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State Aid Rules to be enforced by the CMA Post-Brexit

Totis Kotsonis (Pinsent Masons) · Thursday, May 3rd, 2018

The Government has given its strongest indication yet that a domestic State aid regulatory regime, substantively similar to the EU State aid regime which applies today, will be in place at the end of the Brexit transitional period, with the Competition and Markets Authority (CMA) taking on the role of State aid regulator. Preparations to that end are in progress - without prejudice to the outcome of future negotiations with the EU.

The Government's position on this issue was made clear in a recent letter by Andrew Griffith MP and Minister for Small Business, Consumers & Corporate Responsibility, to Lord Whitty, Chair of the House of Lords' EU Internal Market Sub-Committee (the "EU Committee"). Back in February, the EU Committee published a report on the implications of Brexit on competition law and State aid (the "[Report](#)"). One of the Report's recommendations was the setting up of a UK-wide domestic State aid framework, post-Brexit.

Currently, State aid is regulated at an EU level, with the European Commission being the sole arbiter of the compatibility of State aid measures with the EU's internal market. Under the EU system, subject to certain exemptions, there is a requirement for the notification of a proposed State aid measure to the European Commission for clearance, before implementation. Aid which is implemented unlawfully normally has to be recovered from the beneficiary (or beneficiaries) with interest.

In his letter, Mr Griffith:

- acknowledges that during the transitional period, the European Commission will still be the responsible State aid regulator and that the EU State aid rules will continue to apply in the UK as it is the case at the moment
- confirms that, without prejudice to the negotiations with the EU, the UK should be prepared to establish "a full, UK-wide subsidy control framework" with a single domestic enforcement and supervisory body
- clarifies that in pursuit of this objective, EU State aid rules will be converted into UK law through the European Union (Withdrawal) Bill, that these will apply to all sectors and replicate existing exemptions from State aid rules
- indicates that the Government considers that the CMA would be best placed to be the domestic State aid regulator in view of its "experience and understanding of

markets as the UK's competition regulator and the independence of its decision-making from Government”:

Comment

The Government's position on this issue should not come as a surprise. In her Mansion House speech, on 2 March 2018, the Prime Minister indicated that “the UK has much to gain from maintaining proper disciplines on the use of subsidies and anti-competitive practices” and that the UK might choose to commit to some areas of regulation such as in the field of State aid and competition, remaining in step with the EU's. Other Government ministers have made similar pronouncements.

Equally, this approach is very much in line with the EU's own position. The EU27 have indicated on a number of occasions, most recently in the European Council (Art.50) guidelines published on 23 March 2018, that the future EU-UK relationship “will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level-playing field” including in relation to competition and State aid. This position reflects a recognition of the UK's geographic proximity and economic interdependence with the EU27, and the EU27's concern that the UK will obtain an unfair competitive advantage, absent robust rules to address, among other things, the potential distortive effects of subsidies on investment, trade and competition.

Separately, the choice of the CMA as a future domestic State aid regulator makes good sense. As we noted in [our response](#) to the EU Committee's inquiry on the impact of Brexit on UK competition policy:

“An obvious candidate for the role of [State aid] regulator would be the CMA. In this regard, we are aware that concerns have been expressed as to the ability of the CMA to take on such a role given limited resources and the likely increase of its workload following Brexit. However, there is an argument that the creation of a separate State aid authority would involve the duplication of resources. Separately, it might also create the risk of State aid regulation being implemented in isolation from other aspects of competition regulation, leading to inconsistencies of approach, as regards for example, market definitions.”

In a follow up development, the CMA announced on 10 April that Sheldon Mills and Juliette Enser have been appointed as interim Senior Director and interim Project Director of State aid, respectively and that further details about how the CMA will take on the European Commission's State aid enforcement and monitoring functions post-Brexit will be released in due course.

The Government's clarification on the UK's post-Brexit State aid regime is welcomed.

The business community will no doubt be keen to gain a better understanding of how the complex system of EU State aid rules, involving numerous regulations, communications and guidelines, and which concerns the possible adverse effects of State aid on competition in the EU's internal market, will be implemented in the UK.

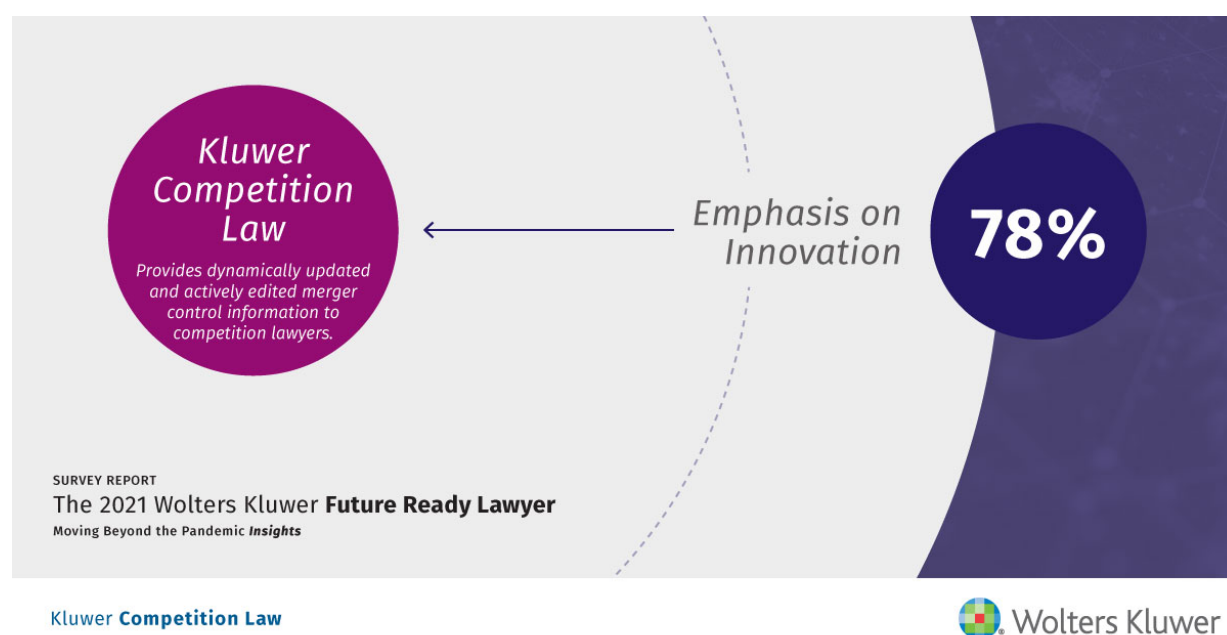
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