

newsletter

EU | BREXIT | STATE AID

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IMPACT OF BREXIT ON THE APPLICATION OF STATE AID RULES

The referendum on the United Kingdom leaving the European Union took place on 23 June 2016. With a turnout of over 71%, the Leave campaign gained the support of 52% of voters, against 48% for Remain. The implementation of this vote in favour of Brexit raises a number of questions, in particular as regards the future status of the United Kingdom (UK) and its relationship with the European Union (EU).

This newsletter aims to analyse the legal consequences in the event the UK leaves the EU, more particularly regarding rules pertaining to State aid, and situations involving a commitment from the British authorities to compensate companies present on British soil for the potential negative consequences of Brexit – which may be construed as State aid.

editorial

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Uncertainty as regards access to the Single Market. Over five months after the referendum, uncertainty remains as to the procedure, the negotiations calendar and the various options open to the United Kingdom for its withdrawal from the EU.

The greatest uncertainty concerns the solution which will be negotiated for the UK access to the Single Market. Indeed, the EU Treaty provides no guarantee of an automatic free access to the Single Market for a Member State that leaves the EU. Additionally, the declarations made by the British authorities seem to indicate a “hard Brexit” scenario, in which the UK would become a third country with no privileged access to the Single Market.

This uncertainty is naturally a source of concern for companies located on British soil and which would like to maintain access to the Single Market to freely export towards the rest of the European Union.

With this in mind, British authorities are looking to reassure companies by pledging they will implement appropriate provisions so that Brexit will not negatively impact their activities. For instance, Nissan has indicated having received a letter from the British government offering certain guarantees concerning continued access to the European market, without customs duties and administrative red tape.

«Until this process of negotiations is over, the United Kingdom remains a member of the EU, with all the rights and obligations that derive from this.»

Martin Schulz, Donald Tusk, Mark Rutte and Jean-Claude Juncker

APPLICATION OF STATE AID RULES TO THE DECLARATIONS AND COMMITMENTS OF A MEMBER STATE

As a reminder, the concept of “State aid” is a legal and objective concept defined by the Treaty on the Functioning of the European Union (TFEU). The principles applicable to State aid are set out in Article 107. This article states that “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”.

The concept of “State aid” is thus made up of five cumulative elements: the existence of an undertaking, imputability of the measure to the State, the use of State resources, granting an advantage, the selectivity of the measure and its impacts on competition and trade between Member States.

In particular, to meet the requirements of Article 107(1) TFEU, any aid granted by a State must favour certain companies or economic activities. Consequently, all measures that encourage economic operators do not necessarily constitute State aid; only those that selectively bestow an advantage on certain undertakings or categories of undertakings, or certain industries.

An aid measure that fulfils the cumulative criteria indicated above is subject to the “standstill” obligation, i.e. it cannot be implemented without having first been notified to, and authorised by, the European Commission.

Any commitment made by the British government to implement certain measures with a view to compensating the negative effects of Brexit is clearly likely to constitute State aid, if such commitment draws on State resources.

Additionally, as illustrated by the Commission’s decisional practice, mere declarations made by the British government may also qualify as State aid.

It is worth recalling here the example of the France Telecom case, in which the French Minister for the Economy and Finance of the time had declared in an interview that the State, as shareholder, would act as an informed investor and take appropriate measures if France Telecom were to encounter difficulties.

The ensuing cases before the General Court and the Court of Justice of the European Union clarified that the declaration alone could constitute a State aid so long as it can be interpreted as comprising a concrete, firm and unconditional offer from the State to act in a given situation, and committing State’s resources. Conversely, if the declaration is open, imprecise and conditional, then its qualification as State aid cannot be held.

Moreover, qualification as State aid is not assessed from the moment its potential effects may be felt, but rather from the time the legal commitment, bestowing the advantage, is made.

It is on this basis that the European Commission questioned the British government as to the content and nature of the potential commitments taken as regards Nissan.

In summary, the principle of “*business as usual*” recalled by the European political leaders following the referendum also apply to the rules applicable to State aids, which remain fully applicable until the UK formally leaves the EU.

CONDITIONS TO RECOVER, POST-BREXIT, STATE AIDS GRANTED PRIOR TO THE WITHDRAWAL OF THE UK FROM THE EU

Where a State aid is qualified as being incompatible with the Single Market, the European Commission usually orders the granted aid to be recovered. However, in the event of Brexit, situations may arise where a State aid, granted prior to the UK's withdrawal, is proclaimed incompatible with the Single Market (with order of recovery), but *after* the withdrawal of the UK. In such cases, there could be uncertainty as to the lawfulness of the appropriate legal grounds to impose the recovery of the British State's unlawful aid.

«The termination of a treaty [...] does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.»

Article 70 of the Vienna Convention

The Vienna Convention on the law of treaties (signed in Vienna on 23 May 1969, ratified by the UK on 25 June 1971 and entered into force on 27 January 1980) is relevant here, as it codifies principles of international law. The principles embedded in this Convention address, in particular, the consequences of a treaty's termination.

Article 70 of the Vienna Convention thus provides that "*Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention (a) Releases the parties from any obligation further to perform the treaty; (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*" (our emphasis)

Upon reading this provision, two scenarios may be considered: either the parties to the European treaties decide otherwise, in which case the agreement between the UK and the EU would define the legal framework applicable post-Brexit; or the parties have not been able to negotiate an agreement on this issue within the given timeframe, in which case the UK is freed from its obligation to continue to apply the treaty in the future, without this impacting the legal situations created by the execution of the treaty prior to its termination.

It follows from such provision that the legal situations (grant of an aid incompatible with the Single Market) created by the execution of the treaty cannot be brought into question. Article 70 of the Vienna Convention thus aims to ensure a certain legal certainty and predictability.

Post-Brexit, the UK would therefore not be able to question the qualification as unlawful State aid of a national measure that was decided prior to the formal withdrawal of the UK from the EU, and thus prior to the termination of European treaties for the UK.

DOES BREXIT SPELL THE END OF STATE AID RULES APPLICATION FOR THE UNITED KINGDOM?

One last question may be raised as to the impact of Brexit on the European regime of State aid: will these rules simply disappear once the United Kingdom has left the European Union?

The answer to this question will depend in particular on the negotiations conducted in line with Article 50, and a potential *ad hoc* agreement between the EU and the UK. However, even outside of European treaties, a number of rules govern the conditions in which a State can grant aid to a domestic company.

In the European Economic Area (EEA), for instance, the rules pertaining to State aid are equivalent to those of the TFEU and are applicable in the same way. However, State aid rules are not enforced by the European Commission itself, but by the Supervisory Authority, and the EFTA Court is the competent authority in the event of dispute.

In the event of a bilateral agreement between the UK and the EU, it is possible that clauses pertaining to State aid may be integrated. Recent agreements negotiated between the EU and third countries do not all include provisions pertaining to State aid. Nonetheless, as highlighted in its Communication of January 2016 on an external strategy for effective taxation, the Commission considers that this type of agreement must include provisions that aim to ensure fair competition conditions.

According to the European Commission, provisions pertaining to State aid in bilateral agreements can *"increase transparency on subsidies, prohibit the most harmful types of subsidies and provide for consultations on harmful subsidies"*, in order to establish fairer competition between Member States and third countries.

Lastly, the rules of the World Trade Organisation (WTO) provide for a framework to govern the use of subsidies, and regulate the measures that countries may implement to compensate the effects of subsidies.

Regardless of the future legal framework governing the relationship between the UK and the EU, it is likely that the rules governing the granting of aid measures or subsidies will remain in force and apply to the whole of the UK, even once it has formally left the EU.

Should you require any further information on this newsletter, please contact us or the lawyer you are usually in touch with.

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