



Brussels, 18 January 2021

NOTICE TO STAKEHOLDERS

WITHDRAWAL OF THE UNITED KINGDOM AND EU RULES IN THE FIELD OF STATE AID

Since 1 February 2020, the United Kingdom has withdrawn from the European Union and has become a “third country”.¹ The Withdrawal Agreement² provided for a transition period which ended on 31 December 2020.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 to 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

As from the end of the transition period, EU State aid control will cease 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.³ The European Commission will therefore no longer have the power to investigate, and take decisions on, potential State aid measures granted by the United Kingdom after that date. Consequently, stakeholders will not be 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 will apply:

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 Protocol on Ireland/Northern Ireland, see Part B of this notice.

Pursuant to Article 92(1) of the Withdrawal Agreement, the European Commission will remain competent to continue any ongoing procedures⁴ 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 transitional period, if such proceedings are started within four years of the end of the transitional 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 ("CJEU") for non-compliance with such decisions for a period of 4 years after the end of the transition period or the date of the decision concerned, whichever is later⁵. The Court's judgments on these matters remain binding and enforceable on the United Kingdom.

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.⁶ After the end of the transition period, the United Kingdom will no longer be counted towards such criteria, and Member States will have to take due account of this for any new aid granted under the relevant provisions.

As regards the effect on undertakings benefitting from existing aid schemes, there is an immediate effect on certain stakeholders in the maritime sector. With the end of the transition period, vessels registered in the United Kingdom will no longer qualify as "EEA flagged". This may have the following consequences for operators:

Operators may become ineligible under national tonnage tax schemes that require them to increase or at least maintain a certain share of their fleet under an EEA flag

⁴ The term "ongoing procedures" refers to procedures that have been allocated an internal case number before the end of the transitional period (see Article 92(3)(a) of the Withdrawal Agreement).

⁵ See respectively Articles 87(1) and (2) of the Withdrawal Agreement.

⁶ 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.

and/or to meet minimum EEA flag requirements, including for ship management companies to be eligible (where applicable).⁷

Operators may become ineligible under national schemes that foresee a (partial) exemption from non-wage labour costs for employing seafarers on vessels registered in a Member State. After the end of the transition period, seafarers on vessels registered in the United Kingdom will no longer be eligible under such schemes. In addition, in certain cases (e.g. seafarers working on board vessels providing scheduled passenger services between ports of the Union), United Kingdom nationals employed as seafarers on vessels registered in a Member State will no longer be eligible.⁸

Therefore, stakeholders in the maritime sector are advised to verify their situation against the background of these changes.

B. APPLICABLE RULES FOR AID AFFECTING TRADE BETWEEN NORTHERN IRELAND AND THE EUROPEAN UNION

Since the end of the transition period, the Protocol on Ireland/Northern Ireland (“IE/NI Protocol”) applies.⁹ The IE/NI Protocol is subject to periodic consent of the Northern Ireland Legislative Assembly, the initial period of application extending to 4 years after the end of the transition period.¹⁰

The IE/NI Protocol makes certain provisions of EU law applicable also to and in the United Kingdom in respect of Northern Ireland.

Article 10 of the IE/NI Protocol 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*”.¹¹

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 IE/NI Protocol. In this context, the Protocol foresees that these rules shall apply to trade in goods and to the

⁷ See Section 3.1 of Commission communication C(2004) 43 — Community guidelines on State aid to maritime transport OJ C 13, 17.1.2004, p. 3 (“Maritime Guidelines”)

⁸ See Section 3.2 of the Maritime Guidelines.

⁹ Article 185 of the Withdrawal Agreement.

¹⁰ Article 18 of the IE/NI Protocol.

¹¹ Article 10 of the IE/NI Protocol.

wholesale electricity market.¹² The European Commission, as well as the CJEU and the General Court (“the Union Courts”), will remain competent as regards such aid.¹³

This section will first address the scope of Article 10 of the IE/Ni Protocol and clarify the notion of effect on trade, based on the principles developed by the Union Courts. Section 2 of this part of the notice will give some explanations as regards Article 5(6) of the IE/Ni Protocol. The explanations provided herein do not intend to be exhaustive. Their purpose is to give in particular 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.

1. ARTICLE 10 OF THE IE/Ni PROTOCOL

The application of Article 10 of the IE/Ni Protocol is limited to measures that affect that trade between Northern Ireland and the Union, which is subject to the IE/Ni Protocol, i.e. trade in goods and the Single Electricity Market.¹⁴

This does not mean, however, that only State aid measures relating to the production of and/or trade in goods (including agricultural and fisheries, see below), or relating to the Single Electricity Market, would have to be considered. Rather, any public support for any economic activity can fall within the scope of Article 10 of the IE/Ni Protocol, as long as it can be established that the public support is liable to affect the relevant trade between Northern Ireland and the Union. For example, public support to a service provider – wherever located – whose customers engage in trade subject to the IE/Ni Protocol might fall within the scope of Article 10 of IE/Ni Protocol.

Furthermore, Article 10 of the IE/Ni Protocol also subjects any measures supporting the production of and trade in agricultural and fisheries products in Northern Ireland to the application of the Union’s State aid rules listed in Annex 5 to the IE/Ni Protocol if those measures affect the relevant trade between Northern Ireland and the Union. At the same time, Article 10(2) of the IE/Ni Protocol 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 2020¹⁵. All measures taken to support the

¹² Articles 5 to 9 of the IE/Ni Protocol.

¹³ See Article 12(4) of the IE/Ni Protocol.

¹⁴ See Articles 5 to 9 of the IE/Ni Protocol.

¹⁵ 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.

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 IE/NI Protocol.

For the purposes of applying Article 10 of the IE/NI Protocol, the notion of “effect on trade” in that provision has to be read in light of the same notion in Article 107(1) of the Treaty on the Functioning of the European Union.

On 17 December 2020, the EU released the following unilateral declaration in the Joint Committee established under Article 164 of the Withdrawal Agreement: *“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.”*¹⁶

This declaration clarifies the scope of Article 10(1) of the IE/NI Protocol. It is, however, without prejudice to the interpretation of the notion of “effect on trade” by the Union Courts, which will be explained below.

In this context, it should be noted that the sentence stating: *“[...] cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland”* as well as the explanation that such finding must be *“based on the real and quantifiable effects of the measure”* qualify the earlier phrase *“effect on trade between Northern Ireland and the Union which is subject to this Protocol”*. This qualification is fully in line with the case law of the Union Courts (see below) that an effect on trade cannot be merely hypothetical or presumed, but has to be demonstrated, and needs to extend to the relevant trade, i.e. between Northern Ireland and the Union in the case of Article 10(1) of the IE/NI Protocol.

The declaration therefore clarifies, but does not alter, the notion of “effect on trade” as interpreted by the Union Courts.

1.1. The notion of State aid

According to the European Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty¹⁷, for the “effect on trade” threshold to be met, *“it is not necessary to establish that the aid has an actual effect on trade (...) but only whether the aid is liable to affect such trade. In particular, the Union Courts have ruled that ‘where State financial aid strengthens the*

¹⁶ https://ec.europa.eu/info/publications/unilateral-declarations-eu-and-uk-application-unions-state-aid-rules-under-article-10-ie-ni-protocol_en.

¹⁷ 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 (“NoA”), OJ C 262, 19.07.2016, p. 1.

*position of an undertaking as compared with other undertakings competing in [such] trade, the latter must be regarded as affected by the aid’.*¹⁸

The case law thus creates a presumption that an effect on trade exists as soon as a financial support from State resources strengthens the position of an undertaking compared with other undertakings in a market subject to trade.¹⁹ Alternatively, an effect on trade exists where it is at least conceivable that the beneficiary of the support is in competition with operators established in other Member States. The Courts observe that, “*aid distorts competition in so far as it strengthens the financial position and opportunities of the recipient firms with respect to competitors who do not receive the aid. Whenever this effect extends to intra-[Union] trade, the latter is impaired by the aid*”²⁰.

Aid may also affect trade within the Union even if the undertaking receiving the aid exports almost all of its production outside the Union²¹. This is because it would place the undertaking receiving the aid at a competitive advantage compared to other undertakings of the Union. Moreover, the Court has clarified that, with the exception of situations covered by the *de minimis* rules, the effect on trade does not need to meet any significance test.²² That is to say that even a very small, or indeed, even merely potential effect on trade suffices.²³ However, an effect on trade cannot be merely hypothetical or presumed, but has to be demonstrated.²⁴ This excludes for example measures with a purely local impact from the scope of the State aid rules.²⁵ Finally, the fact that aid is granted to all the operators in a given economic sector does not exclude an effect on trade, as the beneficiaries would for example be compensated for costs that they would otherwise had to face.

1.2. The notion of effect on trade between Northern Ireland and the Union

For aid to have an effect on trade between Northern Ireland and the Union, the beneficiary does not necessarily need to be located in the EU Member States or in Northern Ireland, nor does the beneficiary necessarily need to be directly involved in trade between Northern Ireland and the Union.

¹⁸ NoA, paragraph 190 (footnotes not reproduced).

¹⁹ Case 730/79 *Philip Morris v Commission*, ECLI:EU:C:1980:209, paragraph 11.

²⁰ Case C-310/99 *Italy v Commission*, ECLI:EU:C:2002:143; Case T-291/11 *Portovesme v Commission*, ECLI:EU:T:2014:896 and in Case T-308/11 *Eurallumina v Commission*, ECLI:EU:T:2014:894.

²¹ Case C-142/87 *Belgium v Commission* (“*Tubemeuse*”), ECLI:EU:C:1990:125.

²² Case T-55/99 *CETM v Commission*, ECLI:EU:T:2000:223, paragraph 6.

²³ Case C-518/13 *Eventech*, ECLI:EU:C:2015:9; Case C-706/17 *Achema and others*, ECLI:EU:C:2019:407; Case C-659/17 *Azienda Napoletana Mobilità*, ECLI:EU:C:2019:633; Case T-578/17 *a&o hostel and hotel Berlin v Commission*, ECLI:EU:T:2019:437.

²⁴ Case T-728/17 *Marinvest and Porting v Commission*, ECLI:EU:T:2019:325, paragraph 81.

²⁵ NoA, paragraph 196.

Rather, any aid granted to an undertaking by the Member States or the United Kingdom may be found to affect trade between Northern Ireland and the Union if it affects the possibilities for undertakings located in the other market to engage in such trade, or strengthens the ability of the beneficiary to enter the Union or Northern Irish markets, should it wish to do so²⁶. In particular, aid granted by the United Kingdom to undertakings that are not located in Northern Ireland may also fall under Article 10 of the IE/Ni Protocol if the potential of an effect on the relevant trade between Northern Ireland and the Union can be demonstrated. This might notably be the case if the undertaking operates in, or trades with, Northern Ireland, as the aid might reduce the possibilities of Union competitors to be active in that market.

To clarify the above by means of examples, the following measures would likely be considered to affect trade between Northern Ireland and the Union:

- A tax scheme granting a direct or indirect benefit to any firm trading with Northern Ireland;
- Incentives to the financial services industry that would allow manufacturers or electricity companies engaged in trade between Northern Ireland and the Union to access cheaper credit, thus gaining an advantage over their trading partners;
- Aid to a manufacturer in difficulty if its goods are available for sale in Northern Ireland.

2. ARTICLE 5(6) OF THE IE/Ni PROTOCOL

Article 5(6) of the IE/Ni Protocol identifies specific measures in relation to the IE/Ni Protocol.²⁷ These measures, in so far as they affect the relevant trade between Northern Ireland and the Union (i.e. trade in goods and trade in wholesale energy), are subject to the provisions of Article 10 of the IE/Ni Protocol on State aid.

As a result, the United Kingdom will be able to waive tariff debt or reimburse traders as foreseen in Article 5(6) of the IE/Ni Protocol, but only in accordance with the EU State aid rules. To that end, reimbursements of more than 200 000 EUR over three years (i.e. above the *de minimis* threshold) would be subject to notification to the European Commission, unless an exemption applies.

When assessing the compatibility of such aid measures, the European Commission will take the circumstances in Northern Ireland into account as appropriate.²⁸

²⁶ Joined Cases C-197/11 and 203/11 *Libert and others*, ECLI:EU:C:2013:288.

²⁷ 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).

²⁸ Article 5(6) of the IE/Ni Protocol.

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

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