



Legal update — April 2018

State Aid Group UK set to keep State Aid law

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You may be relieved or disappointment, depending on your point of view, at the news that the UK is set to keep state aid control.

The UK government has indicated that state aid law will be incorporated into UK law as part of the EU withdrawal bill. Interestingly the government minister responsible has stated that the state aid structure, not just the regulations will be adopted. The UK's Competition and Markets Authority (CMA) has been nominated to take the role of the EU Commission as the independent arbitrator of state aid compliance.

Minister, Andrew Griffith's letter/statement confirming this position is not a surprise. UK governments (of all persuasions) have steadfastly supported the state aid framework as a tool to ensure fair competition by eliminating 'unfair' and often counterproductive public/taxpayer subsidies (anyone remember British Leyland). The government appears keen to ensure that neither the UK nor EU descend into 1960s style subsidy wars following Brexit.

How does it affect my organisation?

Subject to the Brexit negotiation mantra of 'nothing is agreed until everything is agreed' public and private sector organisations should assume that existing state aid regulation will apply during and after the Brexit transition period.

Following that, there is scope for divergence between the details of the respective EU and UK versions of state aid law, though the fundamental principle (of preventing the distortion of competition) will be identical and both will be underpinned by World Trade Organisation requirements. This approach is not new for England/the UK. The legal divergence between it and commonwealth countries since the 1950s followed a similar path. We can expect that the UK courts (who will replace the EU court for UK state aid cases) will consider EU state aid decisions/judgements as persuasive legal authorities, without being bound to accept them as binding decisions which must be followed in the UK.

Clarity with reservations

Andrew Griffith's statement/letter provides some clarity to public authorities and businesses. However, there are still details concerning future UK state aid control which we don't yet have visibility about. It is possible that this will not be provided until the end of the Brexit transition period.

One is the ability/right of UK and EU businesses and public bodies to challenge the EU Commission's and/or the CMA's state aid decisions in the others jurisdiction. Without this right how would a British company effectively object to, say, an Irish breach of state aid law which affected its business? Relying on merely an inter-state arrangement (e.g. only the UK government or EU Commission) for challenges is likely to be less effective, for businesses, as diplomatic and geo-political considerations could make either reluctant to challenge the others state aid breaches. As an example, if the UK's current dispute with Russia was to reoccur post Brexit then, it is possible that the UK government would not raise a state aid breach with the EU if a consequence could be to alienate military allies such as Germany, France or the Netherlands.

Another, which is ordinarily a matter for law students, is the difference in jurisprudence between most of the UK and the EU. At its simplest this is how the courts and lawyers interpret the law. The common law system (used in most of the UK) is a detailed rules based system – e.g. the law will expressly prohibit/permit something – and this is usually set out in detail. The EU legal system is rooted in civil law and is based on, more general, written principles rather than a detailed list of rules. Interpreting those principles is more nuanced than under our common law system.

It is not clear whether the UK will continue to interpret state law under the EU's civil law system or revert to our common law ways. Unfortunately, this legal difference is not just of academic interest. Many English lawyers, due to legal training, already have a tendency to translate EU state aid law using the common law approach, with negative consequences for UK plc. Legitimate public sector interventions can be stifled due to a 'common law' lawyer reading EU state aid

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regulations expecting (and failing) to find a detailed rule permitting aid (as might be expected under common law). We are hope that the UK retains a civil law approach to state aid law as otherwise, the UK is likely to be over cautious in deciding whether public support for legitimate economic and social programmes is compatible (lawful state aid).

Andrew Griffiths M.P.s letter to the House of Lords:
[http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318 -
Letter Andrew Griffiths to Rt Hon Lord Whitty.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318-_Letter_Andrew_Griffiths_to_Rt_Hon_Lord_Whitty.pdf)

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