Labour's Programme and EU Law

Andy Tarrant and Andrea Biondi

It has been routinely asserted that Labour's 2017 election programme is incompatible with 'neoliberal' European law. Here, two senior European competition lawyers take issue with this assessment. They offer a comprehensive legal analysis of the 2017 manifesto, grounded in a historical and political-economic argument that European rules are not hostile to nationalisation, and seek instead to promote the 'social market' economy favoured by German and Scandinavian social democrats.

In recent years, a socialist critique of the European Union has returned to prominence on the British left. The Bennite heritage of the Labour leadership, the difficulties of the Eurozone and the ideological exhaustion of neoliberal globalization have broken a tacit pro-European consensus, exposing divisions that continue to frustrate the formation of a coherent long-term European policy. An account of the European Union that portrays it as a single-mindedly free market

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institution, implacably hostile to a transformative politics in Britain, has been put forward by a range of influential figures – from the *Guardian's* Larry Elliott to Harvard University's Richard Tuck and *Renewal's* own Joe Guinan.

As part of this argument, it is commonly asserted that the radical moves towards public ownership in key utility sectors, demanded by Labour's popular 2017 manifesto, would be incompatible with EU law. A 'hard' Brexit, completely separating the UK from the legal framework of the European economy, would therefore represent the only path towards the implementation of Jeremy Corbyn's social democratic agenda for Britain.

As lawyers specialising in European competition and state aid rules, we have undertaken a study of the manifesto that leads us to disagree with these assessments. Addressing the specific history, content, and application of EU rules, as well as their relationship with the longstanding policy preferences of other member states, leads us to conclude that EU state aid laws do not prevent a future Labour government from introducing necessary radical reform of the British economy.

This article seeks to offer a more complete explanation of the nature and purpose of EU state aid rules. Their primary goal is not to embed neoliberalism, but rather to protect a European-scale single market. Their genesis lies in a post-war response to the ruinous beggar-thy-neighbour policies of the 1930s. Their design requires that state aid is channelled to support the kind of 'social market' economy associated in particular with Germany, the Netherlands, and Scandinavian countries. Indeed, amendments to the Treaty on European Union agreed at Lisbon mean that a 'social market economy' has been formally enshrined as an objective of the EU since 2009.[1]

Developments in EU state aid law in the last few years have made it much clearer what national governments can do in terms of domestic economic restructuring. They also demonstrate the progressive potential of rules that prevent individual multinational corporations from pressuring individual member states into granting them large tax subsidies. These legal refinements make it feasible to assess the likely potential impact of EU state aid rules on the pledges made in 2017 Labour manifesto, and to develop a more balanced account of the costs and benefits (from a left-wing perspective) of the UK remaining under the ambit of European law.

We have conducted our assessment with respect to each of Labour's twenty-six specific economic proposals and find that the effect would likely be negligible. Particular concern has been expressed in some 'Lexit' quarters about state aid rules preventing those parts of the Labour programme which favour nationalisation.[2] This is not the case; nor would Lexit in any event be a mechanism for avoiding state aid laws. Any measure of interaction with Europe short of autarchy – whether this took the form of membership of the European Economic Area, or a more limited bilateral trade agreement – would likely impose the same or very similar rules.

Finally, we make a broader point about attitudes towards Europe among British policy elites using the example of a large scale but little-known UK not-for-profit public service, the National Employment Savings Trust (NEST). NEST was set up to provide workplace pensions by the 2005-2010 Labour administration. There were constraints imposed on NEST by the UK government, allegedly deriving from EU state aid rules – but these were entirely driven by British beliefs about EU state aid law, alongside UK domestic interests, rather than any pressure from Brussels. When eventually asked, the EU Commission said these constraints were not required by EU state aid law. The case for Lexit can be seen as a broader function of a counterproductive British mindset that exists across ordinary ideological divides, and tends on the one hand to overstate the power, reach, ideological homogeneity and malign intention of the European institutions and on the other to exaggerate the exceptional nature of the United Kingdom.

A brief history of EU state aid rules

EU state aid rules have been an integral element of the EU since its inception as the European Economic Community in 1957. Three of the countries which signed the original Treaty of Rome had Socialist prime ministers, three had Christian Democratic leaders. The purpose of the Treaty was to create a common economic space within which the mixed economies of Europe could prosper and where the economic drivers considered to have fuelled the rise of populist dictators prior to the war could be controlled. State aid rules were designed to meet both ends. The greater economic space was intended to create a larger market, generating increased opportunities for specialisation at firm level and the exploitation of national comparative advantage. State aid rules were intended to ensure that individual states would not try and free-ride on this larger common market by providing aid to their national companies at the expense of unsubsidised rivals in other member countries.[3] In the 1920s and 1930s, just such temptations had led countries to provide export subsidies and provoked both tit-for-tat export subsidies and counteracting tariffs, helping create the ruinous economic conditions that led to the rise of fascist dictatorships.

In the early years of the European Economic Community, the Community's institutions focused on controlling aid to private enterprise. A single market could not be created if inefficient national enterprises were propped up, preventing more efficient enterprises in other member states from expanding.[4] In the 1970s and

1980s, as countries reacted to oil crises and lack of competitiveness against Japanese and US manufacturing by nationalising and subsidising loss-making national enterprises, the attention of the Community institutions was refocused away from aid granted to private enterprises to controlling aid to state owned enterprises. If economic activities were nationalised and then subsidised to compete, they would have the same potential effect of eliminating the single market as subsidised private national enterprises.

Control of state aid today

Structure of the rules

The drafters of the Rome Treaty were aware that the market does not always deliver, and wanted states to have scope to provide aid to enterprises where this was justified. The state aid rules are intended to control the provision of state aid to individual companies to ensure that it can be provided where it meets a public policy goal, but cannot be provided where it undermines the single market. The rules in the Lisbon Treaty are structured as follows:

> a general rule prohibiting aid from the state to individual enterprises in principle. (This is often quoted in isolation by proponents of Lexit).
>
> a series of exceptions, some which are always applicable (for example, aid in the event of a natural disaster) and others which are discretionary, ie dependent on a decision by the European Commission and the European Courts.[5]

Some of the discretionary exceptions are very wide. For example, aid is potentially permissible '…to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.[6]

In order for such discretionary exceptions not to be a mechanism for undermining the general principle, the rules around their operation are policed by the European Commission and the European Courts. Exemptions are delivered either by individual notification of proposals to the Commission from member states, which the Commission then assesses case by case, or by 'block' i.e. pre-defined categories of legitimate aid that can be granted without any prior notification.[7] For instance, aid to research, development and innovation, to risk capital, broadband internet, regional aid, aviation, energy and the environment can all fall within 'block exemptions'.

State aid rules do not affect economy-wide regulation

A further limitation to the scope of state rules concerns 'general', or economy-wide regulation. The member states insisted on wording the European Treaties to ensure that EU state aid rules would not interfere with their ability to set general regulations to structure their economies. To give a hypothetical example: a tax-break given to a single or several favoured individual multinationals could be caught by state aid rules, whereas a general national economy-wide cut in corporation tax could not be caught. Equally, state aid rules also do not impede general regulation including consumer protection or labour laws.

It can of course be difficult to distinguish what consists of a selective measure and what is a general measure when categories of enterprise benefit. This is a question of particular relevance to the Labour Party, which is now seeking to promote alternative forms of ownership in the British economy. Nonetheless, the European Court of Justice has held that, for example, member states are entitled to apply a different tax system for cooperative societies in general because of their specific characteristics that distinguish them from corporations.[8]

How is aid assessed as acceptable?

Assessment of the acceptability of aid is intended to be a logical reasoned process. In order for an aid which requires notification to be cleared, the applicant has to show that:

> it is aimed at making a material improvement that the market alone will not deliver
>
> there is a logical connection between the provision of aid and a change in the behaviour of the undertaking that receives the aid that will bring about the outcome the aid is intended to achieve
>
> the aid is limited to the minimum necessary to achieve the outcome
>
> the benefits of the aid outweigh any costs in terms of damage to trade
>
> the grant is transparent.

An important benefit of this reasoned process is that it forces states to transparently assess why they are granting an aid, and to demonstrate why there is a reasonable basis for concluding that it is in the public interest.

In those areas where no prior notification is necessary, member states are still required to comply with strict rules on transparency and publications of the aid granted. Far from entrenching the interests of private capital, this 'evidentiary' characteristic of state aid control operates as an important corrective to the susceptibility of the modern state either to be held to ransom by multi-national corporations or to indulge the 'corporate welfare state'.[9] Without the EU framework obliging member states to direct scarce aid resources to impoverished regions or innovation, spending would likely be even more skewed to big corporations and already-favoured regions. Multinationals would tour national capitals demanding greater subsidies.

State aid does not prevent the state from investing in public enterprises

The EU Treaty enshrines the right of member states to run public enterprises should they choose.[10] The state aid rules do not interfere with this right. State aid rules shape what member states do depending on whether there is a functioning market or not. Where there is *a functioning marke*t the state's investment must be a rational economic investment of the type a private investor would also make. This principle is now known as the '*market operator principle*'.[11]

In the absence of a 'functioning market', it is important to note that the EU state aid rules do not require that the state only operate profitable public services. A member state is free to define what it views as public needs, and to decide that a service ought to be provided to meet a need. Where there are no economic actors capable of profitably offering that service, the member state is free to set up a subsidised service.[12] Indeed, the Court has recently set out a set of circumstances which avoids the funding of many public services being brought within the state aid rules at all and therefore avoids the need for notification (for further discussion of this point, see below).

The political economy of state aid

From this brief survey, we can draw some general conclusions as to what interventions in the economy European state aid rules are likely to permit. A member state cannot subsidise an individual private enterprise operating on an existing market but can invest in one. It can invest in, but not subsidise, a public service operating on an existing market, and it can subsidise a public service operating where there is no viable market. These general rules do not sound much like neo-liberalism, if this is understood to mean the market at all costs. They do fall within what is usually considered the classic exposition of European social democracy, encapsulated in the German Social Democratic Party's 1959 Bad Godesberg formulation: 'The market where possible; the state where necessary'.

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The recent development of the EU state aid rules

There have been a number of important refinements of the state aid rules during the last few years. These underline that state aid rules do not prevent government spending to restructure the economy, but rather channel it in particular ways. Indeed, in one important respect these developments actively *protect* government spending generally by targeting state-sponsored tax evasion. These developments have been at the behest of the member states which renegotiated the Treaties to make it clear to the EU institutions – against the wishes of the then-British government – that competition was a tool, not a goal, of the European Union.[13]

The European Union as an industrial policy actor

The approach of the EU has followed the direction taken by northern European countries like Germany, which have never taken the Anglo-Saxon view that industrial policy was a mistake. What has changed in the northern European countries since the 1970s has been a move from what is described as 'vertical' to 'horizontal' industrial policy. Instead of picking individual 'national champions', it is about setting policy frameworks (which can include aid, but aid available to any qualifying applicant, for example, aid for research and development), and then letting arm's-length agents compete within these frameworks.[14]

'Horizontal' in this context does not necessarily mean economy-wide. Policies are tailored to specific sectors. EU industrial policy, for example, particularly seeks to support advances in advanced manufacturing technologies for clean production; key enabling technologies for all industrial production (such as micro- and nanoelectronics, advanced materials, industrial biotechnology, photonics, nanotechnology); bio-based products; support for sustainable construction; clean vehicles and vessels; and smart energy grids.[15] The EU has also set itself the objective of increasing the level of overall EU GDP coming from manufacturing by 2020.

The role of state aid rules in this context is two-pronged. They are used to prevent member states propping up unsuccessful national firms so that resources go to those which are capable of delivering the goods and services of the future, and to remedy perceived market failures. These include insufficient support for research development in priority areas, inadequate flows of capital to SMEs, and inadequate infrastructure which jeopardise the ability of any firm to participate. As the Commission stated in 2010, 'state aid rules provide a framework that directs member states' investments to address identified market failures.'[16]

The EU has also, like Germany, put sustainability as an organising principle for industrial policy. For example, in order to accelerate the flow of state investment in this area, member states do not have to seek authorisation for aid to the private or public sector which assists enterprises to meet standards which member states wish to set and which go further than mandatory EU environmental standards.[17]

State aid rules against corporate tax evasion

Since June 2013, the Commission has been investigating the tax ruling practices of member states. A dedicated task force to examine tax planning practices was set up in summer 2013 to follow up on public allegations of favourable tax treatment of certain companies voiced in the media and in national parliaments. 'Sweetheart deals' for individual companies fall within the definition of state aid, since a measure by which the public authorities grant certain undertakings favourable tax treatment places them in a more favourable financial position than other taxpayers. In a series of investigations, the Commission found against individual tax rulings granted by Ireland, Luxembourg and the Netherlands in favour of firms including Starbucks, Amazon and Apple.

A market with limits: public service obligations

The definition of state aid - and consequently the scope of state aid rules - has boundaries. The Court of Justice has held that compensation for the discharge of public service obligations cannot be considered as aid. In the *Altmark* case, the Court of Justice set out specific criteria to be met for funding for public services to fall outside state aid.[18] These are worth quoting in full, because they establish a vital area of autonomy for national governments in determining the scope of the market within their respective societies.

> (…) First, the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined (…) :
>
> (…) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (…)
>
> (…) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public services obligation, taking into account the relevant receipts and a reasonable profit (…)[19]
>
> (…) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, which would allow for the selection of the tenderer capable of

> providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs, which a typical undertaking, well run and adequately provided within the same sector would incur, taking into account the receipts and a reasonable profit from discharging the obligations.

The *Altmark* judgement has now been fully incorporated in a series of Commission instruments aimed at clearly sheltering public services obligations (the so called 'Almunia package'). Thus, measures aimed at funding 'social' services (schools, hospitals, sports centres and so on) can be exempted *ex ante* from any control by the Commission.[20] Even if funding did not meet all the *Altmark* criteria, an aid can nonetheless obtain clearance from the European Commission if the aid is to provide a service of general economic interest ('SGEI') and prohibition of the aid would obstruct the performance of the particular public service assigned to the body. SGEIs are not defined by the European institutions. It is within the scope of the member state's discretion to decide that a service is of general economic interest and should be publicly provided if private undertakings will not provide the service to the same 'extent or under the same conditions' as the member state considers to be in the public interest.[21] Lifting the prohibition on an aid must not affect the development of trade between member states to an extent which would be contrary to the interests of the Union.

Targeting of controls

The widespread observance of EU state aid rules is in practice relatively recent. It really only began to be taken notice of by many national public services in the later 1990s. Experience of reviewing a much greater number of cases since then has led the Commission to conclude that there are many forms of state aid that do not need to be notified and can be assumed to be in conformity with the rules as long as they meet criteria in the state aid block exemption. These include national public investments in roads, inland waterways, rail, and water distribution networks, local public investments in broadband, research and energy infrastructures, hospitals, old age homes and regional urban development funds, culture and heritage conservation, audio-visual works, sports and recreational infrastructures.[22]

The 2017 Labour Party Manifesto and state aid rules

From this brief account of the evolution, structure and extent of state aid rules, two general conclusions might be drawn. Firstly, their intellectual inheritance is Christian and Social-Democratic rather than 'neoliberal'. Markets are seen as a tool of European integration, rather than an end in themselves; they are understood as being *constituted*, rather than compromised, by rules and exceptions that preserve their stability and address damaging externalities. The commitment to enforcing competition is consequently as tough – if not tougher – on rent-seeking American corporations as it is on social-democratic national governments.

The explicit policy preferences enshrined in the treaties and the decision-making of the institutions, meanwhile, tend in the directions favoured by the British left, seeking systematic improvements in productivity, environmental sustainability, and inter-regional equity. From both a political and an analytical perspective, therefore, it is vital to distinguish between the destructive macroeconomic policies of the Eurozone and the Growth and Stability Pact (which do not apply to the UK), and the more benign supply-side agenda promoted by European jurisprudence.

With this general perspective in mind, our specific assessment is that of the twenty-six specific economic measures set out in Labour's manifesto at the 2017 Election, most (seventeen) do not even potentially fall within the scope of European State Aid rules. Of those that could, seven are likely to fall within 'block' exemptions governing, for example, infrastructure spending. This likely leaves only two measures which might have to be notified: the state investment bank/regional bank proposition and the state-funded regional energy suppliers.

This assessment is of course provisional, as the analysis depends on the precise content of Labour's plans. Nonetheless, the provisional analysis suggests that Labour has plenty of scope to act in these priority areas without any impediment from state aid rules.

With respect to investment banks, it is worth noting (i) that the UK has already had clearance for state banks to provide investment to Small and Medium Sized Enterprises (SMES) and for renewable energy, and (ii) that the EU's general policy is to increase state aid, where justified, to SMEs and for renewable energy.

With regards to regional energy suppliers, the proposed reason for Labour's intervention is to reduce excessive profits, so there would appear to be ample scope to operate profitable public enterprises which did not require aid at all. The recent European Commission Guidelines on environmental protection and energy exempt aid for renewable energy projects below certain thresholds altogether and set out the conditions under which it can be cleared if it is above the threshold.[23]

Over the following pages, we have tabulated a selection of Labour's key policies as set out in the 2017 manifesto, excluding those which are very obviously matters of 'general regulation' and therefore irrelevant to state aid rules. We set out the extent to which they constitute a potential aid under EU law, the likelihood of clearance if they constitute an aid, and their relationship to existing EU policies in the relevant areas.

Labour policy	Potential state aid?
Promote renewables (pp.20-21).	If profitable investment then not an aid. If subsidy, block exempted under certain thresholds. Infrastructure also block exempted. UK Green Investment Bank to lend for renewables already cleared.
Increase spending on research and development (p.14)	Yes, block exempted under certain thresholds
Increase spending on skills (pp.39-42)	The EU does not require notification of spending on skills subject to meeting the rules set out in the Training block exemption.
Increase spending on infrastructure (particularly rail) (pp.11-12)	Public investment in infrastructure is free of State aid, if it does not directly compete with other infrastructure of the same kind. This is typically the case for road, railway and water networks.
Superfast broadband by 2022 and other telecoms infrastructure improvements (p.12)	Number of measures already approved by Commission. State aid rules will be applicable depending on whether this is intended to be a spending programme or a regulatory programme which makes a condition of telecoms operators to provide certain services, in which case aid rules do not apply.
Improve public procurement standards	Not an aid
National Investment Bank and Regional Investment Banks. Intention to identify where other lenders fail to meet the needs of SMEs and prioritise lending to improve the funding gap (pp.16-18).	The UK has already had the Green Investment Bank and the British Business Bank (BBB) cleared in 2012 and 2014. It may be possible to design the NIB so it or parts of it fall within the scope of the *Altmark* judgement (as was the case for the BBB) and does not constitute an aid. Similarly, regional banks would not be providing aid if they were acting within Altmark or according to the Private Market Operator principle. Even where there is an aid, investment in Small and Medium-sized Enterprises (SMEs) and research and development aid to SMEs potentially benefits from a bloc exemption and does not require notification.
Proper legal definition for co-operative ownership. National Investment Bank and regional development banks will be charged with helping support co-operative sector. (p. 18).	Under EU law, generally, cooperative societies are not in a comparable factual and legal situation to that of commercial companies and consequently do not entail state aid, provided that: they operate in the economic interest of their members the relations with their members are personal and individual the members are actively engaged in the work of the cooperatives they are entitled to equitable distribution of their economic results.

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	Likely outcome of a notification	**Problem/benefit other EU legislation**
	Where there is a notifiable aid, likely to be cleared if meeting a market failure (eg insufficient generation of electricity based on renewables by target date). EU State Aid policy seeks to encourage efficient promotion of renewables	EU 2030 Framework to achieve, inter alia, a 40% reduction in greenhouse gases compared to 1990.
	Clearance likely. EU State Aid policy seeks to encourage greater spending on research and development. For example, the allowed maximum funding rate for close-to-market projects that involve prototyping and testing is 70% of eligible costs under Horizon 2020 and is also 70% under the R&D&I Framework, for large enterprises as long as the project is collaborative	EU Horizon 2020 programme.
	Clearance likely. EU State Aid policy seeks to encourage greater spending on skills	
	Clearance likely. EU State Aid policy seeks to encourage greater spending on infrastructure with emphasis on transparency.	The Commission's Investment Plan for Europe hopes to mobilise at least 315 billion over three years in private and public investment across the EU and infrastructure spending is intended to be a major component.
	Clearance likely if existing networks are not duplicated. EU State Aid policy seeks to encourage greater public spending on telecoms infrastructure and to accelerate deployment beyond what the market could achieve on its own.	The Labour Party proposals mirror the EU's 2016 Gigabit Society proposals. These include a widening of the scope of the Universal Service Obligation (USO) to include affordable broadband as a safety-net, with a list of online services enabling users' (especially vulnerable users) participation in civil society. The proposals allow expanded public subsidies to operators to meet new social requirements.
	N/A	New public procurement directives provide more flexibility for Member States. Directive 2014/24 enables public authorities to take into account public policy objectives, such as environmental and social considerations as well as innovation aspects in awarding contracts.[1]
	Clearance likely as EU State Aid policy seeks to increase flows of capital to regions and SMEs beyond what the market could achieve on its own.	

Labour policy	Potential state aid?
Ringfence between retail and investment bank (p. 16)	Not an aid
Break up RBS to create regional banks (p. 16)	Not an aid
'Insource' public and local council services (p. 19)	Not an aid. The internal organisation of public administration is not a state aid issue. State aid could potentially be an issue if the council no longer operated a service and instead wanted to set up a rival service to compete with private providers. However, there are many services (eg local public investments in broadband, research and energy infrastructures, hospitals, old age homes and regional urban development funds, culture and heritage conservation, audio-visual works, sports and recreational infrastructures) that do not fall within the state aid rules at all. Recent decisions of European Commission exclude application of Article 107 TFEU to measures with local impact only. The Notion of Aid Notice confirms this as a general Commission position.
Bring private rail companies back into public ownership as their franchises expire (p.19)	Not an aid.
Reverse the privatisation of Royal Mail at the earliest opportunity (p. 19)	State aid rules do not prevent nationalisation. Aid rules would only apply if government offered subsidies to Royal Mail on a basis no rational investor could contemplate. Aid can be provided where Royal Mail is offering a Service of Economic Interest.
Introduce an immediate emergency price cap to ensure that the average dual-fuel household energy bill remains below £1,000 per year, while we transition to a fairer system (p.20).	Not an aid
Regaining control of energy supply networks through the alteration of the National and Regional Network Operator license conditions (p. 20).	State aid rules do not prevent nationalisation. Aid rules would only apply if government offered subsidies to alternative operators.
Supporting the creation of publicly owned, locally accountable energy companies and co-operatives to rival existing private energy suppliers, with at least one in every region (p. 20)	This potentially constitutes an aid if state financial resources are provided above a certain threshold. Suppliers serving below 300,000 households likely to benefit from block exemption.
Legislating to permit publicly owned local companies to purchase the regional grid infrastructure, and to ensure that national and regional grid infrastructure is brought into public ownership over time (p. 20).	Not an aid.

1 Directive 2014/24/EU of the European Parliament and of the Council, 26th February 2014, on public procurement and repealing Directive 2004/18/EC. Online at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0024.

Likely outcome of a notification	Problem/benefit other EU legislation
N/A	
N/A	
	EU public procurement rules can have an effect where the council wants to in-source partly owned (depending on certain thresholds) or fully privatised former council services, in which case competitive tendering would be required.
N/A	Under EU rail legislation, the UK cannot offer monopolies. However, in practice, most routes would not have economically viable competitors.
N/A	EU rules do require the liberalisation of certain postal services; but they also allow member states to impose Universal Service Obligations on providers to ensure citizen access to postal services and infrastructure.
N/A	
N/A	
To be cleared: Aid to coops can be cleared if just serving members; Aid to local companies serving a functioning market must be made on the market investor principle or defined as a Service of General Economic Interest.	
N/A	

State ownership in the EU

One of the arguments made by proponents of Lexit is that the EU is hostile to state ownership. As discussed above, this is not the case. What the EU state aid rules do prevent is subsidies from the state to loss making public services where an alternative enterprise within the EU is in practice capable of offering that service on a profitable basis. These rules apply regardless of whether the enterprise in question is state-owned. The narrowness of that objection helps explain why nationalised economic actors do in fact remain prevalent across the EU.

Political scientists have, incorrectly, often tended to accept as a given that state ownership is disappearing in the EU.[24] However, the reason for this may be that research has tended to consider the sale of shares as being identical to privatization.[25] This has led to an assumed shared identity between sales of shares and the termination of State control. This confusion arises because in many cases, while States have substantially reduced the proportion of capital they own in nationalised industries, they have nonetheless often remained the largest single shareholder.

For example, one of the leading academic commentators on liberalisation, Mark Thatcher, has argued that the European electricity and telecommunications sectors are privatised.[26] However, the evidence he presented could also be interpreted as showing that, in two thirds of the States examined, the State had control levels of ownership in the main operators. His tables could also be amended to show State control of German electricity and Italian telecommunications; in which case, State control continued to apply to 100 per cent of the cases examined outside the UK in these sectors. From a US and UK perspective, privatisations may have been undertaken because the State aspired to become a neutral economic 'umpire'.[27] But this does not seem to have become the ubiquitous driver which was predicted on the back of the UK experience in the 1980s. The body representing public enterprises at EU-level, the European Centre of Employers and Enterprises providing Public Services (CEEP), has characterised the opening of capital in public enterprises as being conducted in many European states not to remove the involvement of the state but 'with the sole aim of drastically reducing national debt'.[28] Member states seem to have concluded that they do not need 100 per cent holdings to still be able to steer companies when they wish to do so.

Utility regulation in the EU

What proponents of the argument that EU rules prevent nationalisation actually tend to mean is that in certain sectors EU rules prevent member states from granting monopolies.[29] It is, however, also arguable that in most cases politicians have lifted national monopolies because they did not consider they were beneficial to the public interest. The public interest can, *inter alia,* include the creation of a greater market than that which is available within one member state.

For example, EU rules have required national railway operators to make access available to track and other railway systems so that railways operators can piece together trans-continental freight services over the top of the patchwork of national rail track systems. The EU has also facilitated the adoption of common standards so that trains will actually be able to run right across Europe (whereas different national standards previously prevented this). Why was this sensible? Because restricting rail freight to a series of national monopolies was killing it off as a service: rail freight generally only becomes competitive with road haulage at distances of around 600km.[30] Without the ability to compete across borders and thus the restriction of freight providers to the delivery of national services, rail freight had become largely irrelevant. In fact, the carriage of freight by rail in the EU declined in volume terms from 32 per cent in 1970 to 8 per cent in 2003[31] whereas a continental rail freight system in the US means that the railways currently carry 40 per cent of freight by volume.[32] The Commission's 1997 White Paper put it as follows: 'The national focus of railways has left them handicapped when dealing with this [freight] traffic although they are potentially well suited to carry it'.[33]

Renewable energy is another sector where national monopolies are not in the public interest. It requires that there is a continental grid which allows the generation of energy in relatively peripheral parts of the EU and its distribution across the EU. This is important not just for the 'central' EU but also the peripheral regions as they are investing in energy intermittent energy sources. A European grid is particularly important for the UK as it can potentially access about 50 per cent of Europe's tidal energy resource and about 40 per cent of the wind.[34] EU open access rules mean that British energy generators can potentially sell their power to German car makers and the UK grid can draw energy from continental generators when the wind is low. This would not be the case without open access rules.

Telecommunications provide a final example. National telecoms monopolies originally extended not just to networks but to all services supplied over them and the equipment attached to them. Like the two sectors already described above, the main national telecoms provider no longer maps onto the economic space needed to support the needs of a much greater number of national economic actors. They are now dependent upon utility networks as elements in a chain of European national networks linked by open access rules that form European grids. Digital telecoms networks are the nervous system of the entire single market production process.[35] Having distinct monopoly digital islands would effectively mean restricting and restructuring industrial production back to a purely national level. It is unlikely this would increase employment in telecoms in the UK beyond a few thousands at most, but it would certainly have a huge negative impact on Britain's wider workforce. The UK is now economically integrated with EU countries quite differently to how it is integrated with non-EU countries. UK exports to the rest of the world are primarily finished products, whereas almost 40 per cent of UK exports to the EU involve products which are then exported from a partner-EU country to the rest of the world.[36] It is quite conceivable, therefore, that a return to national monopoly telecoms would do a great deal of damage to UK manufacturing.

The proponents of public monopolies typically argue that they are required to ensure that workers and consumers receive the benefits of economic activity.[37] However, there is nothing obvious about monopoly necessarily leading to greater consumer or employee welfare. It is also, even at best, an indirect way of achieving superior consumer or employee outcomes. If public policy is that sectors should offer a certain level of wage for employees or worker representation in decision-making then the state can explicitly regulate to achieve this. One would imagine a state owned enterprise or workers' cooperative might be better at meeting such requirements. Setting high regulatory standards is not a state aid under EU law and does not have to be notified to be cleared.

The EU utility regimes meanwhile allow member states to either force private enterprises to share a requirement to offer a service to uneconomic customers, or to divide up the costs of the state-owned enterprise serving uneconomic customers and make private enterprises contribute to the costs of the state owned enterprise. Typically, in the utility sectors EU legislation allows member states to require providers to offer loss-making services such as services at socially necessary prices which are below the market level or to connect customers to grids despite such connections never being likely to cover their costs. These rules allow member states to nominate one or multiple operators to supply these services and to opt, if one operator carries the burden (typically the previous monopoly operator) for it to pass a fair share of the costs to other entrants to the market. The state can also opt to provide a subsidy to cover the costs.

In summary, therefore, there is little reason to believe that EU state aid or other rules would prevent a future Labour government from significantly increasing state intervention in utility markets, including through the promotion (direct or otherwise) of new state or co-operative providers. EU utility regulations, like state aid rules, have been shaped by the desire to create and regulate an integrated economic space, rather than by a dogmatic preference for private provision.

British views of EU state aid laws: the case of the National Employment Savings Trust

The extent to which new public enterprises can be supported by member states within EU rules can usefully be illustrated with reference to the case of the National

Employment Savings Trust (NEST). The 1997-2010 Labour government, on advice from the Turner Commission on pensions, decided that there was a market failure in the provision of workplace pensions: existing market participants did not want to serve low and medium earners as there was little or no profit to be made. The government therefore decided to set up a not-for-profit provider – NEST.

NEST would not cover its costs for perhaps 25 years and so required state subsidy. The UK therefore notified the Commission, which authorised state aid to NEST.[38] The UK government, however, imposed several restrictions on NEST which handicapped its ability to compete with private providers. It was not allowed to serve employees who earned over a certain amount, and it could not take in bulk transfers of existing pensions built up by employees of employers who switched to NEST. Both of these restrictions were applied by the UK on the basis that these restrictions were necessary to protect the existing UK pensions market. The problem with these restrictions was that they handicapped NEST's ability to deliver its public service mission of serving low and medium earners. The incoming Conservative-Liberal Democrat government decided that it had no choice but to maintain these restrictions due to EU state aid law.

As the then-shadow pensions minister Gregg McClymont MP argued, the UK government was overzealous in its interpretation of the European rules. The restrictions were disproportionate, and they frustrated NEST's ability to deliver its public interest mission. It was also unlikely that the UK had ever needed to notify the aid in the first place as the conditions under which the aid had been granted potentially fell within the Altmark criteria discussed above.[39] Under pressure from the Labour Party, the Government notified the Commission to ask whether it could lift the restrictions. The Commission responded that the restrictions were likely to frustrate NEST's ability to deliver its public service mission and the UK was free to lift the restrictions.[40]

Why had the UK ended up with an overzealous interpretation? First, Labour ministers at the time, with little knowledge of how the EU operates, were prepared to believe civil servants that the EU was intrinsically hostile to state aid and therefore restrictions had to be put in place to try and get it through.

Second, the Treasury – which is more hostile to state spending than the EU – was not in favour of NEST because it increased government spending. The Treasury exploited misconceptions about state aid to try and hinder its creation. The Treasury also has a departmental brief to act as the sponsoring ministry for the UK financial services industry, and was hostile to NEST for these reasons too.

Third, the Department of Work and Pensions, which was pushing for NEST, did not have in-house state aid specialists and was over-cautious in the face of claims from pension companies that they would mount a legal challenge.

Arguably, the lessons to be learnt here are (i) that where there is genuine market failure, a reasonable case for public intervention will succeed under EU rules; and, (ii) that Treasury and UK private industry interpretations of EU state aid law should not necessarily be assumed to be objective. Ironically, proponents of Lexit have based their arguments on mistaken interpretations of EU law that they share with the Treasury and the City of London.

Would leaving the EU allow the UK to avoid State Aid Laws?

Leaving the EU would not in any event provide much respite from EU rules unless the UK government were prepared to operate an autarchic economic policy. Any trade deal with the EU is likely to include provisions relating to state aid. The European Council guidelines for the Brexit negotiations of 29 April 2017 explicitly state that any future free trade agreement

> ...must ensure a level playing field, notably in terms of competition and state aid, and in this regard, encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.[41]

The inclusion of state aid provisions seem likely as state aid control is required by parallel systems such as the European Economic Area[42] and by virtually all free trade agreements recently concluded or currently negotiated by the EU such as those with South Korea, Vietnam, Singapore, Japan and Canada.[43] These all contain specific and comprehensive provisions on subsidies.

Even in the absence of an EU-UK agreement, the provisions of the Agreement on Subsidies and Countervailing Measures (SCM) under World Trade Organisation ('WTO') umbrella also police the provision of state aids with respect to trade in goods. Illegal subsidies could lead to trade sanctions. Aids which were not *per se* illegal but which caused injury to domestic producers in other countries would allow those countries to impose countervailing duties. As we explained at the outset of the article, it was to avoid such trade conflicts among European countries that the EU state aid rules and arbitration mechanisms were created in the first place.

Conclusion

Neither EU state aid rules, nor other EU rules which are distinct from state aid rules but sometimes considered in the same bracket, provide any obvious barrier to the implementation in the UK of the economic policies contained in Labour's 2017 election manifesto. This is unsurprising since EU state aid rules are not intended, as is sometimes claimed, to prevent state intervention in the economy. Instead, the rules are intended to ensure that, where scarce state subsidies are deployed to support economic actors, they are channelled to where they will have the greatest beneficial impact in meeting market failures. The rules also help stop national governments being held to ransom by firms threatening to exit one member state in exchange for subsidy in another. State aid is an important and integral element of European industrial policy. While Labour's plans for fiscal expansion diverge from the austerian preferences of the Eurozone, its demands for activist supply-side interventions place it in the mainstream of European policy-making.

This is not to say that the state aid system requires no reforms at all. It is the case that the European Commission and the EFTA Surveillance Authority have discretion over the timeframes in which they clear national aid proposals. This could be a potential concern to an incoming radical UK government. However, to minimise that concern the Labour Party would be advised to engage early with supranational decision-makers to ensure rapid clearances. Such engagement is likely to be facilitated by the fact that most European policy makers would regard the content of Labour's programme as what any self-respecting European administration should already be doing. It is also worth noting that the UK currently spends less on non-crisis related state aid than almost every other member state as a proportion of GDP, and would have to more than triple its expenditure to reach the levels spent by Germany.[44]

The real question for Labour now concerns the best route to implementing and further developing its successful election programme. This requires a balanced analysis of the costs and benefits of the range of policy tools available to the Labour party for the creation of a freer and more equal society. These would include a huge range of ambitious measures that have little to do with EU law: a macro-economic policy designed to achieve full employment (including people's QE), government spending on the welfare state, spending on social housing, taxation policy, policing the split between retail and investment in private banks, and general regulation on consumer and workers' rights. Further measures such as state investment banks to grow the economy and to push an environmental agenda fall squarely within EU policy. Regaining the freedom to establish counterproductive national utility monopolies, or to indefinitely subsidise loss-making enterprises to no defined purpose, are minor issues by comparison.

The price of regaining these peripheral areas of autonomy – exit from the single market –would be a prolonged and unpredictable level of economic disruption and stagnation, which would impose constraints of its own on a future Labour government. Rather than pedalling establishment myths about the restrictive character of EU rules, the British left needs a more honest and nuanced debate about the likely priorities of a future government that is seriously committed permanently and radically transforming British society.

For a critical response to Tarrant and Biondi by Professor Danny Nicol – the leading legal authority for Lexit – and a reply to him in turn, please see the Renewal blog.

Andy Tarrant is Head of Policy and Government Affairs at the People's Pension, a not-for-profit workplace pension provider. Previously he was adviser to Labour shadow Europe and Pension ministers. He is an EU Competition lawyer by training and has held a range of corporate and regulatory positions in the telecoms sector.

Andrea Biondi is Professor of European Union Law and Director of the Centre of European Law at King's College London, and academic associate at 39 Essex Chambers.

Notes

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3. *Brussels Report on the General Common Market* (or 'Spaak report'), 1956. Online at: https://www.cvce.eu/en/education/unit-content/-/unit/1c8aa583-8ec5-41c4-9ad8-73674ea7f4a7/dee61d43-7dc3-4383-a3dc-eb1e9f2e78db.
4. See M Merola, 2016,'The Forces Shaping State Aid Control in the EU', in L. Rubini & J. Hawkins (eds) *'What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines'*- e-book, EUI-University of Birmingham, at 101.
5. The key provisions are contained in two articles of the Treaty of Rome, now Articles 107 and 108 Treaty on the Functioning of European Union (TFEU), which have barely changed since 1957. Online at: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-vii-common-rules-on-competition-taxation-and-approximation-of-laws/chapter-1-rules-on-competition/section-2-aids-granted-by-states.html.
6. Article 107(3)(c) TFEU.
7. For example, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, OJ L 187, 26.6.2014, p. 1–78. Online at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0651.
8. Joined ECJ cases C-78/08 and C-80/08 *Paint Graphos* ECLI EU 2011 I-07611. Online at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CC0078.

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11. Notice C-2016 Commission Notice on the notion of Aid ex Art 107 (1) TFEU OJC 262, 19.07.2016, p.18. Online at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.262.01.0001.01.ENG.
12. Joined Cases C-341/06 P and C-342/06 *UFEX* ECLI:EU:C:2008:375. Online at: http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0341&lang1=en&type=TXT&ancre=.
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