



## DEBATE PACK

Number CDP 2018/0273, 10 December 2018

# State aid, public ownership and workers' rights after the UK leaves the EU

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## Summary

This debate pack has been prepared ahead of the debate on State aid, public ownership and workers' rights after the UK leaves the EU, to be held in Westminster Hall on Tuesday 11 December at 2.30pm. This debate will be led by Laura Smith MP.

The House of Commons Library prepares a briefing in hard copy and/or online for most non-legislative debates in the Chamber and Westminster Hall other than half-hour debates. Debate Packs are produced quickly after the announcement of parliamentary business. They are intended to provide a summary or overview of the issue being debated and identify relevant briefings and useful documents, including press and parliamentary material. More detailed briefing can be prepared for Members on request to the Library.

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# 1. State aid

## 1.1 State aid provisions in the Political Declaration

Paragraph 79 of the Political Declaration states the need for a 'level playing field' in the future relationship between the EU and the UK. It states that the future relationship "must ensure open and fair competition", mentioning state aid as one of the areas where arrangements between the EU and the UK would be needed.

The Political Declaration states that the precise nature of the commitments in the area of state aid will correspond with the "scope and depth of the future relationship", combining relevant EU and international standards and adequate mechanism to ensure effective implementation domestically, enforcement and dispute settlement.

It follows from this that provisions on state aid will be important in the future relationship in ensuring open and fair competition between the EU and the UK and maintaining access to each other's markets.

Successive UK governments have supported rigorous state aid controls.<sup>1</sup> This Government has said it will set up an independent UK state aid regime after leaving the EU, combined with restrictions on state aid. For example, in her Mansion House speech in March, Mrs May stated:

As with any trade agreement, we must accept the need for binding commitments – for example, we may choose to commit some areas of our regulations like state aid and competition to remaining in step with the EU's.<sup>2</sup>

As to the future arrangements of state aid, free trade agreements between the EU and third countries include varying degrees of controls on state aid. In general though, the closer the market integration, the more state aid rules form part of the agreement.<sup>3</sup>

Commons Briefing Paper [EU State Aid Rules and WTO Subsidies Agreement](#) contains more information on the application of EU state aid rules and the effects of Brexit.

See also Commons Briefing Paper [The Political Declaration on the Framework for Future EU-UK Relations](#), Number 08454, 3 December 2018, chapter 4.16

## 1.2 Separation provisions on state aid in the Withdrawal Agreement

For information on the state aid provisions in the Withdrawal Agreement, please see Commons Briefing Paper [The UK's EU](#)

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[Withdrawal Agreement](#), Number 08453, 1 December 2018, Chapter 4.11

### 1.3 State aid provisions in the Ireland/ NI Protocol in the Withdrawal Agreement

For information on the state aid provisions in the Ireland / Northern Ireland Protocol in the Withdrawal Agreement, please see Commons Briefing Paper [The UK's EU Withdrawal Agreement](#), Number 08453, 1 December 2018, Chapter 8.7

### 1.4 Background on state aid

EU Member States sometimes intervene in their national economies by providing assistance to companies or industries using public resources. This can range from a government tax relief scheme for investors to a local authority giving a subsidy to a property developer. This type of assistance is called 'state aid' and is generally prohibited under the EU law (Article 107 of the TFEU).

The EU state aid regime is specifically targeted at creating a level playing field for businesses. As a general rule, state aid is prohibited when it threatens to distort competition and trade between Member States. Under certain conditions, the European Commission can authorise state aid which helps achieve defined policy goals such as regional economic development or better environmental protection. State aid can also be allowed in crisis situations in certain sectors or to aid specific businesses. Successive UK governments have supported rigorous state aid controls.

Commons Library Briefing Paper 6775 [EU State Aid Rules and WTO Subsidies Agreement](#) contains more information on the application of EU state aid rules and the effects of Brexit.

## 2. Public ownership post-Brexit

EU rules governing the ownership of companies are in Article 345 of the Treaty on the functioning of the European Union. The relevant section can be interpreted as stating that the EU has no stance on whether member states choose public or private ownership of industries or utilities:<sup>4</sup>

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

However, EU rules on state aid (discussed elsewhere in this debate pack) and EU competition rules do limit the extent to which member states can support and operate companies in competitive market places. And there are also some relevant EU rules that refer to specific sectors – these are explained in the Library briefing paper, [Public ownership of industries and services](#).

In the UK, there are few publically owned enterprises operating in competitive market places. The National Health Service could be viewed as an exception, although private healthcare providers make up a very small fraction of the overall healthcare market. The Post Office is another state owned enterprise. Others, such as Network Rail, are part of the public sector because of a crisis in the privately-owned predecessor that necessitated a public takeover.

### Do EU rules prevent more state ownership?

EU state aid rules, combined with EU competition rules mean that all enterprises have to behave competitively. This means that fully state owned enterprises cannot receive subsidies to prevent their failure, or benefit from a tax regime which discourages other entrants into a market.

But EU rules do not expressly prohibit state owned enterprises. It has been argued that most examples of public ownership can be structured in such a way that they are allowed under EU rules.<sup>5</sup> And the wide variety of state owned enterprises that exist in EU countries supports this view.<sup>6</sup>

### 2.1 Withdrawal Agreement

The [UK's EU Withdrawal Agreement](#) sets out arrangements for the transition or implementation period when the UK leaves the EU on 29<sup>th</sup> March 2019. The Ireland/Northern Ireland Protocol of the Withdrawal Agreement (in Part 6 of Annex 4) relates to state-owned undertakings,

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<sup>4</sup> European Union, Treaty on the functioning of the European Union, [Article 345](#), 2008

<sup>5</sup> Tarrant, A. and Biondi, A., [EU law is no barrier to Labour's economic programme](#), September 2017

<sup>6</sup> OECD, [The size and sectoral distribution of state owned enterprises](#), 2017, and Peretz, G., [Calls for EU "commitments" on state aid are a fantastical solution to an imaginary problem](#), New Statesman, 15 May 2018

undertakings granted special rights and privileges (for example, Royal Mail), and monopolies (for example, many regional water companies).<sup>7</sup>

Part 6 has one article – Article 25: Neutral Regulation. It states that the UK and EU will “make best use of relevant international standards” including, among others, “the OECD Guidelines on Corporate Governance of State-Owned Undertakings”. The OECD Guidelines are an international standard intended to help governments “avoid the pitfalls of both passive ownership and excessive state intervention”.<sup>8</sup>

As examples, two of the Guidelines are:

- Rationales for state ownership  
The state exercises the ownership of [state-owned enterprises] in the interest of the general public. It should carefully evaluate and disclose the objectives that justify state ownership and subject these to a recurrent review.
- State-owned enterprises in the marketplace  
Consistent with the rationale for state ownership, the legal and regulatory framework for [state-owned enterprises] should ensure a level playing field and fair competition in the marketplace when [state-owned enterprises] undertake economic activities.<sup>9</sup>

The Article also states that UK and EU regulators should be independent of the bodies they regulate and act impartially. The UK and EU should ensure that laws and regulations are enforced in a consistent and non-discriminatory manner.

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<sup>7</sup> Library briefing [Public ownership of industries and services](#) gives background on such bodies and their regulation in the UK.

<sup>8</sup> From foreword to OECD, [OECD Guidelines on Corporate Governance of State-Owned Enterprises](#), Nov 2015.

<sup>9</sup> OECD, OECD [Guidelines on Corporate Governance of State-Owned Enterprises](#), 2015 Edition, Nov 2015.

## 3. Workers' Rights Post-Brexit

### 3.1 Summary

A large number of employment rights in the UK are grounded in EU law. The extent to which these rights are safeguarded post-Brexit will largely depend on the manner in which Brexit proceeds.

If the Withdrawal Agreement is ratified, EU employment rights will continue to apply in the UK throughout the transition period. A future relationship agreement will likely include provisions on employment rights following the transition. The Political Declaration appears to envisage some form of non-regression clause.

If a future relationship agreement is not reached by the end of transition, the Protocol on Ireland / Northern Ireland (the backstop) kicks in. The Protocol lists specific EU equality laws that will continue to apply in Northern Ireland. Furthermore, the whole of the UK is bound by a non-regression clause covering labour protection standards. The enforcement mechanisms for this non-regression clause have, however, been criticised as weak.

In a no-deal scenario all existing EU employment law rights will still be converted into 'retained EU law' by the *European Union (Withdrawal) Act 2018*. While these rights could then be amended or repealed, the Government has stated that worker's rights will remain unchanged.

### 3.2 UK and EU employment law

Many, although by no means all, employment rights in the UK are grounded in EU law. Certain key employment rights (e.g. unfair dismissal; national minimum wage; industrial action) are almost entirely based in UK law. By contrast, other key rights (e.g. working time; holidays and holiday pay; discrimination) are grounded in EU law.

EU employment law provides a minimum floor for the protection of employment rights domestically. In a number of cases, implementing legislation in the UK goes further than what is required by EU law.

There are three ways in which EU-law-based rights apply in the UK:

- 1 EU rights are directly effective (e.g. the right to equal pay under Article 157 [TFEU](#))
- 2 EU rights are enshrined in primary legislation (e.g. prohibition of discrimination in the [Equality Act 2010](#))
- 3 EU rights are enshrined in secondary legislation (e.g. [Working Time Regulations 1998](#))

Where secondary legislation is used to enshrine EU employment laws in the UK, it can be made through powers derived from: (i) [section 2](#) of the *European Communities Act 1972* (ECA); (ii) another Act of Parliament; or (iii) a mixture of both.

A list of EU employment rights and the implementing UK legislation can be found at the end of Commons Briefing Paper 7732, [Brexit: employment law](#).

### 3.3 European Union (Withdrawal) Act 2018

[Section 1](#) of the *European Union (Withdrawal) Act 2018* (EUWA) repeals the ECA on exit day. This will have no impact on employment rights enshrined in primary legislation or secondary legislation made under an Act of Parliament other than the ECA. It would, however, mean that EU employment rights that are not enshrined in UK legislation (because they are directly effective) and those that are enshrined in secondary legislation made under the ECA would cease to apply.

EUWA 'saves' EU laws by converting them into domestic law (called 'retained EU law'). Retained EU law covers a wide variety of laws, including directly effective EU rights and secondary legislation made under the ECA, but also primary legislation that gives effect to EU law (such as the *Equality Act 2010*). How retained EU law can be changed will depend on what type of law it is (e.g. primary legislation or retained directly effective EU laws). This is covered in detail in Commons Briefing Paper 08375, [The status of "retained EU law"](#).

### 3.4 Workers' rights under the Withdrawal Agreement & Political Declaration

#### Withdrawal Agreement

[Part Four](#) of the Withdrawal Agreement provides that the UK and EU will enter a transition period which will run until the end of December 2020, with the possibility of extension for a further two years. [Article 127](#) provides that, with limited exceptions, the entirety of EU law (incl. employment law) will continue to apply in the UK during transition.

#### Protocol on Ireland / Northern Ireland ('the backstop')

Unless the UK and EU agree a future relationship agreement that negates the need for it, the Protocol on Ireland / Northern Ireland will come into force at the end of the transition period.

[Article 4](#) of the Protocol provides that six EU laws listed in [Annex 1](#) will continue to apply in Northern Ireland. These include employment-related EU laws such as directives on Race Equality ([Directive 2000/43/EC](#)) and Employment Equality ([Directive 2000/78/EC](#)). If any of the six directives are amended or replaced, Northern Irish law must reflect this ([Article 15\(4\)](#)). Employment law is devolved in Northern Ireland.

[Article 4 of Annex 4](#) to the Protocol provides that the whole of the UK may not lower labour and social protections below the standard common between the UK and EU at the end of the transition (a 'non-regression clause'). No specific employment rights are listed, but the broad wording of Article 4 would appear to cover most, if not all, EU

employment laws. Disputes arising under Article 4 cannot be subject to the arbitration proceedings under Part Six of the Withdrawal Agreement. Rather, the UK undertakes to ensure the effective enforcement of labour and social standards at a domestic level ([Article 6 of Annex 4](#)). If the UK fails to provide sufficient domestic enforcement, this could be subject to arbitration under Part Six. Marley Morris and Tom Kibasi, senior researcher and director of the Institute for Public Policy Research respectively, have, however, argued that this is not a sufficient mechanism for protecting worker's rights in full, principally as arbitration would only be a state-to-state process.<sup>10</sup>

In [Article 5 of Annex 4](#), the UK reaffirms its commitment to implement the ILO Conventions and the Council of Europe European Social Charter.

Further information on the Withdrawal Agreement the Protocol can be found in Section 8 of Commons Briefing Paper 08453, [The UK's EU Withdrawal Agreement](#).

## Political Declaration

[Paragraph 79](#) of the Political Declaration states that the future relationship must ensure open and fair competition in areas including labour and social protection. It states that the agreement should “[build] on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship.”

While it is unclear, at this stage, what mechanisms will be used to secure worker's rights in the agreement, this wording does suggest some sort of non-regression clause. It is not uncommon for the EU to include such clauses in its Free Trade Agreements. Marley Morris, of IPPR, has published a detailed paper which considered various models that would offer varying degrees of protection for worker's rights.<sup>11</sup>

Further information on Paragraph 79 of the Political Declaration can be found in Section 4.16 of Commons Briefing Paper 08454, [The Political Declaration on the Framework for Future EU-UK Relations](#).

## 3.5 Workers' rights in a no-deal scenario

In a no-deal scenario the UK will leave the EU on 29 March 2019. On that date, EUWA will convert EU-based employment laws into retained EU law. The UK will be able to amend or repeal any retained EU law (see above).

On 23 August 2018, the Department for Business, Energy and Industrial Strategy (BEIS) published [guidance](#) on worker's rights following a no-deal Brexit. The guidance states:

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<sup>10</sup> M. Morris and T. Kibasi, [The Brexit Withdrawal Agreement: A First Analysis](#), IPPR, November 2018, p. 5.

<sup>11</sup> M. Morris, [A level playing field for workers: The future of employment rights post-Brexit](#), IPPR, October 2018

The EU (Withdrawal) Act 2018 brings across the powers from EU Directives. This means that workers in the UK will continue to be entitled to the rights they have under UK law, covering those aspects which come from EU law (including those listed above except where caveated below). Domestic legislation already exceeds EU-required levels of employment protections in a number of ways. The government will make small amendments to the language of workplace legislation to ensure the existing regulations reflect the UK is no longer an EU country. These amendments will not change existing policy.

The guidance states that workers' rights will remain unchanged. This echoes the Prime Minister's promise in her [Lancaster House speech](#) in January 2017, where she said "not only will the government protect the rights of workers set out in European legislation, we will build on them".

The guidance notes two exceptions to this. First, UK or EU employees working for a UK employer in an EU country may no longer be able to rely on protections under the Insolvency Directive ([Directive 2008/94/EC](#)). Second, it will no longer be possible to request the establishment of a European Works Council under the European Works Council Directive ([Directive 2009/38/EC](#)).

In addition, BEIS has published two draft statutory instruments that, it states, will make technical amendments to correct retained EU law. The effect of the SIs is outlined in a BEIS [explanatory note](#).

The TUC has expressed concern about the protection of workers' rights as retained EU law, stating that "the [EUWA] won't stop future governments from repealing or watering down these rights further down the line."<sup>12</sup>

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<sup>12</sup> H. Reed, [Brexit and your rights at work – why you should be worried](#), TUC, 6 Aug 2018

## 4. Press Articles

### State Aid

[Embracing Brexit would be a historic mistake for the left](#), Tom Kibasi, Red Pepper, 5 December 2018

[UK competition watchdog warns of hit from no-deal Brexit](#), Barney Thompson, Financial Times, 3 December 2018

[If Britain can't keep the lights on this winter, will the EU be to blame?](#) Tony Lodge, Spectator, 3 December 2018

[Britain's biotech industry stifled by strict EU aid rules](#), Hannah Boland, Telegraph, 19 November 2018

[UK's backup power subsidies are illegal, European court rules](#), Adam Vaughan, The Guardian, 15 November 2018

[Brussels ties environment and state-aid rules to Brexit 'backstop'](#), Alex Barker, Financial Times, 12 November 2018

[UK Brexit team seeks to exploit EU concern over Corbyn state aid plans](#), Daniel Boffey, The Guardian, 2 August 2018

[Dispute over state aid exposes logical quagmire at the heart of Brexit](#), Raphael Hogarth, The Times, 22 June 2018

### Public ownership

[How John McDonnell plans to transform the state from within](#), George Eaton, New Statesman, 13 November 2018

[MSPs to vote on public ownership of trains](#), Scotsman, 12 November 2018

[The collapse in public ownership of land](#), Brett Christophers, Financial Times, 8 November 2018

[Sir John Armitt \[National Infrastructure Commission\]: "Infrastructure is not for engineers. It's by engineers, for the public"](#), Sebastian Whale, House Magazine, 18 October 2018

[Labour pledges radical response to Brexit 'mess'](#), Financial Times, 24 September 2018

[Municipal bus companies: can public ownership be profitable?](#) Jonny Ball, New Statesman, 13 June 2018

[A soft Brexit would make Labour's public ownership plans impossible](#), Fawzi Ibrahim, LabourList, 12 April 2018

[Returning the UK's privatised services to the public](#), Jonathan Ford and Gill Plimmer, Financial Times, 26 February 2018

[John McDonnell is right: Britain can easily nationalise water](#), Jonathan Ford, Financial Times, 18 February 2018

[John McDonnell: Labour public ownership plan will cost nothing](#), BBC, 10 February 2018

## Workers' rights

[May's Brexit deal quietly gambles with our rights at work](#), Jason Moyer-Lee, Guardian, 26 November 2018

[Theresa May's Brexit Deal Doesn't Come Close To Protecting Workers' Rights](#), Frances O'Grady, Huffington Post, 20 November 2018

[UK to announce new rights for gig economy workers](#), Jim Pickard, Financial Times, 9 November 2018

[Gig economy workers' rights to be given boost in overhaul](#), Pippa Crerar, Guardian, 8 November 2018

[Workers' rights at risk after Brexit 'even in event of deal' – report](#), Lisa O'Carroll, The Guardian, 9 October 2018

[TUC: Labour's John McDonnell pledges 'gig economy' rights boost](#), BBC, 11 September 2018

[Brexit and your rights at work – why you should be worried](#), Hannah Reed, TUC blog, 6 August 2018

[Gig economy: Matthew Taylor rates government response to his review as just four out of 10](#), Ben Chapman, The Independent, 8 March 2018

## 5. Press releases and speeches

[Post-Brexit state aid in the UK](#), Juliette Enser  
Competition and Markets Authority, 30 October 2018

[John McDonnell's full speech to Labour Conference 2018](#), Labour Party,  
24 September 2018

[Labour proposals unprecedented overreach that increases uncertainty for business](#), British Chambers of Commerce, 24 September 2018

[Build it in Britain](#), Jeremy Corbyn, Labour Party, 24 July 2018

[A view from the CMA: Brexit and beyond](#), Michael Grenfell  
Competition and Markets Authority, 16 May 2018

[Co-operative Party publishes 'Ownership Matters' report, making the case for democratic public ownership](#), Co-operative Party, 17 April 2018

[Jeremy Corbyn speech to Alternative Models of Ownership Conference](#),  
Labour Party, 10 February 2018

[Labour still aren't being honest with the public about nationalisation](#),  
Centre for Policy Studies, 10 February 2018

## 6. Parliamentary material

### Papers

[Brexid: Competition and State Aid](#), House of Lords European Union Committee, 12<sup>th</sup> report of session 2017-19, 2 February 2018

[Government response to the House of Lords EU Internal Market sub-committee report on the Impact of Brexit on UK competition and state aid](#), Letter to Lord Whitty from Andrew Griffiths MP, Minister for Small Business, Consumers and Corporate Responsibility, BEIS, 29 March 2018

[Opportunity for a more effective competition regime post-Brexit](#), House of Lords EU Internal Market Sub-Committee, 2 February 2018

### Debates

[Employment and Workers' Rights Bill 2017-19](#), Private Members' Bill (Ballot Bill) sponsored by Stephanie Peacock MP

[European Union \(Withdrawal\) Act](#)

5 December 2018  
HC Deb, Volume 650, c899

[Leaving the EU](#)

26 November 2018  
HC Deb, Volume 650, c 23  
Caroline Flint on workers' rights and the Prime Minister's response

[Progress on EU Negotiations](#)

22 November 2018  
HC Deb, Volume 649, c 1096  
Dan Carden on state aid and the Prime Minister on workers' rights

[EU Exit Negotiations](#)

15 November 2018  
HC Deb, Volume 649, c 431  
Jeremy Corbyn on workers' rights and the Prime Minister's response

[Brexid: Competition and State Aid \(EUC Report\)](#)

House of Lords  
24 May 2018 Volume 791, c1082

## Parliamentary Questions

Topical Questions  
20 November 2018  
Volume 649, c718

[Rebecca Long Bailey \(Salford and Eccles\) \(Lab\)](#)

Brexit cannot result in a race to the bottom for workers' rights and protections but, sadly, the EU withdrawal agreement does not guarantee that it will not. Thompsons Solicitors says that the non-regression clause will be "ineffective" and the Institute for Public Policy Research states that it is "not sufficient to maintain current protections". Individuals will not even be able to bring about proceedings, and if the EU raises standards, the UK is permitted simply to fall behind. When the Secretary of State called stakeholders after agreeing the deal last week, were trade unions on that call? Will he confirm exactly how he intends to maintain current standards and enforceability and to prevent Britain from falling behind the EU's standards?

[Greg Clark](#)

I note that the hon. Lady dismissed the withdrawal agreement on the airwaves before she had even read it, so it does not surprise me that her question is so misplaced. As for the trade unions, I met Frances O'Grady, the general secretary of the TUC, to discuss the provisions of the agreement in person. When it comes to our record of protecting employees' rights, the hon. Lady should have more confidence in this country and in this House. We are perfectly capable. We have been leaders in protecting and promoting workplace rights for many generations. We do not need to be required to do so by the European Union; this House can do that itself.

Conditions of Employment: Written question - 178390

Asked by [Jon Trickett](#) (Hemsworth)

Asked on: 09 October 2018

Department for Business, Energy and Industrial Strategy

To ask the Secretary of State for Business, Energy and Industrial Strategy, whether her Cabinet have had discussions on the potential suspension of protections of workers' rights in the event of a no-deal Brexit.

Answered by: [Kelly Tolhurst](#)

Answered on: 23 October 2018

This government has committed not to roll back workers' rights when we leave the European Union. This commitment stands regardless of whether there is a Withdrawal Agreement between the UK and the EU or not.

## 7. Library briefings

### [The UK's EU Withdrawal Agreement](#)

Published 07 December 2018 | Commons Briefing papers CBP-8453

This briefing looks in detail at the Withdrawal Agreement negotiated between the EU and UK and finalised on 14 November. It was endorsed by EU Member State leaders at a special European Council summit on 25 November and the UK Prime Minister has promoted it in the UK Parliament and around the country. But it will be debated at length in Parliament over the coming days before being put to the so-called 'meaningful vote' on 11 December.

### [The Political Declaration on the Framework for Future EU-UK Relations](#)

Published 30 November 2018 | Commons Briefing papers CBP-8454

This paper looks at the Political Declaration on the Framework for the Future Relationship between the European Union and the United Kingdom, which was agreed by EU leaders on 25 November.

### [Key Employment Rights](#)

Published 23 November 2018 | Commons Briefing papers CBP-7245

This briefing paper sets out the basic architecture of a range of statutory employment rights and provides links to underpinning legislation.

### [EU State Aid rules and WTO Subsidies Agreement](#)

Published 07 November 2018 | Commons Briefing papers SN06775

As a member of the EU and of the WTO, the UK must follow a number of rules when providing assistance to businesses and industries. This note explains the rules around state aid and subsidies, their motivations and differences. It also looks at what might change after the UK leaves the EU.

### [Public ownership of industries and services](#)

Published 31 May 2018 | Commons Briefing papers CBP-8325

Utilities, industries and services can be owned by the public or the private sector. Various models have existed in the UK, including full nationalisation, privatisation with regulation and municipalisation.

[Employment status](#)

Published 28 March 2018 | Commons Briefing papers CBP-8045

This briefing provides an overview of the concept of employment status and recent reviews of the law in this area.

## 8. Further reading

[Brexit negotiations - what is the 'level playing field'?](#) Institute for Government, 22 October 2018

[A level playing field for workers: The future of employment rights post-Brexit](#), Marley Morris, IPPR, 9 October 2018

[State aid and Brexit: the temptation for political intervention](#), Dr Totis Kotsonis, Eversheds Sutherland, LSE Blog, 21 September 2018

[General Council statement on Brexit](#), TUC, 10 September 2018

[State aid control](#), European Commission, accessed 10 December 2018

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