

BRUSSELS REGULATORY BRIEF: AUGUST

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ANTITRUST AND COMPETITION

Best Practices Code for State aid control adopted by the European Commission

On 16 July 2018, the European Commission adopted a Code of Best Practices for the conduct of State aid control procedures (“Best Practices Code” or “Code”). This Code follows the adoption of a number of other instruments in the past years (e.g. Notice on the Notion of State Aid, General Block Exemption Regulation, and revised Procedural State Aid Regulation).

Under the EU State aid rules, it is generally prohibited for national public authorities to confer an advantage on a selective basis to companies doing business in the EU. In particular, to be State aid, a measure needs to have these features: (i) intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.); (ii) the State intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions; (iii) competition has to be distorted; and (iv) the intervention is likely to affect trade between Member States. Aid measures can only be implemented after approval by the Commission. At the heart of the Commission's powers lies the notification procedure which - except in certain instances - requires Member States to notify all new aid to the Commission, which cannot be implemented unless approved by it. If the aid is incompatible but has already been paid out, the Member State is ordered to recover it from the beneficiary.

This new Code provides a practical guidance on the EU State aid procedure with the purpose of making it “as *transparent, simple, clear, predictable and timely as possible*”. In particular, it gives information on the pre-notification contacts between Member States and the Commission, useful especially in cases presenting novel aspects or features or complexity, or in case of projects of common interest with high EU relevance. It also discusses the possibility for Member States to indicate the cases which are of priority for them and to agree with the Commission the investigation timeline. It goes on to explain the conduct of the preliminary examination of notified State aid measures, including the gathering of additional information from the Commission services, as well as the application of a streamlined procedure for cases which are straightforward and of the formal investigation procedure for more complex cases.

Finally, the new Best Practices Code includes information about the handling of complaints by the Commission and stresses the importance of cooperation between the Commission and Member States.

TRADE

EU - Japan Economic Partnership Agreement

On 6 July 2018, the Council of the European Union authorized the signature of the EU-Japan Economic Partnership Agreement, which was signed on the EU-Japan summit on 17 July 2018 in Tokyo by the European Commission President, Jean-Claude Juncker, and Donald Tusk, President of the European Council, and Japanese Prime Minister, Shinzo Abe.

This free trade agreement is the most important one negotiated by the EU, creating an open trade zone over 600 million people. Under the agreement, a vast majority of the EUR 1 billion of duties paid annually by EU businesses exporting to Japan is abolished. The agreement further leads to the removal of a number of long-standing regulatory barriers. It will also open up the Japanese market of 127 million consumers to key EU agricultural exports and will increase EU export opportunities in a range of other sectors.

The agreement opens access to services markets, including financial services, e-commerce, telecommunications and transport (often called a “Diary-for-Cars Agreement”). Moreover, EU businesses will have access to the procurement markets of 48 large Japanese cities and the economically important railway sector at national level. In addition, the agreement provides for the removal of customs duties on EU exports to Japan in the automotive sector. It further abolishes duties on many types of cheese such as Cheddar (currently at 29.8%) as well as on wine exports (an average of 15%). EU businesses will be able to increase beef exports to Japan substantially. Import duties on processed pork meat will be abolished and those on fresh meat imports will be significantly decreased.

The Japanese computer, electric and automobile industries are all expected to benefit from this free trade agreement. EU import tariffs on a number of Japanese products, such as cars, currently at 10 %, will gradually be abolished over eight years. Although cars and auto components account for about 20% of Japan's exports to Europe, Japanese carmakers' share of the European market is only about 10%. This share is considerably lower compared to market shares in the United States or Asia.

The EU and Japan further concluded talks on a reciprocal adequacy agreement on data protection which will complement the Economic Partnership Agreement, agreeing to mutually recognize each other's data protection systems as “equivalent”.

The agreement will be ratified by the European Parliament and the Japanese Diet and it is expected to come into force in 2019.

ECONOMIC AND FINANCIAL AFFAIRS

European Parliament toughens the Commission's proposal on sustainability disclosures

The European Parliament's Economic and Monetary Affairs Committee ("ECON") published its [draft report](#) on the European Commission's proposal for a Regulation on disclosures relating to sustainable investments and sustainability risks. The proposal is part of a package of new rules designed to integrate environmental, social and governance ("ESG") considerations in the provision of finance and thereby drive the participation of the financial sector in the transition to a low-carbon and sustainable economy.

The ECON report was drafted in less than three months since the publication of the initial proposal, which demonstrates that sustainable finance ranks high in the political agenda of the Parliament before the end of its term. Paul Tang, Dutch member of the Parliament's Socialists & Democrats Group in charge of the file, proposes a number of amendments broadening the scope and some of the disclosure requirements under the draft legislation.

Rapporteur Tang argues that banks "should be fully included in the scope" of the proposed rules. On top of being subjected to supervisory evaluations of ESG incorporation in their risk management, banks would be also obliged to consider sustainability risks in their product offers and corporate loan origination processes.

The Parliament further toughens the Commission's proposal by requiring investors to carry out due diligence in their decision making in line with the OECD's guidelines on responsible business conduct for institutional investors. According to Tang, this would lead them to "move beyond a merely financial understanding of their investor duties" and help them "avoid negative impacts of their investments on the society and the environment". A mandatory framework with minimum requirements for the due diligence processes would be developed by the Commission at a later stage.

Requirements on variable remuneration rules for executive directors have been also amended by the ECON rapporteur to include a minimum 50% sustainable investment target in the performance measurement. Further changes to the text, for example, oblige institutions for occupational retirement provision ("IORPs") to actively consult their beneficiaries when deciding, which investments would be in their best interests.

The ECON Committee is expected to vote on its draft report at the beginning of November 2018. The co-legislator, i.e. the Council of the European Union, has only started to examine the proposal in July. Meanwhile, the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA) have been already requested to advise the Commission on the technical details of the proposals to be implemented through delegated acts after the adoption of the Regulation.

European Parliament proposes to use the crowdfunding proposal as a first step to regulate ICOs

The European Parliament's Economic and Monetary Affairs Committee ("ECON") published its [draft report](#) on the European Commission's proposal for a Regulation on European Crowdfunding Service Providers ("ECSP"). The proposal constitutes a first legislative deliverable of the EU FinTech Action Plan and establishes a single pan-European regulatory regime and a passport for crowdfunding services providers. The aim of the Regulation is to improve access to finance by simplifying cross border provision of crowdfunding services across the EU, and ensuring investor protection through improved transparency and risk management requirements. The ECON text was prepared by Ashley Fox, British member of the Parliament's Conservatives and Reformists Group.

Among other amendments, Fox proposes to extend the draft legislation to encompass the use of initial coin offerings ("ICOs") as one of the crowdfunding methods. The British rapporteur acknowledges that this file cannot represent a final solution for Regulation of the ICOs markets, but argues that it could constitute a first step towards standards and investor protection, providing ICOs with an opportunity to prove their legitimacy. According to the amendments, crowdfunding platforms offering ICOs would be obliged to comply with specific provisions of the Regulation. ECSPs could raise capital using cryptocurrencies provided that the ICOs are public, involve counterparty and do not exceed EUR 8 million.

Fox further proposes to add new provisions to the text, which would enable crowdfunding providers from third countries with equivalent supervisory and regulatory frameworks to offer their services in the EU. The rapporteur also doesn't agree with the EUR 1 million threshold for a maximum consideration for each crowdfunding offer, as proposed by the Commission. The ECON text recommends raising this threshold to EUR 8 million, which is the maximum amount allowed to be set by the Member States to exempt public offers of securities from the obligation to publish prospectus.

Moreover, Fox would like to see the primary supervisory authority over ECSPs assigned to national supervisors and recommends more proportionate rules reflecting the different levels of complexity and types of crowdfunding platforms.

BREXIT

The European Commission pushes forward urgent legislation ahead of Brexit deadline

As it is known, Brexit will take place on 29 March 2019, and may happen without any transition period extending the application of EU law until December 2020, if there is no deal on the Withdrawal Agreement. Such a "cliff-edge" scenario is becoming more plausible with each day, even though the European Commission believes that an agreement between the UK and the EU is still possible.

That is why the Commission has already published six of these "preparation-for-Brexit" legislative texts and has

announced two others. This is consistent with the Commission's urgent calls for everybody to get ready for Brexit, last expressed in its Communication issued on 19 July 2018 regarding the preparation for the withdrawal of the United Kingdom from the European Union.

The texts ready for their discussion and approval by both co-legislators are:

- A [draft Regulation](#) on the apportionment of tariff rate quotas included in the World Trade Organization schedule of the EU following Brexit. The proposal would allow for the apportionment of tariff rate quotas between the EU27 and the UK in the absence of an agreement with WTO Members on this issue.
- A [draft Regulation](#) complementing EU type-approval legislation with regard to Brexit. The proposal would enable manufacturers of cars and other vehicles, as well as their technical parts currently holding type approvals issued by the UK type-approval authority, to apply for the same types with the EU27 correspondent authorities in time to prevent disruption in the manufacturing and distribution process.
- A [draft Regulation](#) regarding the relocation of the European Medicines Agency from London to Amsterdam.
- A [draft Regulation](#) about the move of the seat of the European Banking Authority from London to Paris.
- A [draft Regulation](#) amending the Regulation establishing the Connecting Europe Facility, a EU instrument that supports trans-European networks and infrastructures in the sectors of transport, telecommunications and energy. The proposal designs a new maritime route to connect Ireland with the continental part of the North Sea - Mediterranean corridor (specifically the Belgian ports of Zeebrugge and Antwerp and the Dutch port of Rotterdam), ensuring the connection between Ireland and the other Member States.
- A [draft Regulation](#) amending the Regulation on common rules and standards for ship inspection and survey organizations. The proposal addresses the transfer of sponsorship from the UK to a EU27 Member States in order to allow marine standards bodies that have been “sponsored” by the UK to continue to operate for EU-flagged ships after Brexit.

Moreover, the Commission plans to release two other legislative proposals soon:

- A Proposal amending the energy efficiency Directive and the Proposed Regulation on the Governance of the Energy Union: references to EU energy efficiency targets for 2030 would be adapted to the EU27.
- A Proposal for an amendment to the Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. The act would place the UK on either the “visa required” list of third countries or the “visa free” list.

While presenting this list as a proof of its own preparedness, the Commission urges all actors - primarily business operators and professionals - to also prepare for all potential outcomes of Brexit, with the help and guide of the already published technical “notices” on how to deal with Brexit consequences in different matters and sectors. In the Communication, the Commission underlines the strong impact for companies operating on transport, financial services, pharma and digital sectors, as well as all businesses trading goods between the EU and the UK.

Does the post-Brexit regulation of products in the EU and UK continue to mean "double the trouble" for businesses?

The UK Government's long-awaited negotiating position for Brexit was published on 12 July 2018 by way of a White Paper ("Chequers Paper") shedding light on what the UK is seeking in terms of the regulation of various products post-Brexit. It envisages a "*facilitated customs arrangement*" that would ensure the free trade of products between the UK and EU. This arrangement includes the removal of customs controls and the implementation of common rules for products between the EU and UK. Under this "common rulebook" model, a common set of technical rules would apply across the EU and UK that govern (i) the testing of products, so manufacturers would only be required to undergo one series of tests for both jurisdictions, (ii) an agreed framework for the accreditation of conformity assessment bodies as well as manufacturing and quality assurance processes for manufacturers, (iii) agreed licencing regimes, and (iv) the continued use of nominated individuals who would interact with authorities, for example lead registrants under the Registration, Evaluation, Authorisation and Restriction of Chemicals regime ("REACH"). In addition, where a common rulebook applies to a category of products, any relevant EU standard will prevail over any domestic UK standard. This maintains the current policy of the "single standard model", as implemented by the British Standards Institution, whereby any product manufactured or imported into the UK must meet the standards set by the EU.

The Chequers Paper also sets out the UK Government's plans to fully subscribe to the regulatory requirements set by EU agencies. For chemicals, this means maintaining the current practice of UK businesses registering substances with the European Chemicals Agency, while for medicines and medical devices, domestic regulators would continue their positions as leading authorities in conducting technical work for the assessment of medicines, ongoing safety monitoring and participation in the upcoming clinical trial framework. For aviation products, the UK is looking to be categorised as a third country member via the route already established under Article 66 of the European Aviation Safety Agency basic Regulation, following the example of Switzerland.

Previously, the role of the Court of Justice of the European Union ("CJEU") has been a red line for both the EU and the UK in discussions regarding regulation post-Brexit. The EU has refused to permit the UK to remain a participant in the EU regulatory frameworks unless the CJEU remains the highest court, while the UK's position is that the CJEU and EU law should no longer bind UK courts. However, the UK Government now intends, where products are subject to the common rulebook, that the CJEU would continue its role as the highest court and the UK courts would have to "pay due regard to CJEU case law". Thus, in relation to products, the post-Brexit relationship between the CJEU and the UK, as set out in Chequers Paper, is similar to the current position.

However, the EU has wholly rejected the UK Government's propositions, with a no-deal scenario continuing to be a distinct possibility come March 2019. Two of the EU regulatory authorities, the European Chemicals Agency and the European Medicines Agency, continue to urge UK and EU businesses to prepare for the "no-deal" outcome, while the Commission has also begun to prepare for hard-Brexit.

Similarly, the UK Governmental departments appear to be preparing for "hard-Brexit", planning emergency measures for the supply of medical devices, while the Department for Environment, Food and Rural Affairs

("DEFRA") is developing its own regulatory regime for chemicals separate from the EU, dubbed UK-REACH (see our previous article, "[Back to the drawing board: Brexit to result in UK-REACH. How can UK importers and manufacturers best prepare?](#)"). In addition, on 23 August the UK's Department for Exiting the European Union published a number of papers providing guidance in the event that there is "no Brexit deal". The series of technical notices published so far cover arrangements for classification of goods, on labelling tobacco and e-cigarettes, on developing genetically modified organisms and on producing and regulating medicines and medical equipment, amongst others. Further technical notices are to be published in September. The K&L Gates regulatory team is reviewing these documents and will provide an update shortly.

Thus, UK businesses should continue to make preparations for a hard-Brexit, so as to minimise the costs, losses or disruption to their UK and EU operations. You can find out more, including suggested steps businesses can take to best-prepare for Brexit, by reading the full article [here](#).

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