REVIEW OF THE BALANCE OF COMPETENCES – CONSUMER AND COMPETITION POLICY REPORT

RESPONSE OF THE UK STATE AID LAW ASSOCIATION ("UKSALA")[1]

1. Given its remit, UKSALA responds only to the State aid aspects of the Review.

I BRIEF SUMMARY OF THE PRESENT REGIME

2. The present Treaty provisions governing State aid (now Articles 107 and 108 TFEU) date in all essential respects from the outset of what was originally the European Economic Community.

3. Those provisions are replicated in Article 61 of the EEA Agreement, and so fully extend to the EEA Contracting Parties (in relation to which the EFTA Surveillance Authority plays in all essential respects the same role as the Commission in the EU, interpreting both the substantive and procedural rules in the same way as the corresponding EU State aid rules[2]). So, were the United Kingdom to leave the EU and instead become a Contracting Party to the EEA Agreement, that would have no material impact on the application of State aid law in the United Kingdom.

4. The State aid provisions of the TFEU prohibit the grant of aid, without prior notification to and clearance by the European Commission, by Member States (including central, regional and local government and

[1] UKSALA has over 200 members: its members include barristers and solicitors in private practice and in employment in the private and public sectors (including central government, the devolved administrations, and local government), as well as economists and officials with a professional interest in State Aid matters. Its President is Judge Christopher Vajda, Judge of the Court of Justice of the EU. See www.uksala.org.uk.

[2] References to the Commission in this paper therefore include references to the ESA in relation to the EEA Contracting Parties.

public sector bodies whose acts are attributable to the State) to "undertakings", a broad term that includes private companies as well as many non-profit making bodies.

5. The Commission therefore plays a central role in the system of State aid control: -

    a. It is, for most practical purposes[3], the only entity that has the power to authorise State aid, that is to say to find it compatible with the common market under Article 107(3) TFEU;

    b. It has power to issue block exemptions from the requirement to notify State aid; and

    c. It has the duty to enforce the State aid rules, and is equipped with powers of investigation and enforcement, including the power to order the repayment of unlawfully granted and incompatible aid.

6. National courts also play a key role in the enforcement of the State aid rules: -

    a. National courts must grant appropriate relief to complainants if there is a breach or threatened breach of the State aid rules – that relief may include injunctions preventing the implementation of aid that has not been notified to and approved by the Commission;

    b. National courts must enforce recovery orders made by the Commission; and

[3] The power of the Council under Art.108(2) to authorise aid is limited to exceptional circumstances, and cannot be used where the Commission has already taken a decision.

c. National courts may also award damages against the grantor of unlawful aid to adversely affected parties.

7. The question of what counts as State aid is plainly a central aspect of the regime, and has generated a complex jurisprudence. For present purposes, we would highlight the following aspects (which we summarise very briefly): -

a. The concept catches not just traditional subsidies, but all forms of selective advantages, including loans at favourable rates, guarantees, tax derogations, sales of land, privatisations, and contracts on favourable terms;

b. The concept catches grants in favour of groups of undertakings, and in favour of large parts of the economy;

c. The concept does not catch general measures (such as, for example, general tax measures such as national rates of corporation tax, or general infrastructure projects) – though the dividing line between general measures that are not State aid and selective measures that are State aid is notoriously tricky;

d. The concept does not catch certain measures whose differential effect is found to be justified by the inherent features of the relevant system, but again the dividing line between this and measures that are not so justified is extremely difficult and ill-defined in the jurisprudence; and

e. The concept is capable of catching what might be thought to be relatively insignificant measures – that is because, although a measure must have a potential effect on trade between Member States and a potential effect of distorting competition to count as

State aid, those two concepts are broadly applied in the field of State aid.

II NEED FOR THE STATE AID REGIME

8. We consider that the need to control State aid is, in the European context, an essential aspect of the internal market.

9. In saying that, we are well aware that the example of the United States shows that in certain circumstances an internal market can be created without any control over States' power to grant subsidies. But we consider that the European context is very different: -

    a. EEA Member States have historically played a greater role in the economy than have public authorities in the US; and

    b. The spending of European States accounts for a much higher proportion of GDP than does sub-Federal spending in the US, and at European level public spending is minimal, compared with the very substantial amount of Federal spending in the US.

10. There is therefore a much greater risk in Europe, compared to the US, that spending by Member States in favour of particular undertakings could distort competition, and that risk is not counterbalanced, as it is at Federal level in the US, by a very substantial amount of public spending at European level.

11. It seems to us that there are at least three broad justifications for State aid control: -

    a. The need to avoid disruption to the internal market by, for example, Member States promoting "national champions" as a

way of reducing competition from imported goods – this was, historically, the principal rationale for the State aid rules;

b. The need to avoid distortions of competition as between undertakings benefitting from aid and those that do not; and

c. The need to prevent the waste of public resources that flows from "subsidy races" e.g. competition between Member States to attract a particular industrial investment.

12. That latter objective can be broadened into a general objective of preventing Member States from wasting their taxpayers' money. However, though there is plainly always a risk in any modern political system that special interest groups with a strong interest in obtaining subsidy will be able to prevail in the face of a weaker general public interest in not giving it, we regard the protection of taxpayers' money in itself as being a matter for individual Member States: but we do see the three objectives set out above as calling for EU competence, given the clear cross-border effects of unrestrained subsidies on the internal market, on competition, and on national finances.

13. From a UK perspective, we have no doubt that the State aid regime as benefits the competitiveness of the United Kingdom and the ability of UK companies to compete fairly across the EEA on a level playing field. The airline industry is but one example of an industry where the ability of the Commission to prevent other Member States from subsidising "national champions" has been a central element in the development of a competitive market in which UK business can compete fairly and consumers can gain the benefit of that competition.

14. Although all EEA Member States are members of the World Trade Organisation ("WTO") we would not regard the WTO subsidies

framework as offering UK business anything like the same protection from the distortive effect of subsidies by other Member States as is offered by the State aid rules. First, the WTO Agreement on Subsidies and Countervailing Measures does not extend to services (a key area for the United Kingdom). Second, save in relation to export subsidies and subsidies contingent on use of domestic goods, subsidies can be challenged only if they can be shown to cause adverse effects, which a complaining WTO member State has to prove. Third, the WTO regime relies on enforcement by complaining member States, and provides no mechanism for affected businesses themselves to take action about subsidies that harm them: in complete contrast, the EU State aid regime allows affected businesses both to complain to the Commission and to take action themselves in the courts of all Member States to prevent unlawful aid.

III COMMENTS ON THE STATE AID REGIME AND THE PRESENT BALANCE OF COMPETENCES

15. We have described above the central role that the Commission plays in the State aid regime.

16. In our view, it is hard to see any adequate alternative to the central role played by the Commission. It is true that in the field of antitrust – Articles 101 and 102 TFEU – the Commission's central enforcement role has since 2004 been largely shared with national competition authorities of Member States, so that the Commission now deals only with large cases of genuinely trans-national importance. But it is not easy to see how one could satisfactorily decentralise the State aid regime in a similar way, dealing as it does with decisions taken by government, and often by central government: it is very difficult to have much confidence that, in many if not most Member States, any purely national authority charged with enforcing State aid would be able to free itself from what

are often powerful pressures at domestic level to approve politically attractive arrangements between government and business. Although it would be naïve to think that the Commission is completely immune from political pressures, the Commission has the advantages over any national body of operating at some distance, of being insulated from most kinds of political or legislative interference, of being under the direct and active scrutiny of other Member States and the European Parliament, and of being subject to the control of the EU Courts.

17. That said, we think there are some powerful criticisms that could fairly be made of the scope and effectiveness of the EU State aid regime.

18. First, the Commission's central role in the State aid regime can lead to unacceptable delays before entirely justified aid measures can take effect. The Commission has been able to take State aid decisions very fast – overnight in the case of at least one of the measures notified during the banking crisis – but in general the process will delay any notified project by many months, and often years if an in-depth investigation is launched or if a third party challenges a Commission decision in the General Court.

19. We very much welcome the Commission's approach of seeking to broaden block exemptions, of issuing detailed guidance as to its approach and setting up various categories of aid that can be "fast-tracked", but the delay in issuing decisions remains a problem that causes considerable expense and frustration to all those involved in the process. As for delays in the General Court, these have now reached unacceptable levels and we would endorse the call for some way to be found out of the impasse that now exists in relation to the method of appointing the additional judges to which Member States have agreed in principle.

20. A prime example of such delays is the *British Aggregates Association* litigation,[4] where it took the European Courts almost ten years to annul the original Commission decision finding that the Aggregates Levy was not aid, and the Commission then took over 16 months merely to decide to open the formal investigation procedure (in a normal case of new notified aid, the Commission is subject to a two month deadline from receipt of a complete notification by the Member State, in which it must decide whether to open the formal investigation procedure, but the currently procedural rules unfortunately contain no provision for the timing of a new Commission decision if its original decision has been annulled). As a result of these extraordinary delays, the domestic proceedings have now been pending for 12 years and are still unresolved.

21. Second, and related to the problem of delay, is the point that the State aid regime catches too many cases that are not genuinely of cross-border interest. As we noted above, the requirements that a State aid have a potential effect on trade between Member States and that it have a potential effect on competition have been interpreted broadly, so that many aids with only a minimal prospect of a significant cross-border effect are caught. Although the Commission has issued (and recently revised) a *de minimis* Regulation making it clear that aid below certain thresholds (essentially, aid to one undertaking of a value of less than €200,000 over three years) is not caught by the State aid rules, that leaves many aids with little conceivable distortive effect on competition or impact on trade between State at least arguably caught by the State aid rules. The effect is that (unless they can be made to fit within a block exemption, which is frequently not possible) many desirable local projects either have to be delayed pending notification, proceed at the

[4] See Case T-210/02 RENV *British Aggregates Association v Commission*, judgment of 7 March 2012 for the most recent substantive judgment.

commercial risk that the beneficiary may have to repay the aid if there is a complaint (a risk that can endanger parallel commercial funding of such projects), proceed in a way that excludes private sector involvement so as to eliminate aid risk, or simply do not go ahead at all.

22. Third, as we have already noted, the distinction between what is and is not a State aid can be very difficult to draw, particularly (although not only) in relation to taxation measures such as at issue in the *British Aggregates Association* litigation referred to above. That uncertainty is compounded if the ultimate EU arbiters of the issue take a decade or more to resolve the issue.

23. We accept that the problems identified above are difficult to resolve within the current State aid regime: indeed, the problems associated with the scope of the State aid regime stem from case-law based on the State aid provisions of the TFEU and would be difficult to resolve without treaty change. But we would also point out that any attempt to change those treaty provisions could well be problematic from a UK perspective, in that they could well weaken the scope and enforceability of the State aid rules in way that harms the ability of UK business to deal with harmful interventions by other Member States in favour of their competitors.

IV CONCLUSION

24. We would readily accept that the State aid regime does give rise to EU competence - and to problems of delay - in many aspects of central and local government decision-making. Some of those problems, such as delay, could be resolved within the current Treaty framework, but other problems are difficult to resolve without a substantial risk of weakening the regime, to the prejudice of UK business when dealing with the actions of other Member States.

25. Striking the correct balance is ultimately a political question on which views may legitimately differ. However, we would caution against any temptation to focus on the day-to-day constraints that the State aid regime can place on governmental decision-making while losing sight of the point that in general the State aid regime is in the interests of UK business and assists UK competitiveness.

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