



The Future of UK State Aid Control

In recent months, the vexed question of state aid control in the United Kingdom has surged to the front of the negotiations on the future trading relationship between the British Government and the European Commission as a make or break issue. On the one hand, the UK appears to envisage economic independence in which, like Canada, it is free to determine on its own whether it might grant subsidies to individual sectors or companies. On the other, the EU wants the UK to remain closely aligned to the highly developed regulatory system that governs aid granted by Member States that may distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. As they enter into the final phase of negotiations, the good news is that an outline of a mutually acceptable resolution has been coming into view in recent weeks. For state aid lawyers in the UK, the bad news is, however, that directly effective enforcement may soon be a relic of a bygone age.

State aid law in the EU is based on Articles 107-108 TFEU. Essentially, these provide that state aid is prima facie incompatible with the internal market, but certain types of aid may be declared compatible, notably aid to develop certain regions or economic activities. Proposed aid must be notified in advance to the Commission for approval, in the absence of which the aid may not be



implemented. If it is implemented without approval, the aid is deemed illegal and is liable to be recovered. This illegality is directly effective, so that proceedings may be commenced in the High Court to enforce the prohibition and effect recovery. It follows that private operators, particularly competitors of the putative recipient of illegal aid, may be involved in the state aid control process either by engaging with the Commission or by instituting High Court proceedings. Quite apart from the limits of substantive aid that may be available in the UK after 1 January 2021, it is this notion of directly effective enforcement that seems to be anathema to the Government.

The Government has so far refrained from setting out any proposals regarding substantive state aid policy, other than to indicate that subsidies after the transition period will be subject to WTO rules and that it will consult on future policy at a future (unspecified) date. In all the furore over the Internal Market Bill, little attention was paid to clause 46 which would, if implemented, allow a Minister to provide financial assistance for a number of purposes, including promoting economic development, providing infrastructure, supporting cultural,



sporting and educational activities. It is not by accident that much of this closely resembles the categories of compatible aid that are permitted under Article 107(3) TFEU and which are regulated by the Commission in accordance with its guidelines and regulations. Whilst the UK does not wish to be subject to those guidelines and regulations, and may well wish to be able to grant aid to suit its own specific purposes in circumstances not allowed under those provisions, it should not really be that difficult for both parties to come to an understanding on the structural limits of permissible aid, without the UK being bound by the EU's detailed policy instruments. Those structural limits could be incorporated into the forthcoming Free Trade Agreement and be subject to some form of dispute resolution mechanism.

Enforcement is a different matter, however. In clause 43 of the Internal Market Bill, which allows for regulations for the purposes of (departing from) the application of Article 10 of the Northern Ireland Protocol in the Withdrawal Agreement, it is specifically provided that such regulations might include provisions for persons to have no right of action of any sort in respect of aid and that all rights and obligations that might otherwise apply would not be recognised. Article 10 retains the application of EU state aid law, pretty much in its entirety, to the United Kingdom in respect of aid measures that affect trade between Northern Ireland and the EU. This is not limited to aid granted in Northern Ireland but is capable of reaching back to aid granted in Great Britain that has a downstream effect on trade between Northern Ireland and the EU. The perceived major purpose of the IM Bill, as regards aid, is to prevent the future application of the EU rules in Great Britain *inter alia* by removing any right of private enforcement in the courts.

As regards state aid in the UK more generally, the Withdrawal Act 2018 provided that all EU law in force at the end of the transition period would be recognised as UK domestic law, unless it was otherwise removed from the statute book. Last week, the Government published its draft State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, which will effectively delete Article 107-108 TFEU, and all EU state aid decisions, from the UK legal order on 1 January 2021. Certain transitional provisions apply, particular allowing for court actions to continue or be commenced relating to any state aid breach which occurred prior to that date. Specific transitional provisions are also

contained in the Withdrawal Agreement allowing Commission investigations to continue for a further four years in relation to past infringements and allowing UK lawyers to represent their clients in CJEU/GC proceedings.

Even though there may have been few enough High Court proceedings on state aid over the years, this is largely attributable to state aid lawyers, on a daily basis, advising public authorities and recipients of aid how to ensure that the EU regulations, in particular the block exemption regulation, were fully complied with, so as to avoid the directly effective prohibition in Article 108(3) TFEU. With the demise of that provision in UK law, and no replacement on a domestic basis, a valuable and effective enforcement tool will have been foregone. Hopefully, all is not lost, however. The Competition and Markets Authority is hoping to be given certain regulatory or advisory powers presently exercised by the Commission.

Regardless of enforcement of state aid control by and in the UK going forward, the Commission has also intimated that it will enact new legislation aimed at subsidies granted by non-EU countries. A White Paper on levelling the playing field as regards foreign subsidies was published a few months ago, with the Commission expressing concern over subsidies that are granted by non-EU authorities to undertakings operating in the internal market. In order to counteract this, the Commission proposes the possibility of imposing redressive measures aimed at remedying the distortions caused by the foreign subsidy. The Commission expressly envisages that such measures might be agreed within forthcoming free trade

agreements. It is quite possible, therefore, that any final agreement between the UK and the EU will contain level playing field provisions of this nature in addition to, or as a substitute for, state aid enforcement rules in the UK.



Conor Quigley QC
Barrister at Serle Court