STATE AID 2019 KNOW HOW

United Kingdom

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GCR INSIGHT

National state aid control - competent authorities

1 Which national authority or body is responsible for the oversight of state aid in your country, in particular the identification of new aid measures and their notification to the European Commission, the monitoring of existing aid measures for compliance with EU state aid rules and decisions, the submission of annual reports on existing aid schemes to the European Commission and cooperation more generally with the European Commission on state aid matters?

For the period in which the UK remains subject to EU law (see also below for other commentary related to Brexit), the national coordination body for the United Kingdom is the sState aid unit of the Department for Business, Energy and Industrial Strategy (DBEIS), which acts as the principal point of contact with the European Commission in respect of handling notifications, responding to investigations, the submission of annual reports and submitting representations on matters of state aid policy.

However, all central government departments and each of the the devolved administrations (Wales, Scotland and Northern Ireland) as well as Mayoral Combined Authorities, local authorities and other public bodies have the power to award State aid, set up schemes under GBER, use their funding agreements to enforce state aid compliance, deal with enforcement and assist the monitoring of state aid by the European Commission.

Under Regulation 3 of the State Aid (EU Exit) Regulations 2019 the body responsible for regulation and notification of state aid in the UK post-Brexit will be the Competition and Markets Authority (CMA) and any public body may directly seek to notify a UK State aid measure to the CMA. The CMA may take action to enforce unlawful State aid in the UK.

It is our understanding that post-Brexit DBEIS will continue in its role as policy lead for State aid law, for example, working on new block exemptions as part of the legislative process.

2 Does any authority monitor the national legislative process to identify potential aid measures? Does this independent authority have sufficient powers to prevent the legislature or government from adopting aid measures that do not comply with EU state aid rules?

The Parliamentary legislative process contains checks and balances to ensure compliance with the law.

Although the UK is (currently) subject to EU Law, an assessment of State aid compliance is undertaken by Parliamentary Counsel during the legislative process. If concerns are raised, then Parliamentary Counsel may seek an opinion from DBEIS State aid unit. If there was sufficient political support, a formal notification could be sought with the European Commission.

Under Schedule 3 the State Aid (EU Exit) Regulations 2019 the UK Parliament may seek an 'advisory opinion' from the CMA as to the compliance of a measure. The advisory opinion must advise whether aid has been granted by an Act of Parliament, and if so, whether the aid would be notifiable under article 108(3) of the TFEU, and whether if it would be likely to be approved.

3 What are the competences of the national authority responsible for state aid control, and what is the legal basis for these powers in domestic law? Does this authority have the power to grant interim measures in addition to any interim relief that may be available in the national courts?

Under current arrangements, DBEIS State aid unit has no express legislative power under domestic law for its position as co-ordinating authority for state aid law in the UK and DBEIS State aid unit cannot lawfully grant interim measures or provide interim relief.

The monitoring and enforcement powers of the European Commission and national courts apply in UK domestic law as a result of the direct effect of EU Law as a result of the European Communities Act 1972.

Under Regulation 3 of the State Aid (EU Exit) Regulations 2019, the CMA shall take on the role of the European Commission in overseeing state aid law compliance in the UK, post-Brexit.

4 Aside from the role played by the European Commission and national courts in enforcing EU state aid rules, does the national authority responsible for state aid control accept complaints made by competitors, other interested parties, or other third parties regarding potentially unlawful and incompatible aid measures?

No, complaints are not accepted by DBEIS State aid unit. Under current arrangements complaints relating to state aid must be directed to the European Commission. This situation is of course set to change post-Brexit, when the CMA will accept and examine complaints made by interested parties as per Chapter 6 of the State Aid (EU Exit) Regulations 2019.

5 Does the national authority responsible for state aid regularly cooperate or exchange information with the state aid authorities in other member states? If so, are there formal structures to facilitate this cooperation and information exchange, or does this occur on a purely ad hoc basis?

Yes, DBEIS State aid unit attend regular meetings organised by the European Commission involving other EU member states, but any further cooperation is carried out informally.

Under the State Aid (EU Exit) Regulations 2019 the CMA does not have a formal role to cooperate or exchange information. However, it is understood that such cooperation and information exchange may occur on an ad hoc basis.

6 Which body represents your country in state aid proceedings before the EU courts?

There is no single dedicated organisation that represents the UK in state aid enforcement cases before EU courts.

In cases such as Eventech case (C-518/13), the Parking Adjudicator was supported by the London Borough of Camden and, representing the member state, was Transport for London. In many cases the DBEIS State aid unit will work with the Government Legal Department and specialists at the United Kingdom Representation to the EU (UKRep).

7 Is there a national register or other central source of data on national aid measures? Are the various state aid reports, complaints, decisions, etc, published?

There is no national register. Rather, such information is published on the European Commission website.

Under Schedule 6 (5) of the State Aid (EU Exit) Regulations 2019, the transparency requirements at article 9 of GBER will be replaced (post-Brexit) by a requirement to publish such information upon a national website.

Under the State Aid (EU Exit) Regulations 2019, the CMA will need to publish its decision and reasoning after examination of a notified aid, unlawful aid, misuse of aid, existing aid schemes. The CMA will also need to publish an annual report for each year summarising the content of annual reports received by aid grantors in relation to existing aid schemes.

National substantive and procedural rules

8 Describe any recent developments in substantive or procedural rules under domestic law relating to state aid.

Since 1 January 2018 there have been no substantive developments in domestic law relating to State aid, other than that the State Aid (EU Exit) Regulations 2019 were laid before Parliament on 21 January 2019. If adopted by Parliament these will have effect upon 'Exit Day', the date on which the UK leaves the EU as defined by the European Union (Withdrawal) Act 2018. Naturally the effects of Brexit will be far reaching and fundamentally change the way state aid is administered and enforced in the UK thereafter.

9 Is there a specific legislative or administrative scheme under national law relating to the application or enforcement of EU state aid rules?

Not under current arrangements, under which EU Law relating to State Aid has direct effect (the UK government has previously regarded it to be unnecessary to transpose state aid rules into domestic law). However, the State Aid (EU Exit) Regulations 2019, if adopted, will create a domestic state aid regime including corresponding exemptions (with amendments made to address any deficiencies created by the exiting of the UK from the EU), which shall be enforced by the appointed regulator, the CMA.

10 Are there national rules or guidelines relating to the implementation of EU state aid rules, in particular EU guidelines?

There are no additional rules or guidelines which apply to the implementation of state aid rules in the UK. There is no implementing legislation, EU state aid law has direct effect.

There is legislation to give effect to certain state aid rules, for instance, the UK regional aid map is set out in a statutory instrument and there is an assisted area postcode checker on the DBEIS website. There is general state aid guidance published by the Ministry for Housing, Communities and Local Government (MHCLG) (for ESIF purposes) and DBEIS.

If the State Aid (EU Exit) Regulations 2019 are adopted, then the CMA is expected to issue its own guidance including Frequently Asked Questions.

11 Are there national rules or guidelines relating to the process of applying for, and the granting of, state support?

There are no national rules that apply to all public funds (whether the intervention is by grant, guarantee, equity or otherwise). Different rules apply to different funding programmes.

The Treasury has a Centre of Excellence for Grants, which provides high-level support and oversight to government departments setting up and running grant programmes. This is supported by the government Legal Department's team at MHCLG as the centre for excellence for government grant programmes.

12 How is the concept of "service of general economic interest" (SGEI) defined on the national level? Did the definition recently lead to disputes, and, if so, how was the dispute adjudicated?

There is no specific definition set out at national level, rather the UK draws upon EU law (decisions, judgements and practice) to determine SGEIs.

Regulation 4 of the State Aid (EU Exit) Regulations 2019 provides that aid granted in accordance with the SGEI decision (Commission Decision 2012/21/EU of 20 December 2011) will be exempt from the notification requirement.

Under the State Aid (EU Exit) Regulations 2019, the SGEI de minimis regulation (Commission Regulation (EU) No 360/2012 of 25 April 2012) will also be incorporated into UK law upon the UK leaving the EU.

13 Do any studies on national enforcement of EU state aid rules exist? If so, describe the main subjects and results of these studies.

Apart from the European Commission's 2006 study (updated in 2009) there are no recent UK studies of this nature, although the DBEIS organised 2013 study 'Review of the Balance of Competencies between the United Kingdom and the European Union – competition and consumer policy does refer to UK state aid stakeholders (including views of administrators and private sector recipients of aid) views on a range of subjects, including enforcement':

http://unctad.org/sections/wcmu/docs/c2clp_ige7p32_en.pdf.

Role of national courts

14 Do all national courts have jurisdiction to apply state aid rules? Or do certain dedicated courts have specific jurisdiction for state aid cases?

Under the current arrangements the High Court (Queens Bench Division) Administrative Court deals with judicial review actions, which include state aid cases, and there are no dedicated courts as such that have specific jurisdiction for state aid cases. Decisions on the compatibility of state aid are not within the jurisdiction of the national courts.

When the UK is no longer subject to EU law, the national courts are expected to rule upon appeals to decisions of the CMA relating to state aid. However, as detailed procedural rules are not yet in place little detail can be provided at this point.

15 Can the judgment of a national court on a state aid matter be appealed? If so, what grounds of appeal are available, and which court can hear the appeals? Does an appeal of a recovery order entail an automatic suspension of the obligation to recover unlawful aid (not notified) pending the outcome of the appeal?

An appeal can be made from the High Court to the Court of Appeal and from then on to the Supreme Court on a point of law only (ie, there is generally no room for re-examination of the facts). The judicial review procedure will entail a suspension of a recovery order until the appeal is resolved either by the UK courts or the EU institutions.

16 Do national courts sometimes confuse the concept of unlawful aid with incompatible aid?

We are not aware of any instances where a national court has made such an error.

17 Do national courts sometimes confuse the concept of new aid with existing aid?

We are not aware of any instances where a national court has made such an error.

18 Do national courts traditionally refer questions regarding the interpretation of EU state aid rules to the Court of Justice? Provide any notable examples of preliminary references made on state aid questions.

No, the last such referral was Eventech Case (C-518/13), which was referred to the Court of Justice by the UK Court of Appeal under article 267 TFEU. The UK courts generally consider themselves capable of resolving issues of whether a measure involves state aid directly.

19 Do national courts use the possibilities offered by article 29 of Regulation 2015/1589 (Procedural Regulation) providing for the amicus curiae conditions in state aid matters? Has the European Commission submitted written observations to national courts and asked authorisation to appear in court hearings?

We are not aware of any such instances at national court level.

20 Describe recent developments regarding state aid cases before national courts.

Theh Uk has had very few state aid cases heard in the national courts.

On 13 May 2016, the Court of Appeal in R (Sky Blue Sports & Leisure Ltd & Ors) v Coventry City Council upheld a High Court judgment, which found that a £14.4 million loan by Coventry City Council to a subsidiary company it jointly owned did not constitute state aid. Applying the market economy operator test, the Court of Appeal agreed with the High Court's finding that a hypothetical rational private investor in the same position as the Council might have made the loan to its own subsidiary on the same terms, rather than letting the subsidiary go into administration.

As the Council acted in a way that corresponds to normal market conditions, the transaction could not be regarded as state aid.

There was no referral to the European Court of Justice under article 267 TFEU and instead the UK courts applied the market economy investor test set out by the European Commission and European courts in previous cases to the facts of this particular case relating to the refinancing of a sports club by its state investor.

The Court therefore showed itself comfortable in making assessments on whether there is state aid or not. However, in less straightforward cases where, for whatever reason, the court is uncertain it also has the option to refer to the European Court of Justice's advice on the existence of state aid. This may happen where state aid is not the primary concern of the litigant.

21 Under national procedural rules, can a government measure be challenged directly in court on the grounds of illegal state aid, or do applicants first have to go through a preliminary administrative review procedure? If so, describe the steps involved in this procedure.

A government measure can be challenged directly in a UK court via the judicial review process, which considers the compliance of administrative action (in most State aid cases this will be the decision to award public funding) by a public body. There is no compulsory preliminary administrative review process.

To commence a judicial review the pre-action protocol for judicial review cases must be followed before proceedings are issued in the High Court, Queen's Bench Division (Administrative Division).

The time limit for commencing proceedings is within three months of the cause of action arising. Once such an action is commenced, the Administrative Court will first determine whether the claimant should be given permission to continue the claim. This is usually a paper exercise (with no oral hearing) and is intended to weed out vexatious or unmeritorious claims at an early stage. Only if permission is granted will the claim continue to a full oral hearing at which all parties will be represented. Judicial review can give rise to a right to compensation for loss or injury suffered, or it can involve a decision made by an administrative authority being referred back to it for reconsideration.

22 Under national procedural rules, who has legal standing to challenge a government measure in court on the grounds of illegal state aid?

An applicant must have sufficient interest in the matter to which the application for judicial review relates (section 31(3) of the Supreme Court Act 1981).

Sufficient interest is assessed with reference to the merits of the case brought – see IRC v National Federation of Self Employed and Small Businesses [1982] AC 617. Individuals can demonstrate sufficient interest, so long as they are in some way personally interested in the decision they wish to challenge (see R v Independent Broadcasting Authority, ex parte Whitehouse (1984) Times 14 April where a licence fee payer could challenge the broadcast of an offensive TV programme). Where an interest of pressure group is acting in relation to a decision that directly affects its own interests, it is treated as acting in the same way as an individual (see eg R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association [1972] 2 QB 299) and can demonstrate sufficient interest. However, where the group has been formed simply to challenge a decision that does not directly concern its members, it will not have sufficient standing (R v Secretary of State for the Environment, ex parte Rose Theatre Trust [1990] 1 QB 504) unless the group can demonstrate either that:

- some or all of its members are personally interested in the decision (R v HM Inspectorate of Pollution ex parte Greenpeace Ltd (No 2) [1994] 4 All ER 329); or
- where the group is a highly respected "expert" group (R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd [1995] 1 All ER 611).

The UK judicial review criteria for "sufficient interest" is regarded as wider than the article 263 TFEU criteria of "direct and individual concern".

23 Can a national authority argue in domestic court proceedings that a particular measure contains unlawful state aid, or are there any procedural bars to doing so?

Where the European Commission has not taken any action, a case may be made to a national court, which shall be obliged to order recovery if it finds that unlawful aid has been granted. That means that an aid beneficiary runs the risk that a complainant could obtain an order from the national court requiring the authorities to recover the aid.

As discussed below the grant of an unlawful state aid is likely to be regarded as ultra vires and hence void. That said, we are not aware of a published court case in which a UK government authority has required the repayment of aid it had already granted on the grounds that it was unlawfully provided state aid at the time of the initial grant. UK judicial review courts have, however, given declarations that tax differences amount to unlawful state aid (see R v Customs & Excise Commrs, ex p. Lunn Poly [1999] STC 350).

24 What are the limitation periods under national procedural rules for a party seeking to invoke unlawfulness under state aid rules in domestic court proceedings?

For judicial review, a claim form must be filed within 3 months after the grounds to make the claim first arose (UK Civil Procedure Rules 54.5). There are different time limits for procurement law and planning appeal challenges.

25 Does any provision of national law prevent an individual with standing from bringing state aid proceedings in the domestic courts concurrently with an investigation by the European Commission (eg, if the individual has complained to the European Commission in parallel, or the European Commission has started an investigation on its own initiative)?

No, there is no such prohibition. Judicial review does not prevent concurrent actions in an international jurisdiction. That said, there have been instances where a stay on appeal has been applied pending a Commission decision to prevent the risk of inconsistent conclusions being reached (R. (on the application of British Aggregates Association) v Customs and Excise Commissioners).

26 Under which circumstances will a national court stay proceedings as to the existence of state aid pending a European Commission investigation?

A Commission investigation or the commencement of proceedings in the European Court of Justice does not give rise to an automatic stay of proceedings within the national courts. If it is clear to the national court that the measure in question is an unlawful aid and proceedings are progressing at a European level, then the national court's obligations under article 108(3) TFEU will take prominence and a stay of proceedings will take place, with the national court preventing the implementation of the aid in question until the matter is resolved. However, as shown in British Aggregates Association v HM Treasury [2013] EWCA Civ 720 the national court may reconsider whether such a stay of proceedings is appropriate if the Commission takes a substantial period of time to make its decision.

If it is not clear to the national court that the measure in question constitutes an unlawful aid, then the national court's obligations under article 108(3) TFEU will be considered and the national court will consider whether a stay is necessary to avoid the risk of conflicting judgments on a national and European level in line with C-344/98 Masterfoods v HB Ice-Cream [2000] ECR I-11369. If the national court decides that such a stay is necessary due to the risk of a conflict between the concurrent proceedings, then it may consider applying interim relief measures to protect the rights of the relevant individuals if article 108(3) TFEU permits the court to do so. If the national court decides that it is necessary to do so (or if the national court doubts that the measure constitutes unlawful aid), it may make a reference for a preliminary ruling in accordance with article 267 TFEU or alternatively seek clarification from the Commission and may stay proceedings until receipt of the ruling.

27 What are the consequences for national courts if the European Commission has already come to the preliminary conclusion in its opening decision that the measure constitutes incompatible state aid?

Following the European Court of Justice's decision in the case of Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH [2013] All ER (D) 241 (Nov), a European Commission decision to open an in-depth investigation

has legal effect and is binding for national courts in that they must find that the measure qualifies as state aid. Therefore, on the issue of whether state aid is present, a national court has no power to overrule a European Commission Decision and to our knowledge has never attempted to do so. Only the European courts can overrule a decision by the European Commission. Therefore, if the European Commission comes to an adverse decision on a matter that is the subject of parallel UK court proceedings, the European Commission's findings will be implemented (see British Aggregates case discussed above).

28 How do national courts react to the Deutsche Lufthansa case? By referring matters to the European Commission (for amicus curiae support) or to the Court of Justice of the European Union (CJEU) for a preliminary ruling under article 267 TFEU?

We are not aware of any recent UK national court state aid cases where the amicus curiae process was followed. On the other hand, for example, we note in R (Eventech) v Parking Adjudicator (High Court and CA) [2012] EWHC 1903 (Admin) UK Court of Appeal referred the state aid question to the European Court of Justice under article 267 TFEU. It would suggest therefore that the preferred method for seeking clarification is the latter (article 267) route.

29 What is the burden of proof in state aid cases before national courts?

As is the case with all other judicial review and civil cases, the burden of prof is the balance of probabilities. There are no special provisions that apply to state aid cases.

30 In light of the EU law obligation on national courts to protect the rights of individuals affected by the unlawful implementation of state aid, what are the requirements under national law for a plaintiff seeking interim measures in the courts, in particular to prevent the grant of aid? In what form and under what circumstances can interim relief be granted?

It is possible for a claimant to obtain an injunction against the aid awarding authority, to prevent it awarding or continuing to award the aid. This injunction would be an interim order, pending the outcome of the court action, or potentially even a complaint to the Commission. The leading case on the factors which a court will take into consideration before making an injunction is American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1. Before granting an injunction the court will consider whether the claimant can show it has an arguable case and, if it can, the court will then go on to consider whether the balance of convenience lies with granting the injunction or not. This will involve taking account of relevant factors such as the impact on competitors if the aid was granted against the damage to the proposed recipient (and possibly third parties) of not granting the aid, and whether the award of damages would adequately compensate the claimant, in which case there would be less likelihood of the Court ordering an injunction.

Consequences of violation of state aid rules

31 What remedies are available to a national court if it determines that a non-notified measure contained state aid?

If a national court found a non-notified measure to contain state aid, grant of the unlawful aid is likely to qualify as an ultra vires decision that is void. Therefore, remedies for judicial review are available, ie, injunctive relief and damages among other things. Also, the European Court of Justice decision in Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH Case C-284/12 has now given national courts the ability to order recovery of the alleged unlawful state aid even before the Commission has reached a final conclusion to an investigation.

The case C-349/17 Eesti Pragar v Ettevõlve Arendomise Sitha Status (paragraphs 88–92) (Eesti Pragar) confirms that the duty to recover applies not only to national courts but also to public bodies ("including that of recovering on its own initiative").

32 In light of the EU law requirement that national courts must, in principle, order the full recovery of unlawful state aid from a beneficiary, are there any domestic law provisions that may hinder a national court from ordering the recovery of non-notified state aid? Do national courts set aside such domestic law provisions as required by the Court of Justice's case law?

No.

Enforcement by the European Commission

33 Would the national court necessarily declare a guarantee invalid if it secures a loan constituting aid and was granted in breach of article 108(3) TFEU? Does it make a difference if the only aid beneficiary is the borrower and not the lender?

This point has not been specifically tested in a UK court to our knowledge. However, as discussed above, just because an aid is granted illegally and therefore void ab-initio in UK law, this need not affect the validity of subsequent acts entered into in reliance of the primary legal act. As a consequence, there is no automatic requirement in UK administrative law to declare a guarantee (a subsequent act) as invalid just because it supports a loan that was in fact declared illegal state aid.

34 How can a competitor of the beneficiary or other affected third parties claim compensation from the authority granting the state aid for damages caused by the aid? Explain the steps involved in bringing such an action for damages. Explain the steps involved in bringing such an action for damages and how national courts have applied the criteria of the relevant EU case law.

A competitor that can show loss as the result of an unlawful state aid has a right to obtain damages from the relevant public authorities: see CELF [2008] ECR I-469 (C-199/06) at paras 53 and 55. A UK example was Betws Anthracite v DSK Anthrazit Ibbenburen [2004] 1 CMLR 12, where a Welsh anthracite producer managed to prove a quantified loss caused as a result of aid given by Germany to a competing supplier.

Damages can be sought under a judicial review action. The usual obstacle is the time limit (three months). The steps in bringing such an action are discussed above, in terms of the judicial review pre-action protocol, establishing the locus standi of the applicant, issuing a claim in the High Court Queen's Bench (Administrative Division) and claiming a variety of reliefs including injunctions, review of decision by a public authority, damages, etc.

35 How can a third party claim compensation from the member state for damage caused by failure to respect the standstill obligation?

As the standstill provision has direct effect, parties that can prove they have been affected by the unlawful award of state aid can bring direct action before the national court for damages, recovery or injunctive relief. However, in the UK national courts, there are no precedent cases (involving the member state paying damages as a result of its failure to impose the standstill requirement) at this time.

36 Under national law, can a third party bring damages actions against the beneficiary?

Betws Anthracite (question 34) also held that the target of such an action must be the granting authority. In this case the claimant failed because it had no right of action against the aid beneficiary for damages in either national or EU law.

37 Under national law, how can a beneficiary bring damages actions against the member state as per the SFEI case law of the Court of Justice for having unlawfully granted aid? How do national courts avoid the risk of circumvention of EU state aid rules?

We are not aware of any right under national law which would give the UK the right to seek damages from another member state due to unlawful state aid. The process by which damages are calculated considers loss, which makes it difficult to envisage such an action being taken by a member state).

38 What are the consequences of a violation of EU state aid rules for the validity and enforceability of the aid measure under national law? Are the consequences the same for unlawful aid that was not notified to the European Commission as for aid that the European Commission has ultimately determined as incompatible with the internal market?

Yes, once an aid is declared illegal it is (as discussed above) regarded as null and void ab initio. However, it is arguable that subsequent acts based on the void decision and made before this declaration are still regarded as valid.

Recovery of state aid

39 What are the consequences of a violation of EU state aid rules for the validity of a government regulation or contract containing the aid measure, and for subsequent regulations or contracts linked to the aid measure? Are the consequences the same for unlawful aid that was not notified to the European Commission as for aid that the Commission has ultimately determined to be incompatible with the internal market?

The UK may suspend an offending measure or repeal it if it is subject to deliberations in the European Commission/ European Court, and then only bring the measure into force after the EU concludes there is no aid or aid is compatible. It is only the measure under scrutiny (ie, the one involving potential aid) that is suspended or repealed and not the entire legislation in which it is included. The rest of the legislation may continue in force. By way of example this happened in the British Aggregates case mentioned above.

We doubt there would be a distinction made in this regard between non-notified unlawful aid and aid that is notified to the Commission (but found ultimately to be incompatible with the internal market), aside from the fact that the latter would normally not result in grants actually being made pending the Commission's approval.

40 Describe any major state aid investigations opened by the Commission against your country over the past 12 months. State whether these investigations were specific to your country or part of a broader investigation into several member states.

SA.44896 – Controlled Foreign Company Rules

In April 2019 the European Commission reached a decision in the case of SA.44896, which related to a derogation to the UK's Controlled Foreign Company rules (CFC) that formed part of UK law between 1 January 2013 and 31 December 2018.

The decision follows an announcement in 2013 that the European Commission had opened an in-depth investigation into the measure, which exempted certain transactions by multinational groups from the UK tax rules.

The CFC tax measure was designed to prevent companies based in the UK avoiding or deferring taxes by shifting profits to subsidiaries in low tax jurisdictions. The CFC Rules operate by subjecting certain profits of overseas subsidiaries to UK tax.

However, between 1 January 2013 and 31 December 2018, the UK's CFC Rules included a tax exemption called the Group Financing Exemption (GFE) that provided a full or partial (75 per cent) exemption for finance income (interest payments received from loans) between non-UK members of a corporate group. The exemption applied even where the income was generated from UK activities and was, therefore, considered by the European Commission to operate as a proxy for the actual level of tax due (as the exemption of 100 per cent or 75 per cent was not based upon accurate verification of the amounts due).

The UK's CFC Rules were amended with effect from 1 January 2019 following the adoption of the Anti-Tax Avoidance Directive (ATAD) and the European Commission has confirmed that it has no concerns about the compliance of the amended CFC Rules.

The European Commission's April 2019 decision concluded that the Group Financing Exemption under the CFC regime breached State aid rules and ordered the UK to effect full recovery. We understand that the UK government has lodged an appeal with the General Court on 12 June 2019 although the contents have yet to be published.

SA. 34914 - Gibraltar

We cover Gibraltar as for the purposes of EU Membership it is classified as a dependent territory of the United Kingdom.

In December 2018, the European Commission found Gibraltar's corporate tax exemption regime for interest and royalties, as well as five tax rulings to be unlawful under EU State aid rules. The European Commission has ordered the Gibraltar authorities to seek recovery of unpaid taxes of around €100 million from the beneficiaries. In line with the Procedural Regulation this recovered aid will be paid to Gibraltar.

The Commission opened an in-depth investigation into Gibraltar's corporate tax regime in 2013 investigating whether the corporate tax exemption regime that applied between 2011 and 2013 for interest (mainly arising from intra-group loans) and royalty income may have selectively favoured certain categories of companies. This investigation was extended in October 2014 to also cover Gibraltar's tax rulings practice, with a particular focus on 165 tax rulings granted between 2011 and 2013 (the concerns arose that these tax rulings involved State aid because they were not based on sufficient information to ensure that the companies concerned by the rulings were taxed on equal terms with other companies generating or deriving income from Gibraltar).

Following an in-depth analysis of each addressee's situation, the Commission did not identify any selective advantage in relation to the other 160 rulings investigated and therefore found that these rulings do not break EU state aid rules. However, under the five contested tax rulings, the Commission concluded that companies were not taxed on the royalty and interest income, contrary to other companies in receipt of other type of income.

The Commission recognises that procedural changes have been put in place to address State aid, but recovery is due from the companies that benefitted from Gibraltar's corporate tax exemption regime for interest and royalties between 2011 and 2013 and also the five companies that benefitted from the unlawful tax treatment which arose under the five tax rulings.

41 Has the European Commission suggested appropriate measures concerning existing aid measures in your country over the past 12 months?

No, there have been no such statements from the European Commission, except as regards the Commission comments in SA.44896 (CFC tax derogation) and SA. 34914 (Gibraltar Corporation Tax regime).

42 Has the European Commission ever opened specific investigations against your country following a sector inquiry?

Yes, in October 2013, the European Commission opened an investigation into Gibraltar's corporate tax regime (see above). In December 2018, the Commission found that the corporate tax exemption and five of the tax rulings involved illegal state aid.

The European Commission opened a Phase II investigation in 2013 into the UK's CFC Group Financing Tax exemption (SA.44896) – see also above.

43 Has your country ever been subject to an injunction by the European Commission to suspend or provisionally recover aid under article 13 of Regulation 2015/1589?

No. In UK cases where article 108(2) procedure is adopted the European Commission has in general relied on the suspensory effect of article 108(3) – see below.

44 Has your country ever been subject to an infringement procedure under article 108(2) TFEU and article 260 TFEU?

Yes, in 1993, British Aerospace (BAe) repaid to the United Kingdom Department of Trade and Industry (DTI) 57.6 million sterling (72.7 million ECU) in state aid and interest payments in compliance with a recovery order issued by the European Commission in March. This is the first case of aid repayment involving reimbursement of the interest advantage on the granted aid. The aid was granted to enable BAe to acquire Rover.

In 2007, in state aid C 38/2006 (ex NN 93/2005) – Fish factory improvement scheme implemented in the United Kingdom. The scheme in question was set up as a normal state aid scheme and concerned direct grants to fishermen, granted directly by the Shetland Islands Council. It was held the scheme unlawfully granted £92,000 aid to Shetland Fish Products Limited under the Fish factory improvement scheme and the European Commission ordered recovery with interest.

More recently in 2015 as a result of British Aggregates the UK government is now obliged to narrow the scope of the original shale aggregates levy exemption. Additionally, the Commission have ordered the government to recover the unlawful aid provided by this part of the exemption.

State aid SA.34914 (2013/C) – (ex 2013/NN) – United Kingdom Gibraltar corporate tax regime where the European Commission commenced an investigation into 165 tax rulings issued by Gibraltar to benefit offshore companies.

In December 2018, the Commission held that the corporate tax exemption and five of the tax rulings involved illegal state aid. Further details are provided in question 42.

45 Has the European Commission ever undertaken on-site state aid monitoring visits based on article 27 Regulation 2015/1589 (previously article 22 of Regulation 659/1999)? How were the visits carried out? What measures were taken to assist the officials and experts carrying out the visit?

There is no such information in the public domain to our knowledge.

Main areas of state aid

46 Which national authority orders the recovery of state aid following a European Commission decision, a judgment of the Court of Justice, or a national court judgment?

Under current arrangements no one individual national authority is responsible for recovering state aid. However, in its coordination role, we would expect DBEIS to be involved in coordinating the discharge of recovery requirements.

That said, it shall be the body that has awarded the unlawful aid which will normally be expected to recover the same. This will normally be achieved by relying upon the contractual terms of its funding agreement.

In the event the UK leaves the EU, then under the current draft of the State Aid (EU Exit) Regulations 2019, the CMA will take on the role performed by the Commission. A national court could order the recovery of unlawful aid in future in broadly the same way as permitted previously but appeals would be considered in domestic court and, in line with Eesti Pragar, a public body would be expected to recover unlawful state aid on its own initiative.

47 What procedural or administrative actions are contemplated in the national law for the recovery of unlawful or incompatible state aid?

Currently the recovery of unlawful or incompatible state aid in national law would rely upon the direct effect of EU legislation and decisions. Alternatively, they may use express conditions in funding agreements as the basis for litigation.

After Brexit the CMA's ability to enforce state aid is set out in Part 4 (Regulations 37-45) of the State Aid (EU Exit) Regulations 2019. The CMA may make an order for recovery or interim recovery. The CMA must send the enforcement order to the aid grantor and specify a compliance date. The limitation period for making an order is 10 years from the when the aid was granted. The CMA may require the grantor of the aid to provide information on how they plan to comply with the order. If the aid grantor does not comply with an enforcement order, the CMA must certify this in writing to the court who shall then consider enforcement.

Other

48 What actions are available to the national recovering authority seeking to force an unwilling beneficiary to refund the unlawful and incompatible state aid?

Refunds of unlawful and incompatible state aid within the UK are relatively rare and only one case (British Aerospace I [1991] OJ C21/2) has reached the domestic courts. Owing to the lack of case law, it is not immediately apparent as to the basis in law of the State aid recovery, but the national authority would most likely bring court proceedings (and potentially bring a contractual debt claim or a breach of contract claim, depending on the circumstances of the matter). We understand that the UK has from time to time required aid beneficiaries to enter deeds of guarantee or implementation deeds to provide a contractual right to repay aid if the UK was the subject of a recovery order from the Commission, after all rights of appeal have been exhausted.

49 Can an individual with standing bring an action in the national courts for the purpose of: challenging the validity of the national recovery order implementing the European Commission's recovery decision; or suspending the national recovery order pending a final decision either on the validity of the national recovery order itself, or on the validity of the European Commission's recovery decision?

The beneficiary can bring an action under national law to challenge the validity of the national recovery order itself on a procedural basis if the order does not comply with domestic procedural rules, but this does not remove the obligation to repay the aid. In addition, an individual can challenge the national implementation of a Commission decision (eg, such as a national recovery order) subject to the principle set out in Case C-188-92 TWD Textilwerke Deggendorf that a Commission decision cannot be challenged in a domestic court if the individual had the opportunity to make an application for annulment in accordance with article 263 of the Treaty of the Functioning of the European Union but failed to do so. An individual can, however, challenge the Commission decision directly under article 263 and challenge the national implementation of the decision in national courts.

If the Zuckerfabrik criteria are met (ie, a court seriously doubts that the Commission decision is correct and is (or will be) subject to review by the ECJ and the requested interim relief is necessary to avoid serious and irreparable damage caused to the beneficiary), then a national court is permitted to grant interim relief suspending the implementation of the national recovery order flowing from the Commission decision, but these circumstances would need to be exceptional.

50 Can third parties with standing obtain a mandatory order from the court that forces the relevant national authority to recover funds from a beneficiary of incompatible state aid where the former has failed to implement a recovery decision by the European Commission?

We are not aware of any such successful action by a third party with standing requiring the national authority to recover state aid. It is possible through the UK's judicial review procedures for a third party with standing to obtain a declaration from the court that aid received by a beneficiary was illegal. According to the 2006 and 2009 National Enforcement Study cited in Kelyn Bacon's European Law of State Aid, no "innocent third party" is known to have been awarded damages in respect of a grant of illegal aid.

51 What defences by beneficiaries against recovery have been accepted by national authorities or courts?

The defences available to beneficiaries against recovery are very limited and they must be in line with EU law. In practice, the only scenario where effective recovery may be prevented is where the beneficiaries are bankrupt and all assets have been awarded to privileged creditors.

In EU law, there is also a de minimis threshold of recovery, which is €200,000 over three tax years and is beneficial for smaller beneficiaries and smaller tax breaks for instance. In relation to the latter de minimis is being considered in the recovery of tax breaks.

To our knowledge, apart from de minimis mentioned above, these defences have not been invoked in the UK.

51 Provide information on any other special features of your country's state aid regime not covered above.

The draft State Aid (EU Exit) Regulations 2019, if adopted, will give the CMA the ability to enter business premises without a warrant (and associated powers) in order to gather information to corroborate suspicions that aid has been granted unlawfully or is being misused. There will be criminal sanctions for failure to provide information requested and for attempts to mislead or deceive the CMA during its enquiries.

52 What is the situation under national law if recovery was ordered by a national court owing to the violation of the standstill obligation but the aid is later declared compatible with the internal market by the European Commission?

We are not aware of any specific provisions under national UK law as regards the above scenario nor any situation where this has actually occurred in a UK context.

53 How do national courts apply the CELF I case law (Case C-199/06)?

There do not appear to be examples of the CELF I being applied in the UK, where normally a stay of proceedings would be ordered by the national courts if there was any doubt on whether there was state aid or not. The stay would last pending determination of the existence of aid via the Commission, which would then be recovered through European Commission enforcement decision (see eg, British Aggregates Association v HM Treasury [2013] EWCA Civ 720).

54 How do national courts handle cases where the European Commission has not yet decided on compatibility?

The national court must apply article 108(3) TFEU. If the European Commission has opened a formal investigation into the measure this implies that there is a finding of state aid on a preliminary basis. If there is some doubt on whether state aid is involved then the national court may "stay" the domestic proceedings to ensure it does not conflict with any decision made by the EU process. Interim relief (by way of suspension of any recovery process or disapplication of the conclusion itself) may only be granted in exceptional circumstances where the national court has serious doubts as to the validity of the decision and where there is both urgency and the likelihood of irreparable damage.

55 Are the recovery interests paid by a beneficiary tax deductible under national tax rules?

Under normal circumstances interest is deductible for corporation tax purposes if it is wholly and exclusively for the purposes of the company's trade. Although we are not aware of any directly applicable national decision practice, we anticipate that interest would not be tax deductible (as it would be regarded as circumvention of the recovery process, which includes the payment of interest to return the recipient of unlawful state and to its original market position).

56 Is aid that was granted in the form of a fiscal measure always recovered through a new tax assessment, or do the national authorities use the freedom of choice under EU law to recover through the easiest available and most efficient method, even if not fiscal?

From past cases the latter (that national authorities exercise discretion) appears to be correct in that fiscal aid can be recovered in a variety of different ways. In the BT Pensions case, BT had been exempted from paying the full levy for using the UK's Pension Protection Scheme. This was not recovered through future levy assessments on BT, but rather by transfer of underpayment into an escrow account, which was then transferred to the Pension Protection Scheme.

57 Which sectors have received the highest amounts of aid in the past five years?

Support for environmental protections, research and development and support for small and medium-sized enterprises accounted for 93 per cent of state aid measures in 2017. The UK spends less on state aid than the

majority of EU member states. For example, in 2017, the UK spent 0.38 per cent of GDP on state aid (excluding railways), while France spent 0.76 per cent and Germany 1.31 per cent. (see p4 of https://researchbriefings.files.parliament.uk/documents/SN06775/SN06775.pdf).

The information below was sourced from the European Commission state aid register of cases available at: http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

Financial and insurance

There are 18 state aid measures currently in place in respect of the financial sector in the UK. The substantial state aid, and those widely publicised, are the restructuring of UK banks, to include liquidation aid to Bradford & Bingley, restructuring plan for Lloyds Banking Group (as amended in May 2014) and restructuring package for Northern Rock (as amended in September 2014).

The restructuring of Lloyds Banking Group received state recapitalisation funds in the sum total of £17 billion for the issue of ordinary and B shares, with the objective to build a sustainable future for the bank without the requirement for any subsequent state aid funding.

An approved scheme easing access to and the cost of credit for SMEs in the UK was introduced. It comprises two measures – the National Loan Guarantee Scheme to reduce the cost of finance for those relying on banks, through the availability of up to £20 billion government guarantees and Business Finance Partnership, funded by up to £1 billion to increase the supply of credit through non-bank channels.

Estimated total of state funding in respect of financial institutions: £155 billion.

http://ec.europa.eu/competition/recovery/banking_case_list_public.pdf.

Environmental protection (including energy saving)

Environmental protection and energy saving schemes have received a substantial proportion of the state funding in the UK over the past five years.

The focus on spending in the environmental and energy savings sector arises from the inclusion of renewable energy system schemes, which mirrors the European Commissions' decision to improve accounting for aid in respect of renewable energy sources.

Total (2012–2017): €16,402.3 million.

Research and development

The majority of state aid granted by the UK is in respect of research and development, to include innovation aspects.

Total (2012–2017): €10,516.9 million.

State aid funding in culture has increased over the past few years, arising through the introduction of aid for cultural activities and purposes through the GBER.

The table below sets out UK state funding since 2012 into each sector, excluding the railway industry.

United Kingdom	**(Spending in € millions)**					
	2012	**2013**	**2014**	**2015**	**2016**	**2017**
Total state aid, less railways (1+2)	**5753.7**	**6218.1**	**8490.5**	**9649.4**	**9649.3**	**9712.8**
(1) Non-agricultural aid	5417.9	5882.4	8144.4	9334.1	9464.2	8718.4
of which (by objective)						
Closure aid	0.0	0.0	0.0	0.0	0.0	0.0
Compensation of damages caused by natural disaster	0.0	0.0	2.2	0.0	222.6	205.3
Culture	298.4	320.2	448.4	776.9	902.7	877.6
Employment	4.9	25.9	69.4	20.5	10	12.8
Environmental protection incl Energy saving	1536.2	1936.1	2738.9	2655.7	3785/2	3750
Heritage conservation	537.0	492.0	438.7	527.9	0.0	0.0
Promotion of export and internationalisation	0.0	0.0	0.0	0.0	0.0	0.0
Regional development	289.0	328.9	782.2	904.3	365.4	334.2
Rescue & restructure	313.2	320.2	361.5	371.0	0.1	3.8
Research and development incl Innovation	993.0	1222.9	1751.2	2298.8	1520.8	1809.8
Sectoral development	200.6	149.0	8.2	15.0	24.7	19.1

United Kingdom	(Spending in € millions)					
SME incl risk capital	1076.2	949.2	1392.5	1544.8	1493.2	1283.9
Social support to individual consumers	0.0	0.0	0.0	6.1	0.0	8.8
Training	39.7	90.7	132	164.3	37.4	54.9
Other	129.6	76.8	62.7	48.5	102	187.4
of which (by aid instrument)						
Equity participation	144.9	134.2	131.5	113.3	174.6	89.2
Grant	2953.7	3301.8	5189.1	5302.9	4313.9	4972.1
Guarantee	0.0	0.0	130.1	184.9	187.5	223.2
Soft loan	45.0	44.1	102.8	67.7	20.4	14.9
Tax deferral	1.2	1.2	2.5	0.0	0.0	0.0
Tax exemption	2267.8	2390.4	2569.3	3649.3	4546.9	2968.8
Other	5.3	10.8	19.2	9	221.1	279.4
of which						
Co-financed	194.4	234.9	561	948.9	330.1	437.9
Not co-financed	5223.5	5648	7583.4	8385.2	9134.1	8109.7
(2) Agricultural aid (DG AGRI & MARE)	**335.8**	**335.7**	**346.1**	**315.2**	**248.6**	**301.2**
of which						
Agriculture and rural development	334.5	334.8	345.3	313.2	247.5	300.8
Aid granted to fisheries and aquaculture	1.3	0.9	0.8	2.0	1.1	0.4
Transport aid (excluding railways)	**219.0**	**156.7**	**10.0**	**12.9**	**1.5**	**32.8**
of which						
Road	70.5	18.3	2.2	6.5	7	23.1
Maritime transport	126.5	118.3	0.0	0.2	0.1	0.0
Inland water transport	0.0	0.0	0.0	0.1	0.0	0.0
Air transport	6.8	7.0	7.8	6.1	0.7	9.7
Other transport	15.1	13.1	0.0	0.0	0.0	0.0

58 Provide information on the amounts of state aid paid out under approved state aid schemes and individually approved state aid for the past five years.

According to the statistics published by the European Commission (in the table above) over the past five years, there has been an estimated €52,619.9 million injected into the UK, to include the rail sector, by way of state aid funding.

Approved state aid schemes

Accurate and up-to-date information on the levels of state and paid out is difficult to obtain from public sources.

There is information on the approved state aid schemes in the UK for 2010 to 2015, where the aid awarded totalled €33.4 billion including funding in the form of recapitalisation, impaired asset measures, guarantees and other liquidity measures. However, owing to the time frames of each scheme (and the link to the financial crisis), the figure may not be a true reflection of the specified time frame.

There have been 180 approved state aid schemes from March 2014 to date, including the video games tax relief (estimated state aid funding of £45 million), Enterprise Capital Funds (£66.486 million) and support to Hinkley Point C Nuclear Power Station. The General Block Exemption Regulation 651/2014 is widely used but the indicator budget does not always correspond to actual allocation of state and (typically the stated budge is higher than is spent).

There is a number of approved Welsh schemes to include the Welsh government Environmental Protection Scheme, which had an estimated aid budget of £100 million, and the Welsh government research, development and innovation scheme with an estimated aid budget of £200 million.

Total estimated amount: £2,032.727 million (noting statements above).

Broadband delivery UK framework scheme

This UK umbrella support scheme for investments in NGA broadband networks was approved in line with EU state aid rules and will assist the UK achieve the EU Digital Agenda of coverage for all European citizens.

Total estimated aid: €1.5 billion.

An example of a UK aid scheme is the Individually approved state aid.

It is also difficult to provide a full breakdown of individual state aid, given the substantial amount of approved state aid during the preceding five-year period. However, all individual aid measures, in respect of broadband, energy and environmental, risk finance, restructuring and regional aid, RD&I and GBER, exceeding €500,000 and primary agricultural production exceeding €600,000 are required to be made public.

59 Provide information on any other special features of your country's state aid regime not covered above.

The UK's departure from the EU, triggered by the service of notice under article 50 of the TFEU on 29 March 2017 and expected to be effective upon 31 October 2019, will lead to the setting up of a domestic law state aid framework. The State Aid (EU Exit) Regulations 2019 were laid before Parliament on 21 January 2019. If adopted by Parliament, these will take effect on 'Exit Day', the date on which the UK leaves the EU as defined by the European Union (Withdrawal) Act 2018. It is from this day that the CMA will take control over monitoring and enforcement.

If the CMA does take on the new responsibilities it is expected to maintain regulatory dialogue with the European Commission to ensure dynamic alignment. However, it will be the UK's state aid enforcement authority, independent from government, with the full suite of enforcement powers (including to open investigations) and approve notification.

At the date of writing, the UK has not exited the European Union but expects to do so on 31 October 2019. Although a statutory instrument has been laid before Parliament which will set up a UK State aid system of regulation, this has yet to be approved through the Parliamentary system and is therefore subject to change. Given this, the above article is only accurate at the date of publication. We hope to update the article once more information is available on the UK State aid regime.

Jonathan Branton

DWF

Jonathan is a partner and firm-wide Head of EU/Competition at DWF. He is also head of the firm's public sector group and is a dual-qualified English and Irish solicitor. Jonathan has specialised in EU and national competition law for over 20 years and has practised extensively in Brussels as well as the UK and Ireland. In addition to advising on all areas of competition law (including state aid), Jonathan also advises on public procurement and EU and WTO trade law.

Specifically in state aid, Jonathan advises on structuring projects to fit within the rules thereby allowing them to proceed without individual notification to Brussels, and also advises beneficiaries and grant awarding bodies on related audit trails to demonstrate compliance for all funding streams, especially EU structural funds. He also advises in respect of Commission notifications and investigations and any other more contentious challenges in the area of State aid, including funding clawback requests.

Ranked as a Number 1 leading individual in *Chambers UK* and the *UK Legal 500* directories, comments from clients (*The Legal 500*) include: Jonathan Branton is an "expert Competition lawyer". DWF's top-tier practice' is led by 'star performer' Jonathan Branton, who is 'one of the foremost experts nationally for state aid and European Regional Development Fund (ERDF) advice'. Branton "provides technically sound and pragmatic, solution-based advice".

Alexander Rose

DWF

Alexander Rose is a director in the public sector law team at DWF, who is able to draw upon experience working in the Government Legal Department advising government departments upon the state aid compliance of over £1 billion of public funding awards across seven grant programmes and within the European Commission advising upon the design of state aid regulations (DG Competition) and EU Funds (DG Regio). As well as writing national guidance for public procurement, state aid and financial instruments, Alexander also notified some of the first GBER schemes, successfully defended compliance of UK projects in front of the European Court of Auditors in Luxembourg, co-authored the GBER chapter of *EU State Aid Control – Law and Economics* with Dutch economist Koert Van Buiren and regularly presents at conferences, including ESTALI.

Jay Mehta

DWF

Jay has 20 years' public sector experience in areas such as Structural and European Funding (ERDF, ESF, FP7), state aid, freedom of information and environment information regulations. This includes working with the North West Development Agency (NWDA) for seven years. Jay is now a senior associate within DWF's EU/Competition team.

Jay was a member of the cross-national EIB-sponsored JESSICA task force entrusted with developing state aid compliant JESSICA structures. Jay was also chairman of the BIS sponsored cross RDA state aid Technical Group where important national state aid issues were discussed.

Jay has provided state aid and ERDF compliance advice to a wide range of bodies on a full spectrum of projects, both from the perspective of grant awarding authorities and beneficiaries. Jay has been involved in numerous recent state aid notifications and has been published on several occasions in European law journals.

Chambers UK refers to Jay as, "a Star associate who has been involved in a number of state aid matters. Clients say: "He's very good at spotting the details that most wouldn't spot."

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