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State aid after Brexit: exit for the prohibition on state aid?

Imagine…

You are the CEO of a company that sells Belgian waffles in the United Kingdom. Your waffles are amazingly popular with the retailers on the other side of the Channel. Therefore, you had serious forebodings about the impact Brexit might have on your sales figures.

And then the corona crisis hit. Your company was obliged to shut its doors for a longer period of time period, and unfortunately the recent post-Brexit reopening has not had the expected effect. Your sales in the UK have plummeted, having been effectively taken over by new, local waffle sellers.

You learn that these new competitors are no longer subject to the same EU rules on state aid. But what does that mean, exactly? Can the British government freely subsidise them entirely at its own discretion? That could spell “game over” for your company on the British market, so you ask your legal department to clarify the precise impact of Brexit on state aid.

A brief clarification.

On 31 January 2020, the UK withdrew from the European Union. A transitional period then applied that ran until 31 December 2020, but as of 1 January 2021 the EU rules no longer apply in the UK, unless expressly decided otherwise.

For the rules concerning state aid that apply in the UK after Brexit, a distinction is made between state aid granted by the UK government prior to 31 December 2020 and state aid granted after that date.

Which rules apply to state aid granted before 31 December 2020? The EU state aid rules continue

to apply during a period of four years, i.e. until the end of 2024. This means that beneficiaries of UK state aid approved before 1 January 2021 or that was exempted from the notification requirement, may receive this state aid. Any not paid-out instalments of such state aid can continue to be paid out after this date. Until the end of 2024 the European Commission retains its power to finalise ongoing notifications concerning state aid by the UK or to deal with complaints against state aid granted by the UK prior to 31 December 2020.

What about state aid granted after 31 December 2020? EU law no longer applies and it is up to the UK to provide for a national regulatory framework. The UK is not entirely free when it comes to defining that framework. It must comply with the trade and cooperation agreement that was concluded with the EU ("**TCA**"). With respect to state aid, the TCA largely mirrors the existing EU rules. Briefly put, state aid will be possible if it passes the classic proportionality and necessity test and has a stimulating effect. It remains to be seen whether the UK will introduce a notification requirement like the one that applies in the EU, or whether it will limit itself to ex post control.

In any event, the supervision over state aid granted by the UK *after* 31 December 2020 will no longer be performed by the European Commission. An independent authority or body will take over this role, presumably the British Competition and Markets Authority ("**CMA**"), but no final decision has been made on this yet.

What now? Currently a public consultation process is being conducted in the UK concerning the rules that will apply for state aid within the framework of the TCA. Via this consultation interested parties can submit their input through 31 March 2021, after which it is up to the UK to take the first legislative steps regarding state aid in the post-Brexit age.

Concretely:

- In principle, the EU rules concerning state aid have no longer been applicable in the United Kingdom since 1 January 2021.
- State aid granted *before* 31 December 2020 remains subject to the EU rules until the end of 2024. The European Commission and the European Court of Justice each retain their jurisdiction to exercise control over this aid.
- The EU rules are no longer applicable to state aid granted *after* 31 December 2020, and the UK must provide for its own regulatory framework. The European Commission and the European Court of Justice are no longer competent to exercise control over such aid.
- The outlines of the future UK rules concerning state aid can be found in an agreement between the EU and the UK, and are heavily inspired by the EU rules. As a result, in all likelihood a comparable regime will continue to exist in the EU and the UK. The future UK rules are currently forming the object of a public consultation process.

Want to know more?

- You can consult the TCA via this link (Chapter 3 of Title XI concerns the provisions on state aid: "Subsidy control"): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN.
- You can consult the European Commission's notice on the impact of Brexit on state aid via this link: https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_state_aid.pdf.

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