

Brexit: the implications for state aid rules in the UK

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Brexit the Speed Read

- Under the European Union (Withdrawal) Act 2018, the UK will leave the EU on 29 March 2019.
- Currently, the UK and EU are negotiating a withdrawal agreement. These negotiations have yet to conclude.
- Whatever the outcome of the negotiations, public authorities - i.e. central, regional or local government - will need to continue to comply with state aid rules after 29 March 2019.
- If a withdrawal agreement is concluded, then it is anticipated that EU law will continue to apply in the UK, including state aid rules, until the end of 2020.
- If a withdrawal agreement cannot be concluded before 29 March 2019, then EU state aid rules will not apply to the UK any more.
- However, the government has announced it will incorporate state aid rules into national law in case of a "no-deal" scenario, with the Competition and Markets Authority (CMA) enforcing these rules.

Introduction

The UK plans to leave the European Union at 23:00 GMT on 29 March 2019.

The UK and EU are negotiating a withdrawal agreement, which should include a transition period to the end of 2020. EU law would continue to apply in the UK during the transition period - including in relation to state aid. However, there would be immediate implications for public authorities in respect of state aid if the UK and the EU fail to conclude an agreement and we are left with 'no-deal'.

This alert explains in general terms what is likely to happen in respect of state aid under:

- (i) a transition agreement and
- (ii) a no-deal scenario,

and sets out some practical steps public authorities should be taking now in respect of both outcomes.

Transition period scenario

Any withdrawal agreement is expected to include a transition or implementation period, until 31 December 2020. During that transition period EU law will continue to apply in the UK as it does today - including in relation to state aid. Under this transition period scenario, public authorities would have regard to state aid rules as at present. In effect, there would be no change during the transition period. State aid rules are set out in the Treaty of the Functioning of the European Union and associated European legislation. Current state aid rules would continue to apply meaning that, amongst other things, public authorities would not be allowed to provide aid to undertakings, unless:

- The aid does not distort competition and/or affect trade between EU member states; or
- The authority can rely on an exemption, for example because the aid is de minimis or because the General Block Exemption Regulation for state aid applies; or
- The aid has been notified to the European Commission, and the Commission has cleared it.

In practical terms, a public authority would continue to be required to:

- Satisfy itself that it does not provide any form of aid to undertakings that distorts competition and affects trade between EU member states. State aid is support in any form (financial or in kind) from any level of government - central, regional or local - which gives a business or another entity providing goods and/or services in a market a benefit that could not be obtained during the normal course of business.
- If so, find a way to exempt the aid. The most important exemptions are set out in the General Block Exemption Regulation for state aid and include different forms of aid to SMEs, R&D aid etc.
- If not possible, notify the intended aid to the European Commission and await approval before it can grant the aid. Different forms of notification process exist, depending on factors such as complexity and novelty.

Note that in order to implement a withdrawal agreement, the Government will need to amend the European Union (Withdrawal) Act 2018. For further details, see its [July 2018 white paper](#).

No-deal scenario

If a withdrawal agreement cannot be agreed with the EU, there would be immediate changes to state aid when the UK leaves the EU at 23:00 (GMT) on 29 March 2019.

These are set out in an advice note issued by the Government on [23 August 2018](#).

According to the advice note, the government will create a UK-wide subsidy control framework to ensure the continuing control of anti-competitive subsidies. The EU state aid rules will be transposed into UK domestic legislation under the European Union (Withdrawal) Act. The Competition and Markets Authority (CMA) will take on the role of enforcement and supervision for the whole of the UK.

The advice note sets out the implications for public authorities. These are as follows:

- In addition to the UK state aid rules, businesses should also consult further guidance, to be published by the Competition and Markets Authority in early 2019.
- UK public authorities will need to notify state aid to any undertaking to the CMA instead of the European Commission. Similarly, any complaints about unlawful aid or the misuse of aid should be made to the CMA.
- Existing approvals of state aid, including block exemption approvals, will remain valid and will be carried over into UK law under the European Union (Withdrawal) Act.
- Any full notifications not yet approved by the Commission should be submitted to the CMA.

Comment

It remains to be seen how the implementation of EU state aid rules into national law would work in practice. In particular, the technical note is silent on how the European Union (Withdrawal) Act will deal with the fact that EU state aid rules are only engaged where there is an effect on trade between EU member states. If this was to be replaced by state aid having an effect on trade within the UK, then these provisions may capture tiny projects that would currently not be caught by state aid rules.

Another question in case of a no-deal scenario and the CMA taking on the role of enforcement and supervision for the whole of the UK is capacity. Enforcing state aid rules is a major new function for the CMA. In March, the Government allocated an additional £23.6 million to the CMA's budget for 2018-19 in order to prepare for the UK's exit from the EU. However, any additional budget will have to be used to deal not only with new responsibilities regarding state aid enforcement, but also those arising in mergers and general competition law enforcement. Questions have been asked as to whether the CMA has enough staff and resource to deal with these new roles. In addition, the CMA will be making decisions on questions that are often politically charged and contentious. According to the CMA itself, there is still much to be worked out on the practical implementation of this.

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