**Brexit and State Aid**

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If no exit agreement is concluded between the United Kingdom and the EU, Articles 107 et seq. of the TFEU and secondary legislation adopted on the basis of those provisions should no longer be directly applicable to the United Kingdom from March 29, 2019. The Draft Withdrawal Agreement of March 19, 2018,[[1]](#footnote-1) of course, provides for transitional arrangements, which will also be relevant in the context of aid issues. A special status is foreseen for Northern Ireland; in this respect, European State aid law should generally continue to apply. The UK Government White Paper “The Future Relationship between the United Kingdom and the European Union” of July 17, 2018,[[2]](#footnote-2) also reveals the willingness of the UK Government to adopt a common State aid rule, which provides for the establishment of cooperation mechanisms between regulatory authorities and – yet with certain thematic reservations – should be based on the current State aid rules. Following on from a brief overview of the basic structure of EU State aid control as far as it is relevant to the issue, the future legal situation without exit agreement will be presented first, before the State aid effects of the Brexit will be analyzed on the basis of the draft agreement of March 19, 2018, and the joint statement from the negotiators of the EU and the United Kingdom Government of June 19, 2018, on progress of the negotiations[[3]](#footnote-3).

**I. Basic Structure and Territorial Scope of EU State Aid Control**

**1. State Aid Control of the European Commission**

Article 107 (1) TFEU sets up a principle of non-aid[[4]](#footnote-4), but does not exclude that certain types of aid may be declared compatible with the internal market under certain conditions resulting mainly from Article 107 (2) and (3) as well as from Article 106 (2) TFEU. The prohibition of State aid is therefore neither absolute nor unconditional, but leaves State aid to strict supervision by the European Commission.[[5]](#footnote-5) In order to prevent incompatible aid being granted even for a short period of time and thus distorting competition, the Member States are required to grant the proposed aid in accordance with the formal requirements of Article 108 (3) TFEU and Article 2 (1) of Council Regulation (EU) 2015/1589[[6]](#footnote-6) (later referred to as Reg. 2015/1589) only. Thus, in principle, State aid has to be notified to the Commission prior to its implementation and must not be put into effect before the Commission has adopted a final decision on the matter. Pending notification and the Commission decision, Article 108 (3) and Article 3 of Reg. 2015/1589 set out a strict prohibition on implementation measure. If aid is granted before the adoption of the Commission’s approval decision, it is (formally) unlawful in spite of its substantial approval by the Commission at the end of the investigation procedure and its compatibility with the internal market.[[7]](#footnote-7)

**2. Private Law Enforcement**

It is only under very strict conditions that the Commission, pursuant to Article 13 (2) of Reg. 2015/1589, can order an interim recovery of the aid during the investigation procedure. The "neutralization of the aid advantage"[[8]](#footnote-8) before the Commission's final decision can therefore normally only be achieved by competitors of the aid beneficiary initiating their own proceedings before the national courts and, in particular, obtaining a preliminary injunction. If a national court is seized for unlawful aid, it is obliged under EU law to draw all the appropriate conclusions from the unlawfulness of the aid, in accordance with the national law.[[9]](#footnote-9) In particular, as a rule, it must order the full recovery of the unlawful aid from the beneficiary[[10]](#footnote-10), without having regard to the question whether the aid is compatible with the internal market, as this assessment falls within the exclusive competence of the Commission[[11]](#footnote-11). In addition, State liability could be incurred or other compensation claims or interim measures should be considered[[12]](#footnote-12), as Article 108 (3) TFEU is directly applicable[[13]](#footnote-13). Private law enforcement thus fulfills a central function in the field of State aid law.[[14]](#footnote-14)

Moreover, the principles of effet utile and the duty of sincere cooperation under Article 4 (3) TEU also state in the field of State aid that decisions of national courts must never be in conflict with a Commission decision, even if the latter is only provisional. Accordingly, a national court must ensure that the implementation of any measure that even only possibly might constitute State aid, is postponed and that all the other necessary consequences of a possible breach of the standstill requirement are taken if, after preliminary examination, the Commission has decided to initiate the formal investigation procedure in accordance with Article 4 (4) of Reg. 2015/1589 and, by doing so, has formally expressed its concerns as to the State aid character of the measure and its compatibility with the internal market.[[15]](#footnote-15) In that sense, decisions under Article 4 (4) of Reg. 2015/1589 thus have a binding effect on national jurisdictions.

**3. Territorial Scope**

EU State aid rules apply only to aid from EU Member States.[[16]](#footnote-16) Allowances from third countries, on the other hand, should in principle only be assessed in accordance with the WTO subsidy rules[[17]](#footnote-17), which fall far below the standards of EU law, both in content and in terms of enforcement possibility[[18]](#footnote-18). This also applies to aid measures from third countries that affect the internal market.[[19]](#footnote-19) If, however, the intervening third country is a member of the European Economic Area, the State aid provisions of the EEA Agreement of May 2nd, 1992[[20]](#footnote-20) are applicable.[[21]](#footnote-21) The legal situation is more complex in case a State aid measure relating to a third country, but granted by an EU Member State is concerned. Since the Articles 107 et seq. TFEU aim at the prevention of distortions of competition within the internal market[[22]](#footnote-22), the applicability of EU State aid presupposes the suitability of the aid to distort competition within the EU and thus to affect trade between Member States[[23]](#footnote-23). Export subsidies which may have an indirect effect on the competitive position of the beneficiary can therefore also fall within the scope of the Articles 107 et seq. TFEU[[24]](#footnote-24), same as an aid granted by a Member State to a third-country undertaking, provided of course that the aid is suitable to affect trade between Member States[[25]](#footnote-25). This may be conceivable, for example, if in return for the aid, the third country recipient commits itself to perform services more cheaply to undertakings of the Member State having granted the aid. [[26]](#footnote-26)

**II. Legal Situation without Exit Agreement**

**1. Application of the EEA State Aid Provisions**

It does not pose legal problems that the United Kingdom shall be a third country in relation to facts which become fully effective in the period after the withdrawal takes effect, so that aid granted by the United Kingdom (exclusively) after Brexit, shall not be assessed by means of a direct application of the Articles 107 TFEU et seq. and the relevant secondary legislation. It should be discussed, however, whether the United Kingdom can remain a member of the European Economic Area after leaving the EU and thus remains subject to EEA State aid rules.[[27]](#footnote-27) In any event, the United Kingdom may, by virtue of Article 127 (1) of the EEA Agreement, withdraw from the EEA by written notice to the other EEA Contracting Parties that needs to be communicated 12 months in advance. Also, the other EEA Contracting Parties may declare the suspension or the termination of the EEA Agreement vis-à-vis the United Kingdom pursuant to Article 62 (1) or (3) of the Vienna Convention on the law of Treaties of May 23, 1969[[28]](#footnote-28).[[29]](#footnote-29) With that in mind, the details of a continued application of the EEA State aid rules on the United Kingdom shall not be treated in the present article, as this task has already been fulfilled in a different article.[[30]](#footnote-30)

**2. Establishment of a British State Aid Control**

The British Government has announced in a Brexit guidance notice of August 23, 2018 that if a withdrawal agreement does not come to pass, a “rigorous” national State aid regime will be established in order to ensure effective control of anti-competitive aid in the future.[[31]](#footnote-31) The EU State aid rules will be transferred into national law. This will apply to all economic sectors; and will mirror existing as allowed under the current rules, including the Agricultural Block Exemption Regulation[[32]](#footnote-32), and the Fisheries Block Exemption Regulation[[33]](#footnote-33).[[34]](#footnote-34) The Competition and Markets Authority (CMA) will take on the role of enforcement and supervision for the whole of the UK.[[35]](#footnote-35) The CMA being a non-ministerial department[[36]](#footnote-36), an independent performance of tasks[[37]](#footnote-37) will be ensured. As from March 2019, 29 new aid should therefore no longer be notified to the Commission, but to the CMA. Similarly, aid already notified to the Commission, which has not yet been decided on March 2019, 29 will have to be submitted again to the CMA for approval. Commission approval decisions and group exemptions adopted before March 2019, 29 will remain valid.[[38]](#footnote-38)

**3. Private Enforcment in Case of Violations of the Standstill Clause or of Negative Decisions in Old Cases**

**a) Enforcement by British Courts**

With the withdrawal of the United Kingdom from the EU, the question arises as to whether and to what extent British courts have to sanction any failure of compliance with the standstill clause stipulated in Art. 108 (3) TFEU and Article 3 of Reg. 2015/1589, that may have taken place before exit date. It is clear that the United Kingdom is no longer bound by these rules after leaving the EU. While this does not undo in a substantial sense the eventual breach of the standstill clause by the United Kingdom at a time when it still had to comply with EU State aid law, it is not possible to assume a legal obligation of British courts to neutralize State aids granted in violation of EU law, as the United Kingdom including its courts, is no longer subject to any obligations under EU law, even if the handling of issues from the time before withdrawal is concerned.[[39]](#footnote-39)

However, the European Union (Withdrawal) Act 2018 of June 26, 2018[[40]](#footnote-40) indicates that the UK will continue to grant effectiveness to legally acquired rights under EU law even beyond the date of withdrawal and will continue to sanction breaches of the standstill rule that have taken place prior to Brexit. According to Chapter 16 Clause 4 (1) of the EU Withdrawal Act, the directly effective rights ensuing from the EU Treaties, which are available and recognized immediately before exit day, shall continue to be recognized and enforceable. This is reaffirmed in point 87 of the European Union (Withdrawal) Bill Explanatory Notes[[41]](#footnote-41) prepared by the Department for Exiting the European Union. Point 89 of the Explanatory Notes contains an illustrative, non-exhaustive list of provisions of the TFEU granting directly effective rights covered by Clause 4 (1) EU Withdrawal Act; the Articles 107 (1) and 108 (3) TFEU are expressly mentioned therein. However, it should be noted that the prohibition contained in Article 107 (1) TFEU is not directly applicable as it is neither absolute nor unconditional.[[42]](#footnote-42) An individual competitor[[43]](#footnote-43) can only rely on Article 107 (1) TFEU where the European Commission, while making use of its exclusive competence and responsibility[[44]](#footnote-44) that will continue to apply to the UK until the date of effectiveness of its withdrawal from the EU, has declared a State aid measure to be incompatible with the internal market, thereby implementing the prohibition of aid[[45]](#footnote-45). In the aforementioned[[46]](#footnote-46) Guidance notice “State aid if there’s no Brexit deal” of August 23, 2018, the United Kingdom Government has confirmed this view.[[47]](#footnote-47)

It is quite likely, therefore, that British courts will, under national law, continue to take measures to prohibit the granting of benefits contrary to EU law[[48]](#footnote-48) or to neutralize benefits granted to aid recipients in breach of EU law. The neutralization of an aid could be achieved, for example, by requiring the aid beneficiary to pay the average market interests on the amount of aid for the period of the State aid’s formal illegality, i. e. the time between the granting of the aid in violation of the standstill clause and the withdrawal of the UK. Doing this would prevent the State aid recipient to benefit of the temporary usage of the aid for the period of breach of the standstill clause.[[49]](#footnote-49) It is, however, reasonable to assume that from the moment of Brexit, any infringement of Article 108 (3) TFEU will continue to be considered illegal, as it will constitute a breach of the then existing standstill requirement under UK law[[50]](#footnote-50), given the commitment of the British government to transpose Article 108 (3) TFEU, as well as the other State aid rules, into national law and the fact that the CMA will exercise State aid supervision from the date of withdrawal[[51]](#footnote-51). Against this background, it can be assumed that British courts will also consider repayment orders, unless the aid has been approved in the meantime.[[52]](#footnote-52) In addition, there may be claims for damages from competitors for having been exposed to the aid at an earlier date than would have been the case if the standstill requirement based initially on Article 108 (3) TFEU and from March 29, 2019 on national law, had been respected.[[53]](#footnote-53) The same applies to aid introduced before Brexit in spite of a negative decision taken by the Commission pursuant to Article 9 (5) of Reg. 2015/1589, since where Article 107 (1) TFEU has been implemented by a negative decision, the individual can derive rights therefrom.[[54]](#footnote-54)

**b) Enforcement by Member State Courts**

A national court of a Member State where civil proceedings for the granting of aid by the United Kingdom are pending, may also have to deal with the issues raised above. In the light of the fact that, after Brexit, no substantive Commission decisions on State aid can be taken in cases of State aid granted by the United Kingdom, the question should be of considerable practical importance as to the extent to which national courts are obliged to draw conclusions from a past violation of the standstill requirement – or of a negative decision under Article 9 (1) of the Reg. 2015/1589 –, and to what extent they have to take into account a Commission decision to initiate the formal investigation procedure under Article 4 (4) of Reg. 2015/1589, when assessing whether or not there has been an infringement of Article 108 (3) TFEU and Article 3 of the Reg. 2015/1589. If the aid does not constitute an act in the exercise of State authority (acta iure imperii) in the meaning of Article 1 (1) of the Brussels Ia Regulation[[55]](#footnote-55), but rather a measure under private law, in particular because it is granted by a private law contract[[56]](#footnote-56), Member State courts may have international jurisdiction pursuant to Article 7 (2) Brussels Ia Regulation if the place where the harmful event occurred is located in that Member State.[[57]](#footnote-57) However, according to recent case law of the ECJ, it is doubtful whether the scope of application of the Brussels Ia Regulation is always open if the procedure before the national court is directed against the beneficiary that is not acting in the exercise of State authority when receiving the aid[[58]](#footnote-58), as such proceedings necessarily relate to the granting of the aid itself which from the point of view of the aid granting authority may well constitute an act in the exercise of State authority, and the question of its legality. [[59]](#footnote-59)

The law applicable by the national court must be determined in accordance with Article 6 (3) of the Rome II Regulation, which, despite the restrictive wording of Recital 23 of the Rome II Regulation, also covers claims for breach of State aid rules.[[60]](#footnote-60) In particular, Article 6 (3) (b) Rome II Regulation, which gives the injured party the possibility of relying on the lex fori if the aid at issue directly and substantially affects the market in the Member State of the court seized.[[61]](#footnote-61) Thus, before French courts, for example, the assertion of claims for damages under Article 1240 of the Civil Code against a British donor of State aid is possible where the aid has been granted in breach of the standstill obligation of Article 108 (3) TFEU and Article 3 Reg. 2015/1589, or in violation of a negative decision adopted by the Commission before Brexit, provided that the granting of the aid does not constitute an act in the exercise of State authority. Also claims that are directed to the elimination of the competitive advantage obtained by the State aid beneficiary come into consideration.[[62]](#footnote-62)

That elimination may be effected by the recovery of illegality interest for example[[63]](#footnote-63), whereas a recovery order concerning the amount of the formally illegal State aid is not without problems, since the beneficiary of the aid would lose its advantages also for the period after Brexit, although the aid would not violate the standstill clause of Article 108 (3) TFEU and Article 3 of Reg. 2015/1589 anymore.[[64]](#footnote-64) However, claims for violation of the British State aid provisions that will apply instead of EU State aid law may then be considered. For national courts, Commission decisions under Article 4 (4) of Reg. 2015/1589 to initiate the formal investigation procedure concerning measures of the UK that possibly constitute aid, will no longer have any binding effect[[65]](#footnote-65) after Brexit, as a decision terminating the proceedings will no longer be possible, the Commission having lost competence to the CMA.[[66]](#footnote-66)

**III. Legal Situation in Case of an Exit Agreement**

**1. Legal Situation in Substance**

**a) Transition Period**

Article 121 of the Draft Withdrawal Agreement of March 19, 2018 provides for a transitional period from the date of entry into force of the Agreement until December 31st, 2020. During this period, EU law shall continue to be applicable to the United Kingdom in accordance with Article 122 (1) of the Draft Agreement, unless otherwise provided. In accordance with paragraph (3) of that provision, the applicable EU law shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the EU and its Member States and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the EU. Since special State aid rules do not exist in the Draft Agreement, it is clear that during the transition period, EU State aid legislation will be fully apply to the United Kingdom, to the same extent as before Brexit.

**b) Legal Situation after the Transition Period**

For the time after the transitional period, i. e. from January 1st, 2021, the Draft Agreement does not contain any specific requirements concerning the structure and the substantive rules of State aid control in the United Kingdom, with an exception concerning Northern Ireland. This is quite surprising in view of the importance of well-functioning State aid regulation for ensuring free and undistorted competition under Article 3 (3) TEU in conjunction with Protocol No. 27 to the TFEU[[67]](#footnote-67). The European Council, in point 12 of its negotiating guidelines of March 23, 2018, has also emphasized the importance of a level playing field preventing unfair competition, so that a combination of substantive State aid rules aligned with EU and international standards, as well as the establishment of effective enforcement mechanisms, will be required from the United Kingdom.[[68]](#footnote-68) In principle, the UK government takes the same view. In its White Paper “The Future Relationship between the United Kingdom and the European Union” of July 17, 2018[[69]](#footnote-69) it envisages the development and application of a common rulebook for State aid and the establishment of cooperation arrangements between regulators on competition, in order to guarantee an open and fair trading environment on the basis of fair competition.[[70]](#footnote-70) It can be assumed that the common rulebook will be strongly based on EU State aid law, as the United Kingdom, as has been shown above[[71]](#footnote-71), is planning to transpose the EU State aid rules concerning all economic sectors into national law, even in case a withdrawal agreement would not come into being. In order to ensure a uniform interpretation of the common rulebook, the UK Government has announced that the British courts will “pay due regard to EU case law”[[72]](#footnote-72), which of course does not rule out any divergence in the interpretation of the relevant rules, even on key issues.

Moreover, the UK Government has subjected its willingness to establish a common rulebook to a reservation of national sovereignty: The White Paper expressly states that the common rulebook is without prejudice to the United Kingdom’s intention to develop new tailored arrangements in relation to payment to farmers and other land managers for environmental benefits, and the UK’s future public procurement policy.[[73]](#footnote-73) In addition, the UK Government insists on the United Kingdom national sovereignty concerning taxation (“[...] would not fetter its sovereign discretion on tax”), including its sovereign discretion to set direct or indirect tax rates, and to set its own minimum tax rates.[[74]](#footnote-74) All this suggests that, although a common rulebook will most probably be adopted between the EU and the UK on the basis of existing EU State aid rules, it will provide for extensive derogation possibilities for the United Kingdom in the areas just mentioned.

**c) Special Status of Northern Ireland**

However, this view is limited by the particularities that shall apply to Northern Ireland under the Draft Agreement. Pursuant to Article 168 (3) of the Draft Agreement, the Protocol on Ireland/Northern Ireland shall apply as from the end of the transition period. According to Article 9 of that Protocol, the provisions of EU law on aids granted by States listed in Annex 2.9 to the Protocol, shall apply to the United Kingdom ‘with regard to Northern Ireland’. This expression is specified in Article 9 of the Protocol in the sense that only measures that affect trade between the territory of Northern Ireland and the EU shall be regarded as aid within the meaning of Article 107 (1) TFEU. Although Annex 2.9 is currently empty, it is likely that the EU will insist on applying the same aid regime on both sides of the border between Ireland and Northern Ireland. It can therefore be assumed that, in principle, the entire acquis on State aid will be included in the annex, with restrictions, of course, for agricultural aid as well as public procurement and tax policy as a whole, as the United Kingdom has subjected these fields of policy to a strict reservation of national sovereignty in its White Paper of July 17, 2018.[[75]](#footnote-75)

However, that raises the problem of the application of different aid rules for Northern Ireland and the rest of the United Kingdom as it is not covered by Article 9 in conjunction with Annex 2.9 of the Protocol on Ireland/Northern Ireland. Since it is difficult to imagine that the application of different State aid rules in different regions of the same country will not lead to distortions of competition within the country, it is not unlikely that the United Kingdom will extend the rules applicable to Northern Ireland to the whole of the State.[[76]](#footnote-76)

**2. Competences**

**a) European Commission**

As regards the competence of the European Commission, the date of the initiation of the procedure is decisive. If a State aid procedure has been formally registered with the Commission pursuant to Article 88 (2) of the Draft Agreement before the end of the transition period within the meaning of Article 121 of the Draft Agreement, the Commission, in accordance with Article 88 (1) of the Draft Agreement, shall continue to be competent for the procedure until its closure. Under Article 89 of the Draft Agreement, the Commission shall also be competent to initiate new procedures even after the end of the transition period, if the facts forming the subject matter of the procedure occurred before. With respect to aid granted by the United Kingdom before January 1st, 2021, the Commission will therefore continue to exercise its supervisory role. However, the CMA will be responsible for the assessment of aid granted after that date. [[77]](#footnote-77)

**b) Court of Justice of the EU**

According to Article 91 (2) of the Draft Agreement, the Court of Justice of the EU is exclusively competent to review the legality of Commission decisions taken under Articles 88 et seq. of the Draft Agreement. In any case, as regards State aid control, no further jurisdiction under Article 82 (1) of the Draft Agreement is apparent. However, the ECJ has jurisdiction to give preliminary rulings eithre pursuant to Article 82 (2) of the Draft Agreement, where a preliminary question is referred to it before the end of the transition period under Article 82 (2) of the Draft Agreement, i. e. registered by its registry pursuant to Article 82 (3) of the Draft Agreement, or pursuant to Article 83 (2) where a preliminary question relates to facts that occurred before the end of the transition period. The latter is the case for aid granted by the United Kingdom before January 1st, 2021. For infringements procedures, the ECJ also has jurisdiction under Article 83 (1) of the Draft Agreement if infringements of the Treaties or the transitional provisions laid down in the Articles 121 to 126 of the Draft Agreement are at issue, for example in case of failure to comply with a Commission decision on State aid. In all other cases, there will be no jurisdiction of the Court of Justice of the EU, and in particular, CMA measures will be able to be challenged only before the bodies designated by UK law.

**3. Private Enforcement**

**a) Enforcement by British Courts**

During the transition period, in which EU law will continue to apply in principle under Article 122 (1) of the Draft Agreement, British courts will, as before, be required to draw the legal consequences of a breach of State aid law and in particular to neutralize aid that is contrary to EU law. This should also apply to procedures initiated after the end of the transition period in so far as they relate to violations of EU State aid law. The effet utile and the consequent requirement for effective private remedies is also part of EU law, even where it applies only by means of Article 122 (1) of the Draft Agreement. However, in the case of infringements of those (national) State aid rules that will be applicable after the end of the transitional period in the United Kingdom, such an obligation of British courts can only be assumed if the common State aid rulebook announced in the White Paper of the UK Government[[78]](#footnote-78) shall be interpreted in that sense; this is likely to be the case with respect to provisions of EU law, such as Article 108 TFEU, that shall be incorporated into the common rulebook. As far as EU state aid law is applicable pursuant to Article 9 in conjunction with Annex 2.9 of the Protocol on Ireland/Northern Ireland, private law enforcement shall also be possible.

**b) Enforcement by Member State Courts**

Where after Brexit, national courts will have to deal with aid granted by a UK grantor in breach of EU law, regardless of whether EU law is directly applicable or only by virtue of Article 122 (1) of the Draft Agreement or of Article 9 in conjunction with Annex 2.9 of the Protocol on Ireland/Northern Irleand, the legal situation is in line with the assumptions already made in the context of the non-conclusion of an exit agreement.[[79]](#footnote-79) According to Article 63 (2) (a) of the Draft Agreement, as inserted by the Joint Declaration of the EU and United Kingdom negotiators of June 19, 2018, the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, shall follow the provisions of the Brussels Ia Regulation.

**3. Summary**

During a transition period which will last until December 31st, 2020, State aid regulation will remain the same in the event of the conclusion of an exit agreement on the basis of the draft currently under discussion. Even after that, Northern Ireland will continue to be governed in principle by EU State aid law. For the rest of the United Kingdom, a common rulebook between the EU and the United Kingdom is expected to be developed on the basis of European Union law. The European Commission and the Court of Justice of the European Union remain exclusively competent for all procedures that have been instituted before the end of the transition period, or the subject matter of which are formed by facts that occurred before the end of the transition period. The other procedures will be handled by the CMA and the UK courts. Private enforcement in the UK will be possible, at least as far as breaches of the State aid rules applicable until the end of the transition period are concerned. As far as the State aid legislation that shall be in force in the United Kingdom after that is concerned, the common rulebook announced by the British government has to be awaited. However, with regard to Northern Ireland, where EU State aid law will continue to apply, the possibility of private enforcement will continue in the previous extent. Private law enforcement before national Member State courts with regard of violations of State aid rules by British aid grantors, will only be possible where the aid has been granted under private law.

1. Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, published with status as of March 19, 2018, at <https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community\_en> (retrieved on 11/4/ 2018). [↑](#footnote-ref-1)
2. Published at <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> (retrieved on 11/4/2018). [↑](#footnote-ref-2)
3. Published at <https://ec.europa.eu/commission/publications/joint-statement-negotiators-european-union-and-united-kingdom-government-progress-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union\_en> (retrieved on 11/4/2018). [↑](#footnote-ref-3)
4. *Mestmäcker/Schweitzer*, in Immenga/Mestmäcker, Wettbewerbsrecht vol. 3, 5th ed. 2016, Sect. I. A. no. 1; *Bartosch*, EU-Beihilfenrecht, 2nd ed. 2016, Sect. A. no. 1. [↑](#footnote-ref-4)
5. ECJ 3/22/1977 – 78/76, ECR 1977, 595 no. 8 et seq. – Steinike & Weinlig;14.2.1990 – 301/87, ECR 1990, I-307 no. 15 – Boussac; *Mestmäcker/Schweitzer*, in Immenga/Mestmäcker, Wettbewerbsrecht vol. 3, 5th ed. 2016, Sect. I. A. no. 14; *Bartosch*, EU-Beihilfenrecht, 2nd ed. 2016, Sect. A. no. 2; *Bungenberg*, in Birnstiel/Bungenberg/Heinrich, Europäisches Beihilfenrecht, 2013, Chapter 1 nos. 5 et seq.; *Kreße*, Wettbewerb in Recht und Praxis, 2017, 663. [↑](#footnote-ref-5)
6. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), OJ. 2015 L 248, 9. [↑](#footnote-ref-6)
7. ECJ 11/21/1991 – C-354/90, ECR 1991, I-5505 nos. 16 et seq. – FNCE; see. *Cremer*, in Calliess/Ruffert, 5th ed. 2016, TFEU Art. 108 no. 12; *Kreße*, Journal of Competition Law, 2008, 271 (see p. 273 et seq.); *ibid.*, Wettbewerb in Recht und Praxis, 2017, 663 (p. 664); *Kreße*, European Union Private Law Review, 2018, 210. [↑](#footnote-ref-7)
8. *Barbist/Halder/Schachl*, in Jaeger/Haslinger, Beihilferecht Jahrbuch 2012, 2012, 551 (see p. 566); comp. *Kreße*, Wettbewerb in Recht und Praxis, 2017, 663 (p. 664). [↑](#footnote-ref-8)
9. ECJ 07/11/1996 – C-39/94, ECR 1996, I-3547 no. 40 – SFEI; 7/21/2005 – C-71/04, ECR 2005, I-7419 no. 49 – Xunta de Galicia; see also the so-called “airport decisions”: ECJ 11/21/2013 – C-284/12, ECLI:EU:C:2013:755 no. 42 – Lufthansa; 4/4/2014 – C-27/13, ECLI:EU:C:2014:240 no. 25 – Flughafen Lübeck; comp. Commission notice on the enforcement of State aid law by national courts, OJ. 2009 C 85, 1 no. 30. [↑](#footnote-ref-9)
10. ECJ 7/11/1996 – C-39/94, ECR 1996, I-3547 no. 68 – SFEI; 7/21/2005 – C-71/04, ECR 2005, I-7419 no. 49 – Xunta de Galicia; 2/12/2008 – C-199/06, ECR 2008, I-469 no. 39 – CELF I; comp. ECJ 11/21/2013 – C-284/12, ECLI:EU:C:2013:755 no. 43 – Lufthansa; 4/4/2014 – C-27/13, ECLI:EU:C:2014:240 no. 26 – Flughafen Lübeck; comp. Commission notice on the enforcement of State aid law by national courts, no. 30; *Rusche*, in Immenga/Mestmäcker, Wettbewerbsrecht vol. 3, 5th ed. 2016, Sect. II. B., Art. 13 2015/1589 no. 4. [↑](#footnote-ref-10)
11. ECJ 3/22.1977 – 78/76, ECR 1977, 595 no. 9 – Steinike & Weinlig; 11/21/1991 – C-354/90, ECR 1991, I-5505 nos. 9, 14 – FNCE; 12/16/1992 – C-144/91 et al., ECR 1992, I-6613 no. 26 – Demoor; 2/12/2008 – C-199/06, ECR 2008, I-469 no. 38 – CELF I; Commission notice on the enforcement of State aid law by national courts, no. 20. [↑](#footnote-ref-11)
12. ECR 07/11/1996 – C-39/94, ECR 1996, I-3547 no. 75 – SFEI; 10/5/2006 – C-368/04, ECR 2006, I-9957 no. 56 – Transalpine Ölleitung in Österreich; 2/12/2008 – C-199/06, ECR 2008, I-469 no. 53 – CELF I; Commission notice on the enforcement of State aid law by national courts, nos. 43 et seq.; Bundesgerichtshof (German supreme court – BGH) 2/10/2011 – I ZR 136/09, Europäische Zeitschrift für Wirtschaftsrecht, 2011, 440 nos. 14 et seq. – Flughafen Frankfurt-Hahn; 2/10/2011 – I ZR 213/08, juris database, nos. 20 et seq.; comp. *Kreße*, Wettbewerb in Recht und Praxis, 2017, 663. [↑](#footnote-ref-12)
13. In this sense with respect already to Article 93 (3) of the EEC Treaty ECJ 12/11/1973 – 120/73, ECR 1973, 1471 no. 8 – Lorenz; 11/21/1991 – C-354/90, ECR 1991, I-5505 nos. 11 f. – FNCE; see also *Bartosch*, Europarecht, 2012, 60 (p. 62 et seq.); *Kreße*, Wettbewerb in Recht und Praxis, 2017, 663 (p. 664). [↑](#footnote-ref-13)
14. Commission notice on the enforcement of State aid law by national courts, no. 25; *Kreße*, European Union Private Law Review, 2018, 210 et seq. [↑](#footnote-ref-14)
15. ECJ 11/21/2013 – C-284/12, ECLI:EU:C:2013:755 nos. 38 et seq. – Lufthansa; 4/4/2014 – C-27/13, ECLI:EU:C:2014:240 nos. 21 et seq. – Flughafen Lübeck; BGH 2/9/2017 – I ZR 91/15, Europäische Zeitschrift für Wirtschaftsrecht, 2017, 312 no. 35 – Flughafen Lübeck; concerning the binding effect of Commission’s decisions to initiate the formal investigation procedure *Kreße*, Wettbewerb in Recht und Praxis, 2017, 663 et seq.; see also *Kreße*, European Union Private Law Review 2018, 210 (p. 211). [↑](#footnote-ref-15)
16. *Ludwigs*,in Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 7; *Bartosch*, EU-Beihilfenrecht, 2nd ed. 2016, Section A. no. 38; *Cremer*, in Calliess/Ruffert, 5th ed. 2016, TFEU Art. 107 no.6; *Mederer*, in Schröter/Jakob/Klotz/Mederer, Europäisches Wettbewerbsrecht, 2nd ed. 2014, TFEU Art. 107 no. 21. [↑](#footnote-ref-16)
17. *Ludwigs*,in Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 7. [↑](#footnote-ref-17)
18. For detailed information concerning WTO subsidy law see e. g. *Hahn*, in Birnstiel/Bungenberg/Heinrich, Europäisches Beihilfenrecht, 2013, Chapter 6 nos. 32 et seq.; comp. also *Mickonyt*ė, in Jaeger/Haslinger, Beihilferecht Jahrbuch 2018, 2018, 389 (p. 396 et seq.); Biondi, King’s Law Journal 2016, 442 (p. 450 et seq.); Switzer, Edinburgh Law Review 2018, 155 (p. 158 et seq.). [↑](#footnote-ref-18)
19. Comp. *Ludwigs*,in Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 nos. 6 et seq. [↑](#footnote-ref-19)
20. OJ (EC) 1994 L 1, 3. [↑](#footnote-ref-20)
21. See *Kreße*, European Union Private Law Review 2018, 210 (p. 211); *Ludwigs*,in Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 5; *Cremer*, in Calliess/Ruffert, 5th ed. 2016, TFEU Art. 107 no. 6. [↑](#footnote-ref-21)
22. *Von Wallenberg/Schütte*, in Grabitz/Hilf/Nettesheim, Status as of May 2018, TFEU Art. 107 no. 10. [↑](#footnote-ref-22)
23. *Ludwigs*,in Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 6. [↑](#footnote-ref-23)
24. ECJ 03/21/1990 – C-142/87, ECR 1990, I-959 no. 32 – Tubemeuse; 4/30/2009 – C-494/06 P, ECR 2009, I-3639 no. 56 – Commission/Italy and Wam; *Bartosch*, EU-Beihilfenrecht, 2nd ed. 2016, Sect. A. no. 38; in detail *Kliemann*, in Von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed. 2015, TFEU Art. 107 nos. 185 et seq. [↑](#footnote-ref-24)
25. *Ludwigs*,in Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 6; *Mederer*, in Von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed. 2015, TFEU Introduction to Articles 107-109 no. 19. [↑](#footnote-ref-25)
26. *Ludwigs*,Münchener Kommentar zum Kartellrecht, vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 6. [↑](#footnote-ref-26)
27. In the affirmative with convincing arguments *Schroeter/Nemeczek*, European Business Law Review 2016, 921 (see p. 925 et seq.); *ibid.*, Juristenzeitung 2017, 713 (p. 714 et seq.); dissenting *Herbst/Gebhardt*, Deutsches Steuerrecht 2016, 1705 footnote 2. [↑](#footnote-ref-27)
28. Published at <http://legal.un.org/ilc/texts/instruments/english/conventions/1\_1\_1969.pdf> (retrieved on 11/4/2018). [↑](#footnote-ref-28)
29. See in detail *Kreße*, European Union Private Law Review, 2018, 210 (p. 212); dissenting *Schroeter/Nemeczek*, European Business Law Review, 2016, 921 (see p. 940 et seq.); *ibid.*, Juristenzeitung, 2017, 713 (p. 717). [↑](#footnote-ref-29)
30. See in detail *Kreße*, European Union Private Law Review, 2018, 210 (p. 212 et seq.). [↑](#footnote-ref-30)
31. Department for Business, Energy & Industrial Strategy (BEIS), Guidance notice “State aid if there’s no Brexit deal” of 8/23/2018, published at <https://www.gov.uk/government/publications/state-aid-if-theres-no-brexit-deal> (retrieved on 11/4/2018), sub “Before 29 March 2019”. [↑](#footnote-ref-31)
32. Commission Regulation (EU) 702/2014, OJ 2014 L 193, 1. [↑](#footnote-ref-32)
33. Commission Regulation (EU) 1388/2014, OJ 2014 L 369, 37. [↑](#footnote-ref-33)
34. BEIS, State aid if there’s no Brexit deal, sub “After 29 March 2019 if there’s ‘no deal’”. [↑](#footnote-ref-34)
35. BEIS, State aid if there’s no Brexit deal, sub “After 29 March 2019 if there’s ‘no deal’”. [↑](#footnote-ref-35)
36. Comp. the list of “Departments, agencies and public bodies” of the UK government, published at <https://www.gov.uk/government/organisations> (retrieved on 11/4/2018). [↑](#footnote-ref-36)
37. Concerning the measures to ensure the independence of the CMA, comp. in detail the UK government publication “Independence of competition authorities – from designs to practices” of 11/24/2016, OECD Global Forum on Competition, published at <https://one.oecd.org/document/DAF/COMP/GF/WD(2016)77/en/pdf> (retrieved on 11/4/2018). [↑](#footnote-ref-37)
38. BEIS, State aid if there’s no Brexit deal, sub “After 29 March 2019 if there’s ‘no deal’ / Implications”. [↑](#footnote-ref-38)
39. See *Kreße*, European Union Private Law Review, 2018, 210 (p. 214). [↑](#footnote-ref-39)
40. Published at <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted> (retrieved on 11/4/2018). [↑](#footnote-ref-40)
41. Published at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> (retrieved on 11/4/2018). [↑](#footnote-ref-41)
42. ECJ 3/22/1977 – 78/76, ECR 1977, 595 nos. 8 et seq. – Steinike & Weinlig; 2/14/1990 – 301/87, ECR 1990, I-307 no. 15 – Boussac; 7/11/1996 – C-39/94, ECR 1996, I-3547 no. 36 – SFEI; see also *Mestmäcker/Schweitzer*, in Immenga/Mestmäcker, Wettbewerbsrecht vol. 3, 5th ed. 2016, Introduction Sect. A. no. 5; *Ludwigs*,in Münchener Kommentar zum Kartellrecht vol. 5, 2nd ed. 2018, TFEU Art. 107 nos. 47 et seq.; see above sub I. 1. [↑](#footnote-ref-42)
43. Comp. GC 9/15/2016 – T-220/13, ECLI:EU:T:2016:484 no. 40 – Montessori. [↑](#footnote-ref-43)
44. ECJ 11/21/1991 – C-354/90, ECR 1991, I-5505 no. 9 – FNCE; 10/27/1993 – C-72/92, ECR 1993, I-5509 no. 19 – Scharbatke; 4/23/2002 – C-234/99, ECR 2002, I-3657 no. 53 – Nygård; 21.10.2003 – C-261/01 et al., ECR 2003, I-12249 no. 45 – Van Calster; 6/30/2006 – C-451/03, ECR 2006, I-2941 no. 71 – Servizi Ausiliari; *Ludwigs*, in Münchener Kommentar zum Kartellrecht vol. 5, 2nd ed. 2018, TFEU Art. 107 no. 47; *Bartosch*, Recht der Internationalen Wirtschaft 2011, 577. [↑](#footnote-ref-44)
45. EuGH 6/19/1973 – 77/72, ECR 1973, 611 no. 6 – Capolongo; 3/22/1977 – 78/76, ECR 1977, 595 no. 10 – Steinike & Weinlig; *Mestmäcker/Schweitzer*, in Immenga/Mestmäcker, Wettbewerbsrecht vol. 3, 5th ed. 2016, Introduction Sect. A. no. 5; comp. *Bartosch*, EU-Beihilfenrecht, 2nd ed. 2016, Sect. H. no. 6; see *Kreße* European Union Private Law Review 2018, 210 (p. 213). [↑](#footnote-ref-45)
46. See above, sub II. 2. [↑](#footnote-ref-46)
47. BEIS, State aid if there’s no Brexit deal, sub “Before 29 March 2019”. [↑](#footnote-ref-47)
48. Comp. BEIS, State aid if there’s no Brexit deal, sub “Before 29 March 2019”. [↑](#footnote-ref-48)
49. Comp. ECJ 2/12/2008 – C-199/06, ECR 2008, I-469 nos. 51 et seq. – CELF I, concerning an aid that had been granted in violation of the standstill requirement, but was approved later by the European Commission; see also *Kreße*, European Union Private Law Review, 2018, 210 (p. 214). [↑](#footnote-ref-49)
50. Comp. BEIS, State aid if there’s no Brexit deal, sub “After 29 March 2019 if there’s ‘no deal’ / Implications”. [↑](#footnote-ref-50)
51. BEIS, State aid if there’s no Brexit deal, sub “After 29 March 2019 if there’s ‘no deal’”. [↑](#footnote-ref-51)
52. Comp., however, ECJ 2/12/2008 – C-199/06, ECR 2008, I-469 no. 53 – CELF I, who holds a restitution order concerning illegal aid to be possible in any case, without prejudice to the right of the Member State to grant the same aid again after approval. [↑](#footnote-ref-52)
53. Comp. ECJ 2/12/2008 – C-199/06, ECR 2008, I-469 nos. 50 et seq., 55 – CELF I. [↑](#footnote-ref-53)
54. Comp. *Kreße*, European Union Private Law Review, 2018, 210 (p. 214). [↑](#footnote-ref-54)
55. Comp. *Illmer*, in Huber, Rome II Regulation, 2011, Art. 6 no. 74. [↑](#footnote-ref-55)
56. Comp. *Kreße*, Journal of Competition Law 2008, 271 (p. 273). [↑](#footnote-ref-56)
57. See in detail *Wurmnest*, Neue Zeitschrift für Kartellrecht 2017, 1 (p. 5) with further references with respect to the difficulties concerning the similar problem of the determination of the place where the harmful event occurred in case of cartel damages. [↑](#footnote-ref-57)
58. See *Illmer* in Huber, Rome II Regulation, 2011, Art. 6 no. 74; *Plender/Wilderspin*, The European Private International Law of Obligations, 4th ed. 2015, no. 20-039. [↑](#footnote-ref-58)
59. Comp. ECJ 7/28/2016 – C-102/15, ECLI:EU:C:2016:607 nos. 34 et seq. – Siemens AG Österreich with approving notes of. *Wurmnest,* Europäische Zeitschrift für Wirtschaftsrecht 2016, 784 et seq.; see also *Kreße*, European Union Private Law Review 2018, 210 (p. 215). [↑](#footnote-ref-59)
60. *Hellner*, Yearbook of Private International Law vol. 9 (2007), 49 (p. 69); *Illmer*, in Huber, Rome II Regulation, 2011, Art. 6 no. 74; *Plender/Wilderspin*, The European Private International Law of Obligations, 4th ed. 2015, no. 20-039; *Wurmnest*, in Münchener Kommentar zum BGB, vol. 12, 7th ed. 2018, IntWettbR/IntKartellR no. 108; unclear insofar *Augenhofer*, in Calliess, Rome Regulations, 2015, Rome II Art. 6 no. 74. [↑](#footnote-ref-60)
61. Comp. *Wurmnest*, Neue Zeitschrift für Kartellrecht 2017, 2 (p. 3). [↑](#footnote-ref-61)
62. See for such claims under French law *Renner/Olza-Moreno*, in Birnstiel/Bungenberg/Heinrich, Europäisches Beihilfenrecht, 2013 nos. 226 et seq. [↑](#footnote-ref-62)
63. See above, sub II. 3. a). [↑](#footnote-ref-63)
64. Comp., however, ECJ 2/12/2008 – C-199/06, ECR 2008, I-469 no. 53 – CELF I, that considers it possible to recover a formally illegal aid even if the aid has been substantially approved by the Commission, without prejudice to the right of the Member State to grant the same aid again later. [↑](#footnote-ref-64)
65. See above sub I. 2. and the references in footnote 15. [↑](#footnote-ref-65)
66. Comp. *Kreße*, European Union Private Law Review, 2018, 210 (p. 214). [↑](#footnote-ref-66)
67. Protocol (No. 27) on the Internal Market and Competition, OJ 2008 L 115, p. 309; for the importance of State aid law for the Internal Market see *Mestmäcker/Schweitzer*, in Immenga/Mestmäcker, Wettbewerbsrecht vol. 3, 5th ed. 2016, Section I. A. no. 1. [↑](#footnote-ref-67)
68. European Council (Article 50) guidelines on the framework for the future EU-UK relationship, of 3/23/2018, published at <https://www.consilium.europa.eu/de/policies/eu-uk-after-referendum/> (retrieved on 11/4/2018). [↑](#footnote-ref-68)
69. Published at <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> (retrieved on 11/4/2018). [↑](#footnote-ref-69)
70. HMG, White Paper, Executive Summary / Economic partnership p. 9, and point 7. [↑](#footnote-ref-70)
71. Sub II. 2. [↑](#footnote-ref-71)
72. HMG, White Paper, Executive Summary / A practical Brexit p. 11. [↑](#footnote-ref-72)
73. HMG, White Paper, point 111. [↑](#footnote-ref-73)
74. HMG, White Paper, point 112. [↑](#footnote-ref-74)
75. See above, sub III. 1. b). [↑](#footnote-ref-75)
76. *Nicolaides*, State Aid Control in the UK after its Exit from the European Union, article of 8/13/2018 published on StateAidHub.eu, available at <http://stateaidhub.eu/blogs/stateaiduncovered/post/9293>, sub “The Northern Ireland Factor” (retrieved on 11/4/2018). [↑](#footnote-ref-76)
77. HMG, White Paper, point 111. [↑](#footnote-ref-77)
78. See above, sub III. 1. b). [↑](#footnote-ref-78)
79. See above, sub II. 3. b). [↑](#footnote-ref-79)