

Insights

AND THEN THERE WERE NONE...?

STATE AID RULES TO BE REVOKED IN THE UK, BUT PROBABLY ONLY FOR A BRIEF PERIOD

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SUMMARY

On 29 September 2020, the UK Government laid before Parliament draft legislation which effectively revokes the EU state aid rules in the UK from the end of the Brexit transition period. The draft Regulations do not put in place an alternative regime, meaning that, if they are enacted as drafted, the UK will have **no state aid rules** from January 2021.

Whilst many who have grappled with the state aid rules may welcome this development and the greater freedom it may appear to give UK public bodies, the reality is that it is unlikely to last long.

Background

The state aid rules govern whether and how EU Member States can provide financial benefits to businesses. If the European Commission finds that a particular measure amounts to unlawful state aid granted outside the rules, it may order the relevant Member State to claw back the aid from the business concerned.

Under the UK's Withdrawal Agreement, the EU state aid rules have continued to apply to the UK during the Brexit transition period, which ends on 31 December 2020.

Furthermore, draft legislation put forward by the previous (Theresa May) government in 2019 set out the details for retaining the EU state aid rules as domestic UK law in substantively the same way from 1 January 2021 until such point as they were amended by Parliament. The rules would be enforced by the UK's Competition and Markets Authority.

Implications of the new draft Regulations

The new draft Regulations change all of that.

If enacted, the Regulations will revoke the EU state aid rules. That itself won't come as a surprise to anyone who has followed the UK/EU negotiations. What is a surprise, however, is that the Regulations would revoke the EU rules before any new domestic regime had been introduced. This would effectively mean there would be no state aid rules in the UK.

So, is this the dawn of a new age free of state aid rules?

Not so fast....

The Government says it will publish a consultation in the coming months on the form that a new domestic regime should take. The content of this regime will obviously be affected by the outcome of the ongoing negotiations between the UK and EU. However, even if there is no agreement, there will at some point be a new UK state aid regime.

At a minimum, the UK will at some point enact legislation to follow WTO subsidy rules and will have to adhere to any international obligations on subsidies it agrees under free trade agreements (such as those recently agreed with Japan to restrict indefinite government guarantees and bailouts of ailing companies without clear restructuring plans).

In the meantime, although the UK will technically remain bound by WTO rules and its international commitments, without domestic legislation to implement those commitments, there are extremely limited means for them to be enforced.

A legal lacuna such as this of course brings uncertainties – but it also brings opportunities. For any party entering into arrangements with a UK public body which might ordinarily have raised state aid concerns, the lacuna might offer the chance to avoid scrutiny. But don't expect the lacuna to last forever.

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Chris Bryant

Co-Author, London / Brussels

chris.bryant@bclplaw.com

+44 (0) 20 3400 2423

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