UK Subsidy Control Post-Brexit: Experiments in Private Enforcement

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For many Britainophiles in the EU, the noise of the Brexiteers and their shouting about "world-beating Britain" during the last five years of the departure process have been hard to bear. However, the constant banging has also at times obscured the excellent work still being carried out by legal minds on the other side of the English Channel. This became clear during the British Government's consultation process on the new "Subsidy Control Bill". This bill is supposed to take on a pivotal role in post-Brexit relations. The "EU-UK Trade and Cooperation Agreement" (TCA) provides in Articles 363 et seq. that the UK shall establish an effective subsidy control system in which an independently operating authority shall play an appropriate role.

It is fascinating to see the high level of expertise with which stakeholders have participated in this reform process. Here, however, the well-founded input came largely from people in the Remainer camp, mostly private practitioners working in state aid law. In contrast to that, statements from the Brexit camp tended to be limited to the usual buzzwords, such as "take back control," "sovereignty," "freedom", "[no] approval by unelected EU bureaucrats [any more]", "getting rid of the chains from Brussels", etc. Given the British Government's determination to "get Brexit done" at any cost, it was hardly surprising that the contributions from Remainers received only limited consideration in the draft. The proposed bill is a prime example of political and highly symbolical legislation. This, of course, does not help to achieve the ultimate purpose of competition law, i.e., minimizing distortions of competition.

No fundamental change in terms of substance

First, there is some good news. The draft that has now been published is based very, very closely on EU state aid law. After the planned reform, there will be hardly any fundamental changes in terms of content compared to the situation before Brexit. This does not come as a complete surprise given that the new draft bill is largely modelled on the substantive state aid rules from the TCA, which again are to a large extent borrowed from EU state aid law. However, it is astonishing that, as far as the substantive rules are concerned, the UK legislator has left hardly any mark on the document. One would have expected that the UK legislator would have been more ambitious and would have tried to adapt the existing framework at least a little bit. The TCA certainly left some room for such improvements.

In terms of substance, only semantic changes have been made. This was mainly to take account of the Brexiteers' concerns about sovereignty and their notorious dislike of EU jargon. "State aid" is now called "subsidies," "undertaking" becomes "enterprise," "services of general economic interest (SGEI)" becomes "services of public economic interest (SPEI)," and many more meaningless changes. These cosmetic concessions were demanded by the Leave camp in order to emphasize the independence of the new British rules. Such a superficial "rebranding" does not however change the fact that the notion of state aid and the compatibility criteria correspond almost 100% to the EU model. This applies to many fundamental principles, e.g. the definition of state aid, the fundamental ban on aid to firms in difficulties, the generous treatment of energy and environmental aid, exceptions for the defense sector, the prohibition of export aid, rules on services of general interest (SGEI), the transparency requirements and the ban on support for relocation investments. All of this is very sensible and familiar from EU law.

It, therefore, remains the British Government's secret what is – according to its explanations – "new" about this and why the extensive takeover of EU state aid law leads to "more flexible support for UK businesses". In any case, the rules will not become any leaner, not least because they provide for the adoption of numerous additional guidelines.

Private enforcement as the main pillar of subsidy control

The news is not as good when it comes to procedural law. Here, the new regulation provides for a fundamental change that is not foreseen in the TCA. In the future, the notification and approval requirement for subsidies is to be abolished – a fundamentally new approach compared to the EU model. A new Subsidy Advice Unit within the UK Competition Authority (CMA) will provide non-binding advice to authorities, monitor the new system and report on it. However, it will have no powers like the European Commission to prohibit, authorize or recover state aid.

Instead, enforcement is to be carried out more or less exclusively by British courts, with a key role for the Competition Appeal Tribunal (CAT), which until now has been primarily responsible for antitrust law.

Does the new system deliver what it promises?

The main advantage of this system change is supposed to be the acceleration of proceedings. However, it is highly questionable whether state aid control will really be faster in the future than in the past. Even under EU law, the majority of subsidies are granted on the basis of the General Block Exemption Regulation (GBER), i.e. without notification and approval. Only the large subsidy packages (of which, incidentally, only a few came from the UK) have to be approved by the Commission because these are, of course, particularly distortive of competition.

Under the new British model, however, these are no longer subject to notification. Whether such cash gifts are subject to (judicial) review at all will depend on the risk appetite and resources of the competitors, i.e. ultimately on chance. Particularly in the case of large subsidy packages, it is often difficult to find a plaintiff, even in the case of grossly illegal subsidies. This is because the litigation risk is considerable and the costs before the British courts are often high. The problem of the burden of proof (the competitor must prove the existence of state aid) is likely to deter many third parties. Competitor suits in the national courts based on state aid rules have therefore remained a rare phenomenon, especially in the UK.

The idea of making private enforcement the main pillar of subsidy control is therefore not really convincing. Public enforcement by an independent authority seems more efficient, especially if this authority is vested with strong investigative powers. Above all, a purely private enforcement system leads to enforcement deficits. Cases such as the "tax planning practices" investigated by the Commission in recent years would hardly be examined under the new regime. What competitor would challenge billions of euros in aid at its own risk? The new approach, therefore, weakens state aid control. But perhaps that is precisely the intention.

A level playing field?

The new system also has clear disadvantages for aid recipients in terms of legal certainty. They cannot rely on the fact that the funding authority has fulfilled all requirements. This can lead to risk-averse companies foregoing legitimate funding for fear of litigation. And often, cautious funding agencies will award fewer grants, while other, more courageous donors will go to the limit or even beyond.

In terms of a level playing field, this is not progress. Whether the new system is in line with the spirit of the TCA is therefore questionable. This is because there may be considerable differences between EU and UK state aid control. This means that conflicts are once again to be expected.