

# Annual Conference on European State Aid Law 2017

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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

	<b>Norway Model</b>	<b>Turkish Model</b>	<b>Switzerland Model</b>	<b>FTA Model</b>	<b>WTO approach</b>
<b>Access to EU market for goods</b>	Yes (full)	Yes (limited)	Yes (full)	Yes (full)	No
<b>Access to EU market for services</b>	Yes (full)	Yes (unless negotiated)	Yes (limited)	Yes (limited)	No
<b>Common external customs tariff</b>	Yes	Yes	No	No	No
<b>Contribution to EU budget</b>	Yes (reduced)	No	Yes (reduced)	No	No
<b>Free movement of persons/ employees</b>	Yes	No	Yes (limited)	No	No
<b>Influence over EU legislation and trade policy</b>	No	No	No	No	No
<b>Subject to CJEU's jurisdiction</b>	No, but EFTA follows the CJEU	No	No	No	No



# 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)
    - *Cantons* (2007 complaint, BEPS/OECD, "agreement" of 14 October 2014, Reform RIE III rejected in Feb 2017, Patent Box - OECD)
  - KOR: subsidies and guarantees to firms in difficulty only; restructuring plan

## Overview – Impact of Brexit on State aid environment

EU	UK
<ul style="list-style-type: none"> <li>Loss of the "pragmatic contributor"               <ul style="list-style-type: none"> <li>"Good student"</li> <li>Refined economic approach</li> <li>"Good aid"</li> <li>pro-competition (restructuring, financial crisis, etc.)</li> <li><i>risk finance</i>, other guidelines</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li><i>UK devolution</i> will require a domestic control (EU discipline is the current control tool for the UK)</li> <li>But UK €8bn v EU €101bn / <i>per capita</i> €90 (GER-FR-BEL: €170-€240)               <ul style="list-style-type: none"> <li><i>easy trade off internal market vs UK discipline</i></li> </ul> </li> <li>Aversion for "bad aid" : community of interest with EU discipline</li> </ul>
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>Uncertainty, investment postponed (localisation)               <ul style="list-style-type: none"> <li>Transitory period highly complex</li> </ul> </li> </ul> </li> <li>Pending cases before Commission, GC and CJEU (e.g. <i>UK capacity mechanism</i> or <i>Hinkley Point</i> cases)?</li> <li>UK's rights over aid implemented pre-Brexit?</li> <li>Powers of the Commission to implement, post-Brexit, pre-Brexit decisions and rulings (conditional decisions in the banking sector for instance)?</li> <li>UK's obligations, post-Brexit, vis-à-vis its obligations from pre-Brexit decisions?</li> </ul>	
<ul style="list-style-type: none"> <li>Brexit influence on future State aid policy (2019 review)?</li> </ul>	
<ul style="list-style-type: none"> <li>English language?</li> </ul>	
<ul style="list-style-type: none"> <li>Uniform framework, tool for "multilateral disarmament"</li> </ul>	
<ul style="list-style-type: none"> <li>Risk of decentralisation (consequences of GBER) – 10% remaining aid to notify are the most sensitives...</li> </ul>	

## Synopsis – State aid

Pre-Brexit	Hard Brexit	Soft Brexit
<ul style="list-style-type: none"> <li>No change, legally</li> <li>Nissan deal ?</li> </ul>	<ul style="list-style-type: none"> <li>No more EU obligations in the UK</li> <li>WTO</li> <li>But UK companies can invoke EU law in the EU</li> </ul>	<ul style="list-style-type: none"> <li>Should require some form of aid control (<i>in UK's interest</i>)</li> <li>Very unlikely supranational control</li> </ul>
<ul style="list-style-type: none"> <li>Commission</li> <li><i>ex ante</i> control</li> </ul>	<ul style="list-style-type: none"> <li>No <i>ex ante</i> control</li> </ul>	<ul style="list-style-type: none"> <li>EEA? EFTA Court/ESA? Very unlikely!</li> <li>No direct effect – no binding preliminary ruling</li> </ul>
<ul style="list-style-type: none"> <li>GCEU – CJEU – national courts</li> <li>Direct effect</li> <li>Retroactive effect</li> <li>Binding effect of preliminary ruling - uniformisation</li> <li>Full choice of remedies</li> </ul>	<ul style="list-style-type: none"> <li>Control more limited (export-import, goods)</li> <li>Weak enforcement</li> <li>No direct effect (via States only)</li> <li><i>Dispute Settlement Body</i> without retroactive effect</li> </ul>	<ul style="list-style-type: none"> <li>EFTA? EU-CH model?</li> <li>European Agreements (national legislation with independent authority)</li> <li>Ex. EU-Ukraine – control in the UK less than in UKR or TUR?</li> </ul>
	<ul style="list-style-type: none"> <li>Limited remedies                             <ul style="list-style-type: none"> <li>Cessation order</li> <li>Countervailing duties</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li><i>sui generis</i> regime?</li> <li>Access to internal market?</li> <li>CETA type arbitration (+ aid)?</li> </ul>

**Thank you for your attention!**  
**Please contact us with any questions.**

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