"Comfort letters" for investors: British State aid in the wake of Brexit?

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1. Introduction

The recent speculation about the future implications of Brexit have meanwhile reached a point at which many EU lawyers are finding the subject somewhat wearisome. However, the question of how State aid issues are likely to be dealt with in the future relationship between the EU and the United Kingdom is not the topic discussed in this article.[1] It rather focusses on the present legal situation and the fact that some members of the "Leave" camp appear to have forgotten that the United Kingdom is still an EU Member State with all ensuing rights and obligations. This first became clear after the Apple decision taken in summer 2016[2] by which the Commission ordered the repayment of "up to EUR 13 billion" of illegal tax benefits when some representatives of the governing party openly invited Apple to establish itself in the United Kingdom in future. In doing so, they were clearly suggesting that there would be no more "problems" of that kind in the United Kingdom.

As long as Article 107 et seq. TFEU apply in the United Kingdom however, this will not be possible. This needs no further explanation. The same would of course apply, *mutatis mutandis*, to other measures such as capital injections in order to boost the "national player" for post-Brexit international competition.

2. New tools: State Compensation Payments for potential Brexit Disadvantages?

2.1 Background

The treatment of a new type of State aid has now triggered a lively discussion. The May government is (understandably) trying to prevent foreign investors from leaving the country on account of Brexit by issuing so-called "comfort letters". For example, commitments of that nature are said to have been made towards Nissan, one of the largest vehicle manufacturers located in Sunderland. Such letters contain, reportedly, a promise of the British government to advocate future access to the internal market for Nissan post-Brexit.[3] The Commission is already looking at the case.[4]

2.2. Illegal State guarantee?

It seems clear that the government's purely political commitment to try to achieve some form of access to the internal market as a result of the Brexit negotiations is not, in itself, likely to raise concerns under State aid law.
Should these efforts fail, however, State aid law implications will arise if the recipients of such "comfort letters" can actually claim compensation. In this case such commitments can be considered as State guarantees in violation of EU law. Where the state assumes the financial risks resulting

1 See Buendia Sierra EStAL 2016, 331; Peretz EStAL 2016, 334; Baudenbacher NZKart 2016, 498.
2 Commission Decision of 30 August 2016, SA.38.373 – *Apple*.
3 The British government does not wish to comment on details. See, e.g. https://www.theguardian.com/business/2016/oct/30/nissan-eu-tariff-free-brexit-sunderland?
4 See MLex report of 4 November 2016: UK's Nissan support draws EU questions.

from the discontinuation of a certain favourable legal framework, this may well constitute an advantage under State aid law.[5] In the view of the CJEU, it is sufficient that a potential payment obligation on the part of the state could arise in case of a guarantee.[6] By this case law the EU Courts have extended the measures qualifying as State aid to promises made by politicians, if they had guarantee character. This point of view is also in line with the Commission's Guarantee Notice.[7]

The question whether such comfort letters involve State aid therefore ultimately depends on whether these commitments have guarantee character. The addressees of such letters, i.e. the investors, would probably assume that this is the case.[8] Most prudent businessmen would only rely on promises to obtain access to the internal market post-Brexit if they knew that upon the failure of these efforts, the success of which is highly uncertain,[9] they could at least hope for some financial compensation. In addition, according to the Guarantee Notice such a guarantee character can be assumed relatively easily.[10] According to the case law, it is not necessary that such statements are formally legally binding.[11] As a result, there are very good reasons which suggest that such commitments involve State aid.

2.3. No advantage since "only compensation payment" for damage suffered?

Some lawyers argue that the *Asteris* case law would offer a way out of this dilemma. According to *Asteris*, the obligation of the State to pay damages or compensation for economic disadvantages can be acceptable under State aid law where the government is liable for such damage. This is of course subject to the proviso that the obligation has not been artificially fabricated.[12] Unjustified payments of compensation without foundation may therefore certainly have State aid character.[13] It is, however, very doubtful whether *Asteris* would help in the present context. The *Asteris* (non-State aid) category only covers cases of State liability for unlawful acts on governmental authority or for expropriation. Brexit, the democratic legitimacy of which is constantly stressed, is hardly likely to belong to this category. Moreover, it seems questionable whether there would be any damage that could be capable of being compensated. According to the British Government's own logic, leaving the European Union will have a largely positive impact on the British economy and will result in new business opportunities for British businesses. From the May government's viewpoint it therefore seems difficult to argue that there is any damage which could be compensated.

3. Temporal scope of the State aid rules

The supporters of such measures also point out that such guarantees will only have an impact once Brexit has been completed, i.e. when State aid law will no longer apply in the United Kingdom. This argument is misleading, however.

First, the shape of future relations between the United Kingdom and the EU is not yet clear. Depending on the model (EEA plus, association agreement, bilateral agreement, etc.), State aid may continue to be prohibited in the future as well. The measures would then conflict with such rules which could actually be quite similar to Article 107 TFEU.

In addition, today the State aid rules are still fully applicable.. If a State aid measure has been awarded prior to Brexit it remains subject to Article 107 TFEU. In this regard, the point in time when State aid is "granted" is generally defined as the date on which the beneficiary of State aid acquires a legal right under the applicable national legal regime.[14] In the cases described above, this date is prior to Brexit, i.e. at a time when the United Kingdom is still a Member State subject to the State aid rules.

5 Commission Decision of 23 July 2008, O.J. 2008 L 346/1, para. 240 – *DHL and Flughafen Leipzig-Halle.*
6 CJEU, ECLI:EU:C:2013:175 – *Bouygues SA, Bouygues Télécom SA v Commission.*
7 O.J. 2008 C 71/14, section 2.1.
8 The public statements of Nissan, for example, seem to point rather clearly into this direction, see e.g. http://www.politico.eu/article/nissan-written-post-brexit-guarantees-from-uk-business-secretary.
9 Different EU leaders have indicated in numerous statements that non-EU/EEA members are unlikely to have full access to the internal market in the post-Brexit world.
10 O.J. 2008 C 71/14, para. 1.2.
11 CJEU, ECLI:EU:C:2013:175, paras. 89 et seq. and paras. 137 et seq. – *Bouygues SA, Bouygues Télécom SA v Commission.*
12 CJEU, ECLI:EU:C:1988:457 – *Asteris v Greece.* See also (in a somewhat different context) CJEU, ECLI:EU:C:2009:428, para.. 68 – *Commission v Greece.*
13 Commission Decision, NN 71/2007, paras. 8, 69 et seq. – *Olympic Airways*; Commission Decision of 30 March 2015, O.J. 2015 L 232/15, paras. 100 et seq. – *Micula.*
14 See, e.g. Article 2 No. 28 General Block Exemption Regulation, O.J. 2014 L 187/1. This definition is used in numerous regulations. See also GC, ECLI:EU:T:2015:153, para. 86 – *Pollmeier v Commission.*

This naturally also applies to any commitments to pay compensation, which can be considered as guarantees. According to the Commission's Guarantee Notice, State aid is granted at the moment the guarantee is given and not only when the guarantee is enforced or payments are made on the basis of the guarantee.[15] The fact that the case of liability is only likely to be realised at a point in time when the United Kingdom no longer belongs to the EU cannot call into question the temporal application of EU state aid law.

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This outcome would not appear to be unfair either, since a guarantee or other measure has a distorting effect on competition as soon as it is granted. The recipient undertaking thereby obtains a legal entitlement (on which it will normally insist) to specific support and will factor such element into its business plan. This provides the undertaking with an advantage – relief from risks it normally has to bear – and also results in a distortion of competition with ensuing adverse effects on trade between Member States.

4. Conclusion

This discussion underlines the necessity for State aid within the internal market – before and after Brexit. A single economic area can only work with a "level playing field", hereby excluding "subsidy races" between Member States. If therefore British businesses do obtain access to the internal market post-Brexit, in whatever form, this can only be combined with a mechanism which ensures strict State aid control.

Apparently, no one gave any serious thought to this issue prior to the referendum. In particular the "three Brexiteers" in Theresa May's cabinet do not appear to be familiar with this background. This will impede discussions not only on the future shaping of relations between the EU and the UK, but also on measures that are taken at present.

15 O.J. 2008 C 71/14, section 2.1.