SLAUGHTER AND MAY

The EU rules on State aid

January 2018
# Contents

1. Introduction .................................................. 1
2. The notion of State aid ...................................... 2
3. Mandatory and discretionary exemptions ............... 5
4. Block exemptions, guidelines and frameworks for the application of State aid policy ......... 6
5. The European Commission’s role in investigating State aid ........................................... 9
6. Recovery of unlawful aid ..................................... 11
7. The European Courts’ role in enforcing State aid rules .................................................. 12
8. The national courts’ role in enforcing State aid rules .................................................. 13
9. Brexit ........................................................... 14
1. **Introduction**

1.1 Where an undertaking receives financial or other assistance from the State or other public funds on a selective basis, there is a risk that this favoured treatment may operate as a form of protectionism to the detriment of other undertakings, so disrupting normal competitive forces and threatening the EU’s internal market objectives.

1.2 This is why the competition rules in the TFEU contain provisions on the grant of State aid (and similar provisions are contained in the EEA Agreement). The European Commission regards the control of State aid as one of the most important aspects of EU competition policy. It maintains a detailed State aid register with information on pending and decided cases.\(^1\) It also publishes surveys, reports and handbooks on State aid in the EU.\(^2\)

1.3 This publication provides a general overview of the EU State aid rules:

- **Chapter 2** focuses on the concept of State aid - in particular, the conditions that must be satisfied for there to be aid within the meaning of the TFEU;

- **Chapter 3** considers the mandatory and discretionary exemptions to the general prohibition on State aid;

- **Chapter 4** provides an overview of the block exemptions, guidelines and frameworks that have been adopted and developed over the years for the application of State aid policy (including the framework for financing of services of general economic interest (SGEIs));

- **Chapter 5** explains the Commission’s role in investigating State aid;

- **Chapter 6** looks at the rules on recovery (i.e. repayment) of unlawful State aid;

- **Chapter 7** and **Chapter 8** consider the role of the European Courts and the national courts, respectively, in enforcing State aid rules;

- **Chapter 9** considers the impact of Brexit on State aid rules as applicable to the UK.

---


\(^2\) One of the reports is the State aid Scoreboard, which is the Commission’s “benchmarking instrument for providing a transparent and publicly accessible source of information on the State aid expenditure in the EU and the Member States.” The information is based on the annual reports provided by Member States. An example of a handbook is the “Compilation of State aid rules in force.”
2. The notion of State aid

2.1 Article 107(1) TFEU prevents “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States”, unless the aid is permitted in accordance with TFEU rules.¹

2.2 For there to be aid within the meaning of Article 107(1) TFEU, the following conditions must therefore be fulfilled:

• there must be aid;

• the aid must be granted by the State or from State resources;

• the aid must favour the aid beneficiary compared to other operators in the market (selective advantage);

• the aid must distort or threaten to distort competition; and

• the aid must affect trade between Member States.

What is aid?

2.3 The concept of “aid” is very wide, encompassing anything which may be of commercial benefit. Thus, State aid can take a variety of forms, including:

• grants or subsidies from the State or from regional or local government;

• tax or social security exemptions;

• the provision by the State (or State-controlled undertakings) of goods or services on preferential terms; or

• State guarantees, loans, debt write-offs or shareholdings/investments from public funds on preferential/non-market terms.

Granted by a public authority or from State resources

2.4 “State resources” is interpreted broadly and includes all resources of central, but also regional and local government, and, under certain circumstances, even resources of public and private law undertakings or bodies.² The decisive factor is whether the funds are under State control and therefore available to the public authorities.

¹ The general EU rules on State aid are contained within the Chapter of the TFEU relating to competition (at Arts. 106 to 109). Special rules apply to the granting of aid for agricultural products (Art. 42) and for transport (Art. 93).
² See, for example, Cases C-328/99 and C-399/00 Italy and SIM 2 Multimedia v Commission, judgment of 8 May 2003, para. 33 and Cases T-267/08 and 279/08 Région Nord-Pas-de-Calais v Commission, judgment of 12 May 2011, para. 108.
Selective advantage

2.5 For there to be aid within the meaning of Article 107(1) TFEU, the measure must also confer an economic advantage on the undertaking or undertakings that it/they would not have obtained under normal market conditions. The latter is assessed by reference to the market economy operator principle (see below).

2.6 A selective advantage can be granted to an individual undertaking, to a group of undertakings or to undertakings operating in certain economic sectors. Any entity engaged in economic activity will be considered an undertaking for these purposes (including Government-owned undertakings and non-profit entities that offer goods or services on a market).

Distortion of competition and effect on trade

2.7 The “distortion of competition” condition is met if a measure is liable to improve the competitive position of the aid beneficiary compared to other undertakings with which it competes. Once a selective advantage is established, a distortion of competition is normally presumed to arise. However, there must exist a market within the internal market in which competition may be distorted. For example, a possible distortion of competition is excluded if there exists a legal monopoly for a particular service and there is no prospect of competition.

2.8 The “effect on trade between Member States” condition in Article 107(1) TFEU has been interpreted broadly by the Commission and the European Courts. Even where the aid beneficiary does not export its products or services, but operates only at a local level, the aid may still affect inter-State trade by increasing domestic production, with the effect that undertakings in other Member States have less chance of exporting their products to the markets in that Member State.

Market economy operator principle

2.9 A measure does not involve State aid if a Member State makes funds available to an undertaking on the same terms that would be provided in the normal course of events by a private investor applying ordinary commercial criteria (the “market economy operator” or “MEO” principle). It is not necessary to show that a private investor has participated in the measure but where a significant contribution is made by a private investor on equivalent terms, it can be inferred that

---

1 See Case C-39/94 SFEI and Others, judgment of 11 July 1996, para. 60; Case C-342/96 Spain v Commission, judgment of 29 April 1999, para. 41.
3 See Joined Cases T-298/97, T-312/97 etc. Alzetta, judgment of 15 June 2000, paras. 141 to 147; Case C-280/00 Altmark Trans, judgment of 24 July 2003.
4 See footnote 7.
the transaction is in line with market conditions and is therefore not aid. A measure is also not aid simply because with hindsight it was not a prudent investment. It is assessed on the basis of the knowledge available to the State at the time of the decision to grant the measure.

2.10 The same principle applies to the privatisation/sale of a stake in a State-owned undertaking. In that context, to avoid aid to the purchaser the State must not bear costs or losses as a result of the transaction that a normal market operator would not have borne.

Commission Guidance on notion of State aid

2.11 As part of its State aid modernisation exercise, in July 2016 the Commission published a Notice on the notion of State aid. This provides practical guidance to help identify State aid measures. In doing so, it covers the key constitutive elements of the notion of State aid discussed above.

---

13 Commission Guidance Paper on State aid-compliant financing, restructuring and privatisation of State-owned enterprises (10 February 2012), Section 5.
3. **Mandatory and discretionary exemptions**

3.1 Article 107(2)(a)-(c) expressly permit the following forms of aid:

- aid having a social character, granted to individual consumers, provided it is granted in a way which does not discriminate according to the origin of the products concerned;

- aid to make good the damage caused by natural disasters or other exceptional occurrences; and

- aid to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required to compensate for the economic disadvantage caused by that division.

3.2 These categories of State aid are exempted automatically. The measures still need to be notified however to the Commission (see further at Chapter 5), so that the Commission can verify whether the measures fall within an Article 107(2) category.

3.3 Article 107(3)(a)-(d) provide that the following forms of aid may be permitted:

- aid to promote the economic development of underdeveloped areas of the EU (with abnormally poor living standards or high levels of unemployment);

- aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

- aid to facilitate the development of certain economic activities or areas (provided it does not adversely affect trading conditions to an extent contrary to the common interest); and

- aid to promote culture and heritage conservation (again provided it does not affect trading conditions and competition in the EU to an extent contrary to the common interest).

3.4 The Commission has considerable discretion in evaluating whether or not an aid measure is compatible under Article 107(3) TFEU. It has adopted block exemptions covering various categories of aid measures to reduce the number of cases that it is required to examine. It has also published various guidelines setting out the criteria that it will apply when assessing the compatibility of particular categories of aid measures with Article 107(3) TFEU (see Chapter 4).

3.5 If an aid measure falls outside one of the block exemptions or the relevant guidelines, or where no guidelines exist, the Commission will apply Article 107(3) TFEU directly to assess the compatibility of the measure on an individual basis, balancing the positive effect of the measure against its potentially negative effects.\(^\text{15}\)

---

\(^{15}\) The Commission will assess whether: (a) the aid measure is aimed at a well-defined objective of common interest; (b) it is well designed to deliver this objective; (c) it is proportionate to the problem tackled (i.e. the same objective cannot be obtained with no or less aid); and (d) the distortions of competition and effect on trade are limited, so that the overall balance is positive.
4. Block exemptions, guidelines and frameworks for the application of State aid policy

Block exemptions for “horizontal aid”

4.1 The Commission has adopted two block exemptions for certain categories of “horizontal” State aid (i.e. aid that is not specific to particular industry sectors): 16

- the De Minimis Aid Exemption Regulation - covers aid provided to a single undertaking not exceeding €200,000 over any three year period. 17 Aid that falls within this block exemption is exempt from the notification requirement (see Chapter 5); and

- the General Block Exemption Regulation (GBER) - covers a range of categories of aid including regional, training, SMEs, R&D, infrastructure and environmental. 18 There is no need to notify aid that falls within this block exemption but details of the measure must be published in the Official Journal.

4.2 The Commission has also adopted guidelines for certain other categories of aid not covered by the GBER, but where it may be willing to take a favourable approach under Article 107(3) TFEU provided proper safeguards are in place and it is satisfied that the aid will not distort competition in the EU to an extent contrary to the common interest. These guidelines inter alia include the following:

- national regional aid: Revised and updated Guidelines on the criteria applied when examining aid to regions lagging behind in terms of development came into force on 1 July 2014. 19 These Guidelines are applied to regional aid schemes except where they relate to particular industries covered by special rules.

- rescue and restructuring aid: The Commission regards rescue and restructuring aid as one of the most distortive types of State aid. The Guidelines on State aid for rescuing and restructuring firms in difficulty therefore contain strict conditions that must be met for this type of aid to be found compatible. 20 The current Guidelines came into force on 1 August 2014 and will remain in effect until 31 December 2020.

- environmental and energy aid: New guidelines on State aid for environmental protection and energy came into force on 1 July 2014. 21 These Guidelines set out the Commission’s approach towards the assessment of public support projects and measures in the field of the environment and energy.

---


Special rules and guidance relating to particular industries

4.3 Special rules and/or guidelines have been established at the EU level for the approval of State aid to particular industries, notably:

- **public service broadcasting**: Given the significant number of State aid cases involving complaints from commercial broadcasters, in 2009 the Commission updated its Communication on the application of State aid rules to public service broadcasting.\(^{22}\)

- **audio-visual production**: In 2013 the Commission issued a new Communication relating to film and other audio-visual works.\(^{23}\)

- **broadband networks**: In 2013 the Commission also issued revised Guidelines on the public funding of broadband networks.\(^{24}\)

- **financial services**: The Commission has issued a variety of Communications outlining its approach to State aid being provided to the financial sector during the global financial crisis, including the 2013 Banking Communication.\(^{25}\)

- **aviation**: In 2014 the Commission issued revised guidelines on State aid to airports and airlines.\(^{26}\)

Framework for financing of SGEIs

4.4 The TFEU recognises that Member States may grant special or exclusive rights to public or private undertakings to perform “services of general economic interest”. These special or exclusive rights generally correspond to responsibilities linked to the performance of a public service entrusted to the undertaking. When granting such special or exclusive rights to undertakings, Member States must comply with the EU competition rules - including State aid rules (Article 106(1) TFEU). Member States have some flexibility in defining what constitutes a SGEI.

4.5 Certain types of State aid may be justified on the basis of Article 106(2) TFEU, which provides that undertakings entrusted with the operation of a SGEI or having the character of a revenue-producing monopoly are subject to the competition rules in so far as this does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Any measures that constitute State aid, and which are not covered by Article 106(2) TFEU, need to be authorised by the Commission.

4.6 The Court of Justice’s (CJ) landmark decision in the *Altmark* case established the criteria that need to be satisfied for public service compensation not to constitute State aid.\(^{27}\) Where these criteria are met there is no need to notify the compensation to the Commission. The four cumulative criteria are:

\(^{22}\) Communication from the Commission on the application of State aid rules to public service broadcasting (OJ 2009 C257, 27.10.2009).

\(^{23}\) Communication from the Commission on State aid for films and other audiovisual works (OJ 2013 C332/1, 15.11.2013).


\(^{27}\) Case C-280/00 *Altmark*, judgment of 24 July 2003.
• the recipient undertaking must be entrusted with clearly defined public service obligations to discharge;

• the basis on which the compensation is calculated must be established in advance in an objective and transparent manner;

• the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Cross-subsidisation that results in the compensation for discharging public service obligations being used for other activities of the undertaking is not allowed; and

• where the undertaking that is to discharge the public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.

4.7 Where the Altmark criteria are not met, and the other State aid criteria are also present, the public service compensation constitutes State aid and the Member State will have to notify the aid to the Commission for approval.

4.8 In December 2011 the Commission adopted a new SGEI package providing updated guidance on the conditions under which State aid in the form of public service compensation can be approved as compatible with the EU rules. The new 2011 package comprises:

• a Communication clarifying basic concepts of State aid which are relevant to SGEI;\(^\text{28}\)

• a Commission decision exempting from the need to notify public service compensation provided to:
  (a) undertakings receiving annual compensation of less than €15 million in areas other than transport and transport infrastructure; (b) hospitals and SGEI meeting essential social needs as regards health care, childcare, access to and reintegration into the labour market, social housing and the care and social inclusion of vulnerable groups; and (c) certain low-volume air and maritime transport services;\(^\text{29}\)

• a Commission Framework that establishes the criteria for the assessment of compensation for SGEIs that does not satisfy the Altmark criteria and where the Commission decision does not apply;\(^\text{30}\) and

• a de minimis Regulation for the field of SGEI exempting from State aid rules aid of up to €500,000 per company over a three-year period granted as compensation for the provision of SGEI.\(^\text{31}\)

4.9 The period for which an undertaking is entrusted with the operation of the SGEI cannot exceed 10 years, unless significant investment is required.

\(^{28}\) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ 2012 C8, 11.01.2012).

\(^{29}\) Commission decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2011 L7/3, 11.01.2012).


5. The European Commission’s role in investigating State aid

Exclusive competence

5.1 The Commission has exclusive competence to decide whether or not State aid is permitted in accordance with State aid policy. Within the Commission, DG Competition deals with State aid cases in most sectors.

Notification of State aid

5.2 Member States are required to notify the Commission of all plans to grant aid or to alter existing approved aid schemes unless an exemption applies. They must refrain from implementing the aid before the Commission’s authorisation is obtained (the “standstill provision”).

5.3 An aid recipient cannot itself seek Commission authorisation for the aid; rather, it may need to raise with the public authorities in question the need for a notification.

5.4 The procedures for the notification and assessment of aid and the Commission’s related powers and obligations are set out in the Procedural Regulation.

5.5 Notifications must be made by the Member State concerned through the Member States’ Permanent Representations in Brussels. The Implementing Regulation includes (as Annex 1) the form that should be used when notifying a measure to the Commission.

5.6 Prior to a notification being made it is common for a Member State to have pre-notification contacts with the Commission. The purpose of these contacts is to bring the case team up to speed with the relevant proposals. It can be a useful way to flush out and pre-emptively address potential issues. In its Manual of Procedures for State aid the Commission suggests that, for a standard case, the pre-notification phase should last no more than two months. However, this phase can last considerably longer.

5.7 Following formal notification and a preliminary two-month investigation, the Commission will either approve the aid or open an in-depth investigation under Article 108(2). Where the Commission decides to open an in-depth investigation, it sends a letter to the Member State (which will also be published in the Official Journal). During the in-depth procedure, other Member States, the aid recipient and other interested third parties (e.g. competitors and trade associations) have the opportunity to submit comments. Once a formal investigation has been initiated, the Commission also has the power under the Procedural Regulation to issue formal information requests to third parties as well as to Member States.

---

23 Exceptionally, under Art. 108(2) TFEU, para. 3, the Council may (acting unanimously) decide that a specific grant of aid by a Member State is not illegal. This exceptional power was used in 2002 in respect of diesel tax subsidies granted to road hauliers in France, Italy and the Netherlands.

24 DG Competition deals with State aid in all sectors except agriculture and fisheries, which are handled by the Directorates-General responsible for these sectors (i.e. DG Agriculture and Rural Development; and Maritime Affairs and Fisheries). Prior to 2010, energy and transport cases were likewise handled by the DG with responsibility for energy and transport.

25 Art. 108(3) TFEU.


5.8 The Procedural Regulation envisages that the procedure for notified aid should generally not take longer than 18 months; if this time limit is reached, the Member State may request that the Commission issues a decision within two months, but these targets are not binding.  

5.9 An in-depth investigation ends with the Commission issuing either:

- a “positive decision” to close the proceedings and authorise the aid, in which case a letter is sent to the Member State (and published in the Official Journal). Such a decision may be made subject to conditions and obligations (a “conditional decision”). Where the Member State has implemented the aid prior to the positive decision being issued (i.e. in breach of the standstill clause), the positive decision will not have the effect of retroactively authorising that aid. In such circumstances, while the Commission will have no power to order the aid to be repaid solely on the ground that the aid was not notified in advance, the aid implemented in breach of the standstill clause would remain unlawful and national courts would be required to grant a remedy if an action were brought for damage caused by the unlawful nature of the aid; or

- a “negative decision” prohibiting the aid, in which case a letter and formal decision is sent to the Member State (and published in the Official Journal). Where the Commission has taken a negative decision and the aid has already been implemented, the Commission is required to order that illegally granted aid be repaid by recipients to the public authorities which granted it (see Chapter 6).

5.10 For statistics on Commission State aid enforcement, see DG Competition’s Management Plan 2016.

Monitoring powers

5.11 Where the Commission has serious doubts as to whether decisions it has taken with regard to individual aid are being complied with, the Member State concerned (after having been given the opportunity to comment on this) must allow the Commission to undertake on-site monitoring visits. The Commission officials have the power then to:

- enter premises;
- ask for on the spot oral explanations; and
- examine the company’s books and business records, and take copies.

5.12 Member States must ensure that the Commission’s right to undertake an on-site visit is enforced.

---

38 Procedural Regulation, Arts. 9(6)-(7).


40 Commission Notice on the enforcement of State aid law by domestic courts (OJ 2009 C85, 9.4.2009), para. 30. See also Case C-384/07 Wiensstrom, judgment of 18 December 2008, para. 28; Case C-199/06 CELF, judgment of 12 February 2008, para 46.

41 Procedural Regulation, Art. 14(1).


43 Procedural Regulation, Art. 27(6).
6. Recovery of unlawful aid

6.1 Following a Commission order for recovery, the Member State is required to recover the aid “without delay” in accordance with domestic procedures. The Commission’s policy in relation to the implementation of recovery decisions is set out in the Commission’s Recovery Notice.\(^44\)

6.2 The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the unlawful aid.\(^45\) This will generally be through the repayment by the recipient of all the unlawful aid plus interest at an appropriate rate fixed by the Commission. Interest is payable from the date on which the unlawful aid was at the disposal of the aid beneficiary until the date of its recovery.\(^46\)

6.3 Defences to recovery are limited, and in practice attempts to exclude recovery are rarely successful unless circumstances exist that would make it absolutely impossible (as a matter of fact) for the Member State to implement the recovery decision.\(^47\) Neither the laws/representations of a Member State\(^48\) nor the fact that aid had been initially approved by the Commission before being successfully challenged\(^49\) will be a defence to a recovery decision. The limitation period for the recovery of aid is 10 years.\(^50\)

6.4 For statistics on Commission recovery decisions and the amount recovered, see the State aid section of DG Competition’s website.\(^51\)

\(^{44}\) Commission Notice - Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ 2007 C272, 15.11.2007).

\(^{45}\) Recovery Notice, para. 13.

\(^{46}\) Procedural Regulation, Art. 14(2).

\(^{47}\) Case C-404/00 Commission v Spain, judgment of 26 June 2003.

\(^{48}\) Case C-24/95 Alcan, judgment of 20 March 1997, paras. 34 to 37.

\(^{49}\) See Case C-199/06 CELF I, judgment of 12 February 2008, paras. 63 and 66 to 68.


\(^{51}\) Available at: http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html
7. **The European Courts’ role in enforcing State aid rules**

7.1 State aid decisions are subject to judicial review by the General Court (GC) pursuant to Article 263 TFEU. There are however strict time limits. There are also strict rules on who can bring an appeal. With the exception of certain privileged applicants (i.e. a Member State or European Institution), to establish standing before the European Courts, potential applicants must demonstrate that the decision is “of direct and individual concern to them” and that they have an interest in the annulment of the decision.\(^{52}\)

7.2 The GC is restricted to assessing the legality of a Commission decision on the following grounds:\(^{54}\)

- lack of competence;
- infringement of an essential procedural requirement (i.e. where, but for the irregularity, the outcome might have been different);
- infringement of the Treaties (or of any rule of law relating to their application);
- misuse of powers;
- manifest error of facts; and/or
- a failure to provide sufficient reasons.

7.3 In reviewing the decision, the GC will conduct a comprehensive review of the facts and law at the time of the decision.\(^{55}\)

7.4 The filing of an appeal before the GC will not automatically suspend the Commission’s decision.\(^{56}\) While the GC does have the power to grant interim measures including the suspension of a decision,\(^{57}\) it will only do so in exceptional circumstances.\(^{58}\) If an application for annulment is successful, the GC must declare the decision retroactively void (in whole or in part).\(^{59}\) The judgment of the GC may be challenged before the CJ. Such an appeal will be restricted to points of law only.\(^{60}\)

---

\(^{52}\) Art. 263 TFEU.


\(^{54}\) Art. 263 TFEU.

\(^{55}\) Cases 15 and 16/76 France v Commission, judgment of 7 February 1979, para. 7; and Cases T-254/00, T-270/00 and T-277/00 Hotel Cipriani SpA v Commission, judgment of 28 November 2008, para. 238.

\(^{56}\) Art. 278 TFEU.

\(^{57}\) Arts. 278-279 TFEU; EGC Rules of Procedure, Art. 104.

\(^{58}\) Case T-62/06 RENV-R Euralluminia v Commission, order of 9 June 2011, para. 17.

\(^{59}\) Case C-295/07 P Commission v Department du Loiret and Scott, judgment of 11 December 2008, paras. 103 to 106.

\(^{60}\) Art. 58 Statute of the Court of Justice of the European Union.
8. The national courts’ role in enforcing State aid rules

8.1 National courts cannot rule on whether or not an aid measure is compatible with Article 107 TFEU, which is the exclusive competence of the Commission. They can however rule on whether a measure amounts to aid in the first place. If necessary, national courts may refer questions to the CJ for a preliminary ruling under Article 267 TFEU. They may also request guidance from the Commission.

8.2 National courts are expected to use all appropriate measures and provisions of national law to implement the direct effect of the Article 108(3) prohibition on implementation of unauthorised State aid. This includes:

- interim relief to freeze or order recovery of illegally paid amounts; and
- awarding damages to third parties whose interests have been harmed.

8.3 In 2009 the Commission issued new guidance to help national courts apply the State aid rules, including the rules on recovery of unlawful aid. The guidance in particular explains the remedies available in the event of a breach of State aid rules, the role of national courts in State aid enforcement and the procedure for national courts to ask the Commission for information or opinions on the application of the State aid rules.

---

61 Case C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, judgment of 21 November 1991, para. 12; Case C-39/94 SFEI and Others, judgment of 11 July 1996, para. 40; Case C-368/04 Transalpine Olleitung in Österreich, judgment of 5 October 2006, para. 47; and Case C-199/06 CELF and Ministre de la Culture et de la Communication, judgment of 5 October 2006, para. 41.

62 The availability of damages is a matter of national law subject to the possibility of a claim against the State. To claim against the State for failure to implement EU law, a claimant would need to satisfy the criteria in Francovich (Joined Cases C-6/90 and 9/90 Francovich v Italian Republic, judgment of 19 November 1991), which requires meeting a higher threshold than for a standard UK damages claim. In addition, there may in some jurisdictions be a basis for claiming against the aid beneficiary. This may, for example, be the case in France, where the acceptance by a company of unlawful aid may constitute a fault of the company.

63 Notice on the enforcement of State aid law by national courts (OJ 2009 C85/1, 09.04.2009).
9. Brexit

9.1 EU State aid rules will continue to apply to the UK until such time as the UK exits the EU. While technically post-Brexit the system of EU State aid control will cease to apply in the UK, it is possible that State aid rules in some form will continue to be enforced as State aid control is likely to be an essential component of any trade agreement negotiated between the UK and the EU. However, the exact scope and nature of the rules that would apply in the UK remains unclear.