

The EU State aid prohibition: a distortion of international competition?

Queen Mary University of London – Baker McKenzie
Annual Conference – Brussels, 12 May 2017



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



EU State aid control: a necessity

- Origins
 - GATT 1947 – *subsidies* (ASCM)
 - 1951 ECSC
- Market integration tool
 - 1956 Spaak Report
- Unique situation, unique system
- Member States did not fully trust each other:
supranational independent arbitrator (Commission)
- States interventionism in the EU
- From *ex ante control* to (mostly) *ex post control*





Global competitiveness

- Existing Defense Commercial Instruments
 - Anti-dumping (new system proposed in 2016, Council agreement on 10 May 2017)
 - Anti-subsidy (Regulation 2016/1037)
 - Safeguards (Regulation 260/2009 & 625/2009 – 427/2003)
- Limited remedies under State aid control
 - *Matching clause* in R&D cases
 - 2014 R&D&I aid guidelines, § 92 (*distortions of international trade*)



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* (2001 before entry into force in 2002 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: limited to subsidies and guarantees to firms in difficulty; restructuring plan

General impact of Brexit on State aid environment (TF 50)

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 (restructuring, 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) - UK State aid discipline is an easy <i>trade off</i> for the UK Aversion for "bad aid" : community of interest with EU discipline
<p style="text-align: center;">Uncertainty, investment postponed (localisation) Transitory period highly complex</p> <ul style="list-style-type: none"> Pending cases before Commission, GC and CJEU? UK's rights over aid implemented pre-Brexit? Powers of the Commission to implement, post-Brexit, pre-Brexit decisions and rulings? 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... 	

Thank you for your attention!

Jacques Derenne

Avocat aux barreaux de Bruxelles et de Paris

Partner - *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