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Brexit: impact on State aid



Jacques Derenne
Partner, Global Co-Practice Group Leader, *Antitrust & Competition*
Sheppard Mullin, Brussels
Professor, *University of Liège & Brussels School of Competition*
Global Competition Law Centre, College of Europe




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

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

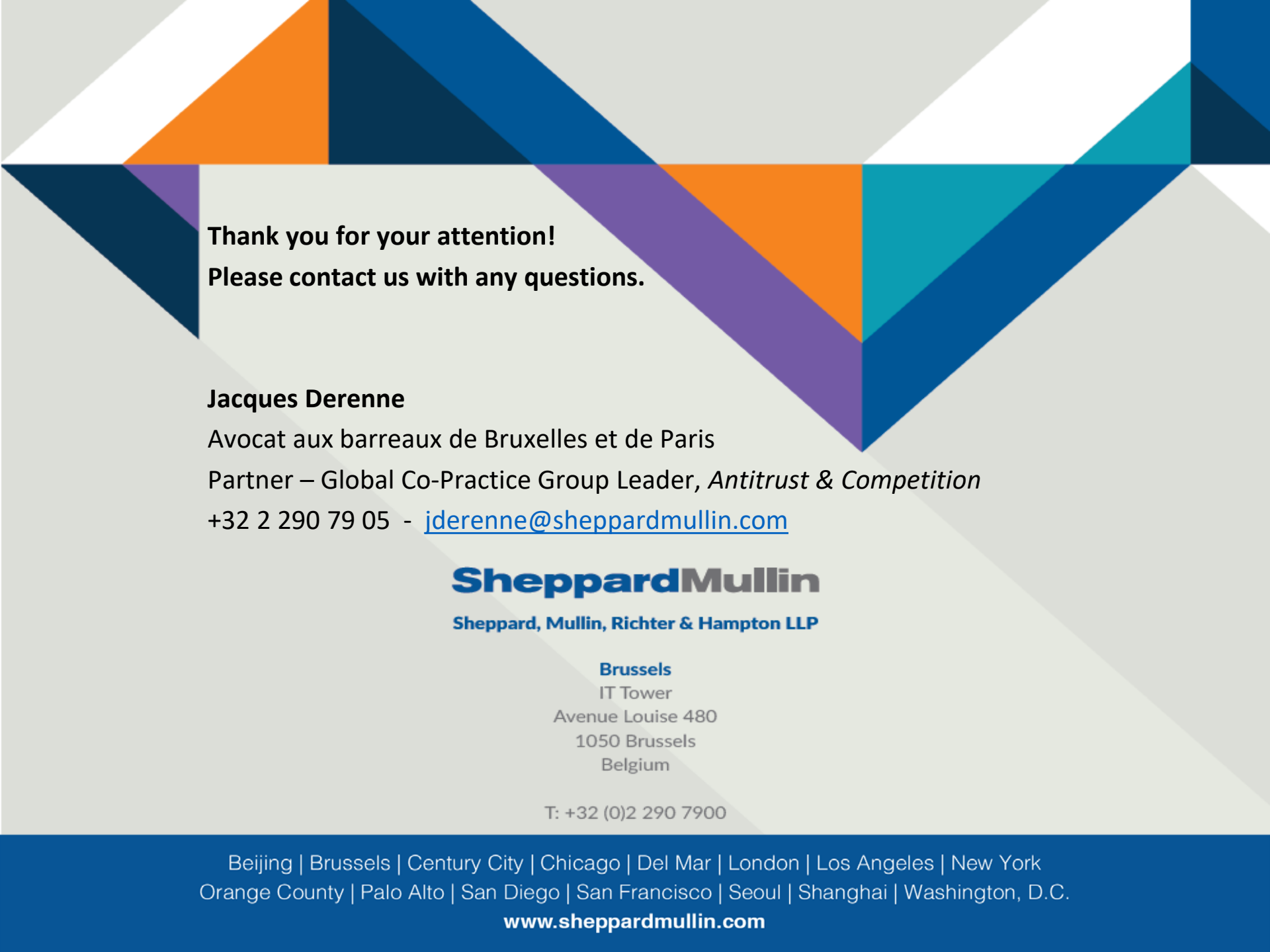
- EEA : Articles 61-64 EEE, *acquis communautaire*, EFTA Court, ESA
- "Enhanced" FTA
 - Same text as Art. 107 – 108 TFUE (e.g., BOS, KOS, MOR, TUN, etc.)
 - Referral to EU case law
 - Obligation to set up a national independent State aid authority
 - Transparency, reports, inventory, EU concepts, etc.
 - 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"> Loss of the "pragmatic contributor" <ul style="list-style-type: none"> "Good student" Refined economic approach "Good aid" pro-competition (restructuration, financial crisis, etc.) <i>risk finance</i>, other guidelines 	<ul style="list-style-type: none"> <i>UK devolution</i> will require a domestic control (EU discipline is the current control tool for the UK) But UK €8bn v EU €101bn / <i>per capita</i> €90 (GER-FR-BEL: €170-€240) <ul style="list-style-type: none"> <i>easy trade off internal market vs UK discipline</i> Aversion for "bad aid" : community of interest with EU discipline
<ul style="list-style-type: none"> <ul style="list-style-type: none"> Uncertainty, investment postponed (localisation) <ul style="list-style-type: none"> Transitory period highly complex Pending cases before Commission, GC and CJEU (e.g. <i>UK capacity mechanism</i> or <i>Hinkley Point</i> cases)? UK's rights over aid implemented pre-Brexit? Powers of the Commission to implement, post-Brexit, pre-Brexit decisions and rulings (conditional decisions in the banking sector for instance)? UK's obligations, post-Brexit, vis-à-vis its obligations from pre-Brexit decisions? 	
<ul style="list-style-type: none"> Brexit influence on future State aid policy (2019 review)? 	
<ul style="list-style-type: none"> English language? 	
<ul style="list-style-type: none"> Uniform framework, tool for "multilateral disarmament" 	
<ul style="list-style-type: none"> Risk of decentralisation (consequences of GBER) – 10% remaining aid to notify are the most sensitives... 	

Synopsis – State aid

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



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

Jacques Derenne

Avocat aux barreaux de Bruxelles et de Paris

Partner – Global Co-Practice Group Leader, *Antitrust & Competition*

+32 2 290 79 05 - jderenne@sheppardmullin.com

SheppardMullin

Sheppard, Mullin, Richter & Hampton LLP

Brussels

IT Tower
Avenue Louise 480
1050 Brussels
Belgium

T: +32 (0)2 290 7900

Beijing | Brussels | Century City | Chicago | Del Mar | London | Los Angeles | New York
Orange County | Palo Alto | San Diego | San Francisco | Seoul | Shanghai | Washington, D.C.

www.sheppardmullin.com