AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

Ref: 08TACD2021

Between:

[redacted]

Appellant

and

THE OFFICE OF THE REVENUE COMMISSIONERS

Respondent

Hearing: 29th October 2020 to 3rd November 2020

Determination

CONTENTS

I. BACKGROUND TO THE ASSESSMENT AND TAX APPEAL

A THE APPEAL

1. The Assessment and Interactions between the Appellant and Revenue

1. This is an appeal to the Tax Appeals Commission ("the Commission") brought on behalf of [redacted] (the "Appellant") pursuant to section 21 of the Stamp Duties Consolidation Act, 1999 (the "SDCA") and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("TCA"). This matter relates to the acquisition of [redacted] ("[redacted]") by the Appellant (the "Transaction") and the stamp duty provisions introduced by section 61 of the Finance Act 2019. Financial Resolution No. 5 was passed on 8th October 2019 and by section 61 of the Finance Act 2019, section 31D was inserted into the SDCA.

2. On [redacted] 2020, the Appellant filed an e-stamping return (document ID [redacted]) with an expression of doubt. The filing was made on the basis that there was nil chargeable consideration in respect of the Transaction, such that no stamp duty was due or paid with the return. On the same date, [redacted] 2020, the Appellant filed a letter of expression of doubt with the Office of the Revenue Commissioners ("Revenue"). On [redacted] 2020, following discussions with Revenue and in anticipation of the Assessment, the Appellant paid an amount [redacted] in respect of stamp duty by electronic funds transfer on account to Revenue (the "Payment"). On [redacted] 2020, the expression of doubt was rejected by Revenue. In rejecting it, Revenue indicated that an assessment may be made.

3. The Payment was made by the Appellant to Revenue on the basis that it:

- was without prejudice to the fact that any duty imposed was unlawful;
- could not be construed as an acceptance or agreement that duty could be lawfully levied in the circumstances or as a waiver of any rights; and
- was made solely for the purpose of protecting the position in respect of interest arising if stamp duty was ultimately determined to arise in the circumstances.

4. The parties have agreed that, if the Payment is at any stage repaid to the Appellant, interest will not be payable under any section of the SDCA. On [redacted] 2020, Revenue sent confirmation of the receipt of the Payment. On [redacted] 2020, Revenue sent a Notice of Assessment ("the Assessment"), pursuant to section 20(2A) SDCA, in the amount of [redacted]

5. The Appellant is appealing the Assessment made by Revenue in the amount of [redacted] The details of the Appeal and Revenue's response are set out below.

2. Substance of the Appeal

6. On 20th July 2020, the Appellant filed a notice of appeal with the Commission. The Appeal was set out in the notice of appeal as follows:-

> *"1. The Assessment is excessive.*
> *2. A nil liability to stamp duty arises pursuant to section 31D SDCA when the provision is interpreted in accordance with relevant EU law.*
> *3. The Assessment in the amount of EUR [redacted] is unlawful, contrary to EU law and in breach of the prohibition against the imposition of "any form of indirect tax" on the*

restructuring operations of capital companies which is contained in Council Directive 2008/7/EC.
4. The Assessment is in breach of Revenue's EU law obligations to interpret domestic legislation in light of the wording and purpose of Council Directive 2008/7/EC concerning indirect taxes on the raising of capital (the "2008 Directive") in order to achieve the results pursued by that Directive.
5. The Assessment unjustly interferes with the Appellant's vested property rights under the Charter of Fundamental Rights of the European Union *(the "Charter") and the* European Convention on Human Rights *(the "Convention").*
6. The Assessment amounts to an unjust and unreasonable attack on the Appellant's vested property rights under the Constitution of Ireland*.*
7. In respect of the above grounds, in particular grounds 5 and 6, the unjust interference and attack includes, but is not limited to, the fact that the Assessment purports to impose the stamp duty retrospectively by relying on a fiction that an agreement completed prior to the introduction of the domestic legislation was deemed to be executed on a later date, and the Assessment is extremely targeted and discriminatory.
The Appellant reserves its right to expand or add to the grounds of appeal over the course of the appeal."

7. On the basis of these grounds of appeal, the Appellant requested that the Commission exercise the powers conferred on them in accordance with Part 40A of the TCA to reduce the Assessment to nil. Section 34 of the Finance (Tax Appeals) Act 2015 inserted Part 40A to the TCA. Under section 949A of TCA (Part 40A), an 'appealable matter' means "*any matter in respect of which an appeal is authorised by the Acts*". The Acts includes the SDCA, and the enactments amending or extending it. Assessment means an assessment to tax made under the Acts.

8. Under section 949I(1) TCA, any person who wishes to appeal an "*appealable matter*" shall do so by giving notice in writing to the Appeal Commissioners. Under section 949 I(2), the notice of appeal shall specify the appealable matter in respect of which the appeal is made and the grounds of the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds. For the purposes of this section 949J(1)(a) TCA, an appeal shall be a valid appeal if it is made in relation to an appealable matter.

9. On receipt of an appeal, the Commission must send to Revenue a copy of the appeal. The Commission duly sent a copy of the appeal to Revenue. Under section 949L(1)(a) TCA where Revenue consider that the appeal is not valid, they have 30 days to object together with the reasons for the objection. Revenue did not object to the appeal on any grounds. The Commission can therefore accept an appeal if there is no objection, where they have no reason to believe it is not a valid appeal. As such, the Commissioner considered the appeal and was satisfied that it was a valid appeal.

10. On 14th September 2020, the Appellant filed a Statement of Case with the Commission. On 6th October 2020, Revenue filed a Statement of Case with the Commission. On 15th October 2020, the Appellant filed an Outline of Arguments. The Commissioner requested details on the timeline of the Transaction from the Appellant and an Addendum to the Outline of Arguments was submitted by the Appellant on 19th October. Revenue were given additional time to respond to the Appellant's Outline of Arguments and the Addendum and submitted their Outline of Arguments on 21st October 2020.

11. The appeal hearing commenced on 29th October 2020 and was heard up to and including 3rd November 2020. Following Revenue raising new arguments at the hearing on 2nd November 2020 in respect of Article 4(1)(b) of the Council Directive 2008/7/EC ("Directive 2008/7") concerning indirect taxes on the raising of capital (commonly referred to as the Capital Taxes Directive), the Appellant filed Replies to Submissions on Article 4(1)(b) on 3rd November 2020. The Commissioner was provided with four substantial books of documents and authorities agreed between the parties and subsequently with additional authorities and documentation as the hearing progressed. The Commissioner has considered in depth all the documentation and authorities provided by the parties in preparing for the hearing and in reaching this determination. Absence of an authority should not be taken as an indication of non-consideration by the Commissioner. Due to the voluminous documentation, it is not intended to list the documentation.

12. The Commissioner has also digested open source published material relevant to the matters raised, in order to inform and thereby aid the final determination. Those sources are referenced. There is no issue in this determination that was not signalled at the hearing by the Commissioner as being worthy of consideration. The parties were invited to address the Commissioner on its constituent parts and the issues throughout the hearing. The Commissioner is aware of the differing weights to be given to open source material, from Revenue's Statement of Strategy (*aspirational*) to the Recommendation from the Court of Justice ("CJEU") to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2018/C 257/01) (*instructional*).

13. The Commissioner is also mindful that the Appellant [redacted] and as such, has attempted to explain Irish legal and EU provisions in order to assist the Appellant. The Commissioner is committed to ensuring determinations are accessible by all appellants, whatever their background. It is appreciated the considerable length of the determination could negate that intent. But the multi-faceted nature of the appeal, the response and the debates that ensued (which included interpretation of the meaning of "interpretation") has meant that brevity became a casualty.

3. Response by Revenue to the Appeal

14. Revenue's response to the Appeal was summarised in paragraph 2 of the Outline of Arguments as follows:

- *"[redacted]'s appeal should be dismissed.*
- *The Commission is established and has the powers conferred by Act of the Oireachtas. A Notice of Appeal sets the ambit for an appeal. The Notice of Appeal is a key component in the legislative framework of the Commission.*
- *With the exception of Ground 2, the grounds set out in [redacted]'s Notice of Appeal are explicitly challenges to the legality of the assessment and not its quantum. These grounds are directed to a matter (ie legality of an assessment) which is outside the jurisdiction of the Commission and is reserved to the courts.*
- *Accordingly, these grounds should be dismissed.*
- *On its face, Ground 2 of [redacted]'s Notice of Appeal is directed to the interpretation of Section 31D in accordance with EU law.*
- *The interpretation of legislation is within the jurisdiction of the Commission but the principles of statutory interpretation have been clearly and definitely circumscribed by decisions of the courts.*

- *In particular, the interpretation of legislation does not extend (as [redacted] contends in its Outline of Argument) to disregarding the applicable legislation by reducing the assessment to nil (as Ground 2 suggests). It follows that interpretation does not extend to amending the wording in question so as to give it a meaning which is different to that stated and intended by the Oireachtas (as [redacted]'s Outline of Argument suggests).*
- *Accordingly, Ground 2 of the appeal should be dismissed.*
- *Ground 2 refers to the interpretation of Section 31D in the context of EU law. Ground 2 does not refer to the Charter, the ECHR Act or the Constitution. Insofar as these arguments are advanced, they are outside the scope of the appeal.*
- *In any event, conforming interpretation in the context of the Charter, ECHR Act or the Constitution, does not apply as a matter of law, does not arise on the facts and insofar as it might be applied, does not materially extend the principle of a conforming interpretation as a result of EU law.*
- *Accordingly, in the respectful submission of Revenue, these additional grounds of argument should be treated as outside the scope of the appeal or alternatively, should be dismissed by the Commission.*
- *[redacted]'s Outline of Argument urges the Commission to disapply Section 31D. This is not a ground set out in the Notice of Appeal and accordingly is outside the scope of the appeal. The Commission should, therefore, give no ruling on such an argument, on the grounds that it is outside the appeal.*
- *Even were such an argument properly part of the appeal, it is respectfully submitted by Revenue that the Commission does not have a jurisdiction to disapply national law.*
- *If Revenue is wrong in its submissions and the Commission can (a) entertain a substantive ground not contained in the Notice of Appeal and (b) disapply national law, it is respectfully urged that the Commission should not exercise such a jurisdiction in a case such as this."*

15. As referred above, Revenue submitted an additional submission at the appeal hearing on 2nd November on the basis that Directive 2008/7 did not apply to the Transaction, firstly, as it was not a merger as defined in Directive 90/434/EEC, and secondly, Directive 2008/7 only applied to transactions between capital companies, both situated within the European Union ("EU").

4. Order of Considerations before Determination

16. The Commissioner has considered in the first instance those preliminary matters raised in Revenue's Outline of Arguments and submissions at the hearing in relation to:

- their position that the Commission does not have jurisdiction to consider the appeal due to the grounds not being specified;
- the legislative interpretation not allowing the Commission to consider the appeal and;
- the jurisdiction of the Commission being confined to matters of "quantification" rather than legality.

17. The parties maintained diametrically opposing views which affected how the hearing was conducted by both parties. Revenue raised jurisdictional objections to the appeal in the first instance before addressing the substantive appeal. They weighted the time spent on those jurisdictional arguments, as demonstrated in the Statement of Case, Outline of Arguments and at the hearing. As stated above, the Commissioner reviewed in the first instance Revenue's jurisdictional objections. But to assist and place those jurisdictional objections in

context and in light of those opposing views, the Commissioner has addressed the appeal in the following order:-

- an overview of schemes of arrangement and the Transaction;
- the history of cancellation schemes in order to understand the operational and the legislative underpinnings of those schemes, both in Ireland and its closest neighbour, the United Kingdom;
- the changes in relation to cancellation schemes that precipitated the Assessment and subsequent appeal;
- Revenue's submission that the Appellant had not set out the grounds in the notice of appeal;
- the history of the Commission and the powers set out in legislation and the applicable jurisprudence in order to understand its jurisdictional role and consider Revenue's submission in respect of that jurisdiction;
- following the review of the Commission's powers and jurisdictional role, the application of that finding in relation to this appeal;
- the history and application of the requisite European jurisprudence to this appeal with respect to the Capital Taxes Directive and;
- the application of the Constitution, the Charter and the Convention to this appeal (as defined in the Appellant's notice of appeal).

B OVERVIEW OF THE TRANSACTION AND HISTORY OF CANCELLATION SCHEMES

1. General Overview of Schemes of Arrangement

18. In the context of takeovers or mergers, there are two types of schemes of arrangement. Firstly, there is a transfer scheme of arrangement whereby shares are transferred from the target to the acquiring company and secondly, a cancellation scheme of arrangement, whereby shares are cancelled in the target and new shares in the acquiring company are issued. With cancellation schemes, the acquiring company effects the takeover by cancelling the shares in the target in exchange for the issue of new shares and/or cash consideration. In Ireland, the law relating to schemes of arrangement is found in the Part 9, Reorganisations, Acquisitions, Mergers and Divisions of the Companies Act 2014. As such, in Ireland cancellation schemes of arrangement were utilised by those in the corporate mergers and acquisitions arena, as no stamp duty was payable on the issue of the new shares. They had other advantages in that it was easier for a purchaser/bidder to acquire 100% control of the target. This contrasts to the "public offer" structure, whereby a purchaser must obtain at least 80% or 90% shareholder approval for its offer before it can compulsorily acquire the shares of dissenting minority shareholders. However, a scheme was less flexible than an "offer", largely because three separate Court hearings were required. Once sanctioned by the Court, the scheme is binding on the target and on all of its shareholders. Pursuant to a scheme, the bidder acquires 100% ownership of the target through an Irish Court approved re-organisation of the target. This re-organisation is undertaken by the target, in conjunction with the bidder, in accordance with a specific procedure set out in Irish company law. This will usually involve a cancellation of all of the shares owned by the target's existing shareholders and the issue of new shares to (and only to) the bidder in their place. Technically, the bidder pays the "offer" consideration to the target shareholders in return for the cancellation of their shares.

19. The United Kingdom had similar provisions in their equivalent Companies Act 2006. As pertained in Ireland, there were also two types of schemes of arrangement, namely the transfer scheme and the cancellation scheme. The Appellant's submissions on the abolition of

cancellation schemes of arrangement in the United Kingdom and how they altered their legislative framework to ensure that the facility for undertaking a merger or takeover without payment of stamp duty was effectively removed have been scrutinised. The Appellant submits that the United Kingdom recognised that cancellation schemes of arrangement came within the definition of "*restructuring operations*" as set out in Article 4 of Directive 2008/7 and hence the levying of stamp duty was prohibited in these cancellation scheme of arrangements. The Commissioner has reviewed the history of the United Kingdom and their change in legislation in considering the Appellant's submissions. But before doing so, the Commissioner sets out the details of the Transaction.

2. The Transaction

20. The Appellant is a [redacted]. [redacted] is also a [redacted] company based in Ireland, with the proprietary rights to [redacted] products. The Appellant incorporated a special purpose wholly owned subsidiary, ("[redacted]") which together with the Appellant sought to acquire [redacted]. The Appellant provided the Commissioner, on request, with the detailed transactional documentation and the timeline of the Transaction. Detailed ventilation is not required for this determination but it provided useful background information for the Commissioner. The Commissioner has read and scrutinised the transactional documentation. The parties also submitted a summary of agreed facts and the details of the Transaction are not in dispute between the parties.

21. An acquisition agreement ("the Acquisition Agreement"), which is the subject of the Assessment, was entered into as follows:

- On [redacted], the Appellant and [redacted] entered into the Acquisition Agreement which set out the terms of the acquisition including the obligations and commitments of the parties in relation to the implementation of the Acquisition Agreement. The Appellant and [redacted] also jointly issued an announcement under Rule 2.5 of the Irish Takeover Rules on this date (the "Announcement").
- Under Rule 2.7 of the Irish Takeover Rules, once the Announcement was issued, the Appellant was obliged to proceed with the takeover unless the Takeover Panel instructed otherwise. The Appellant was precluded by the Irish Takeover Rules from introducing any new condition or term into the offer following the issuance of the Announcement.
- Under the Irish Takeover Rules, save in very limited circumstances which are not applicable to this acquisition, the Appellant was not entitled to reduce the offer price following the issuance of the Announcement.
- Accordingly, the Appellant submits that the acquisition was binding on the Appellant from [redacted], by virtue of both the Acquisition Agreement and the Takeover Rules, subject to a number of conditions contained in Appendix III to the Rule 2.5 Announcement which included: the approval of the Scheme by [redacted] shareholders and the Irish High Court; competition and regulatory approvals; no material adverse change occurring; and the Acquisition Agreement not being terminated/materially breached.

22. None of the conditions in the above paragraph arose and as such, the Appellant was obliged to complete with the acquisition of [redacted] by virtue of the Acquisition Agreement and the application of the Takeover Rules from [redacted]. The High Court, by an Order dated [redacted], directed a meeting of the applicable [redacted] shareholders. The

shareholders meeting took place after the change in the stamp duty regime ([redacted] 2019) but the applicable [redacted] shareholders were not affected, as the consideration had been agreed under the Acquisition Agreement. The value of the Transaction was [redacted]. The [redacted] shareholders received a mix of cash and [redacted] shares ([redacted] [redacted] shares and [redacted] in cash for each [redacted] share). There was no transfer of shares at any time to any party to the Transaction. The acquisition of [redacted] by the Appellant took effect by the cancellation of [redacted] shares and the issue of new Appellant shares together with some consideration in cash. In the corporate acquisition arena, this acquisition was termed a merger. As referred to above, these acquisitions or mergers by utilisation of cancellation of shares are known as cancellation schemes of arrangements. They were utilised by many parties to effect a merger and/or acquisition between two entities.

23. The Transaction was notified to the European Commission on [redacted]. The European Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds under the EU Merger Regulations (Council Regulation (EC) No 139/2004). The details of this assessment are not relevant to this appeal. On [redacted], the European Commission approved the Appellant's acquisition of [redacted], subject to a condition of [redacted] [redacted]. The Commissioner in charge of competition in the EU, [redacted] [redacted] referred to the *"merger"* between the Appellant and [redacted][1]

24. Following what the Federal Trade Commission termed an "*extensive investigation*", on [redacted], the Federal Trade Commission approved the acquisition of the Appellant of [redacted] on condition that [redacted] [redacted].[2]

25. Following approval by the European Commission and the Federal Trade Commission, the acquisition of [redacted] by the Appellant was approved by the Irish High Court by Order dated [redacted] and in accordance with rules of court approved schemes of arrangement of the Companies Act 2014, the Irish Takeover Panel Act 1997 and the Irish Takeover Rules. The Order was delivered to the Companies Registration Office on [redacted]. As stated above, Revenue assessed the stamp duty liability of 1 per cent on the total combined consideration of the share value and cash consideration of [redacted] Based on the applicable Central Bank of Ireland exchange rate on [redacted], this gave rise to a stamp duty liability and assessment of [redacted]

3. Cancellation Schemes in the United Kingdom and Stamp Duty Changes

26. As referred to above, cancellation schemes were also utilised in the United Kingdom under their equivalent Companies Act 2006. Prior to 4 March 2015, takeover schemes of arrangement usually took the form of cancellation schemes involving a reduction of capital under section 641 of the Companies Act 2006. Under such a scheme, shares in the target not owned by the bidder were cancelled and new target shares were issued to the bidder. The bidder undertook to pay to the target shareholders whose shares were cancelled the takeover

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1 [redacted]

2 [redacted]

consideration for their cancelled shares. In the 2014 Autumn Statement the United Kingdom government announced that it intended to amend section 641 of the Companies Act 2006 to prevent the use of reduction schemes of arrangement for company takeovers which enabled companies to avoid paying stamp duty by cancelling the target's shares and reissuing them directly to the acquiring company. The Department for Business Innovation and Skills issued an extensive impact assessment guide entitled "*Restricting Share Capital in Takeovers*" about the new changes and the rationale for them. [3]

27. The Impact Assessment Guide *"Restricting Share Capital in Takeovers"* stated:

> *"the measure will protect the stamp taxes base by preventing the use of share cancellations by target companies in takeovers conducted using schemes of arrangement…*
>
> "*Implementation of a 'transfer' scheme requires payment of stamp tax on shares at 0.5% of the consideration paid for the shares, but no such liability flows from implementation of a 'cancellation' scheme, the taxation of the new issue of shares being prohibited by the EU Capital Duties Directive (2008/7/EC).*

28. Section 641 of the United Kingdom Companies Act 2006 was amended by the Companies Act 2006 (Amendment of Part 17) Regulations 2015 with effect from 4th March 2015. These regulations amended section 641 of the Companies Act 2006 to prohibit a company from reducing its share capital as part of a scheme of arrangement where the purpose of the scheme was to acquire all the shares of the company, except where the acquisition amounted to a restructuring that inserted a new holding company into the group structure. In the United Kingdom, schemes of arrangement are also a court approved arrangement between a company and its shareholders and creditors governed by Part 26 of the Companies Act 2006. In the United Kingdom, prior to 2015, the implementation of a transfer scheme, as opposed to a cancellation scheme, required payment of stamp tax on shares at 0.5 per cent of the consideration paid for the shares. No such liability flowed from implementation of a cancellation scheme, on the premise that the United Kingdom viewed the taxation of the new issue of shares as being prohibited by Directive 2008/7.

29. The United Kingdom informed taxpayers in the Autumn Statement 2014 (page 61, paragraph 1.249) of the pending change in the prohibition of cancellation schemes but also confirmed that the change applied to court orders signed on or after 4th March 2015, but did not affect takeovers where an announcement had been made before that date. [4] The changes did not relate to a public announcement of a firm intention to make an offer for a target pursuant to the Takeover Code (the United Kingdom's Rule 2.7 announcement) published before 4th March 2015; or an offer whose terms have been agreed between the target and the bidder before 4th March 2015, where such offer was not subject to the Takeover Code. The Autumn Statement 2014 states:

[3] The Department for Business Innovation and Skills - Restricting Share Capital in Takeovers https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396311/BIS-15-27-restricting-share-capital-reductions-in-takeovers-information-and-impact-note.pdf

[4] Autumn Statement 2014 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/382328/44695_Autumn_Statement__Print_ready_.pdf

"1.249 *UK company takeovers have increasingly been carried out using schemes of arrangement, which can be structured to enable companies to avoid paying SDLT by cancelling the target's shares and reissuing them directly to the acquiring company. The government believes that takeover structures that achieve the same outcome should have the same SDLT treatment, and will bring forward regulations by early 2015 to prevent the use of 'cancellation' schemes of arrangement for company takeovers.*"

30. Regulation 2 of the Companies Act 2006 (Amendment of Part 17) Regulations 2015 set out provisional arrangements and stated that in Regulation 2 (2)[5]:

These Regulations do not apply in relation to a scheme that—
(a) gives effect to, or is proposed in connection with, a takeover announcement made in relation to a company before the day on which these Regulations come into force, or
(b) gives effect to, or is proposed in connection with, a pre-commencement offer to acquire all the shares in a company that is not subject to the rules or (where there is more than one class of shares in a company) all the shares of one or more classes, in each case other than shares that on the date that the terms of the offer were agreed were already held by the person making the offer or its associates.

31. The new provisions were explained in detailed in the *HM Revenue and Customs Guidance Stamp Duty and Stamp Duty Reserve Tax: transfer schemes of arrangement and restructuring plans*.[6] As such the United Kingdom government decided to remove the legislative facility for a cancellation scheme of arrangement by way of legislative amendment. It did not apply to those schemes already announced, either through the takeover rules applicable or by virtue of a pre-commencement offer. In conclusion, those acquisitions that were already announced were not affected by this legislative change.

4. Cancellations Schemes in Ireland and Stamp Duty changes

32. Prior to October 2019, Ireland did not charge stamp duty on the cancellation of shares in the target and the subsequent issue of new shares by virtue of a cancellation scheme of arrangement. Cancellation schemes of arrangement become more prevalent for takeovers of public companies. It appears that the increase in popularity was due to it being easier for a purchaser to acquire 100% control of the target, as referred to above, and secondly, the scheme offered tax advantages over the more traditional offer structure, as the 1 per cent stamp duty in Ireland (as opposed to 0.5 per cent in United Kingdom) was not payable.

33. In 2019, a change was announced to address the stamp duty on cancellation schemes of arrangements. It was announced in the Budget that this was an anti-avoidance measure and that the SDCA 1999 would be amended to provide that stamp duty of 1 per cent is applicable

[5] Companies Act 2006 (Amendment of Part 17) Regulations 2015
https://www.legislation.gov.uk/uksi/2015/472/contents/made

[6] HM Revenue and Customs Guidance Stamp Duty and Stamp Duty Reserve Tax: transfer schemes of arrangement and restructuring plans
https://www.gov.uk/government/publications/stamp-duty-and-stamp-duty-reserve-tax-transfer-schemes-of-arrangement/stamp-duty-and-stamp-duty-reserve-tax-transfer-schemes-of-arrangement

on schemes of arrangement in accordance with Part 9 of the Companies Act 2014, if used for the acquisition of a company. [7]

34. The anti-avoidance measure was reiterated in *Revenue ebrief* 135/20.[8] The details were also set out in the *Revenue Stamp Duty Manual*, as published on their website.[9] The Revenue ebrief set out that :-

> *"Section 31D was introduced by Finance Act 2020. It imposes a stamp duty charge (1% rate of duty on shares) on the court-approved acquisition of companies involving the cancellation of existing shares and the issue of new shares as consideration (known as 'cancellation schemes of arrangement')."*

35. Ireland chose a different route to the United Kingdom to address the stamp duty avoidance inherent with a cancellation scheme of arrangement. It did not amend the Companies Act 2014 to outlaw cancellation schemes of arrangement nor bring in transitional arrangements so that takeovers already announced were not within the charge. Ireland chose the route of amending the SDCA with a new section 31D. The *Revenue Stamp Duty Manual* set out the effect of the change :-

> *"It imposes a stamp duty charge where there is an agreement to acquire a company (target company) using a court-approved scheme of arrangement in accordance with the Companies Act 2014 involving the cancellation of the target company's shares and the issue of new shares to the person acquiring the company. This type of arrangement was not previously subject to stamp duty as it did not involve an actual transfer of shares to the person acquiring the company, even though the net effect was to transfer ownership of the company. Under such an arrangement, there was no transfer or conveyance on sale on which to impose a charge. This new charge recognises the substance of these types of arrangement and imposes the stamp duty charge that, in the normal course, applies to transfers of shares. Stamp duty is charged on the consideration paid to shareholders for the cancellation of their shares. The charge applies where a scheme order is made by a Court on or after 9 October 2019."*

36. The effect of this change and the application of the charge applying to the scheme order made by a Court on or after 9th October 2019 brought the Appellant within the ambit of Section 31D SDCA, as referred to above. Revenue are under no obligation to provide any explanation to the Commissioner on receipt of the Appellant's submission in respect of the United Kingdom's change methodology with respect to cancellation schemes of arrangements. Revenue made no submissions on this different route.

37. Revenue also provided no documentation or submissions as to the considerations in respect of transitional arrangements nor the considerations of the Directive 2008/7. But it is noted that Revenue's own guide on legislation, the *Revenue Guide to Legislative Process 2016* refers

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[7] Budget 2020 http://www.budget.gov.ie/Budgets/2020/Documents/Budget/Budget%202020%20Tax%20Policy%20Changes.pdf

[8] Revenue's ebrief 135/20 https://www.revenue.ie/en/ta

[9] Revenue's Manual on Stamp Duty https://www.revenue.ie/en/tax-professionals/tdm/stamp-duty/stamp-duty-manual-replacement/part-05-provisions- applicable-to-particular-instruments/section-31D-cancellation-schemes-of arrangement.pdf

to such considerations being a necessary facet of legislative drafting. The Commissioner makes no finding in this respect. But, conversely, the Commissioner cannot assume any considerations on behalf of any party.

38. Revenue confirm in their publication on legislative drafting referred to above that the annual Finance Act must conform to EU legislation and recognises that failure to conform may result in a case being taken against them. They chose not to disclose any considerations in respect of the amendment in section 31D SDCA in respect of that conformity. They had the right to do so but again the Commissioner cannot assume any considerations, where none are put forward. The *Revenue Guide to Legislative Process* at page 42 also refers to the *Code of Conduct on Business Taxation* and that "*Member States may not introduce provisions that constitute harmful tax competition under the Code of Conduct criteria agreed by EU Member States in 1997."*

39. *The Revenue Guide to Legislative Process Guide* 2016[10], page 31 states:-

> *"By far the most common method of implementing EU tax legislation has been the Ministerial Regulation. A second method by which EU legislation is imported into Irish law is by incorporating it in the annual Finance Act. Obligation to Conform with EU Legislation EU membership also makes it necessary to ensure Irish domestic legislation and administrative actions conform to EU legislation and practice. Failure to do so may result in a case being taken against Ireland by a natural or a legal person or by the Commission itself in the Court of Justice (CJEU)."*

5. The New Stamp Duty Charges under Section 31D SDCA

40. As passed by Financial Resolution Number 5 on 8th October, 2019 and by amendment of the SDCA, Section 31D provides :

> *"(1) In this section—*
>
> *'Act of 2014' means the Companies Act 2014;*
> *'agreement' includes any arrangement, contract, compromise, understanding, scheme, offer, transaction or series of transactions;*
> *'company' means a company formed and registered under the Act of 2014 or an existing company within the meaning of that Act;*
> *'registrar' has the same meaning as it has in the Act of 2014;*
> *'scheme order' has the same meaning as it has in Chapter 1 of Part 9 of the Act of 2014.*
>
> *(2)Where—*
>
> *(a) there is an agreement to effect the acquisition of a company*
> *(in this section referred to as the 'target company'),*
> *(b) the target company enters into an arrangement—*

[10] The Revenue Guide to Legislative Process Guide 2016
https://www.revenue.ie/en/tax-professionals/documents/legislative-process.pdf

(i) that has become binding in accordance with section 453 of the Act of 2014, and
(ii) in accordance with which there is a cancellation of shares in the target company pursuant to Chapter 4 of Part 3 of that Act,
and
(c) the shareholders of the target company receive consideration for the cancellation of those shares held by them,

the agreement referred to in paragraph (a) shall be—

(I) chargeable with the same stamp duty as if it were a conveyance or transfer on sale of those shares, and
(II) deemed to be executed on the date on which a copy of the scheme order relating to the arrangement is delivered to the registrar in accordance with section 454 of the Act of 2014.

(3) Where subsection (2) applies, the consideration for the purpose of charging stamp duty shall be the consideration received by the shareholders of the target company for the cancellation of shares held by them.

(4) For the purposes of this Act, the accountable person shall be the person paying the consideration for the cancellation of the shares by the shareholders of the target company.

(5) This section shall have effect in relation to a scheme order made on or after 9 October 2019."

41. The Appellant contends that the Assessment purports to impose the stamp duty retrospectively by relying on an agreement completed prior to the introduction of domestic legislation and as being deemed to be executed at a later date. Section 31D SDCA refers to two important dates that are engaged. The date of the transactional agreement for stamp duty purposes is deemed to be executed on the date the scheme order is delivered to the registrar. The transactional agreement is chargeable to the same stamp duty as if it was an effective transfer of shares. There are no transitional arrangements to cancellation scheme arrangements already announced and the effective date of change is in relation to any scheme order **made on or after 9th October 2019**. So, any transactional agreement entered into before 9th October 2019 but which completes through the necessary court order (known as a scheme order) is chargeable to stamp duty of 1 per cent of the value of the consideration. The Irish legislative change on cancellation schemes of arrangement provides no exemptions for any previously announced mergers or takeovers or those proceeding through the necessary conditions, such as the anti-trust provisions, the shareholders vote or the court order process.

C THE JURISDICTION AND JURISPRUDENCE RELATING TO THE TAX APPEALS COMMISSION

1. Interpretation of Domestic Provisions

42. Before considering the substance of the appeal, Revenue objected to the grounds of the appeal as being ambiguous. The Commissioner rejects this submission and notes, as the Appellant pointed out, that Revenue were able to respond in detail to the grounds in their Statement of Case and Outline of Arguments. The Commissioner finds that the notice of appeal is explicit, clear and there is no ambiguity. The Commissioner had no difficulty in understanding the grounds (section 949I(2) TCA).

43. Revenue proceeded to argue that the Commissioner should dismiss the appeal as it is framed in the context of statutory interpretation. Revenue contend that the Commission does not have jurisdiction to consider the appeal and must interpret the legislation only by applying the interpretative methods recognised by national law.

44. Revenue further submitted that the Commissioner could not apply conforming interpretation to section 31D SDCA with respect to EU law for it to be disregarded or amended and that further that the Appellant is seeking an interpretation which is contra legem (against the law).

45. The parties both agree that the wording of section 31D of the SDCA is not problematic as to its meaning. Both parties agree that the meaning is clear from the natural words contained within it and there is no dispute as to what the words mean. The Commissioner concurs with that agreed position. Section 31D of the SDCA is not overly complex and the words can be read as to their ordinary meaning. There is no dispute over any of the defined terms. A reasonable member of the public could understand the words, ascertain when the stamp duty was payable, what it was payable on and the amount due (1 per cent). There is no dispute about the calculation of the stamp duty or the consideration on which it is calculated. Nor is there a dispute as to the meaning of the agreement or the scheme order or the delivery to the registrar. The parties agree with the meaning of all the constituent parts.

46. Revenue referred the Commissioner to the Supreme Court case of *Bookfinders Limited v Revenue Commissioners* [2020] IESC 60 ("*Bookfinders*"), and the cases of *McGrath v McDermott* [1988] IR 258 and *Dunnes Stores v Revenue Commissioners & Ors* [2019] IESC 50 ("*Dunnes Stores"*). The judgments in *Bookfinders* set out clear guidance on the interpretation of taxation statues. Revenue in their submissions pointed to O'Donnell J, paragraph 39:

> "it is worth emphasising that the starting point in any exercise in statutory interpretation is, and must be, the language of the particular statute rather than any pre-determined theory of statutory interpretation."

47. The Commissioner notes that the *Bookfinders'* judgment should be engaged when there is an issue of ambiguity or imprecision. It could be reasonably interpreted by the Commissioner as regret by O'Donnell J regarding his obiter comments in *Revenue Commissioners v O'Flynn Construction & others* [2011] IESC 47 (paragraph 41-42) as being on reflection "*unnecessary, incautiously expressed*". He confirmed that he was wrong to use the term "*purposive*" and was incorrect to suggest that the Interpretation Act mandated such an approach in respect of taxation legislation. He did confirm at paragraph 47 of *Bookfinders* that his correction should not mean that the interpretation of tax statutes cannot have regard to the purpose of the provision, or that the manner in which the court must approach a taxation statute is to look solely at the words, with or without the aid of a dictionary, and on that basis of that conclude that, if another meaning is capable of being wrenched from the words taken alone, the provision must be treated as ambiguous, and the taxpayer given the benefit of the more beneficial reading. He stated very clearly:

> "Such an approach can only greatly enhance the prospects of an interpretation which defeats the statutory objective, which is, generally speaking, the antithesis of statutory interpretation."

48. Revenue referred amongst other jurisprudence to McKechnie J, (para 63) in *Dunnes Stores* that :

> "if the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail."

49. The Commissioner appreciated the helpful summary of the jurisprudence relating to interpretation of taxation statutes as recently set out by McDonald J in *Perrigo Pharma International Activity Company v McNamara, the Revenue Commissioners, Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") and the step-by-step considerations in statutory interpretation. The Commissioner has also noted the authority of *Bookfinders* and taken cognisance of it and is grateful for the detailed explanation by Revenue of this judgment. But, its relevance to this appeal is limited due to the nature of the explicit and clear wording in section 31D SDCA. The appeal centres on the interpretation of section 31D SDCA in light of Directive 2008/7, the Charter, the Convention and Appellant's claim for vested property rights under the Constitution of Ireland, Bunreacht na hÉireann. The interpretation of the domestic legislation in section 31D SDCA is not in dispute between the parties. Its meaning is clear and the ordinary meaning of the words is not in dispute between the parties. It would be perverse if Revenue were arguing that the statute was not clear. The Appellant has no argument about the meaning of section 31D.

50. Both parties agree that section 31D SDCA seeks to impose stamp duty on a cancellation scheme of arrangement by virtue of the date of the transaction agreement, the rate of stamp duty is 1 per cent, which is payable when the scheme order is delivered to the registrar. There is no dispute as to meaning. There is no requirement for the Commissioner to consider rules of construction in respect of the domestic legislation, as again the meaning is clear, precise and unambiguous, as mentioned by McKechnie J (para 63) in *Dunnes Stores*, as discussed by the learned judges in *Bookfinders* and helpfully summarised by McDonald J in *Perrigo.*

51. As referred above, the dispute relates to the impact of EU law and in particular Directive 2008/7. It further relates to the impact of the Charter, the Convention (if applicable) and the Constitution with respect to section 31D of the SDCA. There is dispute concerning whether section 31D of the SDCA has retrospective effect (with the Appellant contending that it does and Revenue the polar opposite that it does not). That does not rest on an interpretation of the wording but on how the section applies to this particular situation and whether the Appellant has acquired property rights. This is a matter of contractual law and then application to the plain wording in the section. It does not relate to any confusion of the wording in section 31D SDCA. But the Commissioner takes on board the *Bookfinders*' judgment in its consideration of section 31D SDCA.

52. But, the Commissioner firstly addresses grounds 2 to 4 of the appeal, set out above, in relation to the potential contravention of Directive 2008/7 and the Appellant's submission that the Commissioner must read section 31D SDCA in conformity with Directive 2008/7 and if that is not possible, must disapply section 31D SDCA in respect of the Assessment. The Commissioner will then consider grounds 5 to 7 of the appeal.

53. As such, the issue in this appeal (grounds 2 to 4 inclusive) is the utilisation of conforming interpretation with EU law in the first instance and disapplication of EU law in the second. Revenue suggest that the Commission is not a national authority in the context of EU law as it does not have the jurisdiction to consider EU Law (except as incidental to quantification),

and the principles of conforming interpretation in the context of EU law does not extend the principles of statutory interpretation and/or the jurisdiction of the Commission. Further, the Commission is not a body resolving dispute *inter partes* but is the body charged with valuing or estimating the quantum only of a lawful assessment. It submits that the meaning of section 31D is plain and unambiguous and/or any other interpretation is outside the scope of the appeal and the jurisdiction of the Commission. It submits that the Commissioner must only consider the quantum of any assessment and this appeal is outside that jurisdiction of the Commission, as it is seeking the Commissioner to either apply conforming interpretation concerning an EU Directive to domestic legislation or disapply domestic legislation.

54. In relation to grounds 5 to 7, Revenue further submits the Commissioner cannot make any finding in the context of any alleged breaches of the Charter, the Convention or the Constitution. It asks the Commissioner to dismiss the appeal in its entirety. As such, the Commissioner before considering the application of EU law to section 31D SDCA as the appeal is framed, must firstly assess if it has the jurisdiction to do so and the authorities for that assessment. In doing so, it assesses the history of the Commission, the legislative basis for its existence and powers, the equivalent bodies across the EU in respect of tax matters and the Court of Justice of the European Union's ("CJEU") jurisprudence on administrative bodies/tribunals.

2. History and Role of the Commission

55. Due to the nature of Revenue's Outline of Arguments that the Commission does not have jurisdiction to consider this appeal, the Commissioner has examined its history, formation and powers. As Revenue acknowledged in the debates on the establishment of the Commission, the tax appeals system had a long history dating back to the 19th century.[11] It evolved from the Special Commissioners dealing with tax appeals (relating to primarily income tax) to the Office of the Appeals Commissioners (dealing with all appeals of all tax heads) to the Tax Appeals Commission. Revenue have referred the Commission to case law from the 1930's in respect of the Special Commissioners in Ireland (*The State (Whelan) v Smidic* [1938] 1 IR 626 "*Smidic"*) and Special Commissioners in the United Kingdom (*Inland Revenue Commissioners v Sneath* [1932] KB 362 ("*Sneath")* and *R v Income Tax Commissioners* [1936] I KB 487). The Commissioner has considered those cases, the history of the current Commission and the evolution of tax matters and the EU.

56. In the 2014 budget, a reform of the role, functions and structure of the Office of the Appeal Commissioners and the tax appeals system was announced. The stated objective was to *"ensure an enhanced and cost-effective appeal mechanism, which provided transparency and increased certainty for taxpayers"* and to *"enhance the independent status of the Appeal Commissioners while ensuring appropriate accountability, to make the system more transparent, and to make the process more efficient."* It was announced that the provision for full rehearing by a judge of the Circuit Court would be removed. Revenue welcomed the proposal and stated at the public debates that the Appeal Commissioners are an "*expert tribunal*". They proceeded to explain their support for the removal of the Circuit Court in that it seemed incongruous to establish an expert tribunal such as the Appeal Commissioners but then allow an appeal by way of a total rehearing to a forum which does not profess to have

[11] Joint Oireachtas Committee on Finance, Public Expenditure and Reform, 27th January 2015 https://www.oireachtas.ie/en/debates/debate/joint_committee_on_finance_public_expenditure_and_reform/2015-01-27/2/

the same expertise in tax matters. Revenue acknowledged the range and complexity of cases and cases whereby both the facts and/or law are in dispute.

57. In the debates on the proposal Revenue stated :-

> *"it is important to understand that the cases dealt with by the Appeal Commissioners range from those where the law is clear but the facts are in dispute to very complex cases where both the facts and the law are in dispute. To add to the commissioners' difficulties, some of these complex cases, particularly where there is a tax avoidance scheme, can involve a large number of taxpayers. The challenge is to come up with a system which allows for informal procedures in relatively simple cases such as situations, for example, where the taxpayer is not professionally represented, while, at the same time, giving the commissioners' clear powers to manage more complex cases in as efficient a way as possible. Revenue believes the proposed legislation strikes the right balance in that regard."*

58. The Government's representative in the debates referred to appeals and disputes between an individual and Revenue and compared it with other dispute resolution forum when they stated that :

> *"The Appeal Commissioners are the first forum of appeal beyond the position of dispute between the individual and Revenue itself. As in other forums - the Information Commissioner, the Employment Appeals Tribunal, and so on - once the case moves beyond the relationship between the Revenue and the taxpayer, it is appropriate to have greater transparency in the process."*[12]

59. The Commission was established by virtue of the Finance (Tax Appeals) Act 2015. It is described as an "*Act to revise the law concerning the making of appeals in matters of taxation (including in respect of stamp duties and of duties relating to customs and excise)"*. [13] By virtue of section 10 of the Finance (Tax Appeals) Act 2015, the Commission and its members are independent in the performance of their functions. The Act commenced on 21 March 2016 by virtue of the Finance (Tax Appeals) Act 2015 (Commencement) Order 2016. [14] The Commission was further enhanced with the appointment of a Chairperson enacted under the Finance (Tax Appeals and Prospectus Regulation) Act 2019. The powers of the Commission are being further expanded with section 56 Finance Bill 2020 (with amendments to section 949(AV) TCA) to provide greater powers to dismiss appeals.[15]

60. The Commissioner in considering Revenue's Outline of Arguments and oral submissions relating to the jurisdiction (or lack thereof) of the Commission in respect of this appeal has also taken cognisance of Revenue's publications relating to their perspective, prior to this appeal, of the role of the Commission and its immediate predecessor. The Commissioner appreciates that manuals are not legal authority but they do provide an insight into the opinion of Revenue prior to this particular appeal and so some weight can be attached to

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[12] Joint Oireachtas Committee on Finance, Public Expenditure and Reform, 27th January 2015 https://www.oireachtas.ie/en/debates/debate/joint_committee_on_finance_public_expenditure_and_reform/2015-01-27/2/

[13] Finance (Tax Appeals) Act 2015, https://www.oireachtas.ie/en/bills/bill/2015/71/

[14] Finance (Tax Appeals) Act 2015 (Commencement) Order 2016, http://www.irishstatutebook.ie/eli/isbc/2015_59.html.

[15] Finance Bill 2020 https://www.gov.ie/en/speech/4d538-finance-bill-2020-minister-for-finance-paschal-donohoe-td-second-stage-opening-speech-4-november-2020/

them, if only in respect of context and consistency. The role of the Office of the Appeal Commissioners was considered by Revenue in their *Tax and Duty Manual* dated April 2014 before the establishment of the Commission. At Chapter 31, it stated that:

> "*a taxpayer may claim that a tax or duty statute contravenes EU Law; an EU Directive / Regulation (e.g. a VAT Directive or a Customs Regulation), or that it fails to reflect a ruling of the European Court of Justice (ECJ). Whilst direct taxes (e.g. income tax, corporation tax and capital gains tax) are not harmonised, they may still contravene EU law if they conflict with certain rights guaranteed by EU law such as free movement of persons, freedom of establishment and free movement of capital. In addition, EU member states have agreed a number of Directives covering direct taxes (e.g. Parent and Subsidiaries Directives covering dividends, interest and royalties) relating to cross-border business".*

61. At paragraph 31.4 of the *Tax and Duty Manual* it recommended that "*a claim by a person that an Irish domestic tax or duty law contravene EU Law/Directive/Regulation should be brought to the attention of the relevant RLS Division. Where the issue arises in the course of a tax or duty appeal, the Appeal Commissioners or the Courts may refer it the relevant EU office of the ECJ*". At no stage in that manual did it suggest that the Appeal Commissioners would not have jurisdiction to consider an appeal that suggested that Irish domestic tax or duty contravenes EU law. Indeed, there is the comment about referral to the "*relevant EU office of the ECJ"*. It is only national courts or tribunals which have jurisdiction to hear matters and make determinations on the dispute that can make a referral to the CJEU, as discussed below.

62. In Revenue's current guidance on appeals on its website it sets out what can and cannot be appealed but there is no reference to any limitation on the Commission in relation to EU law. The guidance makes clear that not only can the Commission deal with appeals on assessments but can also deal with appeals on decisions and determinations relating to refusal of a tax credit, allowance or relief, claim for repayment, certain valuations, determinations on value added tax (VAT) rate and residency. In addition, it notes that the Commission can deal with appeals on determinations and decisions in respect of artists' exemptions, deductions, cancellations, estimates, custom tariffs, excise matters and mineral fuel trader licences and tax clearance matters. [16]

63. It is self-evident that the Commission's range of powers and functions has widened considerably since the Special Commissioners and the 1930's, when their role was limited to the assessment for the most part to income tax and took place prior to self-assessment, a major change in taxation in Ireland.

64. The Commissioner is also mindful that not only did the role of the Office of the Appeal Commissioners, and by extension its own role, expand since the 1930's but many of the taxes it considers originate from Ireland's entry as a Member State to the EU. The imposition of VAT originates from the EU and is a mechanism to pay for its very existence. Customs duties and tariffs promulgate from the Single Market and the EU. So, Revenue's suggestion that the Commissioner can only consider EU law if it is "incidental" to quantum is somewhat a challenge when the tax originates in Europe and hence the scrutiny of it emanates from EU law.

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[16] Revenue website extract on tax appeals
https://www.revenue.ie/en/corporate/information-about-revenue/appeals/tax-appeals-commission.aspx

65. In addition, the Commissioner is cognisant that its predecessor, the Office of the Appeal Commissioners, has referred matters for preliminary ruling to the CJEU on two occasions without any objection by Revenue. This is consistent with its published material referred to above. By implication, Revenue accepted the Office of the Appeal Commissioners had jurisdiction to consider EU law by not objecting to the appeal and/or the reference for a preliminary ruling to the CJEU. The Office of the Appeal Commissioners must have been dealing with disputes *inter partes* and had the jurisdiction to consider the application of EU law, otherwise the CJEU would not have accepted both referrals for a preliminary ruling, as this is the criteria under Article 267 of the *Treaty of the Functioning of the European Union* ("TFEU"). In addition, it is notable that Revenue did not object on those occasions to the Commission's predecessors as "*not a body resolving disputes inter partes, or enforcing rights and obligations, but is the body charged with valuing or estimating the quantum of a lawful assessment*" (paragraph 5.4 Revenue's Outline of Arguments).

66. In 1998 in the case of Case C-463/98 *Cabletron Systems Ltd v Revenue Commissioners* EU:C:2001:256 (*"Cabletron"*) the Appeal Commissioners of the Office of the Appeal Commissioners made a reference for a preliminary ruling to the CJEU. This concerned the validity of EU Regulations regarding as set out in the headnote to the CJEU decision "*on the interpretation of the Combined Nomenclature of the Common Customs Tariff, set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Commission Regulation (EEC) No 2505/92 of 14 July 1992 (OJ 1992 L 267, p. 1), by Commission Regulation (EEC) No 2551/93 of 10 August 1993 (OJ 1993 L 241, p. 1), by Commission Regulation (EC) No 3115/94 of 20 December 1994 (OJ 1994 L 345, p. 1) and by Commission Regulation (EC) No 3009/95 of 22 December 1995 (OJ 1995 L 319, p. 1).*

67. The CJEU's preliminary ruling reverted that the EU regulations were invalid in certain respects. Revenue did not object that the Appeal Commissioners did not have jurisdiction to determine that case or send a referral for a preliminary ruling to the CJEU. The appeal related to a Revenue decision and the applicable classification of customs tariff. The Appeal Commissioners asked for a view on the interpretation of EU regulations in order to determine the case. There was no suggestion that it was incidental to quantification or any other power. They were having to consider the interpretation of EU law (as set out in the headnote) in order to make their determination.

68. In the case of Case C-355/15 *National Roads Authority v Revenue Commissioners* Case ECLI:EU:C:2017:28 ("*National Roads Authority"*), in June 2015, the Appeal Commissioners of the Office of Appeal Commissioners, referred a preliminary ruling in respect of the interpretation of the VAT Directive relating to the role of a public authority collecting tolls and the VAT treatment. Revenue did not object to the Appeal Commissioners having the jurisdiction to determine this case or make a preliminary ruling to the CJEU. This case involved the interpretation of the VAT Directive. It related to the definition of taxable person and public authorities and the interaction with competition law. It would be somewhat of a challenge to categorise it as incidental to a quantification issue. The issue of whether a public authority should pay VAT and whether it distorted the rules on competition was not "incidental" to quantification. It was the crux of the case.

69. The headnote in *National Roads Authority* describes the reference as a *"request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 13(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1, 'the VAT Directive'). The request has been made in proceedings between the National Roads Authority (Ireland) ('the NRA') and the Revenue Commissioners (Ireland) concerning the treatment of the NRA as a taxable person for value added tax (VAT) in connection with its activity of making road infrastructure available on payment of a toll."*

70. Revenue maintained in this appeal that despite the Commission's predecessors dealing with both the above two cases involving customs tariffs and the VAT Directive and despite Revenue not objecting to preliminary rulings being made and decided by the CJEU (and acting on foot of those preliminary rulings), that the Commission has no jurisdiction to hear a case regarding an assessment on stamp duty and the interpretation of an EU Directive (in relation to stamp duty). It submits that the Commission has no jurisdiction to determine such matters and its jurisdiction is limited to matters incidental to quantification alone.

71. The Commissioner notes that there is no statutory test of "matters incidental to quantification" in the Finance (Tax Appeals) Act 2015. Revenue conceded that the Commissioner could refer this appeal for a preliminary ruling to the CJEU but did not concede that the reference meant it had jurisdiction to determine the appeal. Hence, for completeness the Commissioner has appraised the CJEU jurisprudence on preliminary rulings before it proceeds further and in light of the primacy of EU law with respect to Member States.

3. The Preliminary Ruling Mechanism

72. The reference procedure for preliminary rulings allows national courts to ask questions on EU law to the CJEU. The reference for a preliminary ruling mechanism is one of the key instruments enabling the CJEU to provide this guidance, and to ensure consistency across national courts and tribunals in the Member States. Indeed, many of the most foundational rulings on EU law (and hence the widening of the scope of domestic law across the European Union), including Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1 ("*Van Gend & Loos"*) and Case C-26/62 *Costa v. E.N.E.L.* [1963] ECR 1, EU:C:1963:1 were given in preliminary reference proceedings. Indeed, the case of *Van Gend & Loos* involved the Netherlands Inland Revenue and the application of customs duties in directives. This illustrates the importance of this mechanism. Article 267 of the Treaty on the TFEU states that a preliminary question may be asked by 'any court or tribunal of a Member State'.

73. Article 267 TFEU states that:

> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to* ***enable it to give judgment****, request the Court to give a ruling thereon. (emphasis added)*

74. So, a reference by a court or tribunal which sets out the questions raised and the subsequent decision is undertaken to "*enable it to give judgment*". It is common sense that a tribunal can only refer a question to the CJEU if it needs the answer in order to make a judgment. A preliminary ruling has binding force on the court of tribunal that referred the matter. It cannot ignore the preliminary ruling (*EU Parliament Briefing July 2017 Preliminary Reference Procedure*).[17] It follows that if a court or tribunal has the right to make a preliminary ruling request, and the ruling is binding on it, the same court or tribunal must have jurisdiction to give judgment on the matter in question. Revenue's suggestion that the Commission can make a request for a preliminary ruling in this case ("*to enable it to give judgment*" Article 267 TFEU) but has no jurisdiction in this appeal has no substance. It does not correlate that it has no jurisdiction to determine the matter but that on receipt of the preliminary ruling, the Commission would be bound by it. It could not ignore it or even send the matter to another forum. There are several helpful guidance from the European Union on the preliminary ruling mechanism[18] and the European Court of Justice ("CJEU") (*Recommendations from the Court of Justice of the European Union on Preliminary Rulings*[19]. In the CJEU, *Information note from national courts for a preliminary ruling*, 5 December 2009, OJ C 2009 C 297/01, (para. 9) it confirms that the "*status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law*". [20] All these guidance manuals from the EU confirm the importance of the status of which courts and tribunals can make a referral and the nature of such a referral being in order to enable such a court or tribunal to make a judgment, the referral having to relate to interpretation of EU law on the dispute and the binding nature of the preliminary ruling on the referring body.

75. The leading case on the interpretation of what constitutes a court or tribunal is Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* EU:C:2000:367. The CJEU has confirmed in multiple cases that to qualify as a court or tribunal, a body must meet all, or at least most, of the following criteria to a high degree:

i. It has to be established by law;
ii. It has to be permanent;
iii. It must have compulsory jurisdiction;
iv. It must deal with procedures *inter partes* or follows an adversarial procedure (although the latter is not an obligatory factor (see Case C-54/96 *Dorsch Consult*, para. 31));
v. It must apply rules of law;
vi. And lastly it must be independent. (Case C-14/86 *Pretore di Salò* EU:C:1987:275, or more recently Case C-210/06 *Cartesio* EU:C:2008:723, CJEU, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 17 September 1997, para. 23.)

76. The Commissioner finds that it comes within the definition of a tribunal in accordance with Article 267 TFEU. It was established by the Finance (Tax Appeals) Act 2015. It is a permanent

[17] EU Parliament Briefing July 2017 Preliminary Reference Procedure
https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf
[18] Preliminary ruling proceedings – recommendations to national courts
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14552
[19] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2018/C 257/01)
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0720(01)&from=EN
[20] Information note on references from national courts for a preliminary ruling (2009/C 297/01)
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF

entity, it has compulsory jurisdiction for matters relating to tax and appellants are obliged to lodge their appeals with it, it deals with procedures *inter partes*, namely between two parties, it must apply the rule of law (hence it can be appealed on a point of law through the case stated process) and it is statutorily independent, as outlined in section 10 of the Finance (Tax Appeals) Act 2015. Revenue have submitted that the Commission does not deal with *inter partes* disputes. The Commissioner finds as a matter of fact that this is not the case. There are two parties, namely the taxpayer and Revenue.

77. The disputes relate to determinations, decisions or assessments made or raised by Revenue. If the dispute is not resolved in the taxpaper's favour then there are significant consequences. These can include amongst many other outcomes, from not being able operate your business if you do not have the appropriate licence, not being able to get a tax clearance certificate and hence remain working or in business, issues impacting on the importation of goods, issues affecting the payments of VAT, through to the possibility of having your business wound up for failure to pay your taxes. There are significant consequences for all taxpayers in relation to their appeals and *disputes* with Revenue. Even in the debates before the Oireachtas, as referred to above, the Department of Finance representative stated that the *"Appeal Commissioners are the first forum of appeal beyond the position of dispute between the individual and Revenue itself."*

78. The Commissioner reiterates the view of McCarthy J in *Navan Carpets Ltd v S O'Culachain (Inspector of Taxes)* III ITR 1978-1987 403. McCarthy J held that (page 16) "*in my view it is mere semantics to say that a claim, however procedurally promoted, by a taxpayer that has been overcharged and consequently has overpaid tax, the claim being formally contested in the name of the inspector of taxes is not an action inter partes, it is hair-splitting*."

79. The Commissioner has also read the *Annual Report 2019 Judicial Activity of the Court of Justice of the European Union*.[21] Since 1952 there have been 11,358 references for a preliminary ruling from the Member States. The vast majority of those references emanated from tribunals and administrative bodies, as is confirmed in the Annual Report 2019. Ireland has only referred 125 matters for a preliminary ruling in the period from 1952 to 2019 and 48 of those references occurred since 2015. This compares with Germany who have referred 2641, United Kingdom 655, and Luxembourg 102, population circa 610,000 (page 183). In 2019, the CJEU received 638 references for a preliminary ruling and 67 related to taxation matters (page 162). So, the Commissioner concludes that referrals from tribunals and administrative bodies is not out of the ordinary (de rigeur) and as such, it is normal course that those bodies have the jurisdiction to consider EU law. They would not be able to make a referral if this was not the case.

4. Tribunals in other Member States

80. The Commissioner has also scrutinized the authorities provided by the parties and the many tribunals and in particular tax tribunals across the Member States, who considered they had jurisdiction to consider and either interpret domestic tax provisions in accordance with EU law or disapply EU Directives on taxation. The Commissioner has regard to the seminal case of Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* EU:C:1982:7. This involved a reference for a preliminary ruling from the Finanzgericht Münster in Germany, the first level appeal of a tax assessment.

[21] Annual Report 2019 Judicial Activity of the Court of Justice of the European Union,
https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/qd-ap-20-001-en-n.pdf

81. The Commissioner has also for completeness reviewed in particular the cases relating to Directive 2008/7 and its predecessors, known collectively as the Capital Taxes Directive. It is evident that across the EU, tax tribunals have jurisdiction to consider the Capital Taxes Directive and as such have made references to the CJEU or disapplied the provisions. A limited sample of such cases for brevity include the cases of Case C-50/91 *Commerz-Credit-Bank AG - Europartner v Finanzamt Saarbrücken* ECR 1992 1-05225 EU:C:1992:386. This involved a reference for a preliminary ruling from the Bundesfinanzhof, in Germany, a federal finance court and the imposition of capital duty on the transfer of a branch. In the case of Case C-339/99 *Energie Steiermark Holding AG v Finanzlandesdirektion für Steiermark* ECR 2002 I-08837 EU:C:2002:588, there was a reference for a preliminary ruling from the Verwaltungsgerichtshof in Austria, the Higher Administrative court involving Directive 69/335 and applying capital on payments made upon the entry of a new member as a shareholder in the company. In France, a referral was made in Case C-8/96 *Locamion SA v Directeur des services fiscaux d'Indre-et-Loire* ECR 1997 I-07055 EU:C:1997:601 from the Tribunal de Grande Instance de Tours, which is the France regional tribunal. It involved interpretation of Directive 69/335 and Article 7(1)(b) (equivalent to Article 4 in 2008/7) as amended by Council Directive 73/79/EEC.

82. This undermines Revenue's arguments concerning the Commission not having jurisdiction to deal with this appeal when equivalent tax tribunals across Europe consider the application of EU law. It would effectively mean that the Irish tax tribunal is an outlier in this respect. This cannot be in compliance with EU membership. Revenue in oral submissions repeatedly mentioned that the Commissioner should dismiss the appeal as this would provide certainty as to its jurisdiction. The Commissioner disagrees with this view and would only increase uncertainty to the extent that the Commission would not be able to ascertain in which cases it should consider EU law and which it needs to dismiss. It would undermine the purpose of the setting up of the Commission, namely an expert tribunal dealing with taxation matters including consideration of EU taxes, duties and tariffs and their application in the domestic arena.

83. The Appellant drew on the cases in relation to Directive 2008/7 and its predecessors and its consideration by other tax tribunals and courts across other Member States. There was referrals for preliminary rulings from the Special Commissioners and the First Tier Tribunal, its successor in the United Kingdom. Revenue in their submissions asked the Commissioner to distinguish these tribunals on the basis that their role was different with respect to the Commission and hence they had a different jurisdiction. The Commissioner does not find any merit in that argument. It is notable that both the Special Commissioners and now the First Tier Tribunal have referred cases to the CJEU on UK domestic law and the Directive 2008/7 and its predecessor Directive 69/335. The First Tier Tribunal has also made decisions without recourse to the CJEU on the compatibility of domestic legislation and the Directive 2008/7 in respect of Her Majesty's Revenue and Customs raising an assessment and charge to stamp duty.

84. The Appellant made submissions on the equivalency of the Commission to the First Tier Tribunal in the United Kingdom. Revenue's objected to any equivalency in the First Tier Tribunal and the jurisdiction of the Commission in this area. Their objection centred on two main limbs, namely that the Tribunals Courts and Enforcement Act 2007 which set up the First Tier Tribunal was a 'step change' in the powers and jurisdiction of the First Tier Tribunal as opposed to its predecessor, the Special Commissioners and secondly that the First Tier Tribunal had enforcement powers, as distinct from that of the Commission. There was also a reference to the Upper Tribunal having the power to undertake judicial reviews.

85. The Commissioner has checked the legislative underpinning in this regard but the Upper Tribunal has the same standing in law as the High Court in England and Wales, and so there is no relevancy to this appeal. The Appellant is not suggesting that the Commission should consider judicial reviews. Revenue's counsel suggested that in 2007 England and Wales undertook a radical departure with the introduction of the First Tier Tribunal. Revenue suggests the First Tier Tribunal was constituted differently from the Commission as it had enforcement powers in relation to penalties. The Commissioner notes that it was not until 2009 that the statutory provisions came into force in relation to the First Tier Tribunal and makes that comment for accuracy. The Commissioner does not find that the First Tier Tribunal having an additional functional power negates any equivalency to the Commission, with respect to its role in determining assessments.

86. Revenue further suggested that for the period from 1972 to 2007 (albeit it was 2009) before the replacement of the Special Commissioners by the First Tier Tribunal, there were no cases whereby the Special Commissioners dealt with the Capital Taxes Directive. However, this is not the case and indeed in Case C-569/07 *HSBC Holdings and Vidacos Nominees v the Commissioners of Her Majesty's Revenue & Customs* ECR 2009 I-09047 EU:C:2009:594, there was a preliminary ruling from the Special Commissioners in relation to the interpretation of Council Directive 69/335/EEC, ("Directive 69/335") the predecessor of Directive 2008/7. It was a preliminary ruling concerning the interpretation of Articles 10 and 11 of Directive 69/335 and stamp duty and involved a complex transaction involving transfer and issue of shares through clearance services. The United Kingdom was found to be in breach of the Directive 69/335 in that case.

87. As Revenue raised the First Tier Tribunal as being distinct in its jurisdiction and powers to the Commission, the Commissioner has for absolute surety surveyed the roles and powers of the First Tier Tribunal. The role of the Special Commissioners changed to become the role of the First Tier Tribunal under The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.[22] The United Kingdom transferred the various tribunals and administrative bodies under an umbrella tribunal system. The Law Commission in Ireland is considering reform in Ireland of its many quasi-judicial bodies and consideration of an umbrella forum in its Fifth Programme of Law Reform. [23]

88. On examination of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, the Commissioner finds that the First Tier Tribunal deals with decisions, determinations and appeals on assessment, as had previously been the case in respect of the Special Commissioners. In respect of stamp duty appeals, which is the area of consideration in this case, section 13A(12) of the Stamp Duty Act 1891 was amended so that the reference to "Special Commissioners" was amended to read "First Tier Tribunal". The Commissioner finds that in relation to stamp duty appeals there was no significant change to the role of the First Tier Tribunal, as opposed to the Special Commissioners. The Commissioner does not find any validity in Revenue's contention that the First Tier Tribunal's role is different to the Commission, such that it can make decisions on the compatibility of stamp duty in light of Directive 2008/7 but the Commission cannot. Revenue could not give any helpful

[22] The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009https://www.legislation.gov.uk/uksi/2009/56/made

[23]Law Reform Fifth Programme https://www.lawreform.ie/_fileupload/Programmes%20of%20Law%20Reform/LRC%201202019%20Fifth%20Programme%20of%20Law%20Reform.pdf

distinguishing authorities as to why previous referrals by the Appeal Commissioners, the Special Commissioners in the United Kingdom and the First Tier Tribunal in determining tax appeals and in particular stamp duty assessments had no application to the Commission. Further exploration of the powers of the First Tier Tribunal are discussed below in relation to Revenue's submissions on statutory powers in respect of reducing, increasing or letting stand an assessment.

5. Domestic Jurisprudence in relation to Tribunals

89. In addition to considering the guidance and EU jurisprudence regarding references for preliminary rulings, the jurisprudence concerning other tribunals making determinations and preliminary rulings with regard to Directive 2008/7 and its predecessors, the Commissioner has, for certitude, also reviewed domestic jurisprudence on the role of administrative bodies/tribunals/quasi-judicial decision making bodies and its role in considering EU law and the conformity or otherwise of domestic legislation with EU Law. The leading case in terms of Irish administrative bodies/tribunals is Case C-378/17 *Commissioner of An Garda Síochána v Workplace Relations Commission* EU:C:2018:979 ("*WRC* case"). Revenue submitted that the *WRC* case has very little applicability to the Commission. This was on two grounds. The first being that the Workplace Relations Commission relates to rights between parties and secondly that it is about enforcement role, whereas the Commission's role is about interpretation.

90. The Commissioner has assessed in detail the *WRC* case. This case confirmed, without any equivocation, that Ireland's national bodies established by law in order to ensure enforcement of EU law in a particular area must be able to disapply a rule of national law that is contrary to EU law. It arose from a request for a preliminary ruling by the Supreme Court on the right of the Workplace Relations Commission to disapply domestic law which was in contravention of Directive 2008/78. This Directive related to equality of treatment in employment. The Directive 2008/78 had been transposed by the Employment Equality Acts 1998 to 2015. Any person seeking redress for discrimination could apply to the Workplace Relations Commission. Three individuals brought claims to the Workplace Relations Commission who sought to join An Garda Síochána on the basis that they were being discriminated on the basis of age due to the age restrictions under the Garda Síochána (Admissions and Appointments) Regulations 1988. It is notable that British policing and other police forces across Member States had abandoned any age restrictions on entry or on retirement many years ago in recognition of Directive 2008/78.

91. The Equality Tribunal, the predecessor of the Workplace Relations Commission decided that it would proceed to consider the complaints, nevertheless stating that it would, as part of that process, consider and decide the jurisdictional issue raised by the Minister. The Minister brought an action before the High Court (Ireland) for an order prohibiting the Equality Tribunal from acting in a manner contrary to law. The High Court upheld the Minister's action by an order prohibiting the Equality Tribunal from ruling on the complaints of Mr Boyle and Others. The High Court held that the Equality Tribunal lacked jurisdiction to adopt a legally binding decision concluding that national law was incompatible with EU law, as that power was expressly reserved to the High Court under Article 34 of the Constitution of Ireland. The Equality Tribunal appealed against that order to the referring court, the Supreme Court (Ireland). The Supreme Court made a reference to the CJEU in respect of the jurisdiction of the Workplace Relations Commission to disapply domestic legislation. The issue in that case is closely aligned with this appeal, with the Workplace Relations Commission seeking to consider the disapplication of domestic law, whilst the superior courts held that they did not

have the jurisdiction to do so. In effect, citizens were being expected to partake in a twin track system for bringing their complaints; some to the Workplace Relations Commission - but others (if it involved disapplication of domestic law) to the superior courts. The CJEU held that this was not in compliance with EU law and gave its preliminary ruling to the Supreme Court.

92. The CJEU made a preliminary ruling (paras 36-39) that :

> 36 "any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU 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 disregard national legislative provisions which might prevent directly applicable EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law (see, to that effect, judgments of 9 March 1978, *Simmenthal* 106/77, EU:C:1978:49, paragraph 22; of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 20; and of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 56).
>
> 37 That would be the case if, in the event of a conflict between a provision of EU law and a national law, the solution of the conflict were to be reserved to an authority with a discretion of its own, other than the court called upon to apply EU law (judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 57 and the case-law cited).
>
> 38 As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law (see, to that effect, judgments of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraph 31; of 9 September 2003, *CIF*, C-198/01, EU:C:2003:430, paragraph 49; of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 80; and of 14 September 2017, *The Trustees of the BT Pension Scheme*, C-628/15, EU:C:2017:687, paragraph 54).
>
> 39It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules.

93. In this appeal, Revenue sought to distinguish the clear and unequivocal ruling in this case, that all bodies of Member States to give full effect to EU rules must apply EU law. It suggested that this ruling did not apply to the Commission as it did not "*enforce*" EU law in the way that the Workplace Relations Commission was set up. Revenue read paragraph 46 of the preliminary ruling which stated that "*if the Workplace Relations Commission as a body upon which the legislature has conferred the power to ensure enforcement of the principle… of non-discrimination"* as exclusive to "enforcement". The Commissioner finds that this is a misreading of the ruling. The CEJU is emphasising the potential absurdity of setting up a body to enforce the equality provisions of an EU Directive and then that same body not being able to ensure EU law is fully effective and enforced. It is not meant to be read as meaning that only tribunals whose only raison d'etre is to apply or disapply EU law come within this ruling.

94. The Commissioner reads the gestalt of paragraph 46 of the preliminary ruling, as it was intended and in compliance with Case 103/88 *Fratelli Costanzo SpA v Comune di Milano*, EU:C:1989 (*"Costanzo")*and Case 8/81 *Becker*, at p.71 and in Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* (1986) ECR 723, at p.748).

The CJEU at paragraphs 46 and 47 of the *WRC case*, made clear the wide ranging duty on bodies charged with dealing with disputes in a particular area to ensure application or disapplication of EU law. It also confirms that if a court or tribunal within the meaning of Article 267 TFEU makes a request for a preliminary ruling, it must apply that preliminary ruling in its judgment and if necessary disapply, any conflicting provisions of national legislation. It states:

> "46 Indeed, it would be contradictory if an individual were able to rely upon the provisions of EU law in a particular area before a body upon which national law has conferred jurisdiction over disputes in that area but that body were under no obligation to apply those provisions by refraining from applying provisions of national law which conflict with them (see, to that effect, judgment of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, paragraph 31).
>
> 47 Furthermore, in so far as the Workplace Relations Commission must be considered to be a 'court or tribunal' within the meaning of Article 267 TFEU (see, to that effect, judgment of 18 March 2014, Z.,C-363/12, EU:C:2014:159), it may refer to the Court, pursuant to that article, questions of interpretation of relevant provisions of EU law and, as it is bound by the judgment in which the Court gives a preliminary ruling, it must forthwith apply that judgment, disapplying, if necessary, of its own motion conflicting provisions of national legislation (see, to that effect, judgment of 5 April 2016, PFE, C-689/13, EU:C:2016:199, paragraphs 32, 34, 39 and 40)."

95. The Commissioner is further persuaded that any attempt by a Member State to prevent a body giving full effect to EU law is also incompatible with EU law. It has reviewed the case of Case C-689/13, *Puligienica Facility Esco SpA (PFE) v Airgest SpA* C:2016:199, paragraph 41:

> "41 Any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law (see judgments in Simmenthal, 106/77, EU:C:1978:49, paragraph 22, and A, C-112/13, EU:C:2014:2195, paragraph 37 and the case-law cited)."

96. The Commissioner has no doubt that it must apply EU Law to ensure the effectiveness of EU law and is even further convinced of this view by the recent case of Case C-274/14 *Banco de Santander SA* EU:C:2020:17 ("*Banco de Santander SA*). This case is recent and is dated 21 January 2020. It is further confirmation, if any was needed, as to the obligation of all bodies, not just courts and tribunals, as defined by Article 267 TFEU to consider and apply (or disapply) EU law. The case involved a request for a preliminary ruling from a body in Spain called the Tribunal Económico-Administrativo Central (TEAC) (Central Tax Tribunal, Spain) (and its constituent bodies TEAs). The TEAC requested a preliminary ruling on the interpretation of a Commission Decision relating to tax amortisation of financial goodwill for foreign shareholding acquisitions. The TEAC hears complaints against decisions taken by certain central tax authorities. The Court found that the TEAC was established by law, that it was permanent, that its jurisdiction was compulsory, that its procedure was inter partes and that it applied rules of law. However, the Court found that due to the lack of independence of the TEAC (due to how its members could be removed) it did not meet the independence test that applies for courts or tribunals under Article 267 TFEU. There is no doubt that the Commission meets the independence criteria along with the other criteria. This is demonstrated by acceptance of other requests for preliminary rulings from its predecessor, the statutory provisions of independence, together with other similar tax tribunals in other jurisdictions meeting these tests.

97. The Commissioner is mindful in particular of paragraph 78 of the CJEU in *Banco de Santander SA* which states even if a body does **not** constitute 'courts or tribunals' for the purposes of Article 267 TFEU, that body is **not** relieved of its obligation to ensure that EU law is applied when adopting their decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect. The CJEU even referred to the *WRC* case in this judgment. The CJEU held (para 78):

> "78 It must be added that the fact that the TEAs do not constitute 'courts or tribunals' for the purposes of Article 267 TFEU does not relieve them of the obligation to ensure that EU law is applied when adopting their decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities (see, to that effect, judgments of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, paragraphs 30 to 33; of 14 October 2010, C-243/09 FußEU:C:2010:609, paragraphs 61 and 63; and of 4 December 2018, *The Minister for Justice and Equality and Commissioner of An Garda Síochána*, C-378/17, EU:C:2018:979, paragraphs 36 and 38)."

98. Revenue in paragraph 6.9 of their Outline of Arguments attempts to distinguish *Banco de Santander SA* on the basis that the TEAs and TEAC (the tribunals in question) had been set up under legislation which gave it the right to seek a preliminary ruling, whereas the Commission has no such statutory provision. This is a misreading of the *Banco de Santander SA* case. The CJEU finds that based on its test of Article 267 the TEA does not come within a court or tribunal and even though there is the domestic legislative provision allowing it to do so, that in itself does not make it come within Article 267. It is another example of the supremacy of EU law. The CJEU again is affirming that even bodies that are not within Article 267 must still ensure the application (or disapplication) of EU law. Revenue further noted in paragraph 6.11 of their Outline of Arguments that the Commission had not previously disapplied domestic law in light of EU law or considered in full the WRC case. The Appellant set out the cases in which there had been reference to the *WRC* case by the Commission and which considered EU law in that manner. The fact the Commission has not disapplied EU law previously does not mean of itself that it cannot do so.

99. Revenue in their Outline of Arguments and their submissions contend that the Commission, should not consider the applicability of EU law but should leave that to the courts and promoted this as the "safest course". But this is not the position promulgated by the CJEU and is the opposite of their direction to national authorities, be they courts or tribunals or otherwise (*Banco de Santander SA*). Revenue further suggested that the Commission did not deal with different parties' rights, where one is "the winner and the other a loser", as happens in the Workplace Relations Commission or An Bord Pleanála or the Circuit Court. The Commissioner does not agree with the characterisation of cases before the Workplace Relations Commission, An Bord Pleanála or the Circuit Court in this way. The *WRC* case involved citizens who were prevented from joining An Garda Síochána due to the age restrictions. It could be argued that due to the domestic legislation restricting entries on the basis of age, the State prevented able candidates joining its national police force. So, the State was not the winner. So, a characterisation of winners and losers is not helpful and is not specified in any EU jurisprudence and is not a characteristic of the *WRC* decision of the CJEU. The Commissioner does not consider citizens exercising their lawful entitlements (such as not to be discriminated on any basis) as "winning" but only seeking what they are already entitled to as EU citizens and as a benefit of their membership of the EU.

100. The Commissioner has also examined how it would apply Revenue's submission that it can only consider EU law when it is incidental to quantification and cannot disapply domestic law to appeals brought by the hypothetical individual member of the public, as opposed to an international global entity. This question was put to Revenue at the hearing. Revenue's response was that individual members of the public would also have to seek a remedy in the High Court when disapplication of EU law arises. This would undermine the many cases already determined by the CJEU. It would also cause confusion for the public in trying to ascertain which forum to pursue their case. Individual taxation cases have been successful where Member States have been found to be in breach of the Treaties. Tribunals and courts have disapplied domestic legislation in contravention of Treaty rights. The Schumacker Principle established in *Case C-279/93 Finanzamt Köln-Altstadt v Roland Schumacker* involved a reference for a preliminary ruling from the Bundesfinanzhof, Germany with respect to Article 48 of the EEC Treaty. It established that non-residents working in a Member State must be treated the same for tax purposes as residents and the CJEU found the tax authorities to be in breach of the founding principles of the EU, freedom of movement under Article 48 EEC Treaty.

101. Other tax cases have confirmed individual rights as citizens of the EU such as Case C-520/04 *Turpeinen* under Article 234 EC by the Korkein hallinto-oikeus (Finland) with respect to pension rights, and Case C-169/03 *Wallentin* EU:C:2004:403 and student income earned and taxed outside a Member State. The logical extension of Revenue's submissions in this case is that individual members of the public should also proceed in cases whereby they perceive Revenue have acted contrary to EU law (such as a German national being taxed more than an Irish national (*Schumacker*) or a Finish pensioner (*Turpeinen)* in Ireland having to pay tax in two Member States, only to the High Court. The Commissioner finds such an outcome is against the purpose of the Commission and the jurisprudence of the EU as set out above.

102. The Commissioner has also contemplated Revenue's submission that the "safest course" is not to consider EU law but dismiss the appeal, as also being contrary to the direction of the CJEU which is demonstrated by paragraph 78, *Banco de Santander SA* and paragraph 52 Case C-394/11 *Belov* ("*Belov"*). The CJEU considered that the existence of judicial appeals from a body ensures the uniform interpretation of EU law, as any such appeal body can where appropriate make a request for a preliminary ruling to the Court of Justice for a decision on the interpretation or the validity of EU law in order for them to give judgment. As in *Banco de Santander SA* and *Belov*, the appeal mechanism is another safeguard not the excuse to ignore EU law by tribunals.

103. This negates Revenue's concern that there would not be certainty if the Commissioner made a determination in this appeal with relation to EU law. The CJEU not only commands that national authorities, courts and tribunals must apply, or if applicable, disapply EU law, but in doing so, the right of appeal and hence preliminary rulings are the fail safe mechanism for consistency of application of EU law.

104. The Commissioner observes that if Revenue's view was correct it would only be open to appellants with the resources to go to the superior courts. This in of itself would negate the principle of EU settled law that all citizens are entitled to the application of EU law and consistency across Member States and national courts and tribunals called upon, in the

exercise of their jurisdiction, must give full effect to EU provisions (*Simmenthal*), 106/77, EU:C:1978:49, paragraph 22), *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 20, *Case C-14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen EU:C:1984:153*,paragraph 26).

105. The Commissioner further notes that this would mean that only taxpayers with resources could proceed with "appeals" to the High Court based on consideration of EU law and the application of directives (or other EU provisions) to domestic law. The legal costs of the superior courts can be challenging for members of the public including the added disadvantage of the exposure to costs awards against members of the public, if they lose litigation and the usual "costs in the cause" orders. This is opposed to the free access to the Commission for all taxpayers on all appeals and no exposure to costs awards by either party. The inconsistency of treatment for those that could afford to litigate in the superior courts and have their "appeal" assessed in light of EU law, to those who cannot so afford, would also go against the ethos and values of Revenue who set out in both the *Revenue Statement of Strategy 2020-2022*[24] and the *Revenue Corporate Framework of Governance* of their commitment to "consistency" in all their dealings. [25] This echoes the values of EU membership, with consistency of treatment across Member States being the foundation of EU membership.

106. In addition, Revenue made submissions that if the Commission were to accept that it had jurisdiction to hear this appeal then it would vastly increase the Commission's workload and the complexity of appeals before it. It referred to the Commission's resources. Revenue confirmed that it was not making a "floodgates" type argument, although conceded that it could appear that way from its Outline of Arguments. But it confirmed that it was only suggesting that a bi-product of accepting it had jurisdiction to consider this appeal was that it would increase its workload and the complexity of its cases. Revenue repeatedly submitted that the safest course of action was to dismiss the appeal. For clarity, the Commissioner does not accept that resources are a reason to either accept or dismiss an appeal.

6. Domestic Jurisprudence in relation to Jurisdiction of the Commission

107. Revenue repeatedly suggested that the Commission's jurisdiction relates to quantification of an assessment only and any matter relating to EU law must only be in respect of or incidental to its jurisdiction of quantification. Revenue suggest that the Commissioner's role is to reduce, increase or leave stand the amount of assessment and that does not entail considerations of EU law except where those are incidental to the quantification of the assessment. Revenue submitted that this appeal was taking the Commission beyond that interpretation.

108. The role of the Office of the Appeal Commissioners was defined in section 934(3) of the TCA as set out below:

> *934(3) Where on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.*

[24] Revenue Statement of Strategy 2020-2022
https://www.revenue.ie/en/corporate/documents/governance/sos-2020-2022.pdf
[25] Revenue Corporate Governance Framework – reviewed April 2020
https://www.revenue.ie/en/corporate/documents/governance/governance-framework.pdf

The role of the Commission is set out in section 949AK of the TCA as follows:

> ***949AK*** Determinations in relation to assessments
>
> *(1) In relation to an appeal against an assessment, the Appeal Commissioners shall, if they consider that—*
>
> *(a)an appellant has, by reason of the assessment, been overcharged, determine that the assessment be reduced accordingly,*
> *(b)an appellant has, by reason of the assessment, been undercharged, determine that the assessment be increased accordingly, or*
> *(c)neither paragraph (a) nor (b) applies, determine that the assessment stand.*
>
> *(2) If, on an appeal against an assessment that—*
> *(a)assesses an amount that is chargeable to tax, and*
> *(b)charges tax on the amount assessed,*
>
> *the Appeal Commissioners consider that the appellant is overcharged or, as the case may be, undercharged by the assessment, they may, unless the circumstances of the case otherwise require, give as their determination in the matter a determination solely to the effect that the amount chargeable to tax be reduced or increased.*
>
> *(3) In relation to an appeal against an assessment on the grounds referred to in section 959AF(2), if the Appeal Commissioners determine that a Revenue officer was precluded from making the assessment or the amendment, as the case may be, the Acts (within the meaning of section 959A) shall apply as if the assessment or the amendment had not been made and, accordingly, that assessment or amended assessment shall be void.*
>
> *(4) In relation to an appeal against an assessment on the grounds referred to in section 959AF(2), if the Appeal Commissioners determine that a Revenue officer was not precluded from making the assessment or the amendment, as the case may be, that assessment or amended assessment shall stand, but this is without prejudice to the Appeal Commissioners making a determination in relation to that assessment or amended assessment on foot of an appeal on grounds other than those referred to in section 959AF(2).*

109. Revenue has asked the Commissioner to consider many cases in relation to the Commission and its predecessor's jurisdiction. They include amongst others the cases of *Smidic*, *R v Income Tax Commissioners* [1936] 1 KB 487, *Sneath*, *The State (Calcul International Ltd) v The Appeal Commissioners* III ITR 577, *Menolly Homes Ltd v The Appeal Commissioners* [2010] IEHC 49 (*"Menolly Homes"*)), *O'Rourke v Appeal Commissioners* [2016] 2 IR 615, *Lee v Revenue Commissioners* [2018] IEHC 46 ("*Lee*"), *Criminal Assets Bureau v Sean and Rosaleen Hunt* [2003] IESC 20 ("*CAB v Hunt")*, *Deighan v Hearne* [1990] IR 499 ("*Deighan*"), *Stanley v Revenue Commissioners* [2017] IECA 279 ("*Stanley"), O'Rourke v Appeal Commissioners* [2016] 2 IR 615.

110. Revenue maintained throughout their Outline of Arguments and the hearing that the case referred to above that this appeal is for the Courts alone and the Commission should not trespass on them. The Commissioner has assessed the cases from the 1930's, otherwise known as the *Smidic* and *Sneath* cases. The Commission's powers in respect of the assessment are to reduce, increase, stand or declare void (section 949AK (1)-(5) TCA) as referred to above.

Those powers have been maintained in the various statutory provisions through to the present day.

111. In the case of *Smidic* the specific question arose was whether the Special Commissioner (Ireland) exceeded his authority by purporting to revisit and reverse a ruling that he had made on a question of fact before reaching a final determination. It was in that context that Byrne J stated (at 641) that :

> "It may be a matter of convenience in the hearing of the appeal for the Special Commissioners to give rulings on questions of law or fact which will assist in determining the taxpayer's liability to tax and the extent of such liability, and to have the figures, with reference to the taxpayer's income, examined in light of such rulings, by the Surveyor of Taxes or others; but these seem to me to be merely steps leading up to the final determination."

112. The Commissioner finds nothing in this ruling that negates their jurisdiction to consider this assessment and appeal. The Commissioner must make rulings on questions of law and fact which are merely steps leading up to the final determination. The judgment in *Smidic* directs as to what the final outcome must be in terms of an order directing that the assessment shall abate altogether, can be varied by diminishing it in a definite amount, or that the original assessment remains. There is nothing in this judgment which prevents the Commissioner considering this assessment and making those orders. In respect of stamp duty, it is either payable at 1 per cent or it is not. So questions as to varying or decreasing are only in respect of the 1 per cent or nil. The Commissioner notes that when the *Smidic* case was decided it related to income tax and was before Ireland's membership of the EU. There was no concept such as VAT, or customs tariffs or EU Directives, as they emanate from Ireland's membership of the European Union. The Special Commissioners did not have to consider EU law, as there was no obligation to do so. So, whilst *Smidic* remains applicable to income tax cases and the powers of the Commission are similar to those expressed in that case, the context and considerations in respect of assessments are different some 90 years later. The Commissioner appreciates the holistic explanation of the *Smidic* case, as set out in the *Lee* judgment, referred to below. The Commissioner has assessed how the case of *Smidic* and *Sneath* are judged in the 21st century in both Ireland and then England and Wales respectively.

113. In the High Court decision in *Lee*, the High Court reviewed the context of the *Smidic* and *Sneath* decisions and confirmed that it is inappropriate to excise extracts from case law without understanding the full context of the decision and what went before and after the various extracts. Again, the Commissioner takes cognisance of the High Court's judgment and review of the meaning of *Smidic* and *Sneath,* both in their own time and bringing them up-to-date as "state of the art". Revenue relied on this case. But it does not support its view that the Commissioner does not have jurisdiction to hear this appeal. In fact, it is quite the reverse. It is important that decisions of aged cases are examined holistically rather than passages excised without context.

114. Keane J in *Lee* provides that helpful holistic view and understanding of previous cases. The case is unique on its own facts which related to whether or it consideration of a prior settlement is applicable in respect of the Appeal Commissioners and their obligation to abate, reduce, permit to stand any assessment. Keane J considered the cases of *Smidic* and *Sneath* and their meaning with respect to the Appeal Commissioners' jurisdiction. Due to the consideration of these cases, it is worthwhile quoting extensively from the judgment as the

Commissioner could not have worded it with any more wisdom or precision. Keane J stated at paragraph 56:

> "56. The English Court of Appeal took a different view. The respondent relies very heavily on the following passage from the judgment of Greer LJ (at 385), cited by O'Byrne J in Smidic's Case (at 635):
>
>> 'I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question.'
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> 57. But O'Byrne J went on (at 635) to cite also the following passage from the judgment of Romer LJ in the same case (at 390-1):
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>> 'The appeal is merely another step taken by the Commissioners at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax. In estimating the total income of the taxpayer, the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact and law. But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question.'
>
> 58. As O'Byrne J noted in Smidic's Case, in Elmhirst's Case the English Court of Appeal cited with approval the passages just quoted from the judgment of Greer and Romer LJ in Sneath's Case, in holding that the taxpayer in that case had no right to withdraw a notice of appeal to the Special Commissioners against an income tax assessment without the Commissioners' consent. It is, perhaps, significant to note that the decision of the Court of Appeal appears to be based more obviously on the proposition that the statutory jurisdiction of the Commissioners under the provisions of the Income Tax 1918 - equivalent to that of the Appeal Commissioners and Circuit Court under s.934(3) and (4) of the TCA - is wider, rather than narrower, than that of a judge determining a lis inter partes. As Lord Wright MR observed (at 493):
>
>> 'I may note here at once, that in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter partes; they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed.'
>
> 59. The respondent's argument is that in describing, 'the estimating authorities' under the Income Tax Act 1918 as being 'merely in the position of valuers', even when they were dealing with an appeal, Greer LJ was by implication asserting a strict limitation on the subject-matter jurisdiction of the Special Commissioners in the conduct of an

appeal under that statute. But there are difficulties with that position. It is plain that the limitation Greer LJ had in mind was temporal (or precedential) rather than jurisdictional. That is to say, his conclusion was that a decision of the Commissioners could not have any effect beyond 'valuing' the taxpayer's liability for the assessment period or periods under appeal and could not create an estoppel or res judicata in respect of the approach to the assessment of that - or any other - taxpayer's liability for any other period. The same view was taken by Teevan J in Bourke (Inspector of Taxes) v Lyster and Sons Ltd, already cited.

60. Moreover, it is clear from the authorities just quoted that the statutory powers and authority of the Appeal Commissioners must entail the jurisdiction - indeed, the obligation - to give rulings on incidental questions of law or fact where necessary or appropriate."

115. Keane J went on to explain his reasoning in relation to the import of *Menolly Homes* in terms of the jurisdiction of the Appeal Commissioners. He went on to explain at paragraph 67-68 of his judgment:

"67. The respondent laid great emphasis on the decision in Menolly Homes Limited, already cited as an example of as a case in which the court found that the dissatisfied taxpayer should have pursued an application for judicial review, rather than an appeal to the Appeal Commissioners. But the issue that the taxpayer in that case sought to raise before the Appeal Commissioners on a VAT appeal was whether the tax inspector concerned had properly or bona fide formed a 'reason to believe' that the relevant amount of VAT was due. Hence, the taxpayer there sought to challenge the lawfulness or vires of the original VAT assessment. That is very nearly the archetype of an issue governed by administrative law, rather than private law, principles.

68. In my judgment, in circumstances where the Oireachtas has enacted elaborate procedures for the determination of a taxpayer's liability by assessment and appeal to the appeal commissioners, accompanied by a right of appeal to the Circuit Court, it would be unwarranted and, indeed, unfair to adopt an artificially narrow construction of the powers and authority of those bodies to determine incidental questions of fact and law that may arise in that regard, thereby requiring taxpayers who wish to raise such questions to risk the attendant costs, and to incur the additional stress, of prosecuting or defending separate proceedings instead."

116. The Commissioner determines from this judgment and the other judgments cited by both parties that its role in assessing the taxation that should be paid is not merely as hearing a case *inter partes,* but is wider than that and relates to society as a whole. In terms of the role in relation to its statutory powers it must give rulings and is obliged to give rulings which relate to fact and law. In addition, the reference to Appeal Commissioners being valuers is not to limit their jurisdiction but relates to the temporal nature of each case in relation to another, so that one taxpayer cannot rely on a valuation in one case as opposed to another. However, that is not to suggest that determinations that the Commissioner makes cannot be referred to by other parties but the amount of tax that the Appeal Commissioners have determined in a particular case in their role as valuers, does not create a res judicata for others. In respect of this appeal, the Commissioner determines that it is obliged to consider questions of law and fact in determining the assessment and the amount of stamp duty payable and in doing so it must consider domestic law, EU law and its application to the Assessment. It would be failing in its duty and statutory obligations if it did not do so.

117. Revenue also seek to rely on the case of *Sneath* to promulgate the view that the Commissioner, as was referred to as the role of the Special Commissioners, was to be "*merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate*" and further the "*only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income*". Again, the Commissioner does not consider that this 1930's case limits the Commission's jurisdiction in this case in considering the stamp duty "valuation", to utilise Revenue's repeated expression and to decide the correct amount of stamp duty that should be payable. The Commissioner is also mindful of the place in history of the case of *Sneath* and it is correct to understand that history, as has been done by the English courts and the First Tier Tribunal.

118. The case of *Sneath* has been distinguished on more than one occasion by the English courts and First Tier Tribunal. That does not diminish it in any way but the role of its successors has changed and in consequence, the utilisation of its powers. It is important that when a party seeks to rely on an English case from the 1930's, that its current standing in that jurisdiction is also understood. In the High Court in England and Wales in *King v Walden (HM Inspector of Taxes)* 2001 EWHC Ch 419, Jacob J, (paragraph 20-21) referred to the decision of Megarry J in *Slaney v Kean* [1970] 1 Ch 243. He reminded us as follows:-

> "20. Megarry J held that the Court had no jurisdiction to allow an appeal by consent. His full analysis of the position (which included consideration of *Caffoor*) led him to conclude that the nature of appeals to the Commissioners had changed in 1964 when assessments were made by a tax inspector with appeal to the Commissioners. He said:
>
> > "Under section 5 of the Act of 1964, assessments are now in general made not by the commissioners but by an inspector of taxes or (in the case of surtax) by the Board of Inland Revenue. The general commissioners are now, under section 1, appointed by the Lord Chancellor, and hold office during his pleasure, with a retiring age of 75. Both they and the special commissioners are subject to the general supervision of the Council on Tribunals. These things were not so when the Court of Appeal spoke in 1932 [in *IRC v Sneath* [1932] 2 KB 362 *per* Greer LJ at p.385 and *per* Romer LJ at p.390] Words which refer to the special commissioners' "administrative duty of collecting surtax" fall oddly upon the ear in 1969. Furthermore, I do not think that it suffices merely to attach the label "administrative" to a tribunal or a function and then say that this solves the problem. One must still look at the realities rather than the label.
>
> It seems to me that today the commissioners discharge functions which are essentially judicial in nature. Virtually all their administrative functions have now gone, and their basic functions are judicial: see *Wheatcroft*, *British Tax Encyclopaedia*, p. 1026. They hear evidence and argument, and decide questions of fact and law impartially and without regard to so-called considerations of policy, though this, of course, is nothing new. It is now the inspectors and the Board who, under section 5 of the Act of 1964, are empowered to make assessments "according to the best of their judgment," a phrase which played a substantial part in *Rex v Income Tax Special Commissioners, Ex parte Elmhirst* [1936] 1 KB 487; 20 TC 381. It seems to be now at least open to question whether proceedings on an appeal to the commissioners ought still to be regarded as being quasi-judicial rather than judicial, on the basis that there is no true lis. But however that may be, in hearing and determining an appeal the commissioners now

seem to me to lie squarely on the other side of any reasonable line that the word "administrative" could be held to indicate, in territory which, if not judicial, is at least quasi-judicial. Nothing for which *Sneath's* case still stands as authority in the different sphere of *res judicata* seems to me to support the existence of any exception from the broad general rule against decisions being reversed by appellate courts merely by consent."

21. So Megarry J took the view that the Commissioners were indeed acting judicially – were determining a *lis inter partes* when they were called upon to determine a dispute between the taxpayer and the Crown."

119. The case of *Sneath* was further confirmed as being decided in a different era and matters had changed with the evolution of both the Special Commissioners and the First Tier Tribunal. It is important to note that both the England and Wales High Court and the First Tier Tribunal viewed the decision of *Sneath* as having limited application to the Special Commissioners in the 1960's to 2009 and subsequently limited as to First Tier Tribunal, due to both having different functions to the Special Commissioners of the 1930's. The Special Commissioners up to 2009 and the First Tier Tribunal's powers and legislative underpinning are very different to the commissioners in the 1930's. Brooks J summarises the change in the First Tier Tribunal case of *CM Utilities Limited v the Commission for Her Majesty's Revenue & Customs* [2016] UKFTT 358 (TC) at paragraph 21-23:

21. Describing the role of the Special Commissioners in 1936, Lord Wright MR, in the Court of Appeal in *Elmhirst*, (on the appeal from the Divisional Court) said, at 493:

"… the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter partes; they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed."

He continued, referring to following the very short passage" in Inland Revenue v Sneath [1932] 2 KB 362 where Romer LJ said at 390-91:

"The duty of the Commissioners, as I read the provisions of the Income Tax Acts, is to form an estimate in each year of assessment of the amount of the income of the taxpayer on which the surtax imposed for that year is to be charged. For this purpose the taxpayer is required to make a return of his income from all sources as defined by s. 5 of the Income Tax Act, 1918. With this to guide them, the Special Commissioners have then to form their own estimate of the total income and to make an assessment accordingly. If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax."

22. The functions of the Commissioners as an appellate body and those of an inspector of taxes as the officer responsible for making assessments were separated in 1964. Further changes occurred in 1994 when procedural rules were introduced by the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 and General Commissioners (Jurisdiction and Procedure) Regulations 1994, although neither had provision for the withdrawal of a case. The Commissioners were abolished in April 2009 as a result of the reforms implemented by the Tribunals Courts and Enforcement Act 2007 and their functions transferred to the Tax Chamber of the First-tier Tribunal under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

23. The current position in relation to appeal proceedings is therefore quite different from that at the time of *Elmhirst* and, in contrast to a Special Commissioner then, a Tribunal Judge in a tax appeal is clearly "in the position of a judge deciding an issue between two particular parties", a taxpayer and HMRC, in an adversarial process with its practice and procedure governed by the Procedure Rules which, unlike the procedural rules of the Special and General Commissioners, does have a specific provision, in rule 17, relating to withdrawal."

120. The English courts and First Tier Tribunal have long distinguished the case of *Sneath* and *Elmhirst* as being of their time in relation to "quantification" and in relation to their powers. Revenue suggested that the change in the powers and therefore jurisdiction took place in England and Wales by virtue of the establishment of the First Tier Tribunal. But as the cases of *CM Utilities v The Commission for her Majesty's Revenue and Customs* and *King v Walden (HM Inspector of Taxes)* demonstrate, the change in powers emanated from their role changing by statute in the 1960's. This is also analogous to the Commission, which has been set up under statute, its role is very different to the Special Commissioners in Ireland in the 1930's and due to Ireland's membership of the European Union.

121. In addition, Revenue's suggestion that the First Tier Tribunal's role and powers are substantially different to the Commission does not stand scrutiny when the legislation is reviewed. Again, out of an abundance of caution, the Commissioner has scrutinised the legislation. An appeal to the First Tier Tribunal in section 48 of the Taxes Management Act 1970, is very similar to the legislation for appeal to the Commission in section 949 of the TCA as set out below:

48. ***Application to appeals and other proceedings***
(1) In the following provisions of this Part of this Act, unless the context otherwise requires -
(a) "appeal" means any appeal under the Taxes Acts;

122. In addition, the decisions that the First Tier Tribunal makes under Section 50 of the Taxes Management Act 1970, is also very similar to the Commission in that they can increase, reduce or "stand good" the assessment. Sections 50(6) and (7) are set out below for completeness:

50. ***Procedure***
(6) If, on an appeal notified to the tribunal, the tribunal decides –

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or
(c) that the appellant is overcharged by an assessment other than a self assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides –

(a) that the appellant is undercharged to tax by a self-assessment;
(b) that any amounts contained in a partnership statement are insufficient; or
(c) that the appellant is undercharged by an assessment other than self assessment,

the assessment or amounts shall be increased accordingly.

123. As a reminder section 949AK of the TCA is set out below:

949AK Determinations in relation to assessments

(1) In relation to an appeal against an assessment, the Appeal Commissioners shall, if they consider that—

(a)an appellant has, by reason of the assessment, been overcharged, determine that the assessment be reduced accordingly,
(b)an appellant has, by reason of the assessment, been undercharged, determine that the assessment be increased accordingly, or
(c)neither paragraph (a) nor (b) applies, determine that the assessment stand.

(2) If, on an appeal against an assessment that—
(a)assesses an amount that is chargeable to tax, and
(b)charges tax on the amount assessed,

the Appeal Commissioners consider that the appellant is overcharged or, as the case may be, undercharged by the assessment, they may, unless the circumstances of the case otherwise require, give as their determination in the matter a determination solely to the effect that the amount chargeable to tax be reduced or increased.

124. To ensure that the Commissioner had absolute certainty that the powers did not alter on the introduction of the First Tier Tribunal in relation to the power to increase, reduce or stand good the assessment, the Commissioner has also checked the First Tier enabling legislation, The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 No. 56. [26] The Commissioner has found that under Section 31 of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, the words "commissioners" were merely changed to "tribunal" in Section 50(6) and (7) Taxes Management Act 1970 as follows:

31.*—(1) Section 50 (procedure)(**16**) is amended as follows.*

[26] The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 No. 56https://www.legislation.gov.uk/uksi/2009/56/schedule/1/made/data.xht?view=snippet&wrap=true

(2) In subsection (6) for the words before paragraph (a) substitute—
“(6) If, on an appeal notified to the tribunal, the tribunal decides—”.
(3) In subsection (7) for “If, on an appeal, it appears to the Commissioners” substitute “If, on an appeal notified to the tribunal, the tribunal decides”.
(4) In subsection (7A)—
(a)for “If, on an appeal, it appears to the Commissioners” substitute “If, on an appeal notified to the tribunal, the tribunal decides”, and
(b)for “appears to them” substitute “the tribunal decides is”.

125. As such, the Commissioner finds that the powers and roles of the First Tier Tribunal in relation to decisions with respect to the assessment are analogous to the Commission and there has been no significant divergence in England and Wales as suggested by Revenue, which would explain why the First Tier Tribunal has determined appeals with respect to stamp duty and applied the Capital Taxes Directive to their decisions to either reduce or stand good the assessment.

126. Revenue further suggested that the Special Commissioners in England and Wales never decided cases in relation to the UK legislation and the impact of the Capital Taxes Directives relating to stamp duty. But this was shown to be incorrect during the hearing. It did not prevent the Special Commissioners from doing so in the case of Case C-569/07 *HSBC Holdings plc and Vidacos Nominees Ltd v The Commissioners of Her Majesty's Revenue & Customs* ECR 2009 I-09047 EU:C:2009:594. This referral related to Article 11(a) of Directive 69/335 concerning indirect taxes on the raising of capital, as amended by Directive 85/303, which must be interpreted as meaning that it prohibits the levying of a duty on the issue of shares into a clearance service. The Upper Tribunal have powers to consider judicial review proceedings but that is not relevant to the issue in hand, as referred to above. Indeed in respect of stamp duty, the power to deal with appeals on stamp duty only took a legislative amendment for “special commissioners” to read “first tier tribunal”. Therefore, it is not consistent for Revenue to rely on the case of *Sneath* concerning the Commission’s role as merely “valuers” limiting their role, when the Special Commissioners and the First Tier Tribunal in England and Wales were not so bound by such a narrow view.

127. The Commissioner has reviewed the changes in Ireland since the case of *Smidic* and *Sneath.* It is again noted that the Commission has statutory powers and practice directions and considerable powers to dismiss appeals as happened in the Special Commissioners in England and Wales in the 1960’s and bolstered by the establishment of the First Tier Tribunal. The Commission is also set up with considerable practice rules and decides cases according to those practice rules. The statutory rules and powers of the Commission are laid out in section 949E through to 949AV of the TCA. Indeed, the Finance Bill 2020 proposes further powers of dismissal to the Appeal Commissioners under an amended section 949(AV).

128. The Commissioner has scrutinised the judicial review cases cited by Revenue. But in those cases the appellants were claiming ultra vires and hence the appeal commissioner did not have jurisdiction to hear these matters. But ultra vires is not claimed in this appeal. Matters of administrative law are matters for the superior courts and there is no argument from the Appellant that the Assessment is ultra vires. They concede that the assessment is raised under domestic law within time and is not ultra vires. It is the incompatibility of domestic law which is being engaged, not any question of Revenue acting ultra vires. Revenue relied on *Criminal Assets Bureau v Sean and Rosaleen Hunt (CAB v Hunt)*, *Deighan* and *Stanley* cases to bolster its arguments about the Commission’s jurisdiction.

129. In the case of *CAB v Hunt*, the Commissioner agrees with the Appellant that this case supports the view that the Commission has jurisdiction to consider this appeal and the assessment relating to it. The Supreme Court took cognisance of the case of *Deighan* which rejected the plaintiff's claim that he was constitutionally entitled to have his liability to tax determined by the High Court. The Supreme Court (page 185) also considered the case of *Calcul (*paragraph 584), which determined that a litigant does not have the right to have his cause decided by the High Court when the legislature has ordained otherwise. The Supreme Court (page 185) decided that the submission by the Plaintiff that the High Court retains an inherent jurisdiction to determine a person's liability to tax is not well founded.

130. In the cases cited by Revenue, such as *Deighan* and *Stanley,* in each instance Revenue were acting ultra vires, and hence this was a matter for the High Court. But as stated previously, the Appellant is not claiming any ultra vires by Revenue.

131. The Commissioner has particular note of the case of *Cintra Infrastructures Internacional SLU v The Revenue Commissioners* [2016] IEHC 349 ("*Cintra"*). This was decided by the High Court. The Plaintiff objected to seeking a refund of withholding tax and then appealing through the appeals procedure. They argued that this was not a genuine appeal or alternative remedy (and so it did not have to pursue it and could instead invoke a judicial review). Twomey J expressed the difficulty implicit in this argument that it is the taxpayer's interpretation which determines whether a tax is payable and therefore whether judicial review or the normal tax appeals procedure should be used. As Twomey J stated at paragraph 36 "*If this were correct, it would mean that the tax appeals procedure would only be the correct route for a taxpayer when he does not dispute that the tax is payable, which would mean of course he would never need to use the tax appeals procedure.*" The Court found that this could not be the correct proposition and if it was "*these Courts would be full of cases where taxpayers (who could afford to do so) were judicially reviewing the Revenue, rather than paying taxes which the Revenue allege are due.*" The Courts directed the Plaintiff to the remedy of the appeal commissioners. Conversely, in this appeal, Revenue are suggesting that the Appellant should either not have pursued their appeal to the Commission but commenced proceedings for declaratory relief or judicial review proceedings in the High Court. Alternatively, Revenue are suggesting that the Commissioner should dismiss the appeal leading to the Appellant having to seek a remedy in the High Court. Either way, it is contrary to the clear judgment in *Cintra*.

132. Revenue did not address how they supported the preliminary references to the CJEU under *Cabletron* and *National Roads Authority*, which related to interpretation of EU law in respect of customs and VAT, other than this was incidental to the determination of quantum. It was not able to distinguish how the Commissioner considering EU law in respect of stamp duty was in any way different to these cases, other than this was not incidental to quantum. Effectively, it was arguing that the Commissioner in each case would have to review the case and decide if it had jurisdiction to consider EU law as being incidental to quantum or being "something else". There is no statutory power to do so and it could lead to illogical consequences, and no doubt cause a whole new area of jurisprudence with the High Court deciding which cases relating to EU law were within the boundaries of Revenue's arguments of "incidental to quantum" and which were not.

133. This would be contrary to the requirement of tribunals to consider EU law in making any decision as confirmed by the CJEU. Revenue intimated in the strongest terms that if the Commissioner does not find its favour on jurisdiction, it would seek a case stated. The State has set up a tribunal to deal with taxation matters, free at the point of access and delivery for all taxpayers, whatever their background and which has been given the statutory power to do

so. But according to Revenue's submissions in this case, the Commission can only deal with certain cases whereby EU law is incidental to some concept of quantification not set out in Statute but at the same time Revenue will not object if the same Commission deals with some cases under EU law (*Cabletron* and *National Roads Authority*). In this scenario, the distinguishing feature is Revenue's position. This would severely compromise the independence of the Commission, the integrity of the tax appeals system and access to resolution for taxpayers.

134. The Commissioner is satisfied that it has the jurisdiction to consider this appeal and must in fact do so to be in compliance with EU law and the CJEU's direction. It is satisfied that it is a tribunal within Article 267. It finds that it has the jurisdiction to apply EU law to an appeal on assessment of stamp duty as it has the statutory jurisdiction to hear appeals on stamp duty. The laws on stamp duty are contained in domestic and European law and so both must be considered. In addition, the Commission has already been accepted as having jurisdiction to consider EU law by the acceptance of the Court of Justice of its predecessor's requests for a preliminary ruling and by implication its duty to apply the ruling. In addition, the Oireachtas has set up the Commission as the expert tribunal on tax and removed the Circuit Court rehearing as confirmation of the Commission's expertise in tax.

135. The Commissioner has taken cognisance of the jurisprudence concerning its role and the temporal provision relating to valuation and the gestalt that not only are the Commission dealing with cases *inter partes* but their duty is wider as it must consider wider society in its determination. The Commissioner finds that not only has it jurisdiction to consider EU law in its consideration of an appeal and any assessment, decision or determination of Revenue but it is compelled to do so.

136. The Commissioner notes that Revenue have raised the case of *Menolly Homes*, and the burden of proof resting on the taxpayer. The Appellant is not seeking to shift any burden in this case and so the Commissioner finds this reference to be of limited, if any, cogent value.

137. Following the finding that the Commissioner has jurisdiction to hear this appeal, it will proceed to consider the Appellant's appeal that Section 31D is in contravention of Directive 2008/7 and the consequences that flow from a potential contravention.

II. CONSIDERATION OF DOMESTIC LEGISLATION AND EU DIRECTIVE 2008/7

1. Directive 2008/7 and its predecessors

138. Ireland joined the European Communities (now the EU) on 1 January 1973 and that was effected by the European Communities Act 1972. The Irish Constitution has been amended on joining the European Communities and to allow the ratification of the Single European Act of the *Treaty of Lisbon* (Crotty v An Taoiseach). The primacy of EU law was established in 1964 by the Court of Justice in Case 6-64 *Costa v ENEL* EU:C:1964:66. In the Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 ("*Van Colson"*), the CJEU confirmed that the Member States are obliged to achieve the result envisaged by a directive and must take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after a directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the directive. (Case C-106/89

Marleasing SA v La Comercial Internacional de Alimentacion SA ECR 1990 I-0413 EU:C:1990:395 ("*Marleasing*"). Revenue are an emanation of the State (*Marshall*).

139. The appeal centres on the application of Directive 2008/7 in relation to domestic legislation namely section 31D SDCA. Directive 2008/7, as referred to previously is known as the Capital Taxes Directive. It is the successor to the Directive 69/335 which for the first time set out the agreement in the Member States to the charging of capital taxes. In 1969, the European Economic Community, (now the EU) adopted Directive 69/335. The recital listed the purpose as :

> *"Whereas the indirect taxes on the raising of capital, in force in the Member States at the present time, namely the duty chargeable on contribution of capital to companies and firms and the stamp duty on securities, give rise to discrimination, double taxation and disparities which interfere with the free movement of capital and which, consequently, must be eliminated by harmonisation."*

140. Directive 69/335 went on to explain that the charging of stamp duty on securities from other Member States and on introduction on the market of foreign securities was undesirable and inconsistent with the developments in tax laws of the Member States. The objective of Directive 69/335 was to ensure that capital duty was to be charged once in the Community and at the same level in the Member States. The purpose also set out that the EEC (now the EU) sought to abolish stamp duty on securities, regardless of their origin.

> *"Whereas the charging of stamp duty by a Member State on securities from other Member States introduced into or issued within its territory is contrary to the concept of a common market whose characteristics are those of a domestic market ; whereas, in addition, it has become evident that the retention of stamp duty on the issue of securities in respect of internal loans and on the introduction or issue on the market of a Member State of foreign securities is both undesirable from the economic point of view and inconsistent with current developments in the tax laws of the Member States in this field;*
>
> *Whereas, in these circumstances, it is advisable to abolish the stamp duty on securities, regardless of the origin of such securities, and regardless of whether they represent a company's own capital or its loan capital."*

141. Directive 69/335 was amended on many occasions over the years and on each occasion the EU reduced the scope of Member States on levying stamp duty, such that the prohibition became wider and the derogations from the prohibition narrower. All the changes were harmonised with Directive 2008/7. Directive 2008/7 is intended to promote the free movement of capital, which is regarded as essential for the creation of an economic union. It also seeks to limit as far as possible the negative effects of capital duty on the free movement of capital and conditions of competition with the EU and to bring about the abolition of indirect taxes on the raising of capital.

142. It is clear that the objective of removing barriers to free movement of capital underpins the Directive 2008/7. Recitals two, three and four are particularly relevant and illustrative in this context. Recital 2 states that:

> *"The indirect taxes on the raising of capital, namely the capital duty (the duty chargeable on contributions of capital to companies and firms), the stamp duty on*

securities, and duty on restructuring operations, regardless of whether those operations involve an increase in capital, give rise to discrimination, double taxation and disparities which interfere with the free movement of capital.

143. Recital 3 to the Directive 2008/7 states as follows:

> *"Consequently, it is in the interests of the internal market to harmonise the legislation on indirect taxes on the raising of capital in order to eliminate, as far as possible, factors which may distort conditions of competition or hinder the free movement of capital."*

144. Free movement of capital has never been limited to movement of capital within the EU. Article 63 of the TFEU provides the framework and "*all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited".*

145. As stated above, Directive 2008/7 seeks to abolish capital duty and other indirect taxes (which includes stamp duty on securities) which inhibit the free movement of capital. The CJEU has examined Directive 2008/7 on multiple occasions and in respect of nearly every Member State. The objective of Directive 2008/7 is to abolition of all capital duties and stamp duty. The preamble refers to such taxes being harmful to stimulating investment. Member States cannot introduce new capital duties or stamp duties once it has "*chosen not to levy capital duty on all or part of the transactions under this Directive, it should not be possible for it to reintroduce such duties*" (recital 6). It reiterates that in "*view of the detrimental effects of capital duty, the Commission should report every three years on the operation of this Directive with a view to abolishing this duty*" (recital 14).

146. The Article 1 of Directive 2008/7 regulates the levying of indirect taxes in respect of (a) contributions of capital to capital companies; (b) restructuring operations involving capital companies; (c) the issue of certain securities and debentures. It is evident that both parties to the Transaction fall within the definition of 'capital company' in Article 2 of Directive 2008/7 in particular Article 2(1)(b) "any company … the shares in whose capital or assets can be dealt in on a stock exchange".

147. The CJEU has over many years interpreted Directive 2008/7 in light of and in accordance with its objectives (*Case C-357/13 Drukarnia Multipress sp.z.o.o v Minister Finansów* EU:C;2015: 253, para 22 ("*Drukarnia")*, Case C-278/05 *Robins v Secretary for State for Work and Pensions* EU:C:2007:56, Case C-236/97 *Skatteministeriet v Altierselskabet Forskirinsselskabet Codan* EU:1998:617, paras 26-27, Case C-357/96 *Solred SA v Administración General del Estado* EU:C:1998:87)

148. Directive 2008/7 sets out that certain transactions in Article 5 are not to be subjected to indirect tax (i.e. the prohibitions). But the exceptions to Article 5 are contained in Article 6 (the derogations), which effectively allowed indirect tax on the transfer of shares but only at a consistent rate across the Member States and no more than 1 per cent.

149. The transactions not subject to indirect tax are set out Chapter II. Chapter III sets out the special provisions and confirms that if a Member State does not currently charge indirect taxes on transactions, it cannot implement them. Chapter III also confirms the rate of stamp duty allowed is up to 1 per cent only and cannot exceed that level. Member States were instructed to transpose the Directive 2008/7 by 31 December 2008. Article 15 states "*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply*

with Articles 3, 4, 5, 7, 8, 12, 13 and 14 by 31 December 2008 at the latest". Ireland has not transposed Directive 2008/7.

150. Article 1 of Directive 2008/7 concerning indirect taxes on the raising of capital provides as follows:

CHAPTER I
SUBJECT MATTER AND SCOPE

Article 1
Subject Matter

This Directive regulates the levying of indirect taxes in respect of the following:
(a) *contributions of capital to capital companies;*
(b) *restructuring operations involving capital companies;*
(c) *the issue of certain securities and debentures.*

151. Article 2 of Directive 2008/7 provides as follows:

Article 2
Capital Company

1. For the purposes of this Directive 'capital company' means:
(a) any company which takes one of the forms listed in Annex I;
(b) any company, firm, association or legal person the shares in whose capital or assets can be dealt in on a stock exchange;
(c) any company, firm, association or legal person operating for profit, whose members have the right to dispose of their shares to third parties without prior authorisation and are only responsible for the debts of the company, firm, association or legal person to the extent of their shares.
2. For the purposes of this Directive, any other company, firm, association or legal person operating for profit shall be deemed to be a capital company.

152. Article 3 of Directive 2008/7 provides as follows:

Article 3
Contributions of Capital

For the purposes of this Directive and subject to Article 4, the following transactions shall be considered to be 'contributions of capital':
(a) the formation of a capital company;
(b) the conversion into a capital company of a company, firm, association or legal person which is not a capital company;
(c) an increase in the capital of a capital company by contribution of assets of any kind;
(d) an increase in the assets of a capital company by contribution of assets of any kind, in consideration not of shares in the capital or assets of the company, but of rights of the same kind as those of members, such as voting rights, a share in the profits or a share in the surplus upon liquidation;
(e) the transfer from a third country to a Member State of the centre of effective management of a capital company whose registered office is in a third country;
(f) the transfer from a third country to a Member State of the registered office of a capital company whose centre of effective management is in a third country;

(g) an increase in the capital of a capital company by capitalisation of profits or of permanent or temporary reserves;
(h) an increase in the assets of a capital company through the provision of services by a member which does not entail an increase in the company's capital, but which does result in a variation in the rights in the company or which may increase the value of the company's shares;
(i) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;
(j) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital.

153. Article 4 of Directive 2008/7 provides as follows:

Article 4
Restructuring Operations

1. For the purposes of this Directive, the following restructuring operations shall not be considered to be contributions of capital:
(a) the transfer by one or more capital companies of all their assets and liabilities, or one or more branches of activity to one or more capital companies which are in the process of being formed or which are already in existence, provided that the consideration for the transfer consists at least in part of securities representing the capital of the acquiring company;
(b) the acquisition, by a capital company which is in the process of being formed or which is already in existence, of shares representing a majority of the voting rights of another capital company, provided that the consideration for the shares acquired consists at least in part of securities representing the capital of the former company. Where the majority of the voting rights is reached by means of two or more transactions, only the transaction whereby the majority of voting rights is reached and any subsequent transactions shall be regarded as restructuring operations.
2. Restructuring operations shall also include the transfer to a capital company of all assets and liabilities of another capital company which is wholly owned by the former company.

154. Article 5 of Directive 2008/7 provides as follows:

CHAPTER II
General Provisions
Article 5

Transactions not subject to indirect tax

1. Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following:
(a) contributions of capital;
(b) loans, or the provision of services, occurring as part of contributions of capital;
(c) registration or any other formality required before the commencement of business to which a capital company may be subject by reason of its legal form;
(d) alteration of the constituent instrument or regulations of a capital company, and in particular the following:

(i) the conversion of a capital company into a different type of capital company;
(ii) the transfer from a Member State to another Member State of the centre of effective management or of the registered office of a capital company;
(iii) a change in the objects of a capital company;
(iv) the extension of the period of existence of a capital company;

(e) the restructuring operations referred to in Article 4.

2. Member States shall not subject the following to any form of indirect tax whatsoever:
(a) the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in stocks, shares or other securities of the same type, or of the certificates representing such securities, by whomsoever issued;
(b) loans, including government bonds, raised by the issue of debentures or other negotiable securities, by whomsoever issued, or any formalities relating thereto, or the creation, issue, admission to quotation on a stock exchange, making available on the market or dealing in such debentures or other negotiable securities.

155. Article 6 of Directive 2008/7 provides as follows:

Article 6
Duties and value added tax

1. Notwithstanding Article 5, Member States may charge the following duties and taxes:
(a) duties on the transfer of securities, whether charged at a flat rate or not;
(b) transfer duties, including land registration taxes, on the transfer, to a capital company, of businesses or immovable property situated within their territory;
(c) transfer duties on assets of any kind transferred to a capital company, insofar as such property is transferred for a consideration other than shares in the company;
(d) duties on the creation, registration or discharge of mortgages or other charges on land or other property;
(e) duties in the form of fees or dues;
(f) value added tax.

2. The amount charged by way of the duties and taxes listed in points (b) to (e) of paragraph 1 shall not vary according to whether or not the centre of effective management or the registered office of the capital company is situated within the territory of the Member State charging the duties or taxes. Those amounts may not exceed those of duties or taxes applicable to like transactions which take place within the Member State charging them.

2. Application EU Directive 2008/7 to Transaction and the Appeal

156. The Appellant submits that the Article 5(1) prohibition applies to the Transaction as it was a restructuring operation on the following basis:

- The Transaction qualifies as a restructuring operation within the meaning of Article 4(1)(b) of the Directive 2008/7 for the following reasons:
  (i) [redacted] is a capital company;

(ii) The Appellant and its subsidiary [redacted] together constitute a capital company, and they are each a capital company;
(iii) The Appellant, acting with [redacted], acquired the entire share capital (representing the entirety of the voting rights) of [redacted]; and
(iv) the consideration for the shares acquired consists at least in part of securities representing the capital of the Appellant.

- The issuance of shares by [redacted] out of the reserves created on the cancellation of its shares as part of the Transaction is a contribution of capital within the meaning of Article 3(g) of the Directive. The purported imposition of stamp duty pursuant to Section 31D SDCA on this contribution of capital is in breach of the prohibition in Article 5 (1)(a) of Directive 2008/7.
- Thus, the Transaction falls within the scope of the Article 5(1) prohibition.

157. The Appellant further submits that the Article 5(2) prohibition applies on the following basis:

- Without prejudice to the Appellant's position above, the Transaction also falls within the scope of Article 5(2) prohibition, given that it involves an issue of shares within the meaning of Article 5(2)(a).

158. The Appellant further submits that the Article 6(1) derogation does not apply because the derogation in Article 6(1) of the Directive 2008/7 is not applicable in the circumstances arising here, because the Transaction did not involve the "*transfer of securities*" within the meaning of that provision (as interpreted by the CJEU and as a matter of Irish law). Therefore, the Assessment breaches the Article 5(1) prohibition and the Article 5(2) prohibition.

159. The Appellant submits that the Assessment is contrary to and in breach of:

- the Article 5(1) prohibitions, given that it purports to impose stamp duty on a "*restructuring operation*" and a "*contribution of capital*".
- the Article 5(2) prohibition, given that:
  (i) it purports to impose stamp duty on the issuance of the [redacted] shares by treating the [redacted] shares that were cancelled as part of the Acquisition as if they were in fact transferred or conveyed notwithstanding that, in fact, the ownership of [redacted]'s share capital was acquired by way of the issuance of new [redacted] shares; and
  (ii) it purports to impose stamp duty on the issuance of the Appellant shares (which were admitted to the [redacted]) to the [redacted] shareholders (the "Share Consideration") by treating the Share Consideration as a component of the consideration chargeable to stamp duty.

160. The Commissioner has to firstly establish if the Transaction is a restructuring operation within Article 4 of Directive 2008/7. Put simply, if the Commissioner determines that the Transaction comes within the definition of Article 4, then it cannot be subject to stamp duty, as this is prohibited under Article 5(1)(e). The Transaction in this appeal and the movement of the consideration is much less complicated than cases that were referred to the CJEU, which in many cases involved multiple steps and transactions not explicitly set out in Directive 2008/7 (C-299/13 *Gielen* EU:C02014:2266, Case C-569/07 *HSBC Holdings and Vidacos Nominees*, EU:C:2009:594, C-466/03, *Reiss* EU:C:2007:385).

161. The EU Commission chose to set out a definition of "*restructuring operation*" so that there was less opportunity of dispute as to what is meant by that term. It is defined in broad terms and the nature of the definition has widened over the years, by the amending directives

between Directive 69/335 and the current Directive 2008/7 and also as confirmed by the Commission Proposal (see below). It does not require the increase of capital, as that requirement was removed in the Directive 2008/7. In the Transaction in this case there is in fact a raising of capital. It does not set out any specific percentage needed in respect of the voting rights, as percentages were previously removed, so long as the acquisition relates to the majority of the voting rights. The CJEU has determined that the objectives of the Capital Taxes Directive must be given practical effect and have interpreted the prohibitions broadly and the exemptions/derogations narrowly. The purpose of the Directive 2008/7 is to remove all capital taxes and stamp duty in the future. The exemptions are to be limited in time and narrowed on each iteration of the Capital Taxes Directive. The Commissioner keeps those objectives to the forefront in considering this appeal.

162. The Commissioner notes that CJEU applied Directive 69/335 by reference to the real parties to the transaction when viewed from an economic point of view because to do otherwise "*would result in its effectiveness being undermined*" (Case C-339/99 *Energie*, para 40). In addition, the CJEU has construed the prohibitions contained in the 2008 Directive broadly. In Case C-573/16 *Air Berlin plc v Commissioners of Her Majesty's Revenue and Customs* EU:C:2017:772 at para 31-32 it states :

> "It is clear from the Court's case-law that, in view of the objectives pursued by those directives, Articles 10 and 11 of Directive 69/335 and Article 5 of Directive 2008/7 must be interpreted broadly so as to ensure that the prohibitions laid down in those provisions are not denied practical effect (see, to that effect, judgments of 15 July 2004, Commission v Belgium, C-415/02, EU:C:2004:450, paragraph 33; of 28 June 2007, Albert Reiss Beteiligungsgesellschaft, C-466/03, EU:C:2007:385, paragraph 39; and of 1 October 2009, HSBC Holdings and Vidacos Nominees, C-569/07, EU:C:2009:594, paragraph 34). The Court has thus held that, in accordance with the objectives of Article 11 of Directive 69/335 and Article 5(2) of Directive 2008/7, the prohibition of the taxation of transactions for the raising of capital also applies to transactions which are not expressly covered by that prohibition, where such taxation is tantamount to taxing a transaction forming an integral part of an overall transaction with regard to the raising of capital (see, to that effect, judgment of 9 October 2014, Gielen, C-299/13, EU:C:2014:2266, paragraph 24 and the case-law cited)."

163. The CJEU has emphasised that "*an autonomous and uniform interpretation throughout the EU*" of the 2008 Directive is required, with the nature of a tax, duty or charge being determined according to its objective characteristics and regardless of national classification. (Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany* EU:C:2012:71, para. 37; Case C-357/13 *Drukarnia* (Advocate General Opinion, para 23); Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikringsselskabet Codan* EU:C:1998:617, para 26). So, the Commissioner again must keep the objectives of the Directive 2008/7 to the forefront in considering if the Transaction falls within a "restructuring operation".

164. The Commissioner has examined Article 4(1)(b) of the 2008/7 Directive and finds that the Transaction comes within the definition of restructuring operation. It includes the acquisition by a capital company (i.e. the Appellant and its subsidiary [redacted]) which is already in existence, of shares representing the majority of the voting rights of another capital company ([redacted]), provided the consideration for the shares acquired consists at least in part of securities representing the capital of the former company ([redacted] shareholders received cash and some shares in the Appellant). So, based on the definition of restructuring operation,

under Article 5(1)(e) no form of indirect tax should be levied. In addition, under Article 5(2)(a), there is no form of indirect tax allowed on the issue of shares with respect to the [redacted] shareholders. There was no transfer of shares between the Appellant and [redacted] and so the derogation under Article 6(1) is not applicable.

165. Therefore, the Commission finds that the Assessment is contrary to and in breach of the Directive 2008/7, namely Article 5(1)(e) and there could be no charge under Article 5(2)(a) and the Transaction comes within the definition of a restructuring operation in Article 4.

3. Revenue's Submissions on the Articles in Directive 2008/7

166. Revenue set out in the Outline of Arguments (paragraph 8.6 – 8.10) that the Directive 2008/7 is not directly effective and the Appellant could not rely on the case of Case C-134/99 *IGI Investimentos SA v Fazenda Publica*. EU:C:2000:403 ("*IGI*"). Directive 69/335 (and Article 10, the predecessor to Article 5) had been found in *IGI* at paragraphs 36-38) to be directly effective. The Commissioner finds this argument without merit.

167. Directive 2008/7 is a consolidating one to assist Member States with all the amendments made to Directive 69/335. That is evident from the preamble. In addition, Directive 2008/7 is accessible, and expressed in precise and unconditional terms. Plus, it has been applied by other Member States in respect of taxpayers. In addition, the CJEU has made multiple preliminary rulings in respect of Directive 2008/7 and there has been no issue in relation to it having direct effect. The Commissioner has not encountered an argument whereby a consolidating provision (to assist in incorporating all amendments) is not directly effective whereby the original provision (more complicated) is so. This is especially when the consolidating provision is to simplify a very complicated piece of legislation. It would be an absurdity if this was the case. Article 4(1)(b) and Article 5(1)(e) are precise and clear. In addition, Revenue referred the Commissioner to the EU Proposal on the consolidating Directive 2008/7, (reference below) where it seeks to rely on it, which states at the outset in the Explanatory Memorandum:

> *"This proposal relates to the recasting of Council Directive 69/335/EEC. The purpose of the proposal is to **simplify a very complicated piece of Community legislation**, phase out capital duty which is recognised as a significant obstacle to the development of EU companies, and reinforce the prohibition on creating or levying of other similar taxes."(emphasis added)*

168. Revenue in their Outline of Arguments (paragraphs 8.11 to 8.13) states that the transactions involving the Appellant, [redacted] and [redacted] did not individually or collectively constitute the raising of capital, within the meaning of the Directive 2008/7. Revenue referred to the Advocate General's opinion in *Drukarnia* in enforcing this submission. But, the Transaction did increase capital. In any event, the increase in capital in relation to a "*restructuring operation*" was removed in Directive 2008/7 in Article 5(1)(e). That is set out in the preamble to Directive 2008/7:

> *"The indirect taxes on the raising of capital, namely the capital duty (the duty chargeable on contributions of capital to companies and firms), the stamp duty on securities, and duty on restructuring operations, **regardless of whether those operations involve an increase in capital**, give rise to discrimination, double taxation and disparities which interfere with the free movement of capital. The same applies as*

regards other indirect taxes with the same characteristics as capital duty and the stamp duty on securities." (emphasis added)

169. So, the Commissioner finds that this submission has no validity. The EU Commission Proposal, which Revenue relies on in another context below, confirmed that the requirement to increase capital is no longer a requirement in the definition of restructuring operations. Paragraph 6 of the EU Commission Proposal, which Revenue directed the Commission to states:

"*Article 5(1)(e) is new and sets out specifically that the restructuring operations mentioned in Article 4 are not subject to indirect tax. On the one hand, restructuring operations previously covered by ex-Article 7(1)(b), now Article 4(a), have been exempted from capital duty, since the 1985 amendment. On the other hand, Member States that charged capital duty as at 1 July 1984 (or their date of accession) on the restructuring operations covered by ex-Article 7(1)(bb), now Article 4(b), at the ordinary rate have had the possibility to continue to do so under ex-Article 7* ***i****. This possibility no longer exists, as restructuring operations are not among the transactions that may be subject to capital duty.*

Article 5(1)(e) therefore constitutes a substantive amendment, which affects the Member States that currently charge capital duty on the restructuring operations in question.

Some of the restructuring operations now referred to in Article 4, ***namely mergers not involving an increase in capital, did previously fall outside the scope of the Directive, and Member States were therefore free to charge indirect taxes on those restructuring operations. Under Article 5(1)(e) Member States may no longer do so. This is a substantive amendment that affects all Member States which currently charge indirect taxes on restructuring operations not involving an increase in capital****."(*emphasis added*)*

170. The Commissioner does not find any merit in Revenue's submissions and Outline of Arguments (paragraph 8.16 - 8.22). Merely stating (paragraph 8.17) that a court-sanctioned cancellation of shares does not fall within the wording of Article 4 does not lead to a conclusion that this is the case. The Commissioner does not agree that applying the wording of Article 4 to the Transaction and the purpose of the Directive 2008/7 is not consistent with the "general purpose" of the Directive. There is no "*cloak for voiding Article 4 of any meaning other the most generalised one*" (paragraph 8.19 Revenue's Outline of Arguments) in ascertaining if the Transaction comes within the definition of Article 4. The Appellant is not seeking to treat the cancellation of shares and the issue of shares "as a "synonym for "transfer of securities"" (paragraph 8.20). It seeks to treat the Transaction as it was, namely the cancellation of shares and the issue of new shares. As stated above, Directive 2008/7 is seeking to abolish all stamp duty and indirect taxes on raising of capital and on the issue of new shares. The whole purpose of the Directive 2008/7 and its predecessors was to promote and stimulate investment in the EU. The definition of restructuring operations has widened over the decades to the definition contained within Directive 2008/7 and obstacles that brought transactions within restructuring operations have been removed (Case C-152/97 *Abruzzi Gas SpA (Agas)* [1988] ECR I-06553 "*Abruzzi*").

171. The Commission finds no basis for the suggestion by Revenue that a court sanctioned cancellation of shares does not fall within the definition of wording of Article 4. It is evident

in the widening of the definition of restructuring operations, the EU chose not to exclude cancellation of share schemes in the definition of restructuring operations. In the EU Commission Proposal it did not do so and the case involving a cancellation of shares was explicitly referred to in justifying the widening of the definition of restructuring operations. In the case of *Abruzzi*, the transaction did not fail due to the cancellation of shares in a merger/takeover but due to the lack of increase in assets (which is no longer an element of the definition of restructuring operations). Hence, the Commissioner is further convinced in the decision that the Transaction comes within "*restructuring operations*".

172. Revenue have referred the Commissioner to the EU Commission's Proposal for the Directive 2008/7 and submits that the Transaction does not come within the Directive 2008/7 on two grounds namely:-

- It is not a merger and it is only mergers in the Directive 90/434/EEC (Council Directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States) that come within the definition of "restructuring operations";

- With respect to the definition of 'capital company' both companies related to a transaction must be situated in a Member State and as one company to the Transaction is situated in the [redacted], Directive 2008/7 does not apply.

173. The Commissioner has read the *Commission's Proposal for the Council Directive* (which became 2008/7) (Brussels, 4.12.2006 COM (2006) 760 final, 2006/0253 (CNS). It contains no text which cast any doubt on the Commissioner's finding that the Transaction comes within the definition of "*restructuring operations*". The EU Commission Proposal again confirms the stated objective is to abolish capital duty and it is to stimulate investment. The Summary of the EU Commission Proposal again confirms the objective of the Directive and the continued direction of travel. It states:

> *"Since 1985, the trend has been towards an elimination of capital duty. In response to its detrimental economic effects, capital duty has been abolished by many Member States. The United Kingdom abolished its capital duty in 1988, Germany and France abolished theirs in 1992, Denmark abolished its in 1993 and Italy in 2000. Most recently, capital duty was abolished by Ireland from 7 December 2005, and by Belgium and the Netherlands from 1 January 2006. As a result, only 7 (Greece, Spain, Cyprus, Luxembourg, Austria, Poland, Portugal) of the 25 Member States continue to levy it. In Poland and Portugal, capital duty is levied already at a rate of 0,5% or less; and in Cyprus, the rate is 0,6%. In the remaining 4 Member States, the rate is 1,0%.*
>
> *At Lisbon the EU set itself the strategic goal of building the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion. This recast proposes a limit of 0,5% on the rate by 2008, and a phasing out of capital duty by 2010 to fit with the Lisbon strategy. 2010 seems an appropriate moment for the abolition of capital duty. By then, Member States will have had 25 years to adapt their fiscal arrangements in order to prepare for its abolition.*
>
> *The recast Directive is divided into two parts, which reflects the situation to which the Directive actually applies and keeps in mind that the aim of the Directive, since the 1985 amendment, has been to abolish capital duty. The first part contains the main*

rules which prohibit the levying of capital duty and other similar taxes. The second part contains the special provisions on the levying of capital duty applying to those Member States which during the phasing out period opt to continue to charge capital duty. Once all Member States have abolished capital duty the provisions in the second part will become obsolete while the first part of the Directive will continue to apply."

174. Revenue maintain that the Transaction does not come within Directive 2008/7, as this Directive only applies to "mergers" as defined in Directive 90/434/EEC, (despite there being no reference to mergers within the Directive) and that the capital companies that do merge both have to be within Member States. This is despite there being no reference to that definition and capital investment being the objective of the Directive 2008/7 and despite all references in the Directive 2008/7 explicitly referring to third countries.

175. Revenue maintain that the Commissioner must take into account not only an EU Commission proposal in relation to indirect capital taxes in interpreting Directive 2008/7 but also take into account the definition of merger from another directive on a different tax and which specifically relates to treatment and "mergers within Member States". The Commission is cognisant of the case of Case C-307/98 *Commission v Belgium* [2000] ECR I-3933 at para 40, which set out :

> "Finally, it is important to note that the interpretation of the provisions of Directive 76/160 contained in paras 32 to 39 of this judgement cannot be called in question by the extracts from the proposal for a directive of 3 February 1975 relied on by the Belgian authorities, which were not included in the final text of Directive 760/160…"

176. Proposals that precede the adoption of legislation may be used to inform the context and background to the introduction of the provision or to support and interpretation arrived at by other means. Case C-208 /98 *Berliner Kindi Brauerei AG v Sipert*; Case C-321/196 *Mecklenburg v Pinneberg*, Case C583/11 *Inuit Tapinit Kanatami and Others v Parliament and Council*. The latter cites paragraph 49 *Drukarnia Multipress* C-357/13, Advocate General Jaaskinen's opinion.

177. The Commissioner considered the submissions made at the hearing firstly with respect to the submission that the Transaction is not covered by the Directive 2008/7 as it is not a merger within the definition of merger within Directive 90/434/EEC. Revenue referred to the *Commission Proposal for a Directive* COM (2006) 760, final paragraph 2 but this does not relate to the definition of merger or capital companies. The Commissioner notes paragraph 22 of the Advocate General Jaaskinen's opinion, which confirms EU jurisprudence that account must be taken of the wording but also the objectives it pursues in interpreting EU law.

> "It is settled case-law that, in interpreting a provision of EU law, account must be taken of its wording and the objectives it pursues as well as its context, while the origins of the provision may also provide information relevant to its interpretation. "

178. The Commissioner has also reviewed paragraph 49 of the same opinion to which Revenue refers and the reference to the Commission proposal is in the footnote at the end of that same paragraph 49. The footnote does not relate to the definition of mergers or capital companies. It states:

> "The Commission's proposal in relation to Directive 2008/7 explained that '[t]he object of Article 2(2) is to prevent the choice of a particular legal form from leading to a different fiscal treatment of activities which are in principle equivalent. The second

sentence of ex-Article 3(2) has been moved to Article 9 for editorial reasons. Under this provision Member States are not obliged to consider certain entities as capital companies for the purpose of charging capital duty'."

179. The Commission is guided by the CJEU ruling in paragraph 22 of *Drukarnia* which finds that:

> "According to settled case-law of the Court, in the interpretation of a provision of EU law, account must be taken not only of its wording but also of the context in which it occurs and the objectives pursued by the rules of which it forms part, and if appropriate of the origins of those rules (see, to that effect, judgments in Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 50; Koushkaki, C-84/12, EU:C:2013:862, paragraph 34; and Bouman, C-114/13, EU:C:2015:81, paragraph 31)."

180. The Commissioner has as such, as appropriate, and in accordance with paragraph 22 of the CJEU's ruling in *Drukarnia*, appraised the origins of the rules. But the origin of the rules takes the Commission back to Directive 69/335, which explicitly refers to third party countries and stamp duty on securities, wherever the origin. There is no reference to merger in the original Directive 69/335.

181. Revenue suggested that as this Transaction does not come within Directive 2008/7 as it only applies to mergers within two Member States. The Commissioner finds no basis for such a conclusion. The Directive 2008/7 has no definition of "merger" within it. Directive 2008/7 relates to contributions of capital and it is in that context that restructuring operations is defined. It is not applicable to read across a definition of mergers from another directive on "Mergers within the European Union into another Directive" to Directive 2008/7 which does not contain that definition. Hence, the Commission is guided by the Court's views as to the context in which restructuring operations occurs and the origins of those rules. The Proposal document explains that the definition of "*restructuring operations*" widens so that the previous stipulation of an increase in the capital of assets of the capital company concerned was no longer a requirement. This was due to the case of *Abruzzi*, which involved the cancellation of shares but did not come within the protection of restructuring operations as there was no increase in capital (since deleted). The Commissioner reads this proposal as drafted that a case which involved a cancellation of shares, which either increased or did not increase capital or assets would now come within the definition of "restructuring operations" as this is set out as the intention in the Commission proposal. The Proposal states at paragraph 5 "*an increase in no longer required under the definition of restructuring operations in Article 4, so that the Directive will apply to such restructuring operations regardless of whether they result in an increase in capital or not. This amendment is substantive, since the scope of the Directive is enlarged*."

182. The Commissioner observes that in *Drukarnia* the CJEU did not place any reliance on the Commission Proposal in interpreting Directive 2008/7 but took into account the text of the articles, the purpose and objective of Directive 2008/7 and the origins of the Directive, as again described in the preamble. The Commissioner has regard to the Commission Proposal but it is no more than a working document. And it supports the Appellant's case with regards to the wide scope of restructuring operations and does not change any interpretation with regards restructuring operations. The reference to mergers is illustrative only and again does not affect any interpretation of restructuring operations.

183. The EU Commission Proposal contains the following two references to the Merger Directive in paragraph 4 of that proposal as follows:

- *"by using the term "branches of activity" the wording is also aligned with the terminology used in article 2 (i) of Council Directive of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different member states and to the transfer of the registered office, of an SE or SCA, between Member States…*

- *The restructuring operation described in article 4 (b) corresponds in principle to the one described in ex-Article 7(1)(bb), that is restructuring operations were a capital company acquire shares representing at least 75% of the issued share capital of another capital company. However, the wording of article 4 (b) has been changed insofar as it provides of the shares acquired shall represent a majority of the voting rights. The new wording is consistent with the terminology used in Directive 90/434/EEC. Also, under Article 4(b) the consideration shall only in part consist of securities in the acquiring company, whereas under ex-Article 7(1)(bb) the consideration shall in principal consist exclusively of such securities. These amendments which simplify the definition of restructuring operations are substantive amendments."*

184. These references to the Merger Directive are self-contained and merely provide context for the introduction of "branches of activity" into Directive 2008/7 and the replacement of the 75% threshold with "a majority of the voting rights". These references do not suggest that the Directive 2008/7 should be interpreted based on or subject to the Merger Directive. Such a result could only be achieved by explicit statutory cross reference within the language of the 2008 Directive and as stated above the term "merger" is not found in Directive 2008/7. In addition, it is evident that the EU Commission view the Transaction as a merger as per the EU Merger Regulations as per the press release by the EU Commission referred to above.

185. There is a reference in the EU Commission Proposal which states "*the wording in Article 4(b) has been changed so far as it provides that the shares acquired shall represent a majority of the voting rights. The new wording is consistent with the terminology used in Directive 90/434/EEC.*" The Commissioner finds that the definition in Article 2(d) of Directive 90/434/EEC is what is being referred to in that the previous reference to acquiring a minimum percentage of shares of 75 per cent has been deleted and it is now only a majority of shares required, and that is consistent with the definition of "exchange of shares" in Article 2 (d) of Directive 90/434/EEC as set out below:

> "'exchange of shares' shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company…"

186. For surety, the Commissioner has tracked back through all the changes of all the various Capital Taxes Directive from its introduction to the present date. The Commissioner notes that Directive 73/79 contained a reference (Article 7(1)(bb)) to a transaction involving both companies within the Member States. But this was in relation to the Directive's attempt to reduce the capital duty on those transactions by 50 per cent to assist Member States with the loss of revenue. In addition, this was removed by Directive 85/303 when the scope of restructuring operations widened again. The EU Commission Proposal Paper relied on by Revenue even states "*restructuring operation described in Article 4(a) corresponds in principle to the one described in ex-Article 7(1)(b), that is restructuring operations where capital companies transfer all their assets and liabilities, or parts of their business to other capital*

companies." If the EU Commission had sought to limit restructuring operations to mergers between 'capital companies', both within the Member States, that would have been included. But the reverse is the case, with the definition of 'capital company' as wide as possible and including any company that can be traded on a stock exchange. The Commissioner is satisfied that an EU Commission Proposal paper prior to the introduction of the Directive and a definition in another Directive on another completely different tax (namely capital gains tax) and relating to a different context should not be read into another Directive 2008/7, as meaning that only mergers between capital companies in the Member States are covered by Directive 2008/7. Revenue's submission in this regard is rejected.

187. The Commissioner has also scrutinised Revenue's second submission at the hearing that Directive 2008/7 only relates to mergers and acquisitions between capital companies, both of whom need to be in Member States. There is no evidence that Directive 2008/7 only relates to mergers or acquisitions between companies within two Member States and indeed the definition of 'capital company' makes clear that it relates to companies outside the Member States (se earlier paragraph). Again, as the CJEU state in *Drukarnia* (para 22) the objective of the abolition of capital taxes is to promote investment in the European Union and to encourage the expansion of companies and increases capital. It is to encourage investment and a level playing field within the EU, so that one Member State is not levying stamp duty at a lower level than another and so discouraging a single market and economic union to the disadvantage of another Member State. This is to ensure that those acquiring companies and contributing to the assets of companies are not being levied to tax more than once. All references to only those companies within the Member States receiving the reduced rates that was previously set out in Article 7(1)(b) of Directive 69/335 have also been removed in their entirety, again confirming that there is no requirement for restructuring operations to involve only those companies within the Member States.

188. In addition, the Commissioner is further confident that this interpretation is correct in that this was ventilated at length in the UK case of *HSBC Holdings and Bank of Mellon of New York Corporation and the Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 163 (TC). The Commissioner agrees with their conclusions and again could not improve on the analysis. This case related to Article 10 and 11 of Directive 69/335, as amended, which correlates with Article 5 of the Directive 2008/7. HMRC attempted to seek to limit the territorial scope of the Directive 69/335 to only those companies within the EU but this was rejected emphatically at paragraph 291-294 by Mosedale J :

> "291. Preamble 5 goes on to say "it is advisable to abolish the stamp duty on securities, regardless of the origin of such securities". Now it seems fairly obvious, as it follows Preamble 4, that it is actually referring to stamp duty on the issue of securities and not stamp duty on the transfer of securities, nevertheless it is clear it intends to abolish stamp duty on the issue of securities into the EU and clearly implies, as it goes without saying, that securities the issue of which is within the EU should also be free of stamp duty.
>
> 292.And if there were any doubt about this, preamble 6 provides that that "duty on the raising of capital within the common market by a company or firm should be charged only once and that the level of this duty should be the same in all Member States so as not to interfere with the movement of capital;" clearly virtually expressly saying that *only* capital duty authorised by the Directive could be charged on the raising of capital by companies within the common market.

293.Preambles are not part of the operative legislation and should not be interpreted as if they were, but it seems to us that the drafters of the Directive here must have intended the phrase "raising of capital within the common market" to mean the raising of capital by a company situated within the common market. Article 2 makes it clear that capital duty is chargeable on companies to the extent they are situated within the EU. Its application is not restricted to raising of capital from investors located within the EU. It would be very odd if it did so as this is contrary to the preamble and would involve enormous practical difficulties in identifying the location of all the investors.

294. In conclusion, the argument over whether the Directive was intended to be extra-territorial in scope (although it clearly was in some respects) may be sterile. The question is whether it was intended to apply to companies situated in the EU, or whether (as contended by HMRC) it was only intended to apply to companies situated in the EU in so far as they were raising capital from investors based in the EU. We are in no doubt it was intended to apply to companies situated in the EU irrespective of where their investors were located. It would seem contrary to its expressed objects to limit it to capital raising transactions where the investors were also situated in the EU and in any event it does not expressly do so."

189. There is no limiting language on the definition of 'capital company' and that never existed with regards to territory even in the original Directive 69/335. The broad definition of capital company follows the broad definition of "capital company" set out in the precursors to the 2008 Directive (i.e. Directives 69/335/EEC, 37/79/EEC, 74/553/EEC and 85/303/EEC).

190. The assertion that the concept of 'capital company' contained in Directive 2008/7 should be limited to companies which have their effective centre of management or their registered office within the territory of a member state is further undermined when one looks at the Directive 2008/7 in closer detail. For example, in defining "contributions of capital" for the purposes of the 2008 Directive, Article 3 (1)(e) includes "*the transfer from a third country to Member State of the centre of effective management of a capital company whose registered office is in third country*" within the definition. Similarly, Article 3 (1) (f) of the Directive 2008/7 includes "*the transfer from a third country to Member State of the registered office of a capital company who centre of effective management is in a third country*" within the definition of "contributions of capital". It is clear that it was contemplated that a company with the centre of effective management or registered office in a third country would be classified a capital company for the purposes of Directive 2008/7. The broad construct of what constitutes a "capital company" is one which is also reflected in case law of the CJEU (Case 112/86 *Amro Aandelen Fons v Inspecteur der Regitratie en Successie* EU:C: 1987:488; *Drukarnia*).

191. The Commissioner notes that Revenue never sought to charge a court-sanctioned cancellation scheme before. It enacted Section 31D to ensure that what it viewed as a tax avoidance scheme was prevented. It chose not to outlaw cancellation schemes as the United Kingdom had chosen to do so to effect a merger or acquisition but to attempt to impose a stamp duty on them. The Commissioner finds this device is not permitted in the Transaction pertaining to [redacted] and the Appellant for the reasons outlined above. Revenue put forward no explanation as to if it had any considerations of the United Kingdom's view of imposing stamp duty on cancellation scheme's as coming within the prohibitions in Directive 2008/7 and why it did not choose to prohibit court cancellation schemes in their entirety. The Commissioner makes no finding concerning Revenue's position in relation to the United Kingdom's viewpoint. But it does agree that a cancellation scheme of arrangement whereby a capital company acquires another capital company by reason of cancellation of shares and issuing of

new shares is a device that can be utilised to prevent stamp duty being imposed by virtue of Directive 2008/7. Hence, caution has to be taken to ensure that any change to such cancellation schemes or change in the law to impose stamp duty must be taken to ensure that a Member State does not fall foul of Directive 2008/7.

192. The Commissioner considers that the United Kingdom made a prudent decision to publish the change to its Companies Act to prevent the use of cancellation schemes after considering the Directive 2008/7 and its conclusion that it such a scheme came under the definition of "restructuring operation". The United Kingdom has significant experience of being found in breach of the Directive 69/335 and its successors including 2008/7 (*Air Berlin plc v Commissioners for Her Majesty's Revenue & Customs*, *HSBC Holdings plc and Vidacos Nominees Ltd v The Commissioners of Her Majesty's Revenue & Customs*). The Commissioner understands that any action by the United Kingdom does not create a precedent in this jurisdiction but it is entirely entitled to agree that the course of action the United Kingdom took ensured it did not come within the ambit of infringing Directive 2008/7.

4. Finding in relation to Restructuring Operation

193. The Commissioner finds that the Transaction comes within the definition of "restructuring operations" under Article 4 of the Directive 2008/7/EC and therefore cannot be subjected to stamp duty at any rate. The Commissioner is obliged to read the domestic legislation in conformity with the Directive 2008/7 and if that cannot be undertaken, then is obliged to disapply the domestic provision. The Commissioner will therefore consider whether a conforming interpretation is possible.

5. Conforming Interpretation

194. In considering conforming interpretation, the Commissioner must consider the seminal case of Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153 ("*Van Colson*"). In *Van Colson,* the CJEU made a preliminary ruling regarding a reference from a German Labour Court regarding the principle of equal treatment on gender grounds to access to employment. Two females rejected from employment had no remedy in German law. The CJEU made clear each Member State's obligation to ensure the result envisaged was achieved by domestic law. Paragraph 26 stated :

> *"However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189."*

195. Therefore, the Commissioner is obliged, as per the ruling in *Van Colson* to interpret Irish national law in light of the wording and purpose of the Directive 2008/7. The Appellant's submit that the starting point is that a body charged with interpreting and applying EU law must adopt a conforming interpretation. The Commissioner agrees with this submission. It is the EU's mandatory requirement and the duty to apply conforming interpretation emanates from the EU. The Appellant relies on *Murphy v An Bord Telecom Eireann* [1989] ILRM 53

(paragraph 5) to assert that national legislation can infer words to ensure that domestic legislation is interpreted in conformity with EU legislation which stated that where such a conflict exists, national law must yield to Community law. This referred to the Supreme Court decision of *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713, para 6 and 7, which stated :

> "6. Where such a conflict exists, national law must yield primacy to community law: Crotty v An Taoiseach [1987] ILRM 400. The exclusive role of the making of laws assigned to the Oireachtas by Article 15 of the Constitution has been expressly modified by Article 29.4.3° so as to enable community law to have the force of law in the State.
>
> 7. Where such a conflict arises, the national law is, accordingly, inapplicable. In the words of the Court of Justice of the EC in *Case C-106/77-Amminstrazione della Finanze dello Stato v Simmenthal* [1978] ECR 629, 644:
>
>> 'every national court must, in a case within its jurisdiction, apply community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule'."

196. The Commissioner was also asked to consider the case of C-397/01 to C-403/01 *Bernhard Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* ECR 2004 I-08835 EU:C:2004:584 ("*Pfeiffer*"), relating to the Working Time Directive which sets out the clear terms of obligation in paragraph 114-116. The Commissioner must consider the domestic provisions as a whole in order to assess to what it extent in may be applied so as not to produce a result contrary to that sought by the directive. The CJEU in Pfeiffer (paragraphs 14-116) set out the obligation is clear terms:

> "114 The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 Mau[2003] ECR I-4791, paragraph 34).
>
> 115 Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, Carbonari, paragraphs 49 and 50).
>
> 116 In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive."

197. The Irish courts consideration of conforming interpretation to ensure uniformity and efficacy of EU law and the approach expected to conforming interpretation is set out in *EPA v Neiphin Trading* [2011] IEHC 67. Paragraph 64, Edwards J:

"Article 10 and now Article 4 (3) TEU, has long been regarded as underpinning, and also as requiring, the application of the doctrine of consistent interpretation of EC, now EU, law by member states including the national courts. This doctrine is aimed at securing the efficacy and uniformity of EU law. The best known and most commonly cited articulation and formulation of the doctrine is contained in the judgement of the European Court in Marleasing."

198. At paragraph 65, Edwards J says:

"It is important to note that the European Court of Justice is couched in the requirement in terms of discretion. Consistent interpretation cannot be used to bring about a contra legem interpretation of national law."

199. Edwards J noted that in many instances the conforming interpretation related to circumstances whereby the EU Directive had been transposed into domestic legislation. He referred to another case in paragraph 73 where he referred to the case of Case C-212/04 *Adeneler v Elinkos Organisimos v Galaktos* [2006] IRLR 716 where the CJEU confirmed at paragraph 110 that conforming interpretation is limited by legal certainty and retroactivity and the obligation cannot serve as the basis for an interpretation contra legem. Edwards J stated at paragraph 110 that:

"110 It is true that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem (see, by analogy, Case C-105/03 *Pupino* [2005] ECR I-5285 paragraphs 44 and 47,."

200. He further went on to explain at paragraph 123 that following a directive coming into force, that any interpretation must seek to attain the objective of the directive.

"123 It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive."

201. In the case of Directive 2008/7, Ireland has not transposed this directive into domestic law. The deadline for transposition has long since passed. Therefore, in its obligation to consider conforming legislation, the Commissioner must ensure that the attainment of the objective of the directive is not compromised. Revenue's submissions are that the Commission "would have to find that a Conforming Interpretation was not possible".

202. The Appellant has proposed several options to consider to ensure section 31D SDCA conforms with Directive 2008/7. It suggests words could be read into the legislation (*Murphy*). The Appellant point out that *Bookfinders* does not relate to conforming legislation and the principles of EU law as it confirmed that a conforming interpretation was not necessary to resolve the case. So, *Bookfinders* has no application to the matter in hand.

203. The Appellant put forward several options of additional words and the Commissioner has appraised if they have the effect of conforming section 31D with Directive 2008/7. The first option would be additional wording in subparagraph (c), so that it would read :

Option 1
"the shareholders of the target company receive consideration <u>which does not consist, even in part, of shares</u> for the cancellation of those shares held by them."

204. The Appellant put forward Option 2 which changes the definitions and would read:

Option 2
In the definitions "agreement" would read
"other than an agreement which consists of or forms an integral part of a restructuring operation within the meaning of 4(1)(b) of the Directive".

205. The Appellant argues that Option 1 is a direct reference to the definition in Article 4(1)(b) and so is in conformity with the Directive but also other cancellation schemes would not be affected by reading in these words. They suggested that cancellation schemes that relate to private companies whereby shares are cancelled but the consideration is wholly in cash would still come within the stamp duty provisions set out in section 31D SDCA. The Appellant argues that Option 2 would have the same effect.

206. The Commissioner has appraised Option 2 but is not persuaded that this achieves the certainty that that domestic legislation seeks to achieve in relation to EU law. It is transposing a definition from the EU Directive into domestic law but simply by reference to it. The domestic legislation would need to include the definition of restructuring operations in it. As such, the Commission could end up with the precarious position of a draftsman and the EU does not suggest that a court or tribunal play the part of the legislative branch. Revenue brought forward no information as to the underpinnings or risk or impact assessment of section 31D SDCA and so there is no information for the Commissioner to understand if the legislation was attempting to capture the very essence of restructuring operations. If that was the case, then to include a definition and exclude restructuring operations, would be contra legem.

207. The United Kingdom cases have a useful set of guidelines for assessing conforming legislation. Whilst they are not binding in this jurisdiction, they are useful guidance in assisting their courts and tribunals in ensuring that domestic legislation is read in conformity with EU law. That is the role all courts and tribunals are mandated to undertake by the CJEU and so they are of assistance in that context. The Commissioner stresses that no new test is being promulgated. The EU does advise Member States to seek conformity across the EU and to seek various tools to assist including reviewing decisions of the CJEU but also other decisions in Member States (page 44 Guide to Charter cites various tools including "*constitutional traditions common to the Member States*"). One of the advantages to being a member of the EU is the reservoir of case law to peruse. The EU has even a portal to assist Member States find out other jurisprudence.[27]

208. The First Tier Tribunal in England and Wales, an equivalent tax appeal body, examined conforming interpretation in detail in the case of *Gifford & Co v Commissioners for Her Majesty's Revenue & Customs* [2019] UK FIT 410 TC ("*Gifford")*. They cited the tests utilised in considering conforming interpretation in respect of the European Convention on Human Rights to assist. The Appellant's further grounds of appeal in relation to the Charter and the Convention will also engage concepts of conformity. In *Gifford* Poon J helpfully referred to Lord Rodger's speech in *Ghaidan v Godwin Mendoza* [2004] UKHL 30 which assists in any court

[27] https://e-justice.europa.eu/content_member_state_case_law-13-en.do

or tribunal as a starting point for conforming interpretation. Whilst it is not a domestic authority, it sits alongside the domestic authorities of *Murphy*.

209. The Commissioner finds that it is helpful as Poon J in *Gifford* was considering the interpretation of tax directive and domestic legislation and the various and multiple suggestions of new wording to ensure conformity. At paragraph 118, Poon J quotes Lord Rodger :

> *'[122] … The key is that the emendation must start from a careful consideration of the writer's thought. Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). … what matters is not the number of words but their effect. For this reason, in the Community law context, judges have rightly been concerned with the effect of any proposed implication, but have been relaxed about its exact form….' (emphasis added)*

210. Poon J proceeds at para 122 to summarise the considerations that the United Kingdom courts have applied in conforming interpretation and the Commissioner finds those helpful.

> *"122. Counsel for the appellant has included a helpful summary of the principles to be applied by the courts when construing domestic legislation so far as possible in conformity with EU law and is reproduced here. The courts' obligation in this regard:*
>
> *(1) is not to be constrained by conventional rules of construction (IDT [82]);*
> *(2) does not require ambiguity in the legislative language (Ghaidan [32]);*
> *(3) is not an exercise in semantics or linguistics (Ghaidan [31], [48], [110]);*
> *(4) permits departure from the strict and literal application of the words which the legislature has elected to use (Ghaidan [31]);*
> *(5) permits the implication of words necessary to comply with EU law obligations (IDT [89]);*
> *(6) accepts that the precise form of the words to be implied does not matter (IDT [114], Vidal-Hall [90]);*
> *(7) is only constrained to the extent that the meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed (Ghaidan [33], Vidal-Hall [90]);*
> *(8) must not lead to an interpretation being adopted which is inconsistent with a fundamental or cardinal feature of the national legislation since this would cross the boundary between interpretation and amendment (IDT [82], [113], Vidal-Hall [90]);*
> *(9) cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate (IDT [113])."*

211. The Commissioner has examined Option 1 and 2 and considers that in accordance with domestic and EU case law, it is not construed by conventional rules of construction. The Commissioner has examined the purpose of Directive 2008/7, which is to prohibit stamp duty on restructuring operations so as not to stifle investment and to ensure that the long term goal of prohibition of all capital duties on transactions takes place. The Commissioner has also recognised the objective of section 31D SDCA which is to prevent tax avoidance with the use of cancellation schemes whereby companies are utilising cancellation schemes to avoid stamp duty. The objective of section 31D SDCA does not set out that it is to impose stamp duty on "*restructuring operations*" under Directive 2008/7. In any event to do so would be in contravention of Directive 2008/7. As such the Commissioner must either read the legislation as conforming to Directive 2008/7 or disapply section 31D to the Assessment. The Commissioner considers that it is possible to insert wording into Section 31D which considers both the objectives of Directive 2008/7 and the objectives of domestic legislation.

212. As such, to include the words in Option 1 "*which does not consist, even in part, of shares*" accords with conventional rules and does not require ambiguity in language. It is also not an exercise in semantics or linguistics as the exception is carved out and is clear. The Commissioner is permitted to imply words or include words necessary to comply with the EU law obligations and Option 1 allows the domestic legislation to be in compliance with Directive 2008/7 in relation to restructuring operations. The wording "*goes with the grain*" of the legislation or in domestic terms is not "contra legem" and in the absence of any explanation of the underlying thrust of the legislation, other than a tax avoidance one, there is nothing to prevent the insertion of these words.

213. Option 1 does not require the Commissioner to interpret against a cardinal feature of the legislation. The legislation still allows cancellation schemes to operate just that there are tax implications if companies undertakes to cancel shares in this way. But the insertion of the words in Option 1 allows the domestic legislation to operate, as it must have been intended, but still comply with the prohibition of stamp duty on restructuring operations under Article 4 of Directive 2008/7.

214. The Commissioner has regard to Option 2 but the insertion of additional wording from the Directive would require ambiguity as there is no definition within the domestic legislation and it would need a cross referral to EU directive, and could lead to an accusation that the Commission is seeking to legislate and utilising the United Kingdom vernacular "*go against the grain*" of the domestic legislation or be contra legem.

215. The Appellant have asked the Commissioner to consider the retrospectivity of Section 31D in conforming interpretation, which is discussed in the paragraphs below.

6. Disapplication

216. The Commissioner is not required to consider disapplication of Section 31D SDCA due to the above finding. Nevertheless, and as this appeal may go higher, the Commissioner will briefly deal with the submissions and its views on them. In order for a directive to be directly effective and capable of conferring rights, it must be expressed in sufficiently precise and unconditional terms. In addition, the deadline for transposition of the directive must have passed. This is the situation with Directive 2008/7 and Ireland has not transposed this directive. The direct effect of European law has been enshrined by the Court of Justice in the judgment of *Van Gend & Loos.* Directives do not have direct effect and as Article 288 TFEU states, directives are addressed to Member States, not individuals. Problems arise where Member States fail to implement a directive or implement a directive incorrectly (*Becker*).

217. The CJEU has found that directives can have vertical effect where they have not been correctly implemented and the implementation period is over. The cumulative requirements for a provision in a directive to have direct effect are as follows:

- The provision must be sufficiently clear and precise;
- It must be unconditional, and;
- It must leave no legislative discretion to the Member State;
- The implementation period must have passed; and
- The directive has not been implemented or has not been implemented correctly.

218. These requirements are set out in Case C-41/74 *Van Duyn* EU:C:1974:133, Case C-148/78 *Tullio Ratti* EU:C1979:110. Directives have vertical effect against the State and emanations of the State (*Marshall*). Directive 2008/7 and its predecessor 1969/335 have been found to have direct effect and there is considerable body of law confirming same. In addition Article 5(1) of Directive 2008/7 has been found to be directly effective. Its equivalent provision in Article 10 of the 1969 Directive has been found to be "*expressed in sufficiently precise and unconditional terms to be relied upon by individuals in the national courts in order to contest a provision of national law which is contrary to the Directive"* (Case C-134/99 *IGI* at paras 36-38).

219. The Commissioner finds that Directive 2008/7 and Article 4 and Article 5 are directly effective against an emanation of the State, namely Revenue. EU law has supremacy over domestic law (*Simmenthal*). As referred to at length above, the CJEU has recently confirmed that national bodies must disapply provisions of national law which conflicted with EU law in the *WRC* case (C-367/17 EU:C:2018:979). The Supreme Court confirmed in *An Taisce v An Bord Pleanála* [2020] IESC 39 ("*An Taisce*") that a tribunal or administrative body can set aside a statutory provision if the relevant provision is inconsistent with EU law. It noted:

> "it would therefore seem to be the case in accordance with this judgement that a body such as An Bord Pleanála would be required to disapply national measures of whatever type, if inconsistent with EU principles stop this decision of the court evidently was contrary to the strong views expressed by the Court in its reference, and was also contrary to the opinion previously expressed by Advocate General Wahl."

220. The Supreme Court noted the widespread impact this decision had and explicitly noted that it applied to the tax appeals commission (para 163):

> "If applied to literally, that judgment is capable of having widespread ramifications for the jurisdiction of national non-court bodies, or administrative entities, which are called upon to apply national legislation where an EU measure is relevant. Such bodies, under whose remit EU rights may arise, include the Environmental Protection Agency, the Tax Appeals Commission, the Valuation Tribunal, the Refugee Appeals Commission, the Information Commissioner as well as the District and Circuit Courts."

221. The Supreme Court noted in *An Taisce* (Mc Kechnie J, para 164) orbiter dicta that in order to encourage enhanced coherency and protect any legislative scheme from becoming disjointed and disorderly, decision makers such as the Commissioner must *"search for the most efficient way of dealing with, not only the issue immediately at hand but also with the consequences which any singular decision may have in other situations".*

222. Revenue has interpreted the obiter dicta of McKechnie J that courts and tribunals have a discretion not to disapply domestic legislation when in contravention of EU law. This is not the

correct reading of the EU jurisprudence. The caution that the Supreme Court advances is in relation to the power to disapply and that is not dissimilar (if more directly posed) as the guidance given by the courts in the United Kingdom on conforming interpretation and ultimately disapplication, referred to above. It could not be the case that this comment made obiter dicta is to be taken by tribunals, including the Commission that they must not interpret domestic legislation in conformity with EU law. This is especially the case when the preliminary ruling from the CJEU in the *WRC* case specifically stated that tribunals must do so. It would undermine the instruction from the CJEU in the *WRC case* and all other cases.

223. It is assumed that the reference McKechnie J in *An Taisce* made of *"having a required power does not necessarily mean that in all situations, it must be used"* must refer to the power to disapply rather than a conforming interpretation and that is in compliance with EU jurisprudence. But, the Commissioner does not accept Revenue's interpretation that "*whether national legislation contravenes any directly effective provision, are all matters that should be ventilated by way of judicial review before the High Court"* (paragraph 7.2 Revenue Outline of Arguments). This is diametrically opposed to the jurisprudence and clear instruction of the CJEU. It would also assist those who have considerable resources at their disposal and negate a level playing field, the foundation of the EU and the supremacy of EU law (as discussed at length above). Revenue argue that Directive 2008/7 is not directly effective. The CJEU on every occasion has confirmed that national courts and tribunals must ensure the Capital Taxes Directive is implemented. It gives rulings that it is directly effective and national legislation either needs to be read in conformity or disapplied.

224. The Commissioner has found that it can interpret Section 31D SDCA in conformity with the Directive 2008/7. But if necessary to do so, it would be able and could disapply section 31D SDCA. The outcome is the same in that the assessment is reduced to nil and the appeal is allowed. Either way, the Commissioner must ensure that the objectives of Directive 2008/7 are achieved and that is either done by either conforming interpretation or disapplication.

225. The Appellant has been successful in their appeal on grounds 1 to 4. As such, there is no necessity for the Commissioner to consider grounds 5 to 7. However, as this appeal may reach a higher level of appeal, the Commissioner for completeness has also examined those additional grounds, 5 to 7. But before doing so, it has also scrutinised (again for certainty) whether it should in this case make a referral for a preliminary ruling and the EU guidance on when a referral should be made.

7. Referral for a Preliminary Ruling

226. Following the decision by the Commissioner that it has jurisdiction to hear this appeal and further must consider EU law in determining the appeal, the Commissioner has studied if a reference for a preliminary ruling to the CJEU should be made. This is important in relation to its consideration of Directive 2008/7 but also in relation to the Charter. As such, the Commissioner has reviewed the jurisprudence and the helpful guidance from the CJEU entitled Recommendations to national courts and tribunal in relation to the initiation of preliminary ruling proceedings (2018/C 257/01).[28]

227. The jurisdiction of the CJEU to give a preliminary ruling is exercised exclusively on the initiative of the national courts and tribunals. Paragraph 5 of the CJEU Recommendations in relation to

[28] Recommendations to national courts and tribunal in relation to the initiation of preliminary ruling proceedings https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32018H0720(01)&from=EN

preliminary ruling proceedings states that a "*reference for a preliminary ruling may, inter alia, prove particularly useful when a question of interpretation is raised before a national court that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context*".

228. Paragraph 10 deals with request for a preliminary ruling concerning the interpretation of the Charter. Revenue suggest that if there was to be a reference for a preliminary ruling, it should emanate from the High Court. It is clear that the right of a tribunal to refer a question to the CJEU may never be limited and the higher courts are not allowed to limit the freedom of any lower court or tribunal to refer (Case 166/73 *Rheinmuhlen-Dusseldorf* EU:C:1974:3.)

229. But equally Article 267 TFEU makes a distinction between lower courts (and tribunals), which may refer a preliminary question and a "*court or tribunal of a Member State against whose decisions there is no judicial remedy*". Those courts **shall** refer a question to the CJEU when a question of EU law arises. National courts can refer to different kinds of question to the CJEU. The first type of question concerns the validity of EU law (Case C-293 and 594/12 *Digital Rights Ireland, Data Retention Directive*, EU:C:2014:238). The second type of question concerns the interpretation of EU law and higher certain route of EU law should be interpreted.

230. Even where no legal remedy exists, national courts may not be obligated to refer a question if there is already case law in the CJEU which is clear. The Commissioner is not obligated to refer for a preliminary ruling and so the CJEU guidance is not strictly relevant. But the Commissioner has found it useful in reviewing if it should make a referral in this appeal. The Commissioner has to consider in this case whether it requires a reference for a preliminary ruling. The CJEU gives guidance on the situation of when (or otherwise) a reference is to be utilised for those courts whose decisions where there is no legal remedy (Case 283/81 *CILFIT* EU:C:1982:335, para 10/14/16).

231. In those cases, firstly, no obligation exists where the question of EU law "*is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case*." Secondly, a reference is not required "*where previous decisions of the court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions of issue are not strictly identical" (CILFIT*).This second exception is known as they *acte eclairé doctrine,* and means the courts do not have to ask questions of law that, in their opinion, have already been clarified in previous judgements of the CJEU. Whether the question at stake has already been settled by previous CJEU case law is an assessment the national courts or tribunal has to make. The third exception is known as the *acte clair* doctrine, and removes the obligation to refer where the correct interpretation of EU law is so obvious for the national court that no reference is deemed necessary.

232. The Commissioner views these guidelines set out in *CILFIT* as persuasive to this appeal and considers that in the present appeal there is sufficient jurisprudence and decisions in relation to Directive 1969/335 and Directive 2008/7 and so it comes under the acte éclair and acte clair considerations. As stated above, the Commission is not obliged to consider the guidance in the *CILFIT* case but finds it informative in making its decision that no reference for a preliminary ruling is required. The Commissioner notes that there has been considerable rulings by the CJEU in relation to Member States contraventions of the Capital Duties Directive. The Commissioner also notes that the definition of restructuring operations is so wide and has been drafted as such and so clear that the restructuring taking place in relation to the Appellant comes within that definition. In addition, it is clear that any stamp duty on

the issue of shares is in contravention of the Capital Duties Directive, howsoever the issue of shares manifests itself.

233. The Commission is also guided by the Advocate General Jacobs in Case-338/95 *Weiner SI GmbH v Hauptzollampt Emmerich* [1997] ECR I-6495. He suggested a measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed and it may be counter-productive (para 60) :

> "Excessive resort to preliminary rulings seems therefore increasingly likely to prejudice the quality, the coherence, and even the accessibility, of the case-law, and may therefore be counter-productive to the ultimate aim of ensuring the uniform application of the law throughout the European Union."

234. A passage of his opinion is of particular relevance in the present context (see [1997] ECR I-6495 at 6515-6516, para 61) –

> '…another development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunals can resort in resolving new questions of Community law. **Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this court's case-law. Experience has shown that that case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference.**" (emphasis added)

235. Revenue's position is that their application of section 31D SDCA is lawful under EU law. In addition, they submit the Commission does not have the jurisdiction to deal with this appeal and hence it should not refer this matter for a preliminary ruling. The Appellant submits that the case law and tenets of the appeal are so self-evident that a referral is not necessary. The Commissioner is satisfied that its considerable appraisal of the law to the facts in this case and consideration of the EU Directives and jurisprudence across Member States lead it to the conclusion that a referral for a preliminary ruling is not necessary and a measure of self-restraint, as referred to above is prudent. The Commissioner has taken cognisance of the Advocate General's view that tribunals in technical fields, such as taxation, are able to extrapolate from the principles developed in the CJEU's case-law and that it is sufficiently specialised to decide this appeal without the need for a reference. There is a right of appeal to a higher court, which provides a safe-guard to either party who wished for a referral. But in this case neither party sought the Commissioner to make such a referral. Hence, the Commissioner for all the reasons set out above, is satisfied that a referral for a preliminary ruling to the CJEU is not required in this appeal.

III. VESTED PROPERTY RIGHTS UNDER THE CHARTER, CONVENTION AND THE CONSTITUTION

1. Grounds 5, 6 and 7 of the Appeal

236. The Appellant has been successful in their appeal to the Assessment based on the finding that section 31D needs to be read in conformity with Directive 2008/7 and/or even if it could not

be so read, section 31D should be disapplied. As such the Commissioner does not need to consider ground 5, 6 and 7 of the Appeal, namely that the Assessment unjustly interferes with the Appellant's vested property rights under the Charter and the Convention and/or the Assessment amounts to an unjust and unreasonable attack on the Appellant's vested property rights under the Constitution of Ireland. But, for completeness, and as there is the strongest potential that this appeal will go to a higher appeal, and to assist the parties, the Commissioner has scrutinised all the grounds. The Commissioner considers ground 6 and allied ground 7 of the Appellant's appeal before considering ground 5. Revenue maintain that the imposition of this stamp duty is not retrospective, not targeted, has no discriminatory features and there is no contravention of the Charter, the Convention or the Constitution.

237. Under ground 6 of the appeal, the Appellant submits that the Assessment amount to an unjust and unreasonable attack on the Appellant's vested property rights under the Constitution of Ireland. All parties agree that the Commissioner does not have the requisite jurisdiction to declare a legislative provision as being unconstitutional. The Commissioner also agrees with both parties submissions on this matter.

238. The Appellant, however, does submit that the Commissioner is entitled to presume that Section 31D is constitutional and is not retrospective. It is noted that Revenue agrees that there is a presumption against retrospective effect. In Revenue's *Tax and Duty Manual* Part 01-00-06 May 2019 paragraph 6.6.8 states[29] :

> *"Presumption against retrospective effect*
>
> *Unless the legislation specifically provides that it applies retrospectively, it is presumed not to have retrospective effect [**Hamilton v Hamilton** [1982] IR 466]."*

2. The Appellant's Property Rights and the Constitution

239. The Appellant submits that the unjust and unjustified nature of the interference with its property rights is demonstrated in summary by eight ways as follows:

- the Appellant acquired vested contractual and property rights pursuant to the Acquisition Agreement and Rule 2.5 Announcement.
- The Appellant was defined by the Acquisition Agreement and, separately, the Rule 2.5 Announcement. The Appellant was precluded by the Takeover Rules from reducing the offer price so that a reduction to reflect the stamp duty was not possible. The Appellant had a vested right to have the completion of the Transaction conducted pursuant to the law at the time of the commencement of the process (*Podariu v Veterinary Council of Ireland* [2018] 3 IR 124.
- The High Court was seised of proceedings relating to the approval of the scheme at the time that section 31D SDCA was commenced and hence the Oireachtas cannot interfere with proceedings that are pending before the court.
- The Acquisition Agreement did not attract stamp duty at the time of its execution in [redacted], but is effectively being characterised as not actually being an agreement, namely an agreement completed in the past is deemed to be executed in the future.
- The transactions used under this facility were in the public domain and there was no abuse of rights.

[29] https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation tax/part-01/01-00-06.pdf

- Section 31D is targeted if applied retrospectively [redacted] and this [redacted] impact is discriminatory in nature.
- Stamp duty is imposed in a novel way and not on an instrument that conveys property interests but on an acquisition agreement, which of itself does not transfer any property interests or shares or interest in shares.
- If Section 31D intended to pursue a legitimate public interest in imposing duties on this form of a transaction, this can be done prospectively and by a prospective interpretation.

240. The Commissioner considers Article 15.5, Article 40.3 and Article 43 of the Irish Constitution Bunreacht na hÉireann to be potentially engaged in the Appellant's final grounds of appeal.

241. Article 15.5.1 of Bunreacht na hÉireann provides:

> *"The Oireachtas shall not declare acts to be infringements of the law which are not so at the date of their commission".*

242. In *Doyle v An Taoiseach* [1986] IRLM 693 it concerned a 2 per cent levy imposed from May to December 1979 by a statutory instrument. The Court held it was an invalid delegation of legislative power. Anticipating this result, the State argued that this was 'cured' when the measure was confirmed in section 79 of the Finance Act 1980. In the course of his judgment, Henchy J the same judge who made the decision in Hamilton v Hamilton stated:

> *"If it were held to operate retrospectively, [section 79] would have the effect of making, ex post facto, non-payment of the levy in 1979 an infringement of the law. Such a result would make s.79 invalid having regard to Article 15.5 of the Constitution."*

243. Property is protected by two Articles of Bunreacht na hÉireannn namely Article 40.3.2 and Article 43. They are set out below:

> "Article 40.3.2:
>
> *The State shall in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."*
>
> *"Article 43:*
>
> *1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*
> *2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*
> *2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*
> *2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."*

244. Taxation is an interference with property rights. This was recognised by the Supreme Court in in *Brennan v Attorney General* [1983] IRLM 449 ("*Brennan*") and the High Court in *Daly v*

Revenue Commissioners [1995] IEHC 2 ("*Daly*"). The *Brennan* decision involved rates payable in respect of farm land. The rates were based on property values determined in the 1850s which were at complete variance with modern property values. This resulted in an arbitrary and unfair imposition of tax. The *Daly* decision was concerned with a withholding tax on payments to doctors. The tax so withheld was allowed as a credit against the doctor's income tax bill at the end of the year. The problem was that the withholding tax was invariably considerably higher than the income tax eventually payable. Therefore, the doctor was placed at a significant cash flow disadvantage.

245. In *Daly*, Costello J stated:

> "… legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When, as in this case, an applicant claims that his constitutionally protected right to private property referred to in Article 40.3.2° has been infringed and that the State has failed in the obligation imposed on it by that article to protect his property rights he has to show that those rights have been subject to 'an unjust attack'."

246. In *Dreher v Irish Land Commission* [1984] IRLM 94, the Supreme Court stated that "any State action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purposes of Article 40.3.2°". The Supreme Court has repeatedly confirmed this point.

247. The courts have considered the constitutionality of retrospective legislation in *Re Article 26 and the Health (Amendment) (No2) Bill 2004*13 [2005] 1 IR 105. The government introduced a Bill seeking to retrospectively render health charges for elderly patients (who had incorrectly been charged) lawful. The Supreme Court stated the correct approach in such cases was firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consists of a regulation of those rights in accordance with principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in the light of its conclusions on these issues, to consider whether the Bill constitutes an unjust attack on those property rights.

248. The Supreme Court found that such retrospective legislation in this case could not be regarded as regulating the exercise of property rights within Article 43.2.1 and it was somewhat of a stretch to regard them as the principle of social justice. It further found that to abrogate a property right in this way would only be justifiable in extreme cases of financial crisis in the State. The Supreme Court held that neither an extreme financial crisis nor a fundamental disequilibrium in public finances justifying the Bill had been established. Consequently, the proposed legislation amounted to an abrogation of property rights and an unjust attack on them contrary to the provisions of the Constitution and in particular Articles 43 and 40.3.2.

249. The Commissioner has studied the Transaction and the various contractual documentation. There can be no doubt that the Appellant acquired the right to purchase [redacted] and its assets by virtue of the Acquisition Agreement. [redacted] was bound by in the Acquisition Agreement to use their *"respective reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable, to the extent permitted by applicable law to achieve satisfaction of the conditions of the transaction"* and [redacted] "*each of the Parties agrees that it will perform all of the obligations required of it in respect of the Acquisition on the terms set out in this Agreement, and each will,…use its reasonable best efforts to take such other steps as are within its powers*". Both parties in addition were

obliged under Rule 13 of the Irish Takeover Rules to use all reasonable efforts to ensure the satisfaction of all conditions including anti-trust conditions. [redacted] was obliged to complete the transaction. The Appellant could only terminate the agreement to purchase [redacted] under certain circumstances relating to anti-trust approvals and that was out of their control. A reverse termination fee of [redacted] was payable from the Appellant to [redacted] in those circumstances.

250. Following consideration of the contractual documentation, the Commissioner finds that the Appellant has acquired vested contractual and by extension property rights in the assets of [redacted]. As such, the Commissioner considers whether section 31D SDCA has retrospective effect. Section 31D is constructed so that it is the agreement ("*includes any arrangement, contract, compromise, understanding, scheme, offer, transaction or series of transactions*") which is chargeable with the same stamp duty as if it were a conveyance or transfer on sale of those shares. This is despite there being no sale or transfer of shares. The date the stamp duty is the date the scheme order is delivered to the registrar. The Commissioner finds that the effect of referring to an agreement, which may well have been contracted before the effective date of the legislation, means it has retrospective effect.

251. The Commissioner also notes that other sections of the Finance Bill 2019 imposing new charges occurred prospectively. If taken at its simplest the Finance Bill 2019 means that if a taxpayer had contracted to buy a property, but it was not completed, before the date of the Finance Bill 2019, they were not brought within its ambit due to the transitional arrangements but if the same taxpayer had bought the assets of a company, but it was not completed, before the date of the Finance Bill 2019, it would come with its ambit and there are no transitional arrangements. The amendments to the non-residential property means that those contracts entered into before 9th October 2019 were not subject to the increased rate of stamp duty. In the amendment in the Finance Bill dealing with an increase in stamp duty on non-residential property section 57(3) is amended as follows:

> "*57(3) Subsection (1)(b)—*
> *(a) shall have effect as respects instruments executed on or after 9 October 2019, and*
> *(b) shall not have effect as respects any instrument executed before 1 January 2020, where—*
> *(i) the effect of the application of subsection (1)(b) would be to increase the duty otherwise chargeable on the instrument, and*
> *(ii) the instrument contains a statement, in such form as the Revenue Commissioners may specify, certifying that the instrument was executed solely in pursuance of a binding contract entered into before 9 October 2019."*

252. The legislature itself assumes there is a vested contractual right in the "agreement" as defined in section 31D SDCA, in that the charge to stamp duty arises from that itself and is deemed to be vested on the date the scheme order is delivered to the registrar. It has noted the Appellant's submissions that Supreme Court (*Hamilton v Hamilton* [1982] IR 466 474) ("*Hamilton v Hamilton*) has cited with approval the definition of retrospectivity offered by Craies on Statute Law as any statute which:-

> "*Takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past."*

253. The Appellant had a vested right under the existing laws in early 2019 and the statute (section 31D SDCA) imposed a new duty which attached to the considerations (entering into the transaction) already past.

254. The Supreme Court noted in *Minister for Justice, Equality & Law Reform v Bailey* [2012] 4 IR 1, that legislation is presumed not to have retrospective effect unless clear words are used to confirm that is the intention and there is a presumption that legislation is not intended to affect vested rights unless the contrary intention clearly appears. In *Hamilton v Hamilton*, the Supreme Court, which related to a contract for property entered into before the effective date of an act. The Chief Justice at the time gave a seminal judgment on the reading of legislation in view of the common law and then the Constitution and the long held presumption that legislation must be read as not affecting existing rights.

255. O'Higgins C J held that a retrospective intent on the part of the legislature would indicate a lack of concern for contractual rights acquired. O'Higgins C J discusses at length the common law tradition of not introducing retrospective legislation where it would affect rights going back centuries. He then refers to the Constitution and confirms in the plainest terms that the legislature or Oireachtas is subject to the Constitution and in the first instance it must be presumed that what the Oireachtas has done is not in contravention of the Constitution. In the Hamilton case, if the legislation was read to have retrospective effect, it would have been in contravention of Article 40.3.2 of the Constitution.

256. Henchy J summarised the Chief Justice's judgment :-

> "The judicial authorities (which are mentioned in the judgment just delivered by the Chief Justice) make clear that, because there is a presumption that a statute does not intend to act unfairly, unjustly or oppressively by trenching on rights or obligations, lawfully acquired or created before the statute came into force, it should be construed as prospective in its application and not retrospective, unless there is a clear and unambiguous intention to the contrary expressed, or necessarily implied, in the statute, or unless the change in the statute is purely procedural."

257. Henchy J went on to state:

> "An ex post facto avoidance or devaluation of an agreement to sell which was valid and enforceable when made is prima facie punitive and unfair. Hence, the rule as to prospectivity: in Maxwell on Interpretation of Statutes (12^{th} ed., p.215) it is clearly stated as follows :-
>
> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended."

258. The Commissioner notes that Revenue's submissions are to the effect that section 31D SDCA was not intended to have retrospective effect. The Commissioner notes that the Finance Bill Resolution 5 makes no reference to it having retrospective effect and so that was never intended, as per Henley J reference to *Maxwell* and the rule on prospectivity.

259. The Commissioner finds that section 31D SDCA could not have been intended to have retrospective effect and therefore be in contravention of property rights as protected by the

Constitution. As such, the Commissioner must read that any reference to scheme orders and the date of application of the stamp duty and the agreement, as taking place after 9th October 2020, so there is no retrospective effect. In that case, the Assessment should never have been raised and therefore is reduced to nil. Again, this is consistent with the earlier findings of the Commissioner with respect to the previous grounds of appeal.

260. The Commissioner has not set out Appellant's submissions on in *Dellway Investments v NAMA* [2011] 4 IR 1 due to the finding above but has included them in its deliberations. As the Commissioner has found that the legislation could not have been intended to have retrospective effect, the other ground 5 does not need to be considered. But again for completeness and due to the extensive work engaged by the Appellant in setting out the grounds, the Commissioner has reviewed it to the extent permissible and that consideration is set out below.

3. The Charter and its application to the Appeal

261. The Commissioner has appraised the Charter[30]. Both the Appellant and Revenue agreed that there is not the same volume of jurisprudence, either in the domestic forum or in the CJEU in relation to the Charter and in particular relating to taxation.

262. The Preamble to the Charter (2000/C 364/01) sets out its aims :-

> *"This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights. Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations."*

263. The right to freedom to conduct a business and the right to property is set out in the Articles 16 and 17 of the Charter as follows:

> *Article 16 Freedom to conduct a business*
>
> *The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.*
>
> *Article 17 Right to property*
>
> *1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

[30] EU Charter of Fundamental Rights
https://www.europarl.europa.eu/charter/pdf/text_en.pdf

2. Intellectual property shall be protected.

264. The Commissioner does not have jurisdiction to consider cases that are directed to a violation of the Convention. But, national courts and tribunals are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law. Where the Charter provisions are sufficiently precise and unconditional, they can have direct effect. The scope of the provisions are set out in Article 51 of the Charter. It states:

Article 51 Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

265. The European Union publishes a helpful Guide on the Charter[31]. Page 23 confirms that the Charter contains rights that correspond to rights guaranteed by the Convention (see Figure 2 and the Annex for an overview of corresponding rights). The meaning and scope of those corresponding Charter rights (as well as the extent to which these can be limited) are to be the same as those laid down by the Convention (Article 52(3) of the Charter).

Article 52 Scope of guaranteed rights

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

266. There is no equivalent in the Convention to Article 16, the right to conduct a business but Article 17, right of property is viewed as the equivalent in the Convention. National courts are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law *(*Case C-426/11*, Mark Alemo-Herron and Others v. Parkwood Leisure Ltd,* EU:C:2013:521*,* paras. 30 and 36*;* Case C-169/14*, Juan Carlos Sánchez Morcillo and María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA, 17* EU:C:2014:2099, paras. 50 and 51*)*.

267. National measures can be reviewed in the light of the Charter whenever they come within the scope of EU law. Where the Charter provisions are sufficiently precise and unconditional, they can have a direct effect. (C-26/62 *Van Gend & Loos*). The direct effect allows individuals to invoke the Charter in proceedings before national courts.

[31] European Union Agency for Fundamental Rights, Applying the Charter of Fundamental Rights of the European Union in law and policy making at national level Guidance 2020 https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-charter-guidance_en.pdf

268. Article 267 of the TFEU also applies to references for a preliminary ruling in relation to the Charter. The EU suggests that in considering the application of the Charter, bodies consider amongst other sources the case law of the CJEU and the case law of the Convention and the European Court of Human Rights (page 44 *Applying the Charter of Fundamental Rights of the European Union*).

269. With respect to Article 16, there is limited jurisprudence concerning the Charter and there is no equivalent in the Convention. In relation to taxation of a business, the cases held have confirmed that Member States can apply taxation to businesses for legitimate aims of the collection of taxes and to prevent tax evasion (C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s.r.o,* EU:C:2017:820, para. 39).

270. In respect of Article 17, the right to property, again there is limited jurisprudence arising from the Charter but national bodies can consider the jurisprudence of the Convention, as this is the equivalent right under the Charter. The Protection of Property is set out in Article 1 of Protocol 1 of the Convention. The Commissioner has scrutinised the jurisprudence on taxation, as set out in the *European Court of Human Rights Factsheet – Taxation and the ECHR April 2019*[32].

271. Taxation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the person concerned of a possession, namely the amount of money which must be paid (*Burden v. the United Kingdom* (2006) 21 BHRC 640, [2007] STC 252, 9 ITLR 535, [2007] WTLR 607, para 59; *Špaček, s.r.o., v. the Czech Republic* (26449/95), para 39). The interference for taxation purposes is generally justified under the second paragraph of this Article, which expressly provides for an exception as regards the payment of taxes or other contributions (*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* (1995) EHRR 403). The Court respects the legislature in such matters unless it is devoid of reasonable foundation (*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, para 60). It is first and foremost for the national authorities to decide on the type of tax or contributions they wish to levy (*Musa v. Austria* (40477/98); *Azienda Agricola Silverfunghi S.a.s. and Others v. Italy* [2014] ECHR 650, para 103; *R.Sz. v. Hungary* 2013 [ECHR] 628, para 38 and 46).

272. The issue nonetheless comes under the Court's and by extension a tribunal's purview, since the correct application of Article 1 of Protocol No. 1 is subject to its supervision (*Orion-Břeclav, S.R.O. v. the Czech Republic* (43783/98)). A financial liability arising out of the raising of taxes may adversely affect the guarantee of ownership if it places an excessive burden on the person concerned or fundamentally interferes with his financial position (*Ferretti v. Italy* (25083/94); *Wasa Liv Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse and a group of approximately 15,000 individuals v. Sweden* (13013/87).

273. The Commissioner notes that Member States are allowed a wide margin of appreciation under the Convention when it comes to general measures of economic or social strategy (*Wallishauser v. Austria (no. 2*) [2013] ECHR 565, para 65), as well as when framing and implementing policy in the area of taxation *(Bulves AD v. Bulgaria* (3991/03) para 63).

[32] European Court of Human Rights Factsheet – Taxation and the ECHR April 2019
https://www.echr.coe.int/documents/fs_taxation_eng.pdf

274. There have been cases where the European Court of Human Rights have held that there has been a violation but the Commissioner has found that successful cases related for the most part to delays in reimbursement or failures in respect of refunds or rebates of tax (*Eko-Elda AVEE v Greece* [2006] ECHR 213, *SA Dangeville v France* [2005] BVC 630, *Buffalo Sri in liquidation v Italy* (38746/97, 3 July 2003). The European Court of Human Rights has confirmed that the retrospective application of the law would not of itself have raised an issue under the Convention, since Article 1 of Protocol 1 did not prohibit as such the retrospective application of a law on taxation (*Di Belmonte v Italy* 72638/01, 2010). In the *Di Belmonte* case, the applicant was successful in relation to the imposition of a retrospective law but the European Court of Human Rights found on the basis that the law had placed an excessive burden on the applicant. There was also a delay by the authorities and so that impacted on the tax that would have been imposed if the judgment had been executed properly and punctually.

275. The European Court of Human Rights has also repeatedly made it clear that, in the sphere of tax, the well-established position is that states may be afforded some degree of additional deference and latitude in the exercise of their fiscal functions under the lawfulness test (*NKM v Hungary* (66529/11 May 2013, para 50)*, National & Provincial Building Society v United Kingdom* [1997] ECHR 87 paras 75-83, and *Yukos v Russia* 14902/04, 31 July 2014, para 559). As the European Court also pointed out in *NKM v Hungary* at paragraph 51: "*retroactive taxation can be applicable essentially to remedy technical deficiencies of the law, in particular where the measure is ultimately justified by public-interest considerations*". In any event, it has not been suggested that retrospective legislation is automatically unlawful. The Court held in *NKM v Hungary* that any interference with the peaceful enjoyment of possessions must be <u>both</u> lawful and proportionate. Retrospectivity has generally been considered when evaluating the requirement of proportionality. In relation to proportionality, where payment of taxes is concerned, the national authority must strike a fair balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights, but it enjoys a "wide margin of appreciation".

276. The Commissioner for completeness has also reviewed the United Kingdom case of *Apvco 19 Limited v Her Majesty's Treasury, The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA 648, where the Court of Appeal had to assess the retrospective nature and a potential breach of Article 1 of Protocol 1 in relation to a tax avoidance scheme. Due to the facts of this case, there was found to be no breach but Vos LJ (para 49) did suggest that the situation may have been different if the appellants had been challenging the imposition of stamp duty itself.

277. The Commissioner has appraised the above limited jurisprudence to the appeal in hand but considers that it is not in a position to make a determination in relation to a potential breach of the Charter due to that limit and no cases falling squarely or in the vicinity to the appeal under examination. As such, the Commissioner if this was the only ground of appeal, would refer the matter to the CJEU under Article 267 TFEU. But as the Appellant has already been successful on the other grounds, it is not appropriate to make a reference for a preliminary ruling as it is not “necessary to make a judgment”. Neither the Appellant nor the Respondent requested one to be made. As such, the Commissioner makes no determination in respect of ground 5 of the appeal but has reviewed and appraised it in as fulsome a way as possible and in accordance with the Guidance given by the European Union institutions. The Commissioner also makes no finding in respect of the Appellant’s claim of being targeted and/or discriminated against.

4. Determination and Right of Appeal

278. The Commissioner determines that the Assessment raised under section 31D of the SDCA should be reduced to nil. The Appellant should not have received the Assessment in respect of the Transaction, as this came within the definition of restructuring operations, as set out in Article 4(1)(b) Directive 2008/7 and is prohibited under Article 5(1)(e). The Commissioner reads section 31D in conformity with Directive 2008/7, otherwise section 31D SDCA would be disapplied. In addition and alternatively, section 31D in accordance with the Constitution could not have been drafted to have retrospective effect and therefore the Acquisition Agreement, which was an agreement as defined in section 31D SDCA under a cancellation scheme of arrangement was entered into prior to 9th October 2019 and should not have been charged stamp duty under section 31D SDCA. The appeal is allowed.

279. This appeal is hereby determined in accordance with the statutory provisions of the TCA. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA.

Marie-Claire Maney
Chairperson
Appeal Commissioner
8th December 2020

The Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the TCA 1997.

IV. TABLE OF AUTHORITIES

Irish Cases

Irish Statutes

Irish Statutory Instruments

ECHR Cases

Treaties

CJEU Cases

EU Directives

UK Cases

UK Statutes

UK Statutory Instruments

Guides and Journals

EU Regulations