

COMMUNICATION FROM THE COMMISSION**Notice to stakeholders on the withdrawal of the United Kingdom and EU rules in the field of state aid**

(2023/C 202/04)

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a ‘third country’ ⁽¹⁾. The Withdrawal Agreement ⁽²⁾ provided for a transition period which ended on 31 December 2020. The Withdrawal Agreement provided also, in some cases, for separation provisions at the end of the transition period.

All interested parties are reminded of the legal situation applicable since the end of the transition period (Part A below). This notice also explains the rules applicable in respect of Northern Ireland after the end of the transition period (Part B below).

A. Legal situation since the end of the transition period**1. State aid procedures**

Since the end of the transition period, EU State aid control ceased to apply to any State aid granted by the United Kingdom as from that date, unless it affects trade between Northern Ireland and the European Union that is subject to the Protocol on Ireland/Northern Ireland (the ‘Protocol’) ⁽³⁾ / Windsor Framework ⁽⁴⁾. Outside the specific provisions of the Windsor Framework (see below), the European Commission therefore no longer has the power to investigate, and take decisions on, potential State aid measures granted by the United Kingdom after that date. Consequently, stakeholders are no longer able to make formal complaints to the European Commission about such measures.

As regards State aid granted by the United Kingdom before the end of the transition period, the following rules apply:

Pursuant to Article 92(1) of the Withdrawal Agreement, the European Commission will remain competent to continue any ongoing procedures ⁽⁵⁾ concerning State aid granted by the United Kingdom.

Pursuant to Article 93(1) of the Withdrawal Agreement, the European Commission will also remain competent to initiate new administrative proceedings concerning State aid granted by the United Kingdom before the end of the transition period, if such proceedings are started within four years of the end of the transition period.

Pursuant to Article 95(1) of the Withdrawal Agreement, the European Commission’s decisions are binding and enforceable on the United Kingdom in these cases.

Furthermore, the European Commission retains the right to bring an action before the Court of Justice of the European Union for non-compliance with such decisions for a period of four years after the end of the transition period or the date of the decision concerned, whichever is later ⁽⁶⁾. The Court’s judgments on these matters remain binding and enforceable on the United Kingdom.

⁽¹⁾ A third country is a country not member of the European Union.

⁽²⁾ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7) (‘Withdrawal Agreement’).

⁽³⁾ For further details on the State aid provisions of the Windsor Framework, see Part B of this notice.

⁽⁴⁾ Pursuant to Joint Declaration No 1/2023 of the Union and the United Kingdom in the Withdrawal Agreement Joint Committee of 24 March 2023, reflecting the arrangements laid down in Decision No 1/2023 of the Joint Committee, the Protocol, as amended by that Joint Committee Decision, should now be known as the ‘Windsor Framework’. Therefore, wherever relevant in dealings between the Union and the United Kingdom under the Withdrawal Agreement, the Protocol, as amended by Joint Committee Decision No 1/2023, will, consistent with the requirements of legal certainty, be referred to as the ‘Windsor Framework’. The Protocol, as amended by Joint Committee Decision No 1/2023, may also be referred to as the ‘Windsor Framework’ in the domestic law of the Union and the United Kingdom.

⁽⁵⁾ The term ‘ongoing procedures’ refers to procedures that have been allocated an internal case number before the end of the transition period (see Article 92(3)(a) of the Withdrawal Agreement).

⁽⁶⁾ See respectively Articles 87(1) and (2) of the Withdrawal Agreement.

As a result, stakeholders can continue to inform the European Commission – by way of formal complaints or otherwise – of any potentially illegal State aid granted by the United Kingdom before the end of the transition period. This includes cases where such aid is only paid out or otherwise disbursed at a later stage, provided that the legal right to receive the aid was conferred on the beneficiary before the end of the transition period.

2. *Substantive State aid provisions*

Exceptionally, certain compatibility criteria set out in the European Commission's State aid guidelines refer to cooperation between EU Member States and/or a certain EU or EEA dimension ⁽⁷⁾. Since the end of the transition period, the United Kingdom is no longer be counted towards such criteria, and Member States have to take due account of this for any new aid granted under the relevant provisions.

B. **rules applicable in respect of Northern Ireland**

1. *Application of the State aid rules under Article 10 of the Windsor Framework*

Since the end of the transition period, the Protocol, now known as the Windsor Framework, applies ⁽⁸⁾. The Windsor Framework is subject to periodic consent of the Northern Ireland Legislative Assembly, the initial period of application extending to four years after the end of the transition period ⁽⁹⁾.

Article 10(1) of the Windsor Framework provides that *'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'*.

This means that EU State aid rules will continue to apply to the EU Member States, as well as to the United Kingdom in respect of aid that has an effect on the trade between Northern Ireland and the European Union that is subject to the Windsor Framework. It follows from other provisions of the Windsor Framework, and in particular its Articles 5 and 9, that trade in goods and wholesale electricity is subject to the Windsor Framework ⁽¹⁰⁾.

As regards the production of and trade in agricultural and fisheries products in Northern Ireland, Article 10(2) of the Windsor Framework provides for an exemption from the application of Union law up to a determined maximum overall annual level of support, provided that a determined minimum percentage of that exempted support complies with the provisions of Annex 2 to the WTO Agreement on Agriculture. The said maximum level and minimum percentage have been determined by the Joint Committee (European Union and United Kingdom) with Decision No 05/2020 of 17 December 2020 ⁽¹¹⁾. All measures taken to support the production of and trade in agricultural and fisheries products in Northern Ireland which do not fall within the scope of the exemption and that have an effect on the relevant trade between Northern Ireland and the Union fall within the scope of Article 10(1) of the Windsor Framework.

The European Commission, as well as the Court of Justice of the European Union and the General Court (the 'Union Courts'), remain competent as regards such aid as falls within scope of Article 10(1) of the Windsor Framework ⁽¹²⁾.

⁽⁷⁾ For example, certain instruments foresee increased aid intensities in case of cross-border cooperation between EU Member States and/or with Contracting Parties to the EEA.

⁽⁸⁾ Article 185 of the Withdrawal Agreement.

⁽⁹⁾ Article 18 of the Windsor Framework.

⁽¹⁰⁾ For a detailed explanation on which trade is covered by the Windsor Framework, see its Articles 5 to 9. For the purpose of this Notice, a reference to goods will include the electricity market, as appropriate.

⁽¹¹⁾ Decision No 5/2020 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 17 December 2020 determining the initial maximum exempted overall annual level of support and the initial minimum percentage referred to in Article 10(2) of the Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 443, 30.12.2020, p. 13).

⁽¹²⁾ See Article 12(4) of the Windsor Framework.

On 17 December 2020, the EU released a unilateral declaration in the Joint Committee in charge of overseeing the implementation of the Withdrawal Agreement. The declaration states as follows: *'When applying Art. 107 TFEU to situations referred to in Art. 10(1) of the Protocol, the European Commission will have due regard to Northern Ireland's integral place in the United Kingdom's internal market. The European Union underlines that, in any event, an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure.'*

This declaration clarifies the application of Article 10(1) of the Protocol, now known as the Windsor Framework. It is, however, without prejudice to the interpretation of the notion of 'effect on trade' by the Union Courts.

The conditions for a genuine and direct link to Northern Ireland to exist, based on the real foreseeable effects of the measure, were further explained in a Joint Declaration of the Union and the United Kingdom in the Withdrawal Agreement Joint Committee of 24 March 2023 on the application of Article 10(1) of the Windsor Framework as follows:

'This Joint Declaration on the application of Article 10(1) of the Windsor Framework builds upon the Union Unilateral Declaration, affirming Northern Ireland's place in the United Kingdom's internal market, and at the same time ensuring that the Union internal market is protected. It clarifies the conditions of application of Article 10(1) of the Windsor Framework setting out the particular circumstances in which it is likely to be engaged when subsidies are granted in the United Kingdom, and can be used to interpret that provision.'

For a measure to be considered to have a genuine and direct link to Northern Ireland and thus to have an effect on the trade between Northern Ireland and the Union that is subject to the Windsor Framework, that measure needs to have real foreseeable effects on that trade. The relevant real foreseeable effects should be material, and not merely hypothetical or presumed.

For measures granted to any beneficiary that is located in Great Britain, factors relevant to materiality may include the size of the undertaking, the size of the subsidy, and the market presence of the undertaking in the relevant market in Northern Ireland. While the mere placement of goods on the Northern Ireland market is not sufficient, on its own, to represent a direct and genuine link engaging Article 10(1) of the Windsor Framework, measures that are granted to beneficiaries located in Northern Ireland are more likely to have material effects.

For measures granted to any beneficiary that is located in Great Britain that have a material effect, it must be further demonstrated that the economic benefit of the subsidy would be wholly or partially passed on to an undertaking in Northern Ireland, or through the relevant goods placed on the market in Northern Ireland, for example through selling below market price, for there to be a direct and genuine link engaging Article 10(1) of the Windsor Framework.'

As affirmed by the Joint Declaration, Article 10(1) of the Windsor Framework applies to measures that affect the relevant trade between Northern Ireland and the Union, irrespective of whether a beneficiary is located in Northern Ireland and/or is engaged itself in the relevant trade.

It is for the European Commission to establish that a measure has a sufficiently genuine and direct link to Northern Ireland, based on its real foreseeable effects, to fall within the scope of application of Article 10(1) of the Windsor Framework. In this regard, the European Commission will take into account the following considerations:

Measures granted to beneficiaries located in Northern Ireland are more likely to present a genuine and direct link to Northern Ireland and therefore to engage Article 10(1) of the Windsor Framework.

For measures granted to beneficiaries located in other parts of the United Kingdom than Northern Ireland, the European Commission has to demonstrate a genuine and direct link to Northern Ireland based on the real foreseeable effects of the measure:

- The European Commission considers that to demonstrate such real foreseeable effects on the relevant trade between Northern Ireland and the Union, any effects of a measure have to be sufficiently material. To assess whether this is the case, the European Commission will refer to a set of indicators, based in particular on the size of the undertaking, the size of the subsidy, and the market presence of the undertaking in Northern Ireland.

- The European Commission needs to further show that an economic benefit of the measure would be wholly or partially passed on to an undertaking in Northern Ireland, or through the relevant goods placed on the market in Northern Ireland, for example through selling below market price. In this respect, the European Commission will also take into account any conditions or features of the measure designed to avoid such a passing on of an economic benefit.

In case of measures in favour of service providers, the European Commission needs to establish that an advantage is passed on to undertakings engaged in the relevant trade in goods between Northern Ireland and the Union. Such an indirect advantage is normally only present if the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings ⁽¹³⁾.

To clarify the above by means of examples:

- A subsidy scheme aimed at providing support to manufacturers of goods located in Northern Ireland will normally fall within the application of Article 10(1) of the Windsor Framework, to the extent that it qualifies as State aid.
- A subsidy of limited amount provided to a small enterprise located outside Northern Ireland and without a significant market presence on the Northern Ireland market would normally not produce effects that are material enough to indicate the presence of a genuine and direct link to Northern Ireland based on real foreseeable effects.
- For substantial subsidies to large manufacturers located in other parts of the United Kingdom than Northern Ireland, the European Commission will assess whether there is a material effect on trade with Northern Ireland, based on a series of parameters, such as the market presence of the beneficiary in Northern Ireland. If in addition there is a real risk that an economic benefit could be passed on so as to affect the market in Northern Ireland, the European Commission is likely to consider that Article 10(1) of the Windsor Framework applies. The European Commission would normally not reach this conclusion if the measure is designed in a way to avoid that there is a real risk that the economic benefit could be passed on so as to affect the market in Northern Ireland.
- A subsidy scheme to cover certain training costs of service providers would normally not fall within the application of Article 10(1) of the Windsor Framework, as it would not be designed to channel secondary effects to identifiable undertakings or groups of undertakings engaged in the relevant trade between Northern Ireland and the Union. However, a subsidy scheme aimed at providing financial incentives to service providers (e.g. in the financial sector) designed to reduce the cost of services for undertakings located in Northern Ireland engaged in trade in goods between Northern Ireland and the Union could involve an indirect advantage being passed on to the latter.

2. Article 5(6) of the Windsor Framework

Customs duties levied by the United Kingdom in accordance with Article 5(3) of the Windsor Framework are not remitted to the Union. Article 5(6) of the Windsor Framework states that the UK may under certain circumstances waive tariff debt or reimburse traders ⁽¹⁴⁾. These measures, in so far as they constitute State aid and affect relevant trade between Northern Ireland and the Union, are subject to the provisions of Article 10 of the Windsor Framework on State aid. If called upon to assess the compatibility of such measures, the European Commission shall take the circumstances in Northern Ireland into account as appropriate ⁽¹⁵⁾.

The explanations provided herein do not intend to be exhaustive. Their purpose is to give guidance on the application of the notion of effect on trade between Northern Ireland and the Union to the courts and granting authorities of the EU Member States and of the United Kingdom. The present notice replaces the previous notice to stakeholders published on 10 February 2021.

⁽¹³⁾ For the concept of indirect advantage, reference is made to points 115 and 116 of Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union; *Official Journal of the European Union* (OJ C 262, 19.7.2016, p. 1).

⁽¹⁴⁾ The United Kingdom reimbursing duties on goods brought into Northern Ireland; the waiving (by the United Kingdom) of customs debts for goods brought into Northern Ireland; the establishment (by the United Kingdom) of conditions under which customs duties are reimbursed on goods 'shown not to have entered the Union'; and to 'compensate undertakings to offset' the application of these provisions (by the United Kingdom).

⁽¹⁵⁾ Article 5(6) of the Windsor Framework.

The website of the European Commission on EU rules on State aid (https://competition-policy.ec.europa.eu/state-aid_en) provides general information concerning Union legislation on State aid. These pages will be updated with further information, where necessary.
