 27 What is the usual time frame for court proceedings at first instance and on appeal?

There are no prescribed time periods for a 'typical' judicial review proceeding or private damages action in the English court. Much will depend on how the parties choose to conduct the proceedings (for example, on whether the action is stayed following parallel European Commission proceedings).

As indicated in question 20, a judicial review claim may only be brought with the permission of the High Court, and an application for permission to apply for judicial review must be made promptly and in any event within three months from the date on which grounds for the application first arose (Civil Procedure Rules 54.4(1)).

Judicial review proceedings tend to be quicker than damages claims because these proceedings do not involve a detailed assessment of factual issues, for example around causation and quantification (see question 29).

Ministry of Justice statistics published in March 2015 indicate that the average time taken to hear a judicial review case from lodging an

application was 297 days in 2013 (up from 290 in 2012). However, this includes all types of judicial review proceedings, not just state aid cases.

#### 28 What are the conditions and procedures for grant of interim relief against unlawfully granted aid?

An injunction may be granted at the discretion of the court if it seems 'just and convenient' to do so (section 37(1) of the Senior Courts Act 1981). The court should consider whether:

- there is a serious question to be tried;
- damages would be an adequate remedy;
- on the balance of convenience of each party an injunction should be granted; and
- there are any further special factors (*American Cyanamid Co v Ethicon Ltd* (1975) AC 396).

In addition, a party seeking an interim injunction will normally have to give an undertaking to pay damages to the respondent for any loss sustained as a result of the injunction if the applicant subsequently fails to make out his or her case at trial (ie, if it is found that the aid was not unlawful or should not have been stopped).

In the context of judicial review proceedings, the court also has the ability to make an interim order to stay a decision, which will often have the same effect as an injunction (see, for example, the *British Aerospace and Rover* case where the national court stayed recovery proceedings pending the outcome of an annulment action before the ECJ – see also question 31).

#### 29 What are the conditions for competitors to obtain damages for award of unlawful state aid or a breach of the standstill obligation in article 108(3) TFEU? How do national courts calculate damages?

As indicated above, the English Court of Appeal in *Secretary of State for Employment v Mann* ((1997) ICR 209) ruled that an action for damages for breach by the UK of EU law (ie, a *Francovich* action) may be pursued in the English courts in the same way as any other private claim provided the conditions set out by the ECJ in *R v Secretary of State for Transport ex parte Factortame* (joined cases C-46 and 48/93 (1996) ECR I-1029) are met. These conditions are:

- the rule of law infringed was intended to confer rights on individuals;
- the breach complained of was 'sufficiently serious'; and
- there is a direct causal link between the breach and the loss suffered by the applicant.

The fulfilment of the conditions will depend on the facts of each case. However, it is established that article 108(3) confers rights on individuals (case 120/70 *Lorenz v Germany* (1973) ECR 1471).

The ECJ explained in *Factortame* that the following facts should be taken into account when determining whether a breach was sufficiently serious:

- the clarity and precision of the rule breached;
- the measure of discretion left by the rule to the national or EU authorities;
- whether the infringement and the damage caused was intentional or involuntary;

- whether any error of law was excusable or inexcusable; and
- whether the position adopted by an EU institution may have contributed to the breach.

English courts calculate the damages to be awarded for such claims by reference to the actual loss that a claimant has suffered as a result of the breach. The general aim of an award of damages in such cases is to put the claimant in the same position as he or she would have been in if the breach had not occurred.

#### State actions to recover incompatible aid

### 30 What is the relevant legislation for the recovery of incompatible aid and who enforces it?

There is no specific legislation for the recovery of incompatible aid by national or regional authorities. The basis on which recovery is effected is not well established (see further below).

However, recovery may also be effected on a contractual basis. In particular, where it is clear that state aid is being awarded then contractual provisions that provide a legal basis for recovery, if this becomes necessary, would normally be included as part of the arrangements.

### 31 What is the legal basis for recovery? Are there any grounds for recovery that are purely based on national law?

Absent a contractual right to recover, the basis on which recovery is effected is not well established. As indicated above, there has only been one recovery case in the English courts (*DTI v British Aerospace and Rover* (1991) 1 CMLR 165), and this case does not clarify the basis on which recovery could be effected. In that case the UK government (in the form of the Department of Trade and Industry) brought an action against the aid recipient in the High Court on the basis of the UK government's duty to comply with the Commission's decision that the aid granted to British Aerospace to assist in the purchase of Rover from the UK government was unlawful. The High Court, however, granted an application to stay the UK recovery proceedings pending the appeal of British Aerospace for annulment of the Commission decision before the ECJ. The Commission subsequently made a new recovery order and recovery was eventually effected without the need for a court order.

Two other cases where the European Commission has ordered the UK to recover unlawful aid, have (so far) not provided further judicial guidance on the basis on which recovery could be effected in the English courts as:

- in Case C55/2007, *Support to BT Group plc*, arrangements (in the form of an escrow account to hold the disputed funds) had already been put in place to effect recovery should the ECJ confirm the Commission's decision, which it did on 22 October 2014 (Commission decision of

11 February 2009; Case T-226/09, *BT v Commission*, T-230/09, *BT Pension Scheme Trustees v Commission*; and Case C-620/13P, *BT v Commission*); and

- in Case SA.34775, *British aggregates levy*, the UK Government is still considering how to give effect to the European Commission's recovery order (indicating that it will work with the Commission and businesses to reduce the impact of the order) so it is still unclear whether the recovery will result in any litigation before the English courts (see UK Government press release, dated 27 March 2015).

### 32 How is recovery effected?

See question 31.

### 33 How may beneficiaries of aid challenge recovery actions by the state?

Aid beneficiaries can challenge recovery by resisting recovery actions brought by the UK government in the national courts (see question 31).

If an aid beneficiary wishes to seek a determination proactively that aid is not recoverable (rather than wait for a recovery action to be brought against it), the following options might be available depending on how the decision to effect recovery has been implemented and communicated:

- in cases where the state made the announcement to seek recovery by way of a reviewable decision, the beneficiary could initiate judicial review proceedings applying for a declaration of unlawfulness in relation to the decision; and
- in cases where the grant and recovery of the aid is governed by contractual arrangements the beneficiary could bring an action for a declaration by the court that there is no contractual right to recover.

In addition, other procedural routes might be available. For example, if the aid was in the form of tax relief, which was then withdrawn by HM Revenue and Customs, the case might be heard by specialist tax tribunals.

### 34 Is there a possibility to obtain interim relief against a recovery order? How may aid recipients receive damages for recovery of incompatible aid?

In principle, aid recipients could seek an interim injunction against a recovery order. However, if there is a clear basis for recovery it is unlikely that the court will grant such an injunction (see question 28 in respect of conditions to be met in terms of interim injunctions).

At the same time, the aid recipient could bring an annulment action against the underlying decision of the European Commission before the European Courts.

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