

UK Plans to Maintain State Aid Regime Post-Brexit

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On August 20, 2018, the U.K. government published further details of its negotiation position with the European Union on state aid post-Brexit.¹ Three days later, it published guidance on state aid in case the U.K. leaves the EU without an agreement in March 2019.² The guidance insists that negotiations are progressing well, and both sides continue to work hard to reach a deal. But the U.K. also plans to be ready from day one for a “no deal” scenario.

State aid rules are a crucial part of the EU’s internal market. Their purpose is to prevent member state governments from granting unrestricted subsidies and other types of support to businesses in ways that would harm the development of the EU internal market.

The enforcement of these rules is the responsibility of the European Commission (EC). The EC reviews proposed state aid measures notified by member states for compatibility with the EU’s internal market and actively investigates alleged violations of the state aid rules. Recent examples include EC’s investigations into the tax arrangements applicable to certain multinationals in EU member states, which resulted in significant recovery orders in relation to companies such as Fiat, Starbucks, Apple, Amazon and Engie, as well as various multinationals that relied on Belgian “excess profit” rulings.

Since the start of the Brexit negotiations, the EU has repeatedly made it clear that any future trade agreement with the U.K. must ensure a level playing field, notably in terms of competition and state aid. Last week’s publications show the U.K. government’s intention to “domesticate” the existing EU state aid framework and indeed maintain a level playing field with the EU, regardless of whether a Brexit agreement is reached in time.

The UK’s Negotiating Position

The U.K. government’s August 20, 2018, policy paper detailing its negotiation position on state aid was first presented by U.K. officials to their EU counterparts in late July 2018. The policy paper states that the U.K. sees a rigorous approach to state aid as a critical component of ensuring that a “future economic partnership ... is underpinned by measures to ensure fair and open competition,” and that both sides have much to gain from maintaining proper disciplines on the use of subsidies.

The U.K. proposes to maintain a “common rulebook” on state aid that would “mirror” the EU’s current legal regime and would apply throughout the U.K. and across all sectors of the economy. Doing so would involve not only the relevant EU treaty articles but also all existing EU regulations. The policy paper adds that “the UK will ensure

¹ U.K. policy paper, “[Framework for the UK-EU Partnership: Open and Fair Competition](#).”

² U.K. guidance, “[State Aid if There’s No Brexit Deal](#).”



UK Plans to Maintain State Aid Regime Post-Brexit

that its guidance remains consistent with the EU's." That is an important clarification, as the EU state aid rules consist in large part on soft law guidelines in the form of EC communications issued from time to time.

This common rulebook would be enforced by the Competition and Markets Authority (CMA) by the end of the transition period (likely December 31, 2020). The CMA would review state aid notifications by the U.K. government, just as the EC does currently. The CMA would also have a full suite of enforcement powers similar to those of the EC, including the power to open investigations and seek further information. The Competition Appeals Tribunal and the U.K. courts would hear any appeals against CMA decisions.

The U.K. also proposes to "commit by treaty to ongoing harmonisation with the EU's state aid rules." However, the policy paper also refers to potential "adaptations for the UK" and suggests that the adoption by the U.K. of any new or amended state aid rule would require a change to the Brexit agreement as well as domestic parliamentary approval. To further maintain regulatory alignment, the U.K. wants to establish a robust regulatory dialogue between the CMA and the EC. U.K. courts would pay "due regard" to the case law of the Court of Justice of the European Union (CJEU) "where relevant to the matter before the court." Finally, there would be a robust dispute resolution provision that would provide recourse to an independent arbitration panel to resolve any disputes between the U.K. and the EU.

What if There Is No Deal?

The U.K.'s planned approach toward state aid in case of "no deal" is not much different.

Regardless of the outcome of the negotiations, the U.K. intends to pass secondary legislation under the Withdrawal Act in the fall of 2018 to replicate the existing EU state aid framework, "with only technical modifications to correct deficiencies with the transposed EU law to ensure the regime operates effectively in a domestic context." The guidance further states that the U.K. government will continue to work with the devolved administrations to ensure the new state aid regime works for the U.K. as a whole.

Also in a "no deal" scenario, the CMA would become responsible for state aid enforcement in the U.K. It would assume that role as early as March 30, 2019. Existing state aid approvals by the EC would remain valid and would be carried over into U.K.

law. Notifications not yet approved by the EC would be submitted to the CMA. Similarly, complaints regarding U.K. state aid would be addressed to the CMA. The CMA will publish further guidance in early 2019 on how it intends to operate its new role.

Takeaways

While the outcome of the Brexit negotiations remains highly uncertain and the details of the "no deal" scenario have yet to be worked out, last week's publications make clear that the U.K. intends to maintain a state aid regime that by and large mirrors the EU's. The U.K. government's July 12, 2018, white paper on the future U.K.-EU relationship³ had mentioned in the state aid section that the U.K.'s proposal for its future economic partnership with the EU "would not fetter its sovereign discretion on tax, including to set direct or indirect tax rates, and to set its own minimum tax rates." That could have been interpreted as suggesting that the U.K. may want to depart from the EC's highly controversial application of the state aid rules to tackle tax rulings and fiscal incentive schemes. However, nothing in the new publications confirms any U.K. intentions in this respect. It thus remains to be seen if any such carve-out will be tabled by the U.K.

The U.K.'s domestic state aid regime is expected to be enforced by the CMA, based on a similar set of procedures that currently exist at the EU level. That would give the CMA a brand new type of role as a regulator overseeing the government and Parliament, including on politically sensitive issues such as taxation. In a "no deal" scenario, the CMA would take up its role as early as March 30, 2019. If a Brexit agreement can be reached in time, that agreement is expected to provide for a transition period during which the EC would maintain its state aid competence (likely until the end of 2020).

One of the main areas of uncertainty relates to transitional arrangements, in particular regarding the impact of Brexit on pending state aid procedures before the EC and the CJEU, and on possible new procedures concerning facts arising prior to Brexit. This is a particularly important issue, as the EC still has several high-profile fiscal state aid investigations pending against the U.K., most notably in relation to the group financing exemption under the U.K. controlled foreign companies regime and the Gibraltar corporate tax regime.

³ U.K. white paper, "The Future Relationship Between the United Kingdom and the European Union."



UK Plans to Maintain State Aid Regime Post-Brexit

The EU sees an important role for the EC and the CJEU during the transition period and beyond. The U.K. government wants to end the CJEU’s jurisdiction, arguing in its white paper that the court of one party cannot resolve disputes between the two jurisdictions of the U.K. and the EU. The U.K. expects the Joint Committee or an arbitration panel to resolve such disputes, even if it accepts that under certain conditions, a referral to the CJEU could be made.

It is even less clear how pending procedures would be treated in case of “no deal.” The U.K. government’s guidance on state aid in case of “no deal” remains silent on this point.

Conclusion

Although Brexit negotiations continue to unfold and we do not have complete detail on how the U.K. government and the CMA will “domesticate” the EU state aid framework through new legislation and CMA guidelines, it appears clear that the U.K. will maintain, by and large, the same set of rules and that the CMA will become the enforcer of those rules. That could happen as early as March 30, 2019, in a “no deal scenario,” or possibly after a transition period (likely until the end of 2020) if an agreement can be found with the EU by March 2019. Companies involved in notifiable U.K. state aid projects or pending EC state aid investigations against the U.K. should monitor the potential impact of these developments on their cases.

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