

Deal or No deal: State aid

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The prohibition on State aid (that is, broadly, financial or other assistance provided by public authorities to advantage particular industries or businesses) is a core feature of the EU's internal market. It is intended to prevent Member States from distorting competition within the internal market by favouring their domestic enterprises. Responsibility for enforcing the EU's State aid rules rests primarily with the European Commission.

Our [June 2018 briefing paper](#) followed an announcement by the UK Government of its preparations to introduce a self-standing State aid regime in the UK, in anticipation of a trade deal with the EU post-Brexit. The briefing considered what the UK State aid test could look like, the likely political issues and challenges, and the potential future interrelation with the EU State aid regime.

This briefing considers what we now know about the future State aid regime in each of these two scenarios (deal or no deal) and the potential challenges that might arise in each.

State aid if there is a deal

The UK Government has proposed to make binding commitments to ongoing harmonisation with EU rules on State aid, including ensuring that its legislative framework will have the same content as the EU's regime and will mirror all relevant EU rules. It will also ensure its guidance remains consistent with the EU's. UK courts would pay 'due regard' to the European Court of Justice's case law in this area and there would be robust provision for dispute resolution - including recourse to an independent arbitration panel. The new UK regime would be enforced and supervised domestically by the Competition and Markets Authority (CMA).

Since then, the UK Government has published a [White Paper](#) on its proposals for the UK's future relationship with the EU and a [slide deck](#) on how such proposals (including those in relation to State aid) will ensure open and fair competition.

While it considers that negotiations are progressing well, the Government has also indicated that it must prepare for all eventualities including a 'no deal'. This is the scenario in which the UK leaves the EU and becomes a third country (at 11pm UK time on 29 March 2019) without a Withdrawal Agreement and framework for its future relationship with the EU in place. To prepare for this possibility, last week, the UK Government began publication of a series of [technical notices](#) with the intention of helping businesses and citizens prepare for such a 'no deal' scenario. One of these notices tackles State aid.

Such strong State aid provisions are uncommon in free trade agreements with the EU (as the UK Government itself highlights). Indeed, of the over 30 trade agreements that the EU has negotiated (or is in the process of negotiating), only two agreements - the EEA Agreement and the Swiss Agreement on Air Transport - incorporate the EU State aid rules. However, the EU27 has said that they expect a certain level of alignment in this area to ensure a level playing field post Brexit ([European Council Guidelines](#), 23 March 2018).

State aid if there is no deal

The UK Government has said that, in the event of 'no deal', it would immediately implement a UK-wide State aid framework transposing EU State

aid rules into UK domestic legislation.¹ The CMA would also immediately take on its new role as State aid enforcer within the UK.

This new regime would apply to all businesses with operations in the UK (whether UK, EU or third country based). The Notice also states that as at this point:

- UK public authorities would need to notify State aid to the CMA instead of the Commission;
- Existing approvals of State aid would remain valid;²
- Any full notifications not yet approved by the Commission would have to be submitted to the CMA; and
- Any complaints from businesses about unlawful aid or the misuse of aid would have to be made to the CMA.

Such implementation - which goes far beyond the state subsidy controls required for WTO membership - in the event of no deal is somewhat puzzling, as the purpose of the State aid regime is to prevent the distortion of competition within the single market. For the UK regime to prevent the distortion of competition between the UK and the EU may not be very meaningful in a situation where there is no trade agreement with the EU (and therefore no reciprocal agreement on the EU side).

The proposed treatment of transitional cases also appears unduly burdensome on aid providers and recipients especially where it would require re-submission of notifications that have already gone through a lengthy Commission process and/or are close to receiving approval.

Finally, the EU might disagree and consider that it retains jurisdiction over the transitional cases (as suggested in the draft Withdrawal Agreement by the Commission) resulting in further legal uncertainty for the parties involved.

Concluding thoughts

The UK State aid rules are likely to be similar in substance to the EU State aid rules (deal or no deal), signalling that the UK remains committed to at least some level of regulatory alignment with the single market post Brexit. The State aid rules at least look set to be broadly familiar to practitioners in this area regardless of whether a deal is reached or not. The big question mark is over enforcement practices and the harmonisation of the two regimes, with both being particularly difficult in the event of a no deal.

Many of the questions raised in our previous briefing paper have also yet to be answered in either scenario, such as the degree to which the CMA could (legally or in practice) 'block' primary Government legislation on the grounds of illegal State aid.

¹ Under the European Union (Withdrawal) Act.

² These approvals would be carried over into UK Law under the European Union (Withdrawal) Act.



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