



# Boardroom Brexit: What the deal means for state aid and competition

## BOARDROOM BREXIT

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### State aid

EU state aid law applies to assistance from state resources that is selective in its application and that has a potential effect on trade between EU member states and competition. So too, the TCA applies to a subsidy that is selective (although the word used is “specific”) and that “*has or could have* an effect on trade or investment” between the EU and the UK. The key question is how closely the new UK state aid authority and the courts will follow the EU jurisprudence. Despite containing no actual references to EU state aid law, many of the EU Treaty provisions and jurisprudence on aid are mirrored in the TCA but there are some interesting differences: the TCA does not catch subsidies related to the audio-visual sector and the de minimis threshold, which in EU law is €200,000 over three years, is almost double under the TCA – SDR 325,000 (€380,000).

The TCA obliges the UK to establish a subsidy control system based on seven principles including that subsidies must pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale and be proportionate and limited to what is necessary to achieve that objective and the TCA requires the prohibition of certain specified subsidies if “the subsidies concerned have or could have a material effect on trade or investment” between the EU and the UK.

The TCA does not oblige the UK to follow the EU approach that aid cannot be implemented until notified and approved, but, as mentioned, it does require the UK to establish an independent subsidy control authority and to give the courts powers of review and enforcement. In order to give recipients legal certainty, it may nonetheless prove necessary for the UK authority to authorise aid in advance and to publish block exemptions. The TCA contains specific actions that the EU or the UK can take if the other breaches the subsidy provisions.

The most unsatisfactory part of the TCA is that it makes no mention of how it will operate with Article 10 of the Ireland/Northern Ireland Protocol which applies EU state aid to measures that have an actual or potential effect on trade between Northern Ireland and the EU and which will apply to measures applying in the rest of the UK that have effects in Northern Ireland (despite an ineffectual attempt at clarification in the statement of the Joint Commitment on the Ireland / Northern Ireland Protocol on 8 December 2020).

### Competition

The EU and the UK have virtually identical systems of competition law and the TCA commits both parties to maintaining and enforcing competition law based on the common principles underlying them and by independent

competition authorities. The TCA envisages cooperation between the UK and EU competition authorities on the basis of a further agreement to be made between the UK and the EU and with member states.

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