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Brexit: State Aid Implications

State aid control is unusual internationally. State aid is entirely a matter of EU law and is administered by the EU. Unlike other areas of competition law, such as antitrust and merger control, there are no national rules or institutional structure to enforce State aid rules. There is also no international system of State aid control either—aside from the constraints of the WTO Agreement on Subsidies and Countervailing Measures—which are much less extensive.

As a result, the referendum outcome creates greater uncertainty as to the future of the State aid regime than for other areas of competition law. This short note considers what the UK's referendum result might mean for State aid control including for future UK nuclear projects.

Status of Existing Projects

Because the referendum result is only advisory and has no immediate consequences, EU State aid decisions relating to existing individual aid or schemes (including in respect of Hinkley Point C) continue in effect. It is unclear whether such decisions would be grandfathered if the UK leaves the EU; but given that investment decisions and contractual arrangements will have been based them, in practice this seems likely. Enforcement of State aid is heavily dependent on the cooperation of Member States, but despite this, there is no indication that the UK—which historically has had one of strongest records of State aid compliance in the EU—will not comply with its existing treaty obligations or that it would retroactively change its approach to past State aid decisions.

Considerations for Future Projects

For future projects involving State aid, including those underway now, there are a number of additional considerations:

- The Commission has indicated privately that it will strongly de-prioritise UK-related cases and will focus its resources elsewhere. If this occurs in practice, it may make it difficult for the UK Government and other parties involved in new projects such as nuclear to engage with the Commission regarding State aid during the project design and negotiation stages. This will put greater pressure on the parties themselves and their advisers to consider State aid risks and approach.
- If the UK does eventually leave the EU, there is a wide variety of possible outcomes for the State aid regime, ranging from retaining the existing regime through to not having one at all. Projects going ahead before the situation has been clarified will need to be designed to protect the enforceability of critical terms against any regulatory uncertainty.
- For nuclear projects, the UK was a major voice supporting nuclear power and wider energy policy development in the EU. If the UK leaves, there is potential for less sympathetic treatment of State aid for nuclear projects

within the EU. Austria and German utilities have taken the Commission to Court over what they see as excessive generous terms permitted for Hinkley Point C and have long sought a more restrictive approach.

Will the UK Keep State Aid Rules if it Leaves the EU?

The original purpose of the State aid rules was to prevent subsidy races between European countries. Weaker countries feared that stronger countries could use state subsidies to attract investment and avoid the costs of industrial restructuring. In this way, State aid control is a form of multi-lateral economic disarmament overseen by a third party—the European Commission. It is also why State aid control is so unusual internationally. The Commission permits Member States to grant State aid only where it serves a useful purpose of common interest. Significant amounts of State aid are approved in this way every year, totaling €101bn in 2014[1].

The UK has always been a very strong supporter of the State aid rules and of the Commission in enforcing upon them. This is because historically the UK has not subsidised its industries as much as some other Member States. The UK was also the first EU country to undertake major privatisation schemes—so the State has a less significant role in the economy than was traditionally the case in many other Member States. This is reflected in the relatively small amounts of State aid that the UK seeks approval for, relative to its economy. The UK accounts for approximately 16% of EU GDP but grants less than 8% of State aid approved by the Commission. That said, the UK had a good reputation and record with the EU of gaining approval for the aid that it did want to grant.

The UK government has also often considered the State aid rules to be a useful discipline to restrain wasteful public spending in devolved regions or nations e.g., preventing Wales and Northern England from competing against each other to attract investment. However, the stringency of the existing regime has raised public concerns and been criticized by politicians across the EU, most notably recently following the difficulties faced by the steel industry and currently in respect of the Italian banking industry.

It is likely that both the EU and UK will want to continue pursuing these policy objectives in future.

Options for State Aid Control if the UK Left the EU

There are three relatively clear options at this point. Others or variants of the below may become apparent later:

- UK stays in the single market via EFTA and the EEA Agreement. This option would mean that the EFTA Surveillance Authority would take over State aid supervision from the European Commission, but the substantive rules and procedures would be essentially the same as today.
- UK leaves the single market—at least with respect to the competition rules – and does not have a formal system of State aid control at all.
- UK leaves the single market—again at least with respect to the competition rules - and the UK applies its own system of State aid control. This could be through an independent authority with the power to give legal approval prior to State aid being granted in a similar way to how the Commission operates now. Alternatively, it could be

[1] See European Commission 2015 State aid scorecard available at: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html

through a system of internal Governmental review of certain tax and spending decisions which would provide an opinion on whether subsidisation in any given case is an economically efficient policy tool. This opinion could then have political rather than legal authority. Any system requiring prior legal approval would be unusual and awkward in practice as it would set up the potential for an administrative authority in one branch of Government to decide that another public body's spending choices are unlawful.

Practical Steps

Although much is uncertain, it is clear that the rules in future will not be stricter than the rules today. It is also clear that the Commission will be less engaged on UK projects at least until the new relationship between the UK and the EU is settled. This puts an emphasis on parties and their advisers to assess and plan the State aid consequences of their projects so as to minimise disruption going forward.

There are also opportunities for companies to engage with the UK Government about the changes to the State aid regime that they consider would be advantageous if the UK does leave the EU.

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