UK State Aid Law Association – Written evidence (CMP0008)

1. This paper has been prepared by the Joint Convenors of the UK State Aid Law Association (UKSALA), together with Isabel Taylor. UKSALA was formed in 2012 to provide a forum for lawyers, economists, academics, businesses and the public sector to discuss State aid issues. It has around 300 members on its mailing list. It operates a website (www.uksala.org). For the avoidance of doubt, it should be noted that the views expressed in this paper are those of its authors, and do not necessarily represent the views of any other member of UKSALA.

2. Given its remit, this paper comments only on the State aid aspects of the Committee’s Inquiry.

3. The present authors have prepared two detailed papers on State aid and Brexit, which can be found at http://uksala.org/paper-on-post-brexit-options-for-state-aid/ and http://uksala.org/bringing-state-aid-home-could-an-effective-domestic-state-aid-regime-be-devised-for-the-uk/. As the Committee will see, many of the questions that it raises are covered in those papers. This written evidence aims to summarise and update what was said in those papers.

4. In our view: -

   a. State aid rules are likely to form a key provision of any future deep and special trade relationship with the EU. But they should not be regarded as an unwelcome price for such a relationship: they serve a number of important purposes within the United Kingdom.

   b. Use of the existing EEA mechanisms (the EFTA Court and EFTA Surveillance Authority (“ESA”)) is the most obvious and pragmatic approach. But, on the assumption that the United Kingdom will not be seeking membership of the EEA, agreement would need to be reached on “borrowing” those mechanisms for this purpose (and possibly a limited number of other purposes).

   c. The alternative would be a domestic regime. That would raise a number of practical and constitutional issues, and it would also require a domestic State aid authority, which we suggest should be the Competition and Markets Authority (“CMA”) or an associated agency. However, it could be made to work, and could potentially offer certain advantages over the current EU regime.
Are state aid provisions likely to form an essential component of any future trade agreement between the UK and EU? Do any existing trade agreements between the EU and third countries provide a useful precedent for future UK-EU state aid arrangements?

5. The EU has stated (see §20 of the European Council’s Guidelines) that any deep and special trade agreement with the UK “must ensure a level playing field in terms of competition and state aid”. In our view, there is no reason to doubt that that is a “red line” as far as the EU is concerned. Put shortly, EU politicians will be conscious that it will be impossible to explain to their voters why their businesses should potentially face competition from subsidised UK businesses when their businesses are unable to receive equivalent subsidies. We note in that context that considerable attention has been paid in the EU27 to suggestions that the UK Government might seek to deal with problems faced by UK-based businesses in the Brexit period by, in effect, offering those businesses subsidies of various kinds.

6. We also note that the EU has, in its relationships with other European States, generally insisted on compliance with State aid rules as a condition of a comprehensive trade arrangement. We set out some details of those arrangements in the papers. We believe that, as in other areas, the case of Switzerland – which we describe in our papers – is not a reliable precedent. Nor do we consider that the examples of Canada or Singapore (where the free trade agreements with the EU do not contain State aid provisions but contain anti-subsidy provisions largely based on those of the WTO) are reliable, given the far greater scale of trade between the EU and UK and the fact that (unlike those States) the United Kingdom cannot claim that State aid control is a wholly unfamiliar imposition.

7. Further, we note that effective State aid control is likely to be a condition of any agreement by the EU that it will not impose anti-dumping or countervailing measures (often referred to as trade defence instruments or “TDIs”) against the United Kingdom after Brexit. Such a provision is to be found in Article 26 of the EEA Agreement (which of course also has State aid provisions paralleling EU rules)\(^1\). It should though be noted that the EU/Ukraine agreement (which also contains State aid rules) does permit TDIs as between the parties, subject to some specific provisions in Article 50: so it is probably right to regard State aid rules as a necessary, rather than as a sufficient, condition of an agreement not to apply TDIs between the parties.

8. As explained in more detail below, we have therefore assumed for the purposes of considering the issues raised by the Sub-Committee, that any State aid provisions that are retained in the UK would be modelled on the current EU approach.

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\(^1\) The EEA Agreement excludes fisheries products, which explains why the EU was able in 2006 to take anti-dumping action against Norway in relation to salmon exports.
9. However, we do not believe that the continuance of State aid rules should be regarded solely as an unfortunate price to be paid for a deep and special trade relationship.

10. We accept that any constraint on the ability of public bodies to act as they see fit in relation to the expenditure of public money requires careful justification. That is particularly because the United Kingdom has a number of well-established means of ensuring that public money is well-spent (an advantage not enjoyed to the same degree by all EU Member States).

11. That said, however, and as set out in more detail in the papers, we see a number of advantages in retaining some form of State aid or anti-subsidy control.

12. First, the United Kingdom will want to ensure that it respects its obligations under the WTO Agreement on Subsidies and Countervailing measures (the “SCM Agreement”). The UK Government can of course ensure through administrative means that its own conduct complies with those obligations. But there are many public bodies which have wide powers to make their own spending decisions without reference to Whitehall. Given the overlap between the United Kingdom’s WTO obligations and the State aid rules, it has to date been unnecessary to consider the extent to which UK law needs to ensure that public bodies do not take measures that conflict with the SCM Agreement. But in the absence of EU-enforced State aid control it may well be necessary to ensure, by means of domestic law, that support measures adopted by public bodies do not put the United Kingdom in breach of its WTO obligations.

13. The second, linked to the first, is that devolution (both to Scotland, Wales and Northern Ireland and increasingly within England) means that there are now many public bodies with their own substantial tax and spending powers that are constitutionally independent from the financial control of the UK Government. That strengthens the case for a form of legal control on the ability of those bodies to subsidise favoured firms: legal control that to date has been provided by the State aid rules (and is provided by the State aid rules in EU Member States that also have fiscally autonomous regional government, such as Germany and Spain). We recognise that there are devolution issues here (and that, under the Sewel convention, it may well be that the consent of the devolved administrations would be needed before their powers were limited by a form of State aid control). But there is a powerful policy case for such control, given that it is in no-one’s interests for there to be “subsidy

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2 In Spain, there is a specific provision (art.11 of Ley 15/2007 de Defensa de la Competencia) allowing the Comisión Nacional de Competencia (the national competition authority: “CNC”) to review and report on any State aids when asked by a local or regional Government to do so, and to require local and regional authorities to supply it with relevant information. The CNC is also provided, by the Spanish Ministry of Foreign Affairs, with a copy of all Spanish State aid notifications.
“races” between different parts of the United Kingdom to attract investment.

14. We note in passing that the EU and China have recently opened a dialogue in relation to the introduction in China of measures that appear to constitute a form of State aid control (see http://europa.eu/rapid/press-release_IP-17-1520_en.htm). Although China’s position is evidently very different from that of the United Kingdom, it is at least interesting that the Chinese Government sees advantages to China in introducing a form of State aid control.

15. There also seem to us to be advantages in retaining State aid rules in terms of protecting the interests of UK business: as we explain in more detail in our papers, an acceptance by the United Kingdom of the State aid rules would be likely to be linked to a corresponding obligation on the EU institutions to consider the impact of State aids on the United Kingdom when deciding whether or not to approve State aid proposals, and would probably also give UK businesses rights to complain or take action in the EU in respect of State aids in the EU that adversely affect them.

16. We also note that the Explanatory Notes to the EU (Withdrawal) Bill appears to contain an indication that the Government may intend to preserve the status quo in relation to State aid after Brexit. Article 108(3) TFEU (which is the rule that prohibits the grant of State aid that has not been approved by the Commission) is listed at paragraph 89 of the Notes as one of the rights and obligations which are currently recognised in domestic law by virtue of section 2(1) of the European Communities Act 1972 and which, under clause 4 of the Bill, will continue being recognised in domestic law after exit. We are not aware of any Government proposal to act so as to prevent clause 4 having that effect (e.g. by further primary legislation).

17. We also observe that failure to convert the State aid rules into UK law would have uncertain repercussions into other areas of the law (such as, in particular, tax) where the content of rights and obligations is affected by the existence of the State aid regime, thereby generating the uncertainty as to the continued operation of the law in those other areas which the White Paper seeks to avoid.

18. In theory it might be possible to develop a different but equivalent form of anti-subsidy regime which would meet the policy objectives set out above. But retaining (as far as possible) the current State aid regime seems to us to be considerably more practical than attempting to create some new system of anti-subsidy control. The State aid rules are familiar in the UK,

For an example, see the decision of the First-tier Tribunal (Tax Chamber) in Western Ferries (Clyde) v HMRC [2011] UKFTT 243 (TC) at §163 (need to construe tonnage tax rules so as to avoid State aid).
and there is considerable legal and policy-making experience in their application. They allow for a sophisticated and flexible assessment of measures which have a distorting effect on competition but which also have genuine public policy advantages. They are also readily enforceable, by private bodies affected in the courts as well as by the authorities charged with their enforcement, so that there can be confidence that they will generally be respected. They are bound to be acceptable to the EU as meeting the “level playing field” requirement. And any other form of prohibition on subsidies would inevitably generate considerable legal uncertainty: in particular, although there are similarities in relation to the broad concepts, there is comparatively minimal case-law relating to the provisions in the SCM Agreement that would be the only obvious alternative model. Further, we do not consider that the EU would accept a model (like the SCM Agreement) that relied on state/state litigation in a supranational tribunal: the EU will almost certainly require a mechanism that provides for enforcement by effective supervisory authorities (and, possibly, by private litigants before the courts).

19. Finally and importantly, we think that any of the models we discuss could offer advantages over the current State aid rules, even if the substantive rules remained very similar. In particular, one of the most serious problems caused in practice by the EU State aid rules is the problem of delay. The fact that notifying and getting approval for a State aid from the Commission is a lengthy process and may take 6 months or more even for fairly straightforward cases (and considerably longer for more complex cases) is a serious obstacle in the way of projects that involve (or may well involve) State aid. That problem could be reduced in either an EEA-based or a domestic regime, given the likely lower level of demand and, in a national regime, because notifications could be pursued directly by individual public bodies rather than needing to be channelled through central Government. As we also note below, a domestic regime could also offer somewhat better procedural protection to those affected by the rules, in particular putative beneficiaries of unlawful aid, than those that are currently offered under EU law (though we also note that there is inevitably some trade-off between procedural rights and speed).

20. As to the precedents, we set out a detailed analysis of the most obvious ones in the papers. In essence, we see the main options as being:

a. participation in the existing EEA mechanisms (which may, by agreement, be possible for this purpose even if the United Kingdom does not otherwise take part in the EEA);

b. setting up a parallel supranational UK/EU mechanism to that of the EEA, complete with a court and surveillance authority (though we see no advantage in doing that if the EEA mechanism could be “borrowed”); or

c. a “domestic enforcement” model along the lines of the EU/Ukraine agreement.
Will the UK require a domestic state aid authority after Brexit?

21. If the EEA mechanisms can be “borrowed”, or another supranational mechanism established, then a domestic authority would not be needed.

22. However, if a domestic model is adopted that is based on the EU model (i.e. it involves discretionary decisions on whether to approve aid), then a UK authority would certainly be required. We do not think that the question of whether a measure should be approved under the State aid rules could sensibly be left to the ordinary courts to resolve.

23. The key problem with “leaving it to the courts” would, in our view, be that, while the courts are well-placed to rule on the legal question of whether a measure is State aid, they are ill-equipped to perform the key function of assessing whether the aid should be approved (i.e., in EU State aid law, the assessment of compatibility – an assessment carried out by the Commission exclusively and subject only to judicial review leaving it a wide margin of appreciation). The key reason why they are ill-equipped is that the question at the heart of any such assessment is whether a public policy objective is such as to justify the distortion of competition inherent in State support: an assessment that involves value judgments of a kind that any court will be uncomfortable in making (particularly in cases where the measure is politically controversial, as many large infrastructure projects are), and which differ in order of magnitude from the relatively narrow value judgments that courts now make in the course of economic assessments under Article 101(3) TFEU (the provision that allows agreements that appreciably affect competition to be exempted if they satisfy certain conditions).

24. There are further, practical, reasons for not “leaving it to the courts”: -

   a. There will be many cases where public authorities and private bodies involved in complex projects where there is clearly State aid will wish to ensure that there is a binding ruling that the aid is approved. If there is no public enforcement authority empowered to give binding rulings, then Ministers and others involved in key infrastructure would have to apply to a court for an approval order (with all the expense and delay that flow from complex litigation) in order to achieve certainty: and anyone seeking to oppose such a measure could threaten delay and costly litigation even in a case where the policy case for the measure was strong.

   b. It is possible, with a public enforcement authority, to have preliminary discussions before any formal notification is made, and a process of iterative negotiation as changes to the project are made in order to satisfy the enforcement authority that it is compatible. This is, indeed, now standard Commission State aid practice. It is hard to see how any court procedure could replicate those features.
c. We do not see how any court, comprised of whichever judge happens to be available at the time, could ever make the necessary assessment in the speed with which a regulator, familiar with the policy issues, is able to act in highly urgent cases: see the Commission’s decision-making in the various bank rescue cases over the past decade (and we observe that the balance in those cases between the need for such extraordinary measures and the distortions of competition they entailed, and the negotiation of the detailed provisions in those measures, are classic examples of assessments that are in our view wholly unsuitable for litigation or court resolution).

d. We also do not see how a court-based system would be able to create and develop consistent policy in response to technological or market developments: see, for example, the way in which the Commission has been able to develop policy and issue guidance in areas such as broadband and transport infrastructure. That would lead to considerable uncertainty.

e. Nor, in a court-based system, would there be a regulator able to build up a constructive dialogue with the Commission, ESA, and potentially other anti-subsidy regulators, and to contribute to the development of anti-subsidy policy as a key element of future trade agreements: given the Government’s objective that the UK become a leader in global free trade, that would, in our view, be a significant missed opportunity.

f. Indeed, without an independent regulator, we suspect that any court faced with taking a decision as to whether to approve aid would tend to reach for, and stick rigidly to, any available Commission decision or policy statement, thereby losing any chance to develop a distinctive UK policy approach in this area.

25. We therefore strongly recommend that the prime responsibility for enforcement of the rules be conferred on a public authority, and not the courts.

26. That then raises the question of which authority that should be. The obvious candidate for the role of enforcement authority is the CMA, or possibly a new agency that could operate as a subsidiary or affiliate of the CMA and thus have access to its expertise and resources but with an independent identity. The CMA currently has jurisdiction across the United Kingdom in relation to (amongst other things) competition law enforcement and mergers. It has the necessary combination of legal, economic and policy expertise. It has experience of analysing the effect on competition of government policies and of conducting complex investigations involving detailed factual inquiry and economic assessments. Its independence is widely recognised. Finally, it already has experience of giving advice to public bodies on the competition implications of their policies or on proposals for legislation (a function it
exercises under section 7(1) and (1A) of the Enterprise Act 2002): see, for example, its Guidelines on Competition Impact Assessment (CMA50) published in September 2015.

27. The CMA performs its functions on behalf of the Crown. It might be regarded as somewhat anomalous for one part of the Crown to regulate other parts of the Crown, especially in a situation where litigation is likely. However, it should be noted that that situation already potentially arises under the existing UK competition rules: it is entirely possible for bodies that are part of the Crown to be “undertakings” subject to the prohibitions in the Competition Act 1998 and therefore to be (a) subject to the powers of the CMA to make directions and impose penalties and (b) potential appellants to the Competition Appeal Tribunal (“CAT”) against such decisions.

28. We also note that the powers given to Ministers under the EU (Withdrawal) Bill – see clause 7(5) – to adapt EU law to address deficiencies arising from its post-Brexit context would appear to allow a substitution of the CMA for the Commission in the domestic provision that replaces Articles 107 and 108.

29. It has to be recognised, however, that exercising a State aid function would, for reasons that will be apparent, place the CMA in a more politically-exposed position than its current remit generally involves: essentially, a State aid function would give the CMA what would in effect be a “veto” power over potentially very important and controversial decisions taken by UK, and devolved government, Ministers.

30. It therefore seems to us that, if the CMA is to be given this role, its independence and its authority is likely to need strengthening. It might well be appropriate, for example, for there to be a formal role for Parliament (perhaps via the BEIS Select Committee) and the devolved Parliaments in appointing its key officials.

31. The CMA would also need to be adequately resourced (taking into account that, as this Sub-Committee will doubtless hear from other witnesses, there are expected to be other significant increases in demands on its resources as a result of Brexit): though its expertise in competition law and economics give it a good base for discharging a State aid role, it would need to recruit and train up specialists in the distinct area of State aid.

32. It seems to us that the functions of the CMA would need to mirror the functions of the Commission under the EU State aid rules (subject to the difficult issue of legislation, which we discuss below): that is to say, while the courts could have the power to determine that a measure is not an aid, the CMA would need to have the sole power to declare a State aid to be compatible, and would need to be given powers to investigate and remedy infringements of the standstill obligation (including the power to block a State aid measure and to require a State aid to be repaid).
33. While those main procedural rules would probably, in practice, be drawn up so as to correspond largely with the equivalent EU procedural rules, it ought to be possible to make some changes at a domestic level that would provide rather better protection for beneficiaries of State aid than EU procedures currently do, in order to resolve what is at present one of the most frequent criticisms of the EU State aid regime. The domestic procedures should, in particular, start from the proposition that, given the profound impact of State aid decisions on the beneficiary of aid, the beneficiary should be treated as a full party to the proceedings and not just as an “interested party”.

34. The CMA’s decisions should be subject to a right of appeal to a court (as is the case now for decisions of the Commission) – most obviously (not least because of its expertise in competition law and economics, as well as its UK-wide jurisdiction) to the CAT. We see no difficulty in principle in there being a full right of appeal on the question of whether a measure is State aid at all (that is a role that the UK courts already discharge, and generally do so on the merits even on a judicial review). But we do not consider that decisions as to compatibility of aid measures should be subject to a full merits appeal to a court given the non-judicial nature of the assessment being made: it seems to us that such decisions should be challengeable on only a judicial review basis. It is for discussion whether that difference would need to be expressly set out in legislation: we think it would be better to do so but note that that is the approach the courts would be likely to adopt in any event (as has the General Court, which, despite the single standard of review laid down in the EU Treaties, subjects Commission decisions on whether there is aid to a more intrusive standard of review than decisions on compatibility).

35. There are difficult issues in relation to legislation that amounts to State aid. As pointed out above, legislation that establishes a favourable treatment of a person or class of person may well constitute a State aid measure: the complex litigation surrounding the aggregates levy is a clear example.

36. We do not think that it is constitutionally feasible, or politically realistic, for the CMA – or even a court – to be given power to make an order that effectively renders a State aid measure contained in primary legislation ineffective (for example, by ordering recovery of a tax advantage given by primary legislation to a favoured class).

37. Nonetheless, any State aid provision in a UK/EU free trade agreement is bound to require action to be taken to deal with State aids granted by primary legislation.

38. As we discuss in the papers, it seems to us that the way forward in the case of State aid measure contained in primary legislation would be (a) for the CMA to have power to declare such a measure compatible (in which case no further issues arise) but (b) in a case where it considered that there was an incompatible State aid, for it to be required to apply to
a court (probably the CAT, though it might be considered that the High Court – or its Scottish or Northern Ireland equivalents – would be more appropriate) for a declaration of incompatibility. In such an application, the issues would be (a) whether the measure was in fact State aid (on which the Court would reach its own view) and (b) whether the CMA had acted lawfully in reaching the view that the measure was incompatible. If the court agreed on both points, it could issue a declaration of incompatibility along the lines of section 4 of the Human Rights Act 1998. As with that provision, the effect of that declaration would, we suggest, be to give the appropriate Minister the power to amend the legislation in question so as to remove the State aid aspect (or so as to satisfy the CMA that the remaining State aid aspect of the measure was compatible).

39. As far as secondary legislation is concerned, we see no fundamental objection to such legislation being declared void on State aid grounds: however, again, it might be thought to be appropriate for the CMA (or third parties) to have to apply to the appropriate court for an order declaring the legislation to be incompatible.

What would be the opportunities and challenges for state aid or subsidy controls in the UK if no trade agreement were to be reached with the EU? Would WTO anti-subsidy rules restrict the UK’s ability to support industries, or individual companies, through favourable tax arrangements?

40. As we have explained above, we see good reasons to maintain a form of domestic anti-subsidy rule even if there were no requirement under an agreement with the EU to maintain the State aid rules.

41. As to the WTO rules, a good account of those rules can be found in a paper by David Unterhalter SC and Thomas Sebastian⁴, as well as in Bacon “EU Law of State Aid”, 3rd edition, Ch.4: we summarise those rules in the papers.

42. As far as “tax breaks” are concerned, the WTO regime would prevent many types of tax breaks in favour of industries or individual operators, but only in the goods sector. However, given the comparatively limited enforceability of the WTO rules compared to State aid rules, the level of legal risk in offering tax breaks would be bound to be lower than in a situation where the EU or EU-type State aid rules were in play (though the United Kingdom has always been clear that it will honour its international law obligations).

How will the Government’s industrial strategy shape its approach to state aid after Brexit? To what extent has the European Commission’s state aid policy limited interventions that the UK Government may have otherwise pursued?

43. The first question is not for us to answer. As to the second, we would make the following broad points: -

a. The United Kingdom (under both Labour and Conservative governments) has played a major role in shaping EU State aid policy: although the UK Government may not always agree with the application of the State aid rules to its own decisions, it has generally vigorously supported the Commission’s overall policy approach.

b. The vast majority of State aid given is granted under block exemptions, which (again) the UK Government has played a major role in shaping.

c. The United Kingdom grants rather less State aid per head than do other Member States. That suggests that there is much room within existing rules to give more aid than is currently given, if that is thought to be desirable.

d. There are some suggestions that the UK Government takes a cautious view of whether particular projects amount to State aid. It is certainly true that the United Kingdom has only rarely been found to have granted unlawful (i.e. unapproved) aid. But BEIS has in recent years been clear that it is appropriate to take a “risk based” approach and not to abandon, or spend time notifying out of an abundance of caution, a proposal on the basis of a low risk that it might be regarded as State aid. We are aware of many cases where such a “risk based” approach has sensibly been adopted.

e. In cases where the United Kingdom does notify State aid to the Commission, our experience is that the notification is very well handled, and strong arguments and evidence are assembled. The UK Government has a good record in getting Commission approval. An example is the Hinkley Point C case, a very complex case, which generated (we understand) the largest number of comments from interested parties of any case in recent years, but which was approved following a formal investigation procedure in under a year from the date of notification.

f. The main difficulty is, as we have noted, that in a case where a measure clearly is State aid and is not covered by an existing

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5 The decision is, however, the subject of a challenge in the General Court of the EU by Austria: Case T-356/15 *Austria v Commission*, not yet decided.
exemption, significant delay may be caused by the requirement to notify and get approval from the Commission (including pre-notification periods) – albeit that some important cases are decided relatively quickly, such as the Hinkley case noted above. Delays, when they occur, can be frustrating to Ministers wanting to get key policy proposals implemented quickly. We would, though, also note that the discipline, imposed by notification, of having to analyse in a rigorous way the policy gains against the distorting effects of a measure can be a useful one and can often result in a significantly improved policy. Checks and balances are not always a bad thing.

44. We would also draw the Sub-Committee’s attention to the conclusions of the Coalition Government’s review of balance of competences in the area of State aid (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332779/Review_of_the_Balance_of_Compétences_between_the_United_Kingdom_and_the_European_Union.pdf). That review noted that the balance of evidence was that the State aid regime generally worked well (§4.20), subject to particular points on infrastructure and public services (discussed at §§4.21-4.28). We would endorse those conclusions.

What, if any role, might the devolved institutions play in UK state aid control post-Brexit? Are there any potential implications for the UK internal market?

45. We have already made various observations on the role of the devolved institutions, and the role of State aid control in the UK internal market.

46. We would add that, in a domestic implementation model, it would have to be decided to what extent the State aid rules applied to devolved legislation: that clearly raises significant political and constitutional issues.

Will it be necessary for the UK and EU to agree a transitional arrangement for state aid matters after the UK’s withdrawal from the EU? If so, what transitional issues would such an arrangement need to address?

47. There are at least three issues here. One issue arises from the EU (Withdrawal) Bill, clause 4 of which, as we have noted above, would, on the Government’s view, result in Article 108(3) remaining part of UK law post Brexit. That, however, is not a sustainable position, since Article 108(3) provides for directly effective rights in relation to State aids that are implemented before being approved by the Commission: the Article therefore depends for its operability on there being a mechanism for Commission approval (which, absent some agreement to the contrary, will not be in existence after Brexit). We assume that at some stage the Government will set out its thinking on that.
48. Another question is what happens to cases that are still being considered by or investigated by the Commission on Brexit day, or have pending appeals in the European Courts (as could be the case with the Hinkley point case, especially if there is a further appeal to the CJEU). Would the Commission retain power to investigate or take decisions in relation to the pre-Brexit period? What will happen if the European Court, post-Brexit, sets aside a pre-Brexit Commission decision? It should also be noted that many individual exemption decisions (including many of the banking sector decisions) include conditions that are currently enforceable by the Commission and have a duration that extends beyond Brexit (this is a particular issue in the energy sector and would also apply to some of the banking sector decisions): consideration needs to be given as to the basis on which those conditions should continue to bind post-Brexit and if so who should enforce them.

49. Finally, if the United Kingdom were to maintain a State aid regime, the main issues would be the preservation of the effect of individual compatibility decisions and the transfer of any ongoing notifications and investigations affecting the United Kingdom to the new body. But we do not see any major difficulties of principle there.

13 September 2017