



State aid

During the recent 2019 election campaign, the Conservative Party pledged to introduce a new, more permissive State aid regime post-Brexit that would align more closely with the WTO rules. That announcement was light on detail, however, it remains to be seen how the new Government will flesh this out in a workable regime. The potential for significant deviation from the existing EU State aid regime may also be affected by the ongoing negotiations with the EU over the future trade relationship, in which the EU is seeking to ensure there remains a “level-playing field” post-Brexit and the Northern Ireland Protocol under the Withdrawal Agreement which provides for the continuation of the EU State aid regime in certain areas. In any event, under the Withdrawal Agreement, the existing EU State aid regime remains applicable during the transition period and the Commission will retain jurisdiction after the expiry of the transition period essentially in relation to any State aid matters initiated before the end of the transition period.

The EU State aid rules regulate certain types of interventions by EU Member States in their national economies. An intervention will be classified as “State aid” if it meets the definition thereof under the EU Treaties, which essentially characterises State measures as State aid where they confer an economic/financial advantage to a specific undertaking or a certain group of undertakings, using state resources. Where a measure involves State aid, it cannot be implemented unless it is notified and

approved as “compatible with the internal market” by the European Commission. This “standstill” requirement is subject to various block exemptions, which in practice enable EU Member States to grant significant amounts of State aid without individual notification to and approval by the Commission.

The position of the previous Government under Theresa May’s premiership in relation to the State aid rules was effectively one of continuity.

MARCH 2020

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Brexit Legal Guide.**

Deal/transition period

- Now that it has been approved by the UK and EU Parliaments, the [Withdrawal Agreement](#) sets out arrangements for the UK’s withdrawal from the EU with effect from 11 pm on 31 January 2020 - when the UK ceased to be an EU Member State.
- The UK is now in a transition period following its exit from the EU until the end of 2020. UK legislation calls this the “implementation period”.
- During transition, EU law, including the existing EU State aid regime, continues to apply in and to the UK and the UK continues to trade with the EU as part of the Single Market.

At the end of transition - will there be elements of no deal?

- At the end of the transition period, if the new trading relationship is not in place, the situation could be similar to no

The plan was to establish a UK regime supervised by the CMA (in place of the Commission) that would be based on transposing the existing EU State aid rules and maintaining a “common rulebook” with the EU regime, ie committing to “dynamic alignment”. In early 2019, the previous Government further published a draft State aid SI ([The State Aid \(EU Exit\) Regulations](#)), which would have established a domestic regime to be in place in the case of a no-deal Brexit. The SI followed a similar approach of essentially transposing existing EU State aid legislation into UK legislation and would have led, even in the event of a no-deal Brexit, to a domestic State aid regime that would have been broadly consistent with the existing EU State aid regime.

The draft State aid SI was never passed, however, and it seems that the Government now favours a different approach. On 29 November 2019, during the election campaign, the Conservative Party announced various elements of its “Brexit roadmap”, including most prominently a pledge to introduce a new, more permissive State aid regime post-Brexit. According to a press statement handed to journalists at the time (but not published on-line), the new State aid regime would, inter alia, “make it faster and easier for the Government to intervene to protect jobs when an industry is in trouble”; “move away from vague EU rules” and “instead align more closely with WTO rules, allowing UK Governments to have greater discretion over whether or not an aid is appropriate”; and “allow for decisions to be taken within days, allowing extremely rapid responses to economic turbulence”. While the press release did not state that the regime would be supervised by a functionally independent regulator, such as the CMA, it confirmed that there will be “a Government body to help manage this system, with a transparent decision making process”.

The Conservative Party statement, perhaps understandably given the context, is focused more on rhetoric rather than concrete detail: in particular, the notion that the EU State aid rules are vague or lacking in clarity compared to the WTO anti-subsidy rules is difficult to sustain, given the significant body of detailed EU State aid jurisprudence that has been developed during the past 50 or so years by the EU courts, whereas the jurisprudence under the WTO anti-subsidy rules remains relatively undeveloped. It is also not clear how a more discretionary regime under which presumably the devolved administrations and major city administrations would have considerably more freedom to grant State aid, would be compatible with ensuring the integrity of the UK’s own “internal market”. It may also be

noted that the UK Government has more recently started to refer to its commitment “to maintaining high standards” in the area of State aid and therefore it remains to be seen what appetite and scope there really is for major change.

But leaving this aside, there appear to be two significant potential obstacles to any potential overhaul of the State aid rules in the UK.

The first, is the EU’s position in relation to maintaining a “level-playing field” between the UK and the EU as part of the future trade relationship post-Brexit of which a robust State aid regime is an important part. This features prominently in the [negotiating directives](#) issued by the EU on 25 February in which the EU proposes that the future trade relationship “should ensure the application of Union State aid rules to and in the United Kingdom” and that for aid granted by the UK affecting trade with the EU, “the United Kingdom should set up an independent and adequately resourced enforcement authority with effective powers to enforce the applicable rules, which should work in close cooperation with the Commission.” On the other hand, the level-playing field requirements have been dismissed by the UK Government. In its initial [written statement](#) on its approach to the negotiations published on 3 February, the Government stated that it “will not agree to measures in these areas which go beyond those typically included in a comprehensive free trade agreement”. In its [policy paper](#) on the UK’s approach to the negotiations published on 27 February, the Government similarly stated that it “will not agree to any obligations for our laws to be aligned with the EU’s” and with respect to State aid, that “[t]he UK will have its own regime of subsidy control”. State aid control therefore has the potential to become one of the flashpoints in the negotiations and it remains to be seen how the parties’ opposing positions can be reconciled.

Second, the potential for divergence may be complicated by the Northern Ireland Protocol under the Withdrawal Agreement, which provides for the existing EU State aid regime, enforced by the Commission, to remain applicable to UK measures that affect trade between Northern Ireland and the EU (including Ireland) in the areas covered by the Protocol, ie goods and electricity. The jurisdictional scope of this provision remains undetermined and will no doubt be tested in the coming years. However, on one reading, and taking into account the broad approach taken to the “effect on trade” concept under EU State aid law, it could mean that the Commission has jurisdiction over measures that go beyond State aid to companies not only located in Northern Ireland, but also

deal. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. The UK and the EU have now set out their respective [negotiating positions](#). However, there will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply and no-deal guidance therefore remains relevant. See the accompanying section: [Leaving the EU: The process and preparations](#).

- The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and the UK legislation made to implement EU law will be retained, with suitable amendments – this will be called “retained EU law”.
- A lot of the secondary legislation to make such amendments has already been made but further adjustments may be required by the terms agreed for the future relationship. See the accompanying section: [The UK’s new legal order post-Brexit: A new class of UK law](#).
- State aid is one such area where further adjustments will in any event be required, as the effect of the European Union (Withdrawal) Act 2018 will be to convert into “retained EU law” the EU law prohibition on the implementation of unapproved State aid, but not the provisions that allow for State aid to be approved. It can be expected therefore that the Government will pass some form of measure in order to avoid this outcome.

potentially certain State aid to companies in Great Britain where there is ultimately an impact on trade between Northern Ireland and the EU (including Ireland). In any event, even if a narrower approach is adopted, it may not be expedient for the Government to provide for a significantly more permissive regime to apply to Great Britain while Northern Ireland remains subject to a more restrictive regime supervised by the Commission, meaning that an approach based on greater alignment may ultimately be favoured.

The nature of the future State aid regime in the UK will therefore remain subject to uncertainty for some time and it will be important to monitor developments as well as potential opportunities to contribute to the shaping of UK's future State aid regime.

In any event, under the Withdrawal Agreement the existing EU State aid regime remains applicable during the transition period and the Commission will retain jurisdiction after the expiry of the transition period in relation to any State aid matters initiated before the end of the transition period. In particular, under the Withdrawal Agreement, the Commission will retain jurisdiction, provided it has allocated a case number (a purely formal step) to a State aid matter during the transition period or where the matter relates to aid implemented unlawfully (ie without notification and approval by the Commission) during the transition period, provided it does so within four years. These provisions effectively grant the Commission broad continuing enforcement powers with respect to State aid matters during the transition period and it remains to be seen what approach the UK will take in relation to notifying and granting State aid during the transition period in light of these provisions.

“Up until recently, the Government’s plan had been to establish a domestic State aid regime that essentially preserves the existing status quo. That may no longer be the case, however, and it remains to be seen what kind of regime emerges, which may be influenced by the ongoing UK-EU negotiations over the future relationship, as well as the Northern Ireland Protocol under the Withdrawal Agreement. In any event, the existing EU State aid regime remains applicable during the transition period and for State aid granted by other EU Member States, the existing EU State regime will also continue to apply.”

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