Brexit: impact on State aid

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Outline

• Timeline
• General principles
• Trade options
• EU export of State aid control
• Overview - comments
Timeline

• 16.3.2017 European Union (Notification of Withdrawal) Act 2017
• 29.3.2017 Article 50 TEU notice served
• 29.4.2017 EU guidelines
• 22.5.2017 EU negotiating 'directives' ('TF50' – Commission, Barnier)
• 5-6.2017 Start of negotiations
• 13.7.2017 European Union (Withdrawal) Bill before UK Parliament
• 10.2018 Negotiations conclude (EU objective)
• End 2018 Vote on withdrawal agreement (EP/CM)
• Early 2019 European Union (Withdrawal) Act comes into force
• 29.3.2019 Brexit Deadline
• 5-6.2019 EU Parliament elections
• Several years Negotiations on the future UK/EU trade relationship (?)
General Principles

• § 20 EU Guidelines (29 April 2017)
• PM May Florence Speech (22 September 2017)
• European Union (Withdrawal) Act converts EU law into UK law
• EU State aid rules will no longer apply in the UK
• EU State aid rules will continue to apply to UK companies in the EU
• WTO Agreement on Subsidies and Countervailing Measures (ASCM)
EU (Withdrawal) Act

- It repeals the *European Communities Act 1972*
  - EU law will cease to apply in the UK from the day of exit
  - EU law will no longer be supreme over UK law
  - CJEU's judgments will no longer bind the UK (*pre-Brexit to clarify*)
    - Parliament will be able to amend, repeal or improve any law
- It converts the ‘*acquis communautaire*’ into domestic law
  - Wherever practical and appropriate, the same rules and laws will apply on the day after Brexit as they did before
  - However, there are many rights enjoyed under EU law that are not capable of replication in domestic law
UK options*

• No trade arrangement: WTO ASCM
• State aid domestic legislation
• Some sort of State aid rules in UK/EU trade relationship
  • EEA “borrowed mechanism”
  • or a supranational UK/EU mechanism

* See ongoing debate at the House of Lords [Select Committee on the European Union, Internal Market Sub-Committee, public hearing until November 2017 and report in early 2018], contributions by BEIS, Law Society, UKSALA, etc.
Trade model?

- EEA?
  - ‘Borrowing’ mechanism
- Bilateral agreement (UK/EU)
- Customs union
- Free Trade Agreement – which model?
  - NOR (EEA-EFTA)
  - FTA (such as UKR new model)
  - CH (bilateral EU/UK)
  - TUR (EU/TUR customs union)
  - WTO+
  - *sui generis* model?
- WTO rules
### Various options for various models

<table>
<thead>
<tr>
<th>Model</th>
<th>Norway Model</th>
<th>Turkish Model</th>
<th>Switzerland Model</th>
<th>FTA Model</th>
<th>WTO approach</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Access to EU market for goods</strong></td>
<td>Yes (full)</td>
<td>Yes (limited)</td>
<td>Yes (full)</td>
<td>Yes (full)</td>
<td>No</td>
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<tr>
<td><strong>Access to EU market for services</strong></td>
<td>Yes (full)</td>
<td>Yes (unless negotiated)</td>
<td>Yes (limited)</td>
<td>Yes (limited)</td>
<td>No</td>
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<tr>
<td><strong>Common external customs tariff</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<tr>
<td><strong>Contribution to EU budget</strong></td>
<td>Yes (reduced)</td>
<td>No</td>
<td>Yes (reduced)</td>
<td>No</td>
<td>No</td>
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<td><strong>Free movement of persons/employees</strong></td>
<td>Yes</td>
<td>No</td>
<td>Yes (limited)</td>
<td>No</td>
<td>No</td>
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<tr>
<td><strong>Influence over EU legislation and trade policy</strong></td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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<td><strong>Subject to CJEU’s jurisdiction</strong></td>
<td>No, but EFTA follows the CJEU</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
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Trade – huge challenges

- EU
  - Exit negotiation
  - New terms for future UK-EU trade
  - While maintaining access to the EU for UK trade exports

- EEA
  - UK a member only through its EU membership…
  - Need for a specific ‘borrowing’ agreement

- WTO
  - UK to negotiate new individual tariff and service schedules
  - New terms on WTO procurement rules

- FTAs
  - New terms to replace EU's FTAs (SAF, KOR, MEX, CAN, etc.)
Export of EU State aid control (1)

• Holistic trade strategy including State aid dimension
  • Systematic inclusion of State aid provisions on +36 FTAs since 2006 (WTO+)
  • Recent developments: Mexico, Myanmar, Japan, Mercosur, Tunisia, Philippines, Indonesia

• Free Trade Agreements
  • FTA (Vietnam, South Korea)
  • CETA (Comprehensive Economic and Trade Agreement, Canada)
  • DCFTA (Deep and Comprehensive Free Trade Agreement, Ukraine)
    • New negotiations include multilateral permanent dispute settlement mechanism
Export of EU State aid control (2)

- EEA: Articles 61-64 EEE, *acquis communautaire*, EFTA Court, ESA
- "Enhanced" FTA
  - Same text as Art. 107 – 108 TFUE (e.g., BOS, KOS, MOR, TUN, etc.)
  - Referral to EU case law
  - Obligation to set up a national independent State aid authority
  - Transparency, reports, inventory, EU concepts, etc.
    - UKR: *acquis communautaire*, domestic legislation, domestic independent control
- Old generation
  - Reduced scope (e.g., CH, SER, EGY, ISR, etc.)
  - Information mechanisms, joint committee
  - CH: specific case (72 Agreement, 99 Transport)
    - Swissair, Crossair, Swiss (before entry into force in 02 of the 99 Transport Agreement)
    - Swisspost (Lyon, 23 Sept. 2016, appealed)
  - KOR: subsidies and guarantees to firms in difficulty only; restructuring plan
## Overview – Impact of Brexit on State aid environment

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<th>EU</th>
<th>UK</th>
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<td>• Loss of the &quot;pragmatic contributor&quot;</td>
<td>• <strong>UK devolution</strong> will require a domestic control (EU discipline is the current control tool for the UK)</td>
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<td>• &quot;Good student&quot;</td>
<td>• But UK €8bn v EU €101bn / per capita €90 (GER-FR-BEL: €170-€240)</td>
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<td>• Refined economic approach</td>
<td>• easy <em>trade off internal market vs UK discipline</em></td>
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<tr>
<td>• &quot;Good aid&quot;</td>
<td>• Aversion for &quot;bad aid&quot; : community of interest with EU discipline</td>
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<td>• pro-competition (restructuration, financial crisis, etc.)</td>
<td>• Uncertainty, investment postponed (localisation)</td>
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<td>• <em>risk finance</em>, other guidelines</td>
<td>• Transitory period highly complex</td>
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<td>• Pending cases before Commission, GC and CJEU (e.g. <em>UK capacity mechanism</em> or Hinkley Point cases)?</td>
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<td>• UK’s rights over aid implemented pre-Brexit?</td>
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<td>• Powers of the Commission to implement, post-Brexit, pre-Brexit decisions and rulings (conditional decisions in the banking sector for instance)?</td>
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<td>• UK’s obligations, post-Brexit, vis-à-vis its obligations from pre-Brexit decisions?</td>
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<td>• Brexit influence on future State aid policy (2019 review)?</td>
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<td>• English language?</td>
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<td>• Uniform framework, tool for &quot;multilateral disarmament&quot;</td>
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<td>• Risk of decentralisation (consequences of GBER) – 10% remaining aid to notify are the most sensitives...</td>
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## Synopsis – State aid

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<th>Pre-Brexit</th>
<th><strong>Hard Brexit</strong></th>
<th><strong>Soft Brexit</strong></th>
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</table>
| - No change, legally  
  - Nissan deal? | - No more EU obligations in the UK  
  - WTO  
  - But UK companies can invoke EU law in the EU | - Should require some form of aid control (*in UK's interest*)  
  - Very unlikely supranational control |
| - Commission  
  - *ex ante* control | - No *ex ante* control | - EEA? EFTA Court/ESA? Very unlikely!  
  - No direct effect – no binding preliminary ruling |
| - GCEU – CJEU – national courts  
  - Direct effect  
  - Retroactive effect  
  - Binding effect of preliminary ruling - uniformisation  
  - Full choice of remedies | - Control more limited (export-import, goods)  
  - Weak enforcement  
  - No direct effect (via States only)  
  - *Dispute Settlement Body* without retroactive effect | - EFTA? EU-CH model?  
  - European Agreements (national legislation with independent authority)  
  - Ex. EU-Ukraine – control in the UK less than in UKR or TUR? |
|           | - Limited remedies  
  - Cessation order  
  - Countervailing duties | - *sui generis* regime?  
  - Access to internal market?  
  - CETA type arbitration (+ aid)? |
Thank you for your attention! Please contact us with any questions.

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