



State aid

SEPTEMBER 2019

The previous Government had confirmed that it was planning to establish a full UK-wide subsidy control framework, with the CMA taking on the EU Commission's existing role for enforcement and supervision for the whole of the UK. The UK regime would be based on transposing the existing EU state aid rules and the UK had indicated that it was committed to maintaining a 'common rulebook' with the EU regime, ie committing to "dynamic alignment", subject to the UK developing its own arrangements in relation to rural payments, as well as the UK's future public procurement policy. It remains to be seen, however, whether the present Government will maintain these plans, particularly in the event of a no-deal Brexit.

In 2018, the previous Government confirmed that it was planning to establish a full UK-wide subsidy control framework based on the existing EU state aid rules, with the CMA replacing the role of the EU Commission. This development was in line with the EU's position in the negotiations and in particular the EU Commission's paper on maintaining a "level playing field" between the EU and UK as part of any future trade agreement, which bemoaned the relative limitations of the default WTO anti-subsidy regime and indicated that there should be "substantive rules equivalent to the EU state aid rules" with enforcement by an "independent state aid authority".

In 2019, the Government published a draft state aid SI ([The State Aid \(EU Exit\) Regulations](#)), which would establish a domestic state aid

regime to be in place in the case of a no-deal Brexit and the CMA has since published [Guidance on its state aid role if there is no Brexit deal](#). Existing EU state aid legislation would essentially be transposed into UK legislation with the necessary technical modifications in order to ensure that the regime operates effectively in a domestic context. The new UK state aid regime would therefore be broadly consistent with the existing EU state aid regime.

In terms of the CMA's procedural framework, if the draft SI becomes law, the rules will be kept as similar as possible to the EU Commission's current procedural rules in order to ensure certainty and continuity for businesses. The regime would involve notification of state aid (including

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Brexit Legal Guide.**

No Deal

- If there is no-deal, up until now, the Government's plan has been to establish a UK-wide subsidy control framework which would be broadly consistent with the existing EU state aid framework, save that the CMA would take the place of the EU Commission in enforcing and supervising the rules. However, it remains to be seen whether the present Government will maintain these plans, particularly in the event of a no-deal Brexit

Deal

- In the event that the UK leave the EU with a deal, changes to the state aid rules will not occur before the end of transition and, during that period, the EU Commission will continue to approve state aid given by the UK public sector just as it does now

pre-notification discussions), consideration of complaints and undertaking evaluations in relation to existing aid measures, as well as appeals of CMA decisions. There may, however, be some scope for improvements, eg in relation to the duration of investigations.

The main difference from the existing EU state aid regime is the potential for the Government effectively to override the CMA's supervision by granting aid through primary legislation. In these circumstances, and reflecting the principle of parliamentary sovereignty, the CMA's powers would be limited to issuing a non-binding "advisory opinion" only. Under the new UK regime, it will also be possible for aid to be granted in advance of CMA approval in certain urgent cases, namely to remedy a serious disturbance in the economy, to preserve financial stability or prevent serious social hardship in circumstances where the aid is required to be granted at very short notice. Such aid would, nevertheless, still need to be notified to the CMA as soon as possible and would be subject to recovery if not approved.

The CMA is to accept notifications of state aid from exit day but it has stated that it will already engage in informal pre-notifications with aid grantors who are expecting to notify state aid cases shortly after exit day.

State aid that has been approved by the EU Commission or which qualifies under a block exemption before Brexit would not need to be approved again by the CMA.

State aid which was notified to the EU Commission before Brexit but on which the EU Commission has not yet made a decision before Brexit day would need to be re-notified to the CMA in the event of a no-deal Brexit.

The CMA would have powers to investigate cases where aid has been granted without prior approval and where no block exemption applies, whether before or after exit day.

The CMA has indicated that its new state aid unit will be up and running by October 2019 in order to deal with a no-deal situation. If the [Withdrawal Agreement](#) comes into effect, it will not obtain jurisdiction until the end of the transition period.

The CMA has been working on building up its state aid capacity – it has appointed Juliette Enser, previously Director of Cartel Enforcement, as interim Director of state aid and it is currently in the process of recruiting new staff, including lawyers and economists, to build a dedicated state aid unit. The CMA is planning on the basis that it will be handling around 20-30 cases each year, based on past practice.

It should be noted, however, that the draft state aid SI has not yet been passed and it remains to be seen whether the present Government will maintain these plans, particularly in the event of a no-deal Brexit.

If the draft state aid SI is not passed, it will, in any event, be necessary for the Government to pass an alternative measure dealing with state aid. This is because according to the UK's [European Union Withdrawal Act 2018](#) parts of EU law on state aid would be preserved after the UK ceases to be bound by EU law. The Act converts into domestic law as "retained direct EU law" all the directly effective EU law, including Treaty rights. This would mean that the Treaty prohibition on the implementation of unapproved state aid would become retained EU law. However, the Act would not convert into domestic law the provisions that allow for state aid to be approved, currently exercised by the EU Commission, as these provisions are not directly effective. The net result would be that while the Government would be bound by the prohibition not to implement unapproved state aid, there would be no mechanism in domestic law for state aid to be approved.

It can be expected therefore that the Government will pass some form of measure to avoid this outcome.

"Up until now, the Government's plans have been to establish a domestic state aid regime that essentially preserves the existing status quo. However, it remains to be seen whether the present Government will maintain these plans, particularly in the event of a no-deal Brexit. For state aid granted by other EU member states, the existing EU state aid regime continues to apply."

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Key contacts



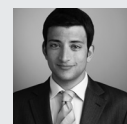
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