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Together forever? How State aid law will affect the UK even after Brexit

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After the UK Brexit referendum of 23 June the implications on the political, economic and legal relations between the UK and the EU have been discussed from many angles. But what about one of the main pillars for the successful integration of the European Single Market: State aid law? Does the end of EU membership also bring to an end the application of State aid provisions that shall ensure that domestic support for companies such as grants or tax breaks does not distort competition? It may not be as easy as this.

Background

The UK is known to be one of the Member States generally in favour of market economy. Despite exceptions, the UK was less active in providing governmental support to the UK economy than other Member States. UK policy was also characterized by a strong record of compliance with EU State aid rules.

Nevertheless, following the Brexit vote, the UK Government's incentives to support its own economy to alleviate the effects of a possible downturn caused by the Brexit vote have increased. Indeed, some Brexit campaigners even accused EU State aid rules for having caused the downturn of certain UK industries such as the steel sector. At the same time, at least until an actual Brexit, the EU Commission remains in charge of the application of State aid rules throughout the EU, including the UK, to avoid distortions of competition. It is also possible that certain on-going State aid cases may be singled out in the Brexit negotiations.

The legal situation until Brexit

Up to an actual Brexit, EU State aid law remains in force in the UK as much as in any other EU Member State. Thus, the European Commission will continue to monitor compliance of any aid granted in the UK with EU State aid laws. However, it remains to be seen how vigorously the Commission would exercise its discretion to open cases against the UK where State aid implications are not crystal-clear, e.g. regarding block-exempted aid. The Commission may concentrate its resources on the more prominent cases with a UK angle to demonstrate its commitment to enforcement of the State aid rules prior to the Brexit.

Vice versa, there is no indication today that the UK would not have an incentive to fully comply with EU State aid rules throughout the transition period. The UK government has stressed the

importance of a reliable and cooperative future relationship with the EU. This political goal would be at risk if the UK opted for non-compliance with existing State aid rules.

Only if the UK in the course of the negotiations opts for a “Full Divorce” model, meaning only WTO subsidies rules applying (see below), there may be less of an incentive for the UK to still notify all aid measures to the Commission, in particular shortly before the implementation of the Brexit.

The legal situation post-Brexit

The situation will be different in a post-Brexit world. If the UK wants to secure access to the EU single market, it may well have to agree to some sort of State aid control as a condition of access to the EU free trade area.

Should the UK join the European Economic Area (“EEA“), it would remain subject to the same EU competition and State aid rules as before, as they are replicated in the EEA Agreement. In this scenario, the UK would also still be subject to supranational State aid control through the EFTA Surveillance Authority (which enforces the EEA competition and State aid rules in the EEA States). As this would contradict one of the main political arguments of the supporters of the Brexit this solution seems rather unlikely.

In case of a tailor-made free trade agreement between the UK and the EU, the UK likely will have to agree to a certain level of State aid control, as the other EU Member States may require this to be part of such a package. In this scenario the UK would have to self-enforce the State aid rules. While this may be a more desirable option for the UK’s Leave majority, it is questionable whether the EU would offer full market access in exchange for a less predictable State aid control mechanism that would be in the hands of the authority that granted the aid, i.e. the UK government.

Only if the UK opts for a “Full Divorce”, i.e. leaving without entering into any special relationship with the EU or access to the single market, no State aid rules would apply in the post-Brexit UK. The UK will be bound by the WTO Agreement on Subsidies and Countervailing Measures which disciplines the use of subsidies and it provides for remedies to counter the adverse effects of subsidies. WTO law allows a country, following an investigation, to charge extra duty (“countervailing duty”) on subsidized imports that are found to be hurting domestic producers.

Post-Brexit implications for UK undertakings active in EU Member States

Whether the UK will be subject to a State aid regime or not post-Brexit, EU State aid law would continue to apply to UK companies with subsidiaries in the remaining EU/EEA Member States, either as beneficiaries or complainants. Since the EU Member States have banned any type of export subsidy, at least the UK would not have to fear that such measures harm its own markets. Furthermore, the WTO Agreement on Subsidies and Countervailing Measures prohibits export subsidies.

Post-Brexit implications for EU undertakings active in the UK

For EU undertakings with affiliates in the UK, the Brexit vote should have little impact on ongoing proceedings prior to the Brexit. Also in the future, any support a company receives in the UK will be treated separately from any support an undertaking may receive in one of the remaining

EU/EEA Member States, i.e. there should not be any accumulation of aid unless the UK and the EU specifically agree on such a provision.

Future proceedings regarding the UK in tax matters

One area in which the European Commission has increased State aid enforcement significantly in recent months concerns national tax rulings. So far, there have been no proceedings against the UK. However, the Brexit vote may have created incentives for the UK Government to use its taxation practice as a means to subsidise domestic companies in the troubled post-Brexit economic environment, possibly including in the banking sector. If this was the case, the Commission may have to consider becoming active in this area as well.

What companies need to consider now

Regardless of Brexit, EU State aid law will remain relevant for companies within and outside the UK. In fact, as the UK Government may have stronger incentives to subsidise domestic undertakings to strengthen the UK economy, any such measure should be carefully reviewed under EU State aid law until the Brexit actually takes place. Aid beneficiaries should also consider the political dimension the future relevance of State aid law in the UK may have during the negotiations between the UK and the EU. It is likely that State aid will continue to affect the UK even after a Brexit, unless the UK is willing to entirely forego any special access to EU/EEA markets.

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