The Agreement on the Withdrawal of the UK from the EU and Euratom and its impact on the future application of state aid rules in the UK

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Abstract
The Agreement on the Withdrawal of the UK from the EU provides that EU state aid rules will apply to the UK until the end of the transition period and to the trade of Northern Ireland at least until 31 December 2024 and from that date for as long as the agreed arrangements receive ‘democratic consent’. This article considers whether the Agreement may incentivize the UK to apply EU state aid rules in the rest of the UK. It concludes that the UK is likely to align itself to the EU’s regime.

Keywords
Brexit, withdrawal agreement, Article 50 TFEU, state aid, Northern Ireland

I. Introduction
The United Kingdom withdrew from the European Union on 31 January 2020. The Agreement on the Withdrawal of the UK from the EU aims to:

1. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 31 January 2020, OJ L 29, p. 7–187.

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1. Provide for reciprocal protection for EU citizens and UK Kingdom nationals who have exercised their right of free movement.
2. Achieve orderly withdrawal in order to prevent disruption and to ensure legal certainty.
3. Establish a transition or implementation period in order to negotiate an agreement on the future relationship and to enable the UK to prepare new international arrangements of its own, especially in areas of EU exclusive competence.
4. Agree on a financial settlement.
5. Create a binding dispute-settlement procedure and enforcement rules.
6. Provide for durable arrangements relating to Ireland/Northern Ireland, the Sovereign Base Areas in Cyprus and Gibraltar.

The Agreement has 185 Articles which are divided into six Parts, covering in total 180 pages. The Agreement also contains three Protocols and nine Annexes. It is accompanied by a 16-page Political Declaration that was published on the same day in the C series of the Official Journal.²

Given the second and third objective of the Agreement, the purpose of this article is to ask for how long the UK will have to abide by the EU’s rules on state aid. This is a timely and pertinent question because, according to press reports, the UK government intends to diverge from the EU’s regulatory regime, despite objections by its industry.³

In this context, there are at least two answers to the question posed above. The first answer, which is simple, straightforward but rather naïve, is that the UK will have to comply with the procedural and substantive rule on state aid for as long as the Agreement requires.

The second answer is indirect and far from simple. Naturally, the state aid rules that the UK will apply after the end of the transition period (see below) will to a large extent depend on the terms of the future relationship between the EU and the UK. However, this article argues that the provisions of the Agreement, especially those on Northern Ireland, will incentivize the UK to follow, if not adhere to, the EU’s practice and evolving rules.

The article is divided into eight sections. Section 2 presents the relevant dates on the implementation of the Agreement. Section 3 outlines the references to state aid in the Agreement. Section 4 examines the significance of the ‘democratic consent’ clause in the Protocol on Ireland/Northern Ireland. Section 5 asks what state aid rules may apply to Northern Ireland. Given the exclusive powers of the Commission in the field of state aid, section 6 considers what may happen if an infringement, non-compliance or a dispute arises. Section 7 speculates on the consequences for the rest of the UK of the application of state aid rules to Northern Ireland. Section 8 summarizes the main points of the analysis.

2. Application of the agreement: relevant dates

The Agreement has six Parts, three Protocols and nine Annexes, which are structured as follows:

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² Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, 31 January 2020, OJ C 34, p. 1–16.
³ G. Parker and J. Brunsden, ‘No 10 vision of fast-track trade deal at odds with industry: PM’s view on regulatory divergence criticized as it would bring friction at border’, Financial Times (2020), https://www.ft.com/content/be5697bc-314c-11ea-a329-0bcf87a328f2: ‘Boris Johnson will on Wednesday put himself at odds with some of Britain’s most successful industries when he sets out his plan to secure a fast-track trade deal with the EU that would see Britain diverge from the Brussels rule book.’
Part One [Articles 1–8]: Common provisions

Part Two [Articles 9–39]: Citizens’ rights

Part Three [Articles 40–125]: Separation provisions

Part Four [Articles 126–132]: Transition provisions

Part Five [Articles 133–157]: Financial provisions

Part Six [Articles 158–185]: Institutional and final provisions

Protocol on Ireland/Northern Ireland

Protocol on the UK sovereign bases in Cyprus

Protocol on Gibraltar

Annexes I–IX

Article 126 of the Agreement stipulates that ‘there shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.’

After this article was completed, the EU and the UK entered into ‘lock-down’ in response to the Covid-19 pandemic. The negotiations on the future relationship between the EU and the UK were put on hold and resumed only in mid-April 2020. The interruption caused by Covid-19 may force the UK to ask for extension of the transition period beyond the deadline of 31 December 2020.

Article 185 requires that ‘this Agreement shall enter into force on one of the following dates, whichever is the earliest: (a) the day following the end of the period provided for in Article 50(3) TEU, as extended by the European Council’.

The end of the Article 50 period had been set at 31 January 2020. Therefore, the Agreement entered into force on 1 February 2020. This is confirmed by a Notice that was published in the Official Journal.4

Part Two of the Agreement, which defines rights for citizens to move and reside in the EU and the UK, extends over the lifetime of citizens. Part Three of the Agreement is valid only for the duration of the transition period and aims to prevent disruption in trade. It also protects certain rights such as patents and maintains certain obligations such as enforcement of judicial decisions, after the end of the transition period if the rights are obtained and the obligations are assumed before the end date.

The Agreement also provides for a special treatment of Northern Ireland. Because that special treatment impacts on the application of state aid rules, it is necessary at this stage to explain that, according to Article 185 of the Agreement, the Protocol on Ireland/Northern Ireland shall apply as from the end of the transition period.

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4. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 31 January 2020, OJ L 29, p. 189.
3. Application of EU state aid rules

The Agreement deals explicitly with state aid at two places: (i) in Part Three on separation provisions and (ii) in the Protocol on Ireland/Northern Ireland.

The first reference to state aid is in Article 87, in Chapter 1 on Judicial Procedures, of Title X on Union Judicial and Administrative Procedures of Part Three, which defines the separation provisions.

Article 87 stipulates that:

1. If the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties or under Part Four of this Agreement [that lays down the rules on the transition period and related arrangements] before the end of the transition period, the European Commission may, within 4 years after the end of the transition period, bring the matter before the Court of Justice of the European Union in accordance with the requirements laid down in Article 258 TFEU or the second subparagraph of Article 108(2) TFEU, as the case may be. The Court of Justice of the European Union shall have jurisdiction over such cases.

2. If the United Kingdom does not comply with a decision referred to in Article 95(1) of this Agreement, or fails to give legal effect in the United Kingdom’s legal order to a decision, as referred to in that provision, that was addressed to a natural or legal person residing or established in the United Kingdom, the European Commission may, within 4 years from the date of the decision concerned, bring the matter to the Court of Justice of the European Union in accordance with the requirements laid down in Article 258 TFEU or the second subparagraph of Article 108(2) TFEU, as the case may be. The Court of Justice of the European Union shall have jurisdiction over such cases.

In other words, the UK will remain responsible until 31 December 2024 for illegal state aid or misused state aid that was granted before 31 December 2020. Indeed, Article 95 which concerns the binding nature and enforceability of decisions explicitly states that ‘decisions adopted by institutions, bodies, offices and agencies of the Union before the end of the transition period, or adopted in the procedures referred to in Articles 92 and 93 after the end of the transition period, and addressed to the United Kingdom or to natural and legal persons residing or established in the United Kingdom, shall be binding on and in the United Kingdom.’

Article 92 in Chapter 2 of Title X, Part three, refers to ongoing administrative procedures, and provides that:

1. The institutions, bodies, offices and agencies of the Union shall continue to be competent for administrative procedures which were initiated before the end of the transition period concerning: (a) compliance with Union law by the United Kingdom, or by natural or legal persons residing or established in the United Kingdom; or (b) compliance with Union law relating to competition in the United Kingdom.

3. For the purposes of this Chapter: (a) an administrative procedure on State aid governed by Council Regulation (EU) 2015/1589 shall be considered as having been initiated at the moment at which the procedure has been allocated a case number;

5. In an administrative procedure on State aid governed by Regulation (EU) 2015/1589, the European Commission shall be bound in relation to the United Kingdom by the applicable case law and best practices, as if the United Kingdom were still a Member State. In particular, the European Commission shall, within a reasonable period of time, adopt one of the following decisions: (a) a decision finding
that the measure does not constitute aid pursuant to Article 4(2) of Regulation (EU) 2015/1589; (b) a
decision not to raise objections pursuant to Article 4(3) of Regulation (EU) 2015/1589; (c) a decision to
initiate formal investigation proceedings pursuant to Article 4(4) of Regulation (EU) 2015/1589.

Next, Article 93 on new state aid provides that:

1. In respect of aid granted before the end of the transition period, for a period of 4 years after the end of
the transition period, the European Commission shall be competent to initiate new administrative
procedures on State aid governed by Regulation (EU) 2015/1589 concerning the United Kingdom.
The European Commission shall continue to be competent after the end of the 4-year period for
procedures initiated before the end of that period. Article 92(5) of this Agreement shall apply mutatis
mutandis. The European Commission shall inform the United Kingdom of any new administrative
proceedings on State aid initiated under the first subparagraph of this paragraph within 3 months of
initiating it.

In other words, the Commission will remain competent to complete a state aid procedure when
the procedure is initiated before 31 December 2020. It will also remain competent to launch a state
aid procedure until 31 December 2024 when the aid is granted before 31 December 2020.

The second place in the Agreement that deals with state aid is the Protocol on Ireland/Northern
Ireland. The Protocol is composed of 19 Articles and seven Annexes. Article 10 of the Protocol
defines how state aid affecting the trade of Northern Ireland is to be treated. Annex 5 of the
Protocol lists the EU rules on state aid and Annex 6 lays down specific arrangements for determining
the amount of public subsidies that may be granted to agricultural activities.

Article 10 reads as follows:

1. The provisions of Union law listed in Annex 5 to this Protocol shall apply to the United Kingdom,
including with regard to measures supporting the production of and trade in agricultural products in
Northern Ireland, in respect of measures which affect that trade between Northern Ireland and the
Union which is subject to this Protocol.

2. Notwithstanding paragraph 1, the provisions of Union law referred to in that paragraph shall not
apply with respect to measures taken by the United Kingdom authorities to support the production of
and trade in agricultural products in Northern Ireland up to a determined maximum overall annual level
of support, and provided that a determined minimum percentage of that exempted support complies
with the provisions of Annex 2 to the WTO Agreement on Agriculture. The determination of the
maximum exempted overall annual level of support and the minimum percentage shall be governed by
the procedures set out in Annex 6.

3. Where the European Commission examines information regarding a measure by the United King-
don authorities that may constitute unlawful aid that is subject to paragraph 1, it shall ensure that the
United Kingdom is kept fully and regularly informed of the progress and outcome of the examination
of that measure.

It is clear that all of EU state aid rules, which are listed in Annex 5, in conjunction with Article
10, will in principle apply to Northern Ireland. Moreover, as laid down in Article 185 of the
Agreement, according to which ‘the Protocol on Ireland/Northern Ireland shall apply as from the
end of the transition period’, EU rules will remain in force also after the end of the transition period.
4. Termination clause: ‘democratic consent’

However, under certain conditions, the application of EU state aid rules to the trade of Northern Ireland after the end of the transition period may be brought to an end. Article 18 of the Protocol lays down what is in essence a termination procedure which is labelled ‘democratic consent’ in Northern Ireland. Article 18 provides that:

1. Within 2 months before the end of both the initial period and any subsequent period, the United Kingdom shall provide the opportunity for democratic consent in Northern Ireland to the continued application of Articles 5 to 10.

Since Article 10 concerns state aid, it follows that the process of obtaining ‘democratic consent’ also covers the application of EU state aid rules.

Article 18(5) defines the ‘initial’ and ‘subsequent’ periods as follows:

For the purposes of this Article, the initial period is the period ending 4 years after the end of the transition period. . . ., the subsequent period is the 4 year period following that period.

Therefore, at minimum, EU state aid rules will apply to the trade of Northern Ireland until 31 December 2024. If democratic consent is secured at that point in time, state aid rules will apply for another four-year period until 31 December 2028 and so on.

5. Scope of application of state aid rules to the trade of Northern Ireland

There is no sectoral or activity-based restriction on the application of Article 107(1) TFEU. It follows that EU state aid rules should in principle apply to all sectors of the economy and all types of activity that affect the trade of Northern Ireland. Indeed Annex 5 of the Protocol that lists the relevant state aid rules in fact replicates all existing EU rules which have both horizontal and sectoral scope.

At this point, it needs to be stressed that Article 10(1) of the Protocol limits its scope to ‘measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol’ [emphasis added]. However, no Article of the Protocol lays down any explicit definition of trade that ‘is subject to this Protocol’. Only Article 5 contains specific provisions on the ‘movement of goods’.

Therefore, the possibility cannot be excluded that the scope of the Protocol is narrower than that of Article 107(1) TFEU. EU case law has made it clear that the concept of affectation of trade in the context of Article 107(1) is very broad indeed and is not subject to any quantitative limits. 5

At the same time, it should be noted that Article 10 does not refer to state aid granted to undertakings in Northern Ireland. It refers to ‘between Northern Ireland and the Union’ [emphasis added], which can be indirectly affected by state aid granted to UK undertakings established outside Northern Ireland. The implications of a possible indirect effect on the trade of Northern Ireland are examined in section 7 below.

5. See the judgments in Cases C-730/79 Philip Morris, EU:C:1980:209; C-280/00 Altmark Trans, EU:C:2003:415; C-518/13 Eventech v. The Parking Adjudicator, EU:C:2015:9.
In conclusion, it appears that Article 10 can be subject to both a narrow interpretation (that it concerns aid affecting only trade subject to the Protocol) and a wide interpretation (that it concerns aid that affects both directly and indirectly the trade between Northern Ireland and the EU).

6. What happens if there is an infringement or non-compliance or a dispute arises?

The Agreement contains at least three categories of provisions on settlement of disputes. The first category covers disputes, infringements and other forms of non-compliance during the transition period. The second category provides for dispute resolution after the end of the transition period. The third category covers problems arising from the application of the Protocol on Ireland/Northern Ireland after the end of the transition period.

With respect to the first category, Article 86 in Chapter 1 on Judicial Procedures of Title X on Union Judicial and Administrative Procedures of Part Three of the Agreement concerns pending cases. It provides that:

1. The Court of Justice of the European Union shall continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period.

2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

Article 89 concerning the binding force and enforceability of judgments and orders provides that:

1. Judgments and orders of the Court of Justice of the European Union handed down before the end of the transition period, as well as such judgments and orders handed down after the end of the transition period in proceedings referred to in Articles 86 and 87, shall have binding force in their entirety on and in the United Kingdom.

Of course, whether the ‘binding force’ will also have a lasting or long-term effect will depend on the facts of the case.

Therefore, if there is non-compliance or an infringement during the transition period, EU law applies and the EU Court of Justice will have competence to adjudicate. During the subsequent four-year period up to 31 December 2024, the Court of Justice will be able to hear state aid cases which were started before 31 December 2020 or concerning state aid that was granted before 31 December 2020. The Court and the Commission will not have competence over state aid granted after 31 December 2020.

With respect to the second category, in general the Court of Justice will not have jurisdiction after the end of the transition period. Disputes will have to be resolved by a Joint Committee of representatives of each side, which will be established on the basis of Article 164 of the Agreement. It will be responsible for the ‘implementation, application and interpretation’ of the Agreement for as long as the Agreement remains in force. The Agreement is for an indefinite period of time, but some parts of it such as the Protocol on Ireland/Northern Ireland may expire (because it receives no ‘democratic consent’), or it may be superseded by a new agreement on a future relationship between the EU and the UK.
Article 166(2&3) of the Agreement requires that ‘the decisions adopted by the Joint Committee shall be binding on the Union and the United Kingdom’ and that ‘the Joint Committee shall adopt its decisions and make its recommendations by mutual consent.’

All disputes will have to be resolved according to the procedures established by the Agreement and with the use of instruments defined in the Agreement. This is because Article 168 stipulates that ‘for any dispute between the Union and the United Kingdom arising under this Agreement, the Union and the United Kingdom shall only have recourse to the procedures provided for in this Agreement.’

Article 170 foresees what may happen in case of inability by the Joint Committee to decide. ‘If no mutually agreed solution has been reached . . ., the Union or the United Kingdom may request the establishment of an arbitration panel. Such request shall be made in writing to the other party and to the International Bureau of the Permanent Court of Arbitration.’

An arbitration panel shall be composed of five members (Article 171(3)). The members of a panel will be independent legal experts. ‘The arbitration panel ruling shall be binding on the Union and the United Kingdom’ (Article 175). ‘The arbitration panel shall make every effort to take decisions by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, the matter at issue shall be decided by majority vote’ (Article 180).

Therefore, disputes on the interpretation of the Agreement after the end of the transition period will have to be resolved at a first stage by the Joint Committee and ultimately by an international arbitration panel.

With respect to the third category of dispute resolution, the Protocol lays down special arrangements for state aid that supplement the normal or standard dispute settlement mechanism explained above. These special arrangements also apply to technical regulations, electricity, VAT and excise taxes.

Article 12(1) of the Protocol provides that:

Without prejudice to paragraph 4, the authorities of the United Kingdom shall be responsible for implementing and applying the provisions of Union law made applicable by this Protocol to and in the United Kingdom in respect of Northern Ireland.

Then Article 12(4) stipulates that:

As regards . . . Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect. [Article 267 TFEU provides for references by national courts requesting the Court of Justice for preliminary rulings on the interpretation of EU law.]

It follows that for as long as the Protocol remains in force, the Court of Justice will remain the ultimate arbiter of the application of EU state aid rules with respect to the trade between Northern Ireland and the rest of the EU.

Moreover, according to Article 4(5) of the Agreement, ‘in the interpretation and application of this Agreement, the United Kingdom’s judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period’ [emphasis added].
7. Consequences for the rest of the UK of the application of EU state aid rules in Northern Ireland

Section 5 above expressed uncertainty as to the type of trade that is ‘subject’ to the Protocol on Ireland/Northern Ireland. This uncertainty notwithstanding, it is worth speculating how the application of EU state aid rules to the trade of Northern Ireland may affect subsidies granted in the rest of the UK, in the absence of any future agreement between the EU and the UK that would regulate that matter.

It is clear that the UK will have to conform with EU state aid rules when it grants state aid to companies based in Northern Ireland until 31 December 2024 at minimum and from thereon until the Protocol receives ‘democratic consent’. Such aid will have a direct impact on the trade of Northern Ireland and the EU. But the important question that arises is whether it will have to conform with those rules after the transition period when it grants aid to companies based in the rest of the UK?

If it wants to maintain a level-playing-field between companies in Northern Ireland and elsewhere in the UK and avoid the emergence of a two-region aid regime, then, even though it will not be legally obliged to do so, in practice it will have to stick to the present set of rules and follow the evolution of the EU’s own regime.

It should be noted that there is nothing in the EU regime that compels a Member State to grant aid. Member States are free to grant less aid than the maximum aid intensities allowed by the various regulations and guidelines or to grant no aid at all. The UK may, therefore, decide to reduce the amount of aid that it grants to companies outside Northern Ireland.

But apart from granting less aid, would it be able to grant aid on different terms and conditions and for purposes not allowed by the present or future rules so that such aid would not conform with EU rules?

The answer to this question depends on how such non-conforming aid would affect trade between Northern Ireland and the EU. State aid can impact on cross-border trade directly or indirectly. If, for example, non-conforming aid increases UK exports to Northern Ireland inducing as a result Northern Irish companies to divert sales from their domestic market to the Republic of Ireland or if non-conforming aid harms exports of North Irish companies to the rest of the UK inducing them to divert their exports to the EU or non-conforming aid harms in any other way Northern Irish companies, there will be an indirect effect on trade that would be sufficient for the application of Article 107(1) TFEU.

It follows that if the UK grants aid breaching the de minimis threshold and on different terms than those in the EU, there will be no legal certainty as to the conformity of that aid with Article 10 of the Protocol and, consequently, with Article 107 TFEU.

But it is more likely that the UK is more likely to align itself to EU rules. Part XIV of the Political Declaration on the future relationship between the EU and the UK, that accompanies the Withdrawal Agreement, refers to the need to maintain a ‘level playing field for open and fair competition’.

In particular paragraph 77 of the Declaration states the following:

Given the Union and the United Kingdom’s geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards,
environment, climate change, and relevant tax matters. The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards. In so doing, they should rely on appropriate and relevant Union and international standards, and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement. The future relationship should also promote adherence to and effective implementation of relevant internationally agreed principles and rules in these domains, including the Paris Agreement.

8. Conclusions

This article has examined how the Agreement on the Withdrawal of the UK from the EU may affect the application of EU state aid rules in the UK. During the transition period that ends on 31 December 2020, the current state aid regime will apply and the Commission and the Court of Justice will remain competent up to 31 December 2014 to deal with state aid that is granted before 31 December 2020. Of course, now, as a result of the Covid-19 pandemic, the transition period may be extended.

EU state aid rules will continue to apply to Northern Ireland, and the Commission and Court of Justice will retain their competence to deal with cases of state aid for as long as the Protocol on Ireland/Northern Ireland is in force. At minimum, it will remain in force until 31 December 2024.

In order to avoid distortions between Northern Ireland and the rest of the UK and to honour the commitment made in the Political Declaration for a level playing field between the UK and the EU, the UK is unlikely to deviate from the EU’s current or future state aid regime. However, the UK may try to ensure that non-conforming aid does not affect trade directly or indirectly or it may reduce the amount of state aid it grants to its own companies without infringing EU state aid rules.

After this article was completed, the pandemic changed radically economic conditions across Europe and the world. All European countries have pumped large amounts of state aid in their economies. According to the conclusions of the meeting of Eurogroup ministers on 9 April 2020, the emergency liquidity that was injected in EU economies had reached 16% of GDP.6 Data from DG Competition of the European Commission indicate that by 20 April 2020 the UK had been authorized to grant close to EUR 60 billion of state aid to combat Covid-19.7 It is unlikely that the amount of state aid will decline any time soon.

Author notes

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6. This is contained in a statement of the Chair of the Eurogroup which can be accessed at: https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/remarks-by-mario-centeno-following-the-eurogroup-videoconference-of-9-april-2020/

7. A list of Commission decisions authorized state aid to combat Covid-19 can be accessed at: https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf