The EU State aid framework

The EU State aid framework is regulated by the European Commission which has sole responsibility for determining whether a state measure is compatible with EU law. However, in the context of a national State aid system, the temptation might be far greater for politicians and policymakers to use the power of the State to intervene in the marketplace. This can be especially true across an internal market of 28 (soon to be 27) EU Member States.

It is important to note that the CMA, which is the UK’s competition agency, would be tasked with the role of regulating the behaviour of the State, essentially concerned with the behaviour of businesses (and those involved in their running). Under its current remit as competition regulator and enforcer, the CMA is concerned with the regulation of competition in the UK, and any full notifications not already approved by the Commission prior to Brexit would have to be submitted to the CMA for approval instead, and State aid would only be considered in accordance with the CMA’s approval.

The notice does not clarify what should happen in cases where the Commission concludes before Brexit that aid was granted illegally and should never have been allowed or have provided the framework for the UK to notify the aid to the Commission. Under the Government’s proposed model, it would be for the CMA (after it has been granted the role of regulator) to ensure that the State aid regime works in a domestic context. The Competition and Markets Authority (CMA) will take on the role of domestic State aid regulation and will issue further guidance in early 2019 setting out in more detail how it will operate its State aid regulatory function.

According to the notice, the EU State aid framework will be transparent into UK law by means of secondary legislation under the European Union (Withdrawal) Act 2018, which means, any “technical modifications” must be made to ensure that the State aid regime in the UK is in line with EU State aid rules and will issue further guidance in early 2019 setting out in more detail how it will operate its State aid regulatory function.

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It is a given that it is transparent into EU State aid regulations will be brought into domestic law by means of secondary legislation under the European Union (Withdrawal) Act 2018, which means that the EU State aid system will remain in place. However, in the context of a national State aid system, the temptation might be far greater for politicians and policymakers to use the power of the State to intervene in the marketplace.

The risk of political intervention in a domestic State aid framework

In seeking answers to these questions it is necessary to understand the different dynamics at play in the UK context.

In both the EU and the UK, the likelihood of this raising issues under the WTO’s ASCM can be limited. This is because the UK is not a member of the WTO, and its regulation of State aid is therefore not subject to the same restrictions as those that apply in the context of the EU.

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media campaigns or otherwise. Whilst it is no doubt that the CMA would rise to the task, it is impractical for this more challenging environment within which the domestic State aid regulator would be operating to be expected to do so.

Separately, it is relevant to note that under EU State aid rules it is, in fact, possible for Member States to intervene in the State aid process. More specifically, Article 108(2) TFEU enables the Council (of EU Ministers) acting unanimously, at the request of a Member State, and where this is justified "by exceptional circumstances", to declare a specific State aid measure as compatible with EU State aid rules. In those circumstances, the Commission cannot investigate the particular measure, or to the extent that it has commenced such an investigation, it would be required to abandon it. Whilst this process has only been used rarely, in principle, it is available under EU law.

Accordingly, it is possible that the current or some future Government might introduce in domestic legislation a power similar to that set out in Article 108(2), allowing the Government of the day to intervene where it considers it appropriate as a result of "exceptional circumstances" in relation to particular State aid measures.

Again, the concern here would be that in a purely domestic context, and in the light of strong hostile public sentiment in relation to certain State aid decisions, a national Government might find it easier, and be more inclined, to use such powers than an EU Member State would (or could given the need for unanimity by all Member States), in the context of the supranational EU State aid system.

Ultimately, the ability of a national Government to initiate parliamentary procedures and amend domestic regulatory rules as swiftly as possible would be a significant advantage in a purely domestic setting. In addition, the relative ease with which national Governments can be influenced by public opinion contrasts with the need for unanimity by all Member States in the context of the supranational EU State aid system.

Is there a way of addressing these challenges? Yes, there is. These issues should disappear if State aid regulation forms an integral part of a future UK-EU trade agreement which provides (a) for the UK to maintain a common State aid rulebook with the EU; and (b) for the domestic State aid regulator to consider the extent to which an aid measure might affect trade not only within the UK but also between the UK and the EU.

It is notable that there would seem to be a significant meeting of minds on this issue. Both the EU27, in the context of numerous statements since June 2016, and the UK Government, most recently in the context of the Government’s Brexit White Paper, have indicated, directly or indirectly, a mutual desire for a common State aid rulebook to be part of a future UK-EU free trade agreement.