Speech: Post-Brexit State Aid in the UK

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Introduction

I am Juliette Enser and I am currently leading the CMA's preparations to take on an entirely new role: that of the post-Brexit State aid authority for the UK. I am here to talk about those preparations and what the future regime might look like.

What are the current State aid rules?

The EU's State aid control rules can be seen in the context of much broader attempts, historically, to bring about a level playing field between EU Member States in order to underpin their economic integration. From the earliest days of the European Economic Community, the European Commission was entrusted with controlling state subsidies to undertakings, acting as a neutral arbiter between the Member States and limiting the ability of those States to distort competition and trade through state support of industry.

The UK Government has been a strong supporter of the EU State aid framework. It is therefore perhaps unsurprising that the issue of ongoing State aid control, overseen by a body independent of government, has formed an important part of discussions about the future trading relationship between the EU and the UK. While the discussions about the UK's future State aid regime tends to focus on its relevance to that trading relationship, it is also doubtless the case that a commitment by the UK to independent State aid control – which is deeper than the basic anti-subsidy regime applicable to all WTO members – may be attractive to other trading parties with whom the UK may negotiate trade agreements in the future.

What is meant by the State aid rules?

As some of you may not practise regularly in this area, it might be worth summarising how the system currently works.

Articles 107 and 108 of the Treaty on the Functioning of the European Union provide that all aid granted using State resources is subject to upfront control by the European Commission. The concept of aid is a broad one, covering virtually any advantage conferred on a business by the State or through State resources, whether at a local, regional or national level and whether through expenditure (for example, in the form of grants or preferential loans), guarantees or reliefs and exemptions from taxes and charges.

Article 107 is structured as a prohibition on the grant of aid. However, Article 107 (and certain other Treaty articles in respect of specific sectors such as transport and agriculture) provides that aid granted for certain

objectives can, and in some cases must, be approved as being ‘compatible with the internal market’. In addition, Article 106 of the Treaty operates to permit Member States to support undertakings in the provision of ‘services of general economic interest’ (for example, certain activities in the postal sector).

Many aid measures are now exempt from the requirement for prior approval under a series of block exemptions (or similar measures) that cover so-called industrial aid, as well as agricultural and fisheries aid and aid to support services of general economic interest. This enables the European Commission to concentrate its resources on dealing with those cases which are most liable to distort competition and trade. Indeed, the latest available data from the European Commission suggests that over 90% of new aid measures fall under a block exemption. Aid falling within block exemptions is subject to certain reporting and transparency requirements but, importantly, it can be implemented without prior approval. In addition, low-value aid is often exempt from controls.

Aid which does not fit within a block exemption falls to be reviewed by the European Commission on a case-by-case basis, which gives rise to a standstill obligation meaning that the aid measure cannot be implemented until approval has been obtained.

To assist in this process of analysing notifiable aid measures, the European Commission has adopted a series of detailed guidelines outlining how it exercises the discretion afforded to it by the Treaty. This includes sectoral guidelines (such as broadband network connectivity) as well as horizontal guidelines (for example, on rescue and restructuring aid or regional aid).

In areas where no guidelines exist, the European Commission will assess the aid against a set of broad principles. In all cases, the European Commission seeks to answer a number of well-defined questions: whether the aid is directed at achieving an acceptable policy objective; whether the aid is an appropriate policy instrument to address that policy objective; whether the aid has an incentive effect such that it will change the behaviour of the aid recipient; and whether the aid is proportionate and involves only limited distortions of competition and trade.

Much of the European Commission’s casework consists of examining aid which has been notified to it for approval. It also receives complaints and is under an obligation to consider sufficiently reasoned complaints from parties whose interests might be affected by the granting of the aid. In addition, the European Commission carries out its own monitoring of aid granted under the block exemptions and it may also carry out ‘own initiative’ investigations.

In cases where the European Commission decides that aid which has come to its attention through a notification or otherwise is not approvable, it can block the aid or (in cases where the standstill obligation has not been observed and the aid has already been granted) order its recovery from the beneficiary. However, this is extremely rare – since 2000, there have been only 11 negative decisions in respect of aid measures in the UK.

The EU regime operates for the most part in a bilateral way, involving only the European Commission and the Member States. While the standstill obligation is directly effective – and can ground a declaration of illegality in the context of domestic judicial review proceedings – private litigation is rare in the UK.

Clearly, there is much more that can be said about the legal concepts underlying the EU regime. Indeed, in contrast to the relative lack of national litigation, the European Commission's State aid decisions are frequently challenged in the European Court. For example, if an advantage is conferred on all businesses (rather than one or a select few) the measure will not qualify as aid and the question of whether a particular measure is selective in its application such that it constitutes State aid has sometimes proved a difficult one for the European Commission and the European Court. However, there are plenty of sources of information about substantive State aid law, so instead I will now speak about my area of relative expertise which is the potential future UK regime and the CMA's role within it. However, before I do so, it is worth noting that those EU legal concepts, and the case law that has grown up around them, are likely to be of continuing relevance to the UK's post-Brexit State aid regime.

When will there be a new UK regime and what will it look like?

The question of when the new State aid regime becomes operational remains subject to the outcome of negotiations between the EU and the UK.

However, as has been widely reported, the UK Government is seeking to negotiate, as part of a Withdrawal Agreement with the EU, a period of adjustment beginning in March 2019 – the 'implementation period'. Assuming that these negotiations are successful, the UK will remain within the EU's State aid regime for the duration of the implementation period and the European Commission will continue to receive and assess notifications from UK aid grantors. In that scenario, the CMA will take on its new role only at the end of the implementation period.

However, at this stage there remains uncertainty as to the outcome of the Withdrawal Agreement negotiations. We, alongside BEIS, and consistent with the overall UK Government policy, are therefore working to ensure that the new regime is ready for March 2019 if necessary.

The substance of the new regime

In relation to the substance of the new regime, the Government is intending to pass legislation in autumn 2018 under the European Union (Withdrawal) Act 2018 to bring over the EU State aid rules, subject to certain technical modifications to ensure that the regime operates effectively in a domestic context. This includes bringing across the existing block exemptions covering all sectors of the economy and also giving effect to existing European Commission approvals. The expectation is that, from a substantive perspective, the regime will look very much like it does today – aid grantors and beneficiaries can work on the basis that it will be 'business as usual' in terms of rules they are used to applying.

Section 6 of the European Union (Withdrawal) Act 2018 provides for the retention of EU law, modified as necessary to take account of the new domestic context. It also provides that EU case law, as it exists on or before exit day, will (or may) continue to be of relevance to the interpretation of retained EU law (whether or not in a modified form). At the risk of repeating myself, the substantive body of EU case law on the interpretation of the State aid provisions of the Treaty, and related case law, is likely to remain important for State aid practitioners at least in the short term, whatever shape our exit from the EU might take.

The other point that is worth noting is the prospect that, as part of any future agreement with the EU, the UK may agree to remain in step with the EU State aid rules beyond the implementation period. In other words, the UK may commit to what is being called 'dynamic alignment' with the EU rules. Of course, the extent to which this will be the case is a matter for negotiation between the UK Government and the EU, the outcome of which remains uncertain.

The CMA as enforcer

In April, the Government made public its intention that the CMA should take over the European Commission's existing role of monitoring and enforcing the State aid rules for the whole of the UK. However, the framework for State aid law and policy will be the responsibility of Government, as is now the case for the framework for competition law and policy.

What does this mean for the CMA?

Firstly, in practical terms, we need to make sure that we have the people, skills, and infrastructure to take on this new function from March 2019. Since April, we have been pursuing a programme of work to make sure we achieve this.

Our new role means we will need to examine notified aid, investigate complaints and, more generally, ensure compliance with the rules. We anticipate that we will be dealing with 20 to 30 cases annually, spanning a wide range of industries. However, that estimate is based on past practice, which has seen the UK give relatively low amounts of aid compared to many other EU countries, as a percentage of GDP – we are alive to the possibility that economic turbulence or political changes could give rise to an expansion in UK State aid figures. As an organisation, we would need be in a position to respond to such changes and we are actively considering how we might do so quickly should the need arise.

Our current thinking is that to deal with a workflow based on historic levels of aid, we will need to add staff to the organisation, most but not all of which will sit in a dedicated State aid group that we are establishing to ensure that we can expand our skills in this new area as quickly as possible. This group – which will be led by a Senior Director who we will be recruiting for shortly – will take forward our casework, deal with complaints and monitor aid which has been granted. We anticipate that it will contain individuals with a range of skills and experience, including lawyers and economists and those with a background in financial analysis. We anticipate

that staff working on State aid matters will be based in our London, Edinburgh, Cardiff and Belfast offices.

Our campaign for the first recruits to our State aid teams closed last week and I hope that some of you have already decided to apply. If not, however, do not worry as our plan is to build up the team to full strength over time so this will not be the last opportunity to join the team. I should underline that this is a genuine opportunity: a rare and – to my mind – exciting chance to join the team at the inception of a new regime and therefore coming with the opportunity to shape that regime.

Those new recruits will be joining an organisation which obviously already has expertise across a broad range of markets and competition issues, much of which will be valuable in considering how to approach State aid cases. We are also fortunate within the CMA to have a number of staff who have already practised in the area of State aid. And we have been adding to the skills of our existing staff through a programme of State aid-specific training, which we will be enhancing for the benefit of our new recruits.

We have also been working on establishing the infrastructure needed to support the operation of the State aid regime. For example, we will need a new IT solution to accept notifications and reports about aid. Those of you who have been involved with implementing IT solutions will know that this can be demanding work, but we have an experienced team working on the project and are comfortable that we are on track to accept notifications through an online system in March 2019, if we are called upon to do so.

We are still considering how to go about investigating and taking decisions with respect to State aid cases. However, we are acutely aware that the State aid portfolio involves making decisions on expenditure by elected public bodies and that some of our cases will be politically controversial. Clearly, we have a demonstrable track record of independence in how we go about our work. Indeed, it is this independence that makes the CMA attractive to trading partners as a State aid authority. We are therefore thinking hard about how the design of the regime can support that independence.

To reiterate, we are still working on our processes. It is thus too early for me to set out in detail how we intend to liaise with aid grantors, beneficiaries and third parties. However, I can confirm we are expecting that many of the key elements of the EU system, including pre-notification discussions, annual reporting of aid, transparency of aid measures, complaints and evaluations, will be included in the domestic system.

Having spoken to users of the EU system, I know that the duration of cases – the time taken to reach a decision – can sometimes be a source of frustration. In that context, we have some advantages when compared to the European Commission. For example, our lines of communication with those who have relevant information may be shorter and we will not face the same linguistic challenges as the European Commission. However, I do not wish to raise expectations prematurely – we will be delivering an entirely new function and it would be unrealistic for us at this stage to make any commitments about the speed with which we will tackle cases.

Finally, we are aware that users of the State aid system, including potential complainants, will want to understand how the new regime will operate. We are therefore working to produce guidance, which we expect to publish early next year – this guidance will explain how we will conduct substantive assessments as well as how to notify us of a new aid measure or initiate a complaint. This will supplement the legislation being prepared by Government which we expect to be brought forward this year.