

State Aid Beyond the EU

Pablo Ibáñez Colomo

London School of Economics and College of Europe

Chillin' State Aid workshop, 14 June 2019

Ensuring a Level Playing Field Post-Brexit: State Aid Control

23 Pages • Posted: 27 Jan 2019

[Vincent Verouden](#)

E.CA Economics

[Pablo Ibáñez Colomo](#)

London School of Economics - Law Department

Date Written: January 11, 2019

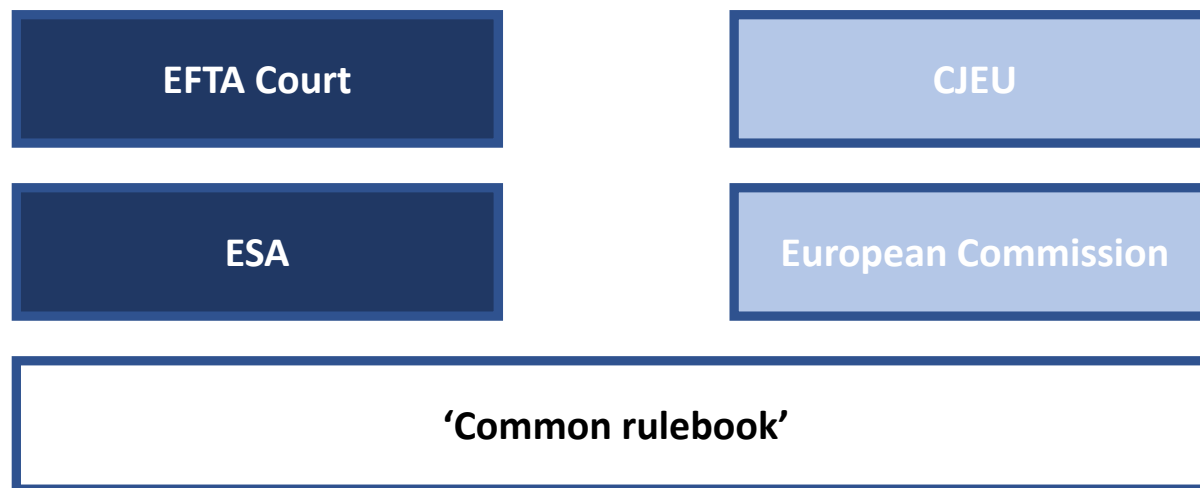
State aid post-Brexit (and beyond)

- The institutional structure issue
- The 'common interest' issue

State aid post-Brexit (and beyond)

- State aid control post-Brexit is an inevitability; any open questions relate to the enforcement and institutional issues
- The UK Government's White Paper (Chequers) introduced an innovation
 - The EEA model was the obvious template for the White Paper: it envisioned a model with two parallel sets of institutions (EU and UK)
 - Unlike the EEA model, however, there would be no supranational institutions overseeing the application of State aid rules in the UK
 - While there were precedents of independent authorities fulfilling somewhat comparable roles, national control was traditionally deemed a no-no

State aid post-Brexit (and beyond)



State aid post-Brexit (and beyond)

- The Draft Withdrawal Agreement reveals the nature of the trade-offs that come with State aid control at the national level
 - Contrary to what the White Paper suggested, it would not be sufficient for the UK to adapt dynamically to State aid legislation (*'common rulebook'*)
 - Due to the nature of State aid provisions (shared by other similar Treaty provisions), frictions and differences of interpretation are inevitable
 - As a result, a national enforcement model would inevitably come with additional guarantees to prevent distortions of competition
- Where the EEA model provides for a symmetric institutional model, the Withdrawal Agreement introduces some asymmetric elements

State aid post-Brexit (and beyond)

- The Draft Withdrawal Agreement highlights the choices faced by the EU and the UK in any post-Brexit settlement:
 - Option 1: symmetric institutional framework with supranational institutions
 - Option 2: asymmetric framework with a national enforcement model
- A symmetric framework could be introduced in two scenarios:
 - The UK joins EFTA/EEA
 - ‘Docking mechanism’ whereby the EFTA institutions apply the rules relating to the UK

State aid post-Brexit (and beyond)

- These asymmetric elements can be found in Annex 4 to the Protocol on Ireland/Northern Ireland
 - Article 9 of the Annex provides for the creation of an independent authority with the same powers as the European Commission in the field
 - Guarantees of independence and impartiality
 - Powers listed in Annex 8 of the Protocol (which includes Articles 107 and 108 TFEU as well as the Procedural Regulation)
 - The effects of the decisions adopted by the independent authority shall be the same as the effects of European Commission decisions in the field
 - Major differences relative to the EEA regime are to be found, inter alia, in Articles 10 and 11 of Annex 4

State aid post-Brexit (and beyond)

- Article 10 introduces enhanced (and asymmetric) mechanisms for the exchange of information:
 - The independent authority is to inform the European Commission of any plans to open the formal procedure within the meaning of Article 108(2) TFEU
 - Similarly, the independent authority is to ‘consult’ the European Commission of all draft decisions it intends to adopt
 - The independent authority shall take the ‘utmost account’ of the opinion submitted by the European Commission (cfr. EU telecoms regulation)
- In the same vein, Article 12 provides for transparency obligations relating to all State aid above EUR 500,000

State aid post-Brexit (and beyond)

- Article 11, in turn, seeks to ensure that the UK system provides for the same remedies with which the EU system is equipped
- The twist comes with the powers that are given to the European Commission in this context:
 - The European Commission is given standing to ensuring compliance with the stand-still obligation and to challenge administrative action
 - It is also given the right to intervene in cases brought by the independent authority or an interested party

The 'common interest' in State aid law

- The point of State aid rules is to avoid cross-border distortions of trade and competition ('beggar thy neighbour')
- State aid is deemed compatible when any such distortions of trade are deemed outweighed by the benefits (economic or non-economic)
- As a result, any compatibility assessment will consider the common interest of all Member States
 - This is obvious in the case of EU Member States (*Philip Morris*)
 - The EEA Agreement works in the same way: the interests of the EFTA States are considered by the European Commission, and vice versa

The 'common interest' in State aid law

'144. The Authority considers that the conditions laid down in Article 61(3)(a) of the EEA Agreement are fulfilled if the region, being a Statistical region at level 2, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75% of the EEA average. The GDP per capita of each region and the EEA average to be used in the analysis are determined by reference to the relevant official statistical. There is however no Statistical region at level 2 in the EFTA States that currently fulfils this condition.⁴⁹ Hence, no region in the EFTA States qualifies for the Article 61(3)(a) EEA derogation'.

EFTA Guidelines on Regional aid

The 'common interest' in State aid law

- It follows from the above that any UK authority will have to assess the impact of measures by reference to the UK and the EU
 - These considerations are at the heart of Annex 4 of the Protocol on Ireland/Northern Ireland
 - In particular, Article 13 of the Annex provides for an (asymmetric) consultation mechanism to avoid trade distortions
 - The Draft Withdrawal Agreement appears to assume that the European Commission will take the 'common interest' into account