



Kelly Tolhurst MP  
Minister for Small Business, Consumers and Corporate Responsibility  
Department for Business, Energy and Industrial Strategy  
1 Victoria Street  
London  
SW1H 0ET

1 July 2019

Dear Ms Tolhurst,

## **House of Lords EU Internal Market Sub-Committee – post-Brexit State aid and associated matters**

1. On 2 February 2018 we published our report *Brexit: competition and State aid*,<sup>1</sup> which examined options for the UK competition and State aid regime after the UK leaves the EU. Our report highlighted that, unlike other aspects of competition law and policy, State aid falls under the exclusive competence of the EU. This means that, unless an exemption applies, Member States must not implement aid without the approval of the Commission. A domestic State aid framework will therefore be needed to replace the EU system after Brexit.
2. As you are aware, the Government announced its intention to designate the Competition and Markets Authority (CMA) as the UK's domestic State aid authority in a letter to us dated 28 March 2018. This is to be given legal effect by the Statutory Instrument (SI) laid before Parliament on 21 January 2019.<sup>2</sup> The SI preserves most EU State aid law, subject to some corrections to make the framework operable in a domestic context.
3. While we welcome the clarity brought by these developments, we are aware of the longer-term questions around UK State aid policy and its implications for the future UK-EU trading relationship, as well as the challenges facing the CMA as the UK's domestic State aid authority. The recent British Steel case has rekindled public debate on some of these issues, in particular the extent to which EU law has constrained the Government's ability to support domestic industries.

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<sup>1</sup> European Union Committee, *Brexit: competition and State aid* (12th Report, Session 2017–19, HL Paper 67)

<sup>2</sup> Draft SI: [Draft State Aid \(EU Exit\) Regulations 2019](#)

4. On 9 April 2019, we wrote to Lord Tyrie, Chair of the CMA, to request an update on the CMA's preparations for its new responsibilities. Lord Tyrie provided a helpful response on 9 May, including estimates of the CMA's casework increase, progress in recruiting additional staff and stakeholder engagement.<sup>3</sup>
5. To assist our ongoing deliberations, we held an oral evidence session on 20 June 2019 with Jonathan Branton and Alexander Rose from the law firm DWF Law LLP, where we discussed the opportunities and challenges for the enforcement of State aid in a UK-only context in the light of developments in the 18 months since we published our report.<sup>4</sup>
6. This letter summarises our reflections, drawing on our report and recent evidence session. It also sets out conclusions and requests for clarification (in bold text). We would be grateful for a response no later than **Thursday 25 July 2019**.
7. We copy this letter to Lord Tyrie, Chair of the Competition and Markets Authority, Rachel Reeves MP, Chair of the House of Commons Business, Energy and Industrial Strategy (BEIS) Committee, and Chris Shaw, Clerk to the Commons BEIS Committee.

### The UK's domestic State aid framework

8. In the Explanatory Memorandum (EM) to the draft State aid SI, the Government states that the Secretary of State of the Department for Business, Energy and Industrial Strategy (BEIS) will produce guidance on the "approach to approving aid under Article 107(3) TFEU".<sup>5</sup> In the EU context, this Article sets out areas where the Commission has broad discretion over whether to approve aid, e.g. aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.
9. The EM further notes that the CMA will publish guidance on its processes in relation to handling State aid cases and on the exercise of its discretion to approve aid. Earlier this year the CMA consulted on draft procedural guidance on the processes the CMA intends to use when examining and investigating notified aid in the event of a 'no deal', as well as information on reporting, monitoring and transparency obligations. It intends to publish further guidance dealing with other aspects in due course.<sup>6</sup>

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<sup>3</sup> Letter from Lord Tyrie, Chair of the Competition and Markets Authority, to Lord Whitty, Chair of the House of Lords EU Internal Market Sub-Committee (9 May 2019): <https://www.parliament.uk/documents/lords-committees/eu-internal-market-subcommittee/brexit-competition/090519-Letter-from-Andrew-to-Lord-Whitty-re-Brexit-competition-and-state%20aid.pdf> [27 June 2019]

<sup>4</sup> The transcript of our session with Mr Branton and Mr Rose is available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-competition/oral/103380.html>.

<sup>5</sup> See the [Draft Explanatory Memorandum](#) to the Draft State Aid (EU Exit) Regulations 2019.

<sup>6</sup> Competition and Markets Authority, *Draft procedural guidance on state aid notifications and reporting*, 4 March 2019: <https://www.gov.uk/government/consultations/guidance-on-state-aid-notifications-and-reporting> [accessed 27 June 2019]

10. The draft State aid SI would also give the CMA powers of entry for State aid investigations. In the EM, the Government describes these powers as “similar” to those enjoyed by the Commission under EU rules and states that they “will only be exercised when appropriate and necessary”. We note that dawn raid powers may go beyond what is necessary, given the public sector nature of State aid.
11. In our recent oral evidence session, Mr Rose set out the difficulties of not yet having a legal framework in place. He described a state of limbo for the CMA, as “it is quite feasible that there will be modifications to the rules that it will currently be asked to apply and to the role that it will have”. This has knock-on effects for the Government and devolved administrations as funders, as they cannot take forward any files to the CMA or initiate informal ‘warm up’ discussions as they would with the Commission.
- 12. We concluded in our 2018 report that the Government should clarify its position on the shape of the future UK State aid framework as soon as possible. The publication of the State aid Statutory Instrument setting out a continuity framework, and the announcement that the CMA will be the UK’s domestic State aid authority go some way to achieving this. Nonetheless, UK stakeholders still face considerable uncertainty over the final shape of the post-Brexit regime.**
- 13. Can the Government clarify when it expects to publish its guidance on the approach to approving aid under Article 107(3) TFEU? We also seek further information on the dividing line between aspects of the domestic State aid regime that will be subject to guidance issued by the Government, and those that will fall exclusively within the remit of the CMA.**
14. In its letter to us of 9 May 2019, the CMA explained that, after Brexit, it expects to receive 14 State aid notifications a year, plus an additional six cases arising from complaints or the CMA’s proactive monitoring. Of these about two are likely to lead to full (‘Phase 2’) investigations. In our recent evidence session, it was however highlighted by way of example that there were 32 complaints against UK measures between 1 January 2013 and mid-April 2014.
15. Mr Rose also pointed out that some State aid measures might be currently “considered too difficult or too risky to take forward”, given current uncertainties, and instead held back and notified “[when] we have a new State-aid regulator in place”.
- 16. We are grateful to the CMA for its ongoing engagement with the Sub-Committee and for the information it has provided on its projections for UK State aid cases.**
- 17. We ask the Government to clarify how closely the CMA’s projections reflect historical annual figures for UK notifications and investigations into UK measures—arising from complaints or proactive monitoring—including full (‘Phase 2’) investigations. Has there been a decrease in the number of UK notifications to the Commission since the 2016**

**referendum? If so, might this suggest that notifications are indeed being delayed until there is greater clarity on the post-Brexit framework?**

*Engagement with the devolved administrations*

18. We emphasised in our report the need to involve and secure the support of the devolved administrations in the process of establishing a domestic State aid regime. We note that there has been disagreement between the UK Government and the devolved administrations on whether State aid is a reserved or a devolved matter.<sup>7</sup>

**19. We strongly reiterate the recommendation in our report that the Government should involve and secure the support of the devolved administrations in devising the future UK State aid framework. We would therefore welcome an update on how the Government is engaging with the devolved administrations.**

**20. How has the UK Government addressed the Welsh Government's request for an explanation of the legal position that State aid is a reserved matter?**

**Future UK State aid policy**

21. As things stand, after Brexit, the UK will have a domestic State aid system that mirrors that applied in the EU. While this provides welcome short-term continuity, the Government will be faced with State aid policy choices over the longer term. We recall the findings in our report that the EU has, in almost every case, insisted that trade agreements with third countries include some form of controls on State aid, and that in any Brexit scenario, the UK will still be bound by its obligations under the WTO Agreement on Subsidies and Countervailing Measures (ASCM).

*Public funding*

22. While the longer-term shape of the UK State aid regime will be influenced by the future UK-EU relationship, there is a wider policy question to be considered when discussing aid, which pre-dates Brexit: the extent to which a Government is willing to provide resources, and how it decides to allocate them.

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<sup>7</sup> Letter from Mick Antoniw, Chair of the Constitutional and Legislative Affairs Committee of the National Assembly for Wales, to Sir Bernard Jenkin, Chair of the House of Commons Public Administration and Constitutional Affairs Committee (6 February 2019): [https://www.parliament.uk/documents/commons-committees/PACAC/Correspondence/Letter%20from%20National%20Assembly%20for%20Wales%20to%20Chair%20on%206.2.19%20regarding%20The%20State%20Aid%20\(EU%20Exit\)%20Regulations%202019.pdf](https://www.parliament.uk/documents/commons-committees/PACAC/Correspondence/Letter%20from%20National%20Assembly%20for%20Wales%20to%20Chair%20on%206.2.19%20regarding%20The%20State%20Aid%20(EU%20Exit)%20Regulations%202019.pdf) [accessed 26 June 2019]

Letter from Ivan McKee MSP, Minister for Trade, Investment and Innovation of the Scottish Government, to Gordon Lindhurst MSP, Convener of the Economy, Energy and Fair Work Committee of the Scottish Parliament (28 January 2019): [https://www.parliament.scot/S5\\_EconomyJobsFairWork/Inquiries/20190128-Minister-Trade\\_Investment\\_Innovation-State\\_Aid\\_Regulations.pdf](https://www.parliament.scot/S5_EconomyJobsFairWork/Inquiries/20190128-Minister-Trade_Investment_Innovation-State_Aid_Regulations.pdf) [accessed 26 June 2019]

23. Mr Branton put it: “it is one thing to work out how State aid will be rendered legal or enforced, but it is another to work out what government policy will be when it comes to making funds available in the first place.” Indeed, our 2018 report highlighted that despite State aid constraints, successive Governments have been able to provide support to major projects. We also reported that the UK spends considerably lower sums on State aid than other Member States, such as France and Belgium.
24. While bearing this in mind, Mr Branton further explained that, historically, there has been a degree of coordination between the design of EU State aid rules and the EU industrial policy. He noted that, for example, the EU State aid regime has been geared towards greater funding to research and development activities and small and medium-sized enterprises. He argued that it is in theory possible for the UK State aid regime to go through a similar process after Brexit, and be “broken apart and reassembled as the Government of the day sees fit”.
25. Our recent evidence session also highlighted the opportunity brought by Brexit for the UK to update its regional aid map, which sets out economically underperforming areas in the UK which are allowed to receive higher intensities of State aid under several block exemptions. Mr Rose argued that the map’s update could be coordinated with the design of the UK Shared Prosperity Fund (UKSPF) that is intended to succeed EU structural funds in the UK. He explained that the Government will have some discretion to calculate “the basis on which we determine what is and is not an assisted area”.
26. We note that the consultation on the UKSPF has still not been published.
- 27. While alignment with EU State aid rules provides welcome continuity in the short term, Brexit will present the Government with an opportunity to reshape the domestic State aid framework around its economic and industrial policies—as done by the EU in designing its own State aid regime. We recall the findings in our report that these choices will involve trade-offs between domestic priorities and the level of access sought to EU markets.**
- 28. We note that the Government in fact has two levers to modify the UK’s State aid regime: it can change the rules about what aid is legitimate but also the level and allocation of the funding it makes available.**
- 29. We ask the Government to provide information on plans for the future of the UK’s regional aid map. Has any preparatory work begun for its update, ahead of its expiry in 2020? Does the Government agree that there is an opportunity to coordinate this work with the design of the UK Shared Prosperity Fund?**

## *Block exemptions*

30. Our report highlighted that the overwhelming majority of EU State aid measures are covered by block exemptions, in particular the General Block Exemption Regulation (GBER). We note that the GBER is currently due to end in 2020, although the EU is in the process of exploring an extension up until the end of 2022.
31. To maintain continuity, EU block exemptions are carried over to UK law under the State aid SI. However, the Commission's powers to make and amend these exemptions are not. The EM accompanying the instrument explains that the Government does not think it is an appropriate correction to transfer these powers to the CMA or the Secretary of State.
- 32. We seek further clarity on the Government's plans for creation and amendment of block exemptions in the context of the UK's State aid regime. For how long does the Government intend for the UK's block exemptions to remain in lockstep with the EU?**

## *The steel sector*

33. On 22 May 2019, the Government announced that it had rejected a request for financial support from the steelmaker British Steel, on the grounds that its intervention would not have met the "required legal tests".<sup>8</sup> The company was subsequently placed in liquidation, and an official receiver from the Insolvency Service appointed to manage the liquidation process.
34. While all the facts surrounding the Government's options for intervention are not public, the British Steel case has again raised the question of whether EU State aid rules have constrained the Government's ability to support the steel sector. Such questions have been intensified by news that the French State will make an investment in a steel production site in Northern France, in partnership with British Steel's investor Greybull Capital.
35. We consider the case of British Steel as an example of the kinds of policy questions the Government may face after Brexit. We undertook an initial examination of some of these matters in our recent evidence session.
36. Mr Branton set out how the EU State aid framework applies to the steel sector: "broadly speaking the steel sector is excluded from regional aid rules, so you cannot give it manufacturing aid and you cannot go in and bail out a failing steel producer based on the rescue and restructuring guidelines".<sup>9</sup> Mr Rose observed however that a government investment would not be State aid if it was akin to one that a "private, commercial investor" would also make—a concept known as the 'market economic operator principle'.

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<sup>8</sup> HC Deb, 22 May 2019, [col 757](#) [Commons ministerial statement]

<sup>9</sup> The EU's rationale is that steelmaking is affected by long-standing oversupply, within Europe and globally, and faces stiff competition from non-EU producers. Steel companies should not, therefore, be reliant on public funds to survive, but should be entitled to receive aid aimed to boost their competitiveness. See [statement by Commissioner Vestager](#) on EU State aid rules in the steel sector, 20 January 2016.

37. Mr Branton highlighted other policy instruments that could be utilised to boost the steel industry. He said that State aid rules for the steel sector “are more restrictive than in most sectors, but it is not the case that you cannot do anything”. Mr Branton noted that aid for research and development, for example, was not excluded for the steel sector. He also said that after Brexit: “The UK ... will be able to take its own view on whether or not it should maintain the current especially restrictive attitude on State aid for steel.” We consider therefore that the Government could seek to re-assess the appropriateness of the limitations on support to steel producers in the light of demand and supply of steel products within the UK, rather than the EU.
38. State aid is not the only lever used by the EU to further its objectives for the steel sector. The EU also relies on trade defence policy to protect EU steel producers from unfair international competition.<sup>10</sup> Commission figures show that, of the 35 new trade defence measures adopted by the EU between 2014 and 2018, 25 related to the steel sector.<sup>11</sup> Almost 44% of the EU trade defence measures in force at the end of the 2018 were against imports of steel products from third countries.<sup>12</sup>
39. After Brexit, the UK will operate a domestic trade defence regime, to be administered by an independent Trade Remedies Authority (TRA). The Department for International Trade (DIT) has set up a Trade Remedies Investigations Directorate to start preparatory work for the establishment of the new trade defence framework. This includes a call for evidence into UK interest in existing EU trade remedy measures (including in the steel sector). We note that EU measures which DIT does not receive sufficient applications to maintain are expected to be discontinued.<sup>13</sup>
40. Mr Branton told us that after Brexit there will be “an important dynamic there for the UK steel industry to retain the protection that it has previously enjoyed”. At the same time, he made the general point that maintaining unnecessary trade defence measures where “there is no domestic UK industry to protect” would mean “adding an extra tax on consumers”.
- 41. We make the initial observation that, after Brexit, the Government will have the opportunity to revise the assumptions underlying EU rules on State aid to the steel industry. For example, it will be able to assess to what extent the UK steel market is affected by domestic oversupply, and**

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<sup>10</sup> See [statement by Commissioner Vestager](#) on EU State aid rules in the steel sector, 20 January 2016.

<sup>11</sup> European Commission, *37th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2018*, 27 March 2018, p 8:

[http://trade.ec.europa.eu/doclib/docs/2019/march/tradoc\\_157810.pdf](http://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157810.pdf) [accessed 13 June 2019]

<sup>12</sup> European Commission, ‘Report on EU trade defence – effective protection against unfair trade’ (28 March 2019): <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2000> [accessed 26 June 2019]

<sup>13</sup> Department for International Trade, ‘Final findings of the call for evidence into UK interest in existing EU trade remedy measures’ (2 May 2019): <https://www.gov.uk/government/consultations/call-for-evidence-to-identify-uk-interest-in-existing-eu-trade-remedy-measures/outcome/final-findings-of-the-call-for-evidence-into-uk-interest-in-existing-eu-trade-remedy-measures> [accessed 26 June 2019]

**make adjustments to the framework accordingly. Such decisions will need to be taken in the context of the UK's wider State aid policy and implications for trading relationships, including with the EU. Has the Government initiated a consideration of the case for amending or exiting constraints on State aid for the steel industry based on UK circumstances?**

**42. The EU's strategy for the steel sector combines stringent State aid provisions with a robust trade defence policy. What cross-departmental coordination, if any, has there been in preparations for the UK State aid and trade defence frameworks post-Brexit?**

43. We look forward to your response to the conclusions and requests for clarification set out in this letter.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Lord Whitty', is enclosed within a thin black rectangular border.

Lord Whitty, Chair of the EU Internal Market Sub-Committee

**Appendix: Witnesses to the Sub-Committee's oral evidence session of 20 June 2019 on the UK's post-Brexit State aid framework**

Jonathan Branton, Partner, DWF Law LLP

Alexander Rose, Director, DWF Law LLP