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Beyond Brexit: Understanding the Rationale of the EU-UK TCA's Subsidy Control Regime

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Abstract:

The issue of subsidy control was one of the major points of contention during Brexit negotiations. The United Kingdom (UK) adopted a minimalist approach, seeking to align its post-Brexit framework with WTO rules. The European Union (EU), instead, insisted on preserving the level playing field through the continued application of its State aid regime to the UK. The article argues that, given the high degree of economic interdependence between the two economies, a system based on WTO subsidy disciplines would not have been sufficient to safeguard the level playing field between the EU and the UK. Thus, the article maintains that the EU–UK Trade and Cooperation Agreement (TCA) is unprecedented in the landscape of international trade agreements, as a consequence of the rationale underpinning it. It also contends that this rationale has shaped all the substantive and procedural elements of its subsidy control regime.

Keywords: EU State aid; EU-UK TCA; SCM Agreement; FTA; level playing field; Brexit.

I. Introduction

The United Kingdom (UK) fully left the European Union (EU) regulatory system on 1 January 2021. One of the key consequences of Brexit is that EU State aid rules no longer apply in the UK, meaning that public authorities are no longer bound by EU constraints when granting funding and other forms of support to businesses.[1] During the negotiations on the future EU-UK relationship, the positions of the parties on State aid control (since Brexit this has been referred to as 'subsidy' control by the UK government) could not have been further apart.[2] The EU, concerned about the

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State Aid (Revocation and Amendments) (EU Exit) Regulations 2020, SI 2020/1470; The only exceptions to this are set out in the Ireland/Northern Ireland Protocol.

[2] George Peretz, 'A Star Is Torn: Brexit and State Aid' (2016) 15 *European State Aid Law Quarterly* 334, 337.

potential for UK firms to gain an unfair competitive advantage because of state support, insisted on maintaining the core principles of its State aid system as a precondition for any future agreement with the UK. Conversely, those in favour of leaving the EU argued that, without the constraints imposed by the EU State aid framework, the UK would have greater freedom to invest in its industries and businesses, allowing it to gain a competitive advantage over the EU.[3] They supported the adoption of a subsidy control regime aligned with World Trade Organization (WTO) rules, as it is inherently less restrictive and more conducive to national economic policy.

This created a serious dilemma for the EU, caught between its interest in maintaining a close economic partnership with the UK and its need to safeguard the integrity of its internal market by avoiding an imbalance between market access rights and regulatory obligations.[4] Given the UK's firm stance of leaving the EU internal market and retaining full regulatory autonomy over subsidies, the EU made the establishment of subsidy control rules a prerequisite for granting zero-tariff and zero-quota access to its market. These rules, designed to preserve a level playing field between the two parties, are set out in Chapter 3, Title XI, Heading One, Part Two of the EU-UK Trade and Cooperation Agreement (TCA).[5] Interestingly, the TCA subsidy regime is not only is the most detailed area devoted to maintaining a level playing field between the EU and the UK across the entire agreement, it also represents the most extensive discipline on subsidies ever seen in any Free Trade Agreement (FTA) to date.[6]

This article explores the rationale that guided EU and UK negotiators' approach to the design of the post-Brexit subsidy control framework. It considers the implications for the UK of moving away from EU State aid control and adopting a subsidy regime aligned with WTO rules, as well as the reasons behind the EU's insistence on preserving strict State aid disciplines despite the UK's new status as a third country. To provide a foundation for this analysis, the article first offers an introductory overview of the WTO and EU subsidy control systems, given their pivotal role in both the negotiations and the drafting of the TCA's subsidy provisions.

I adopt a methodology that extends beyond a pure legal analysis, acknowledging that law emerges from the interplay of political decisions, competing ideologies, and economic considerations, which are ultimately crystallized into formal structures. Therefore, I employ a law-in-context approach, analysing how geopolitical and market dynamics have influenced the drafting of the TCA subsidy control provisions.

Section 1 of the article examines the objectives pursued by the WTO subsidy discipline. It then provides an overview of the WTO subsidy control mechanisms, primarily contained in the Subsidies and Countervailing Measures (SCM) Agreement. Section 2 focuses on EU State aid rules, outlining their role as a fundamental pillar of the EU internal market. It also briefly touches on the main features of the EU State aid control system. Last, Section 3 examines the justification for the EU's need to oversee UK public spending post-Brexit to prevent market distortions, and concludes with an analysis of the main features of Chapter 3, Title XI of the TCA.

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[3] Andrea Biondi, 'Subsidies control and enforcement' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume V: The Trade & Cooperation Agreement* (Oxford University Press 2024) 219.

[4] Jose Luis Buendìa Sierra, '"Brexit", a Stress Test for State Aid Control?' (2016) 15 *European State Aid Law Quarterly* 331.

[5] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) (signed 30 December 2020, provisionally applied from 1 January 2021, entered into force 1 May 2021) [2021] OJ L149/10.

[6] Andrea Biondi and Anneli Howard, 'Levelling up a Level Playing Field: Competition and Subsidies in Post-Brexit Britain' in Adam Lazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022) 392.

I argue that while the WTO, EU, and TCA subsidy control regimes formally pursue the same goal of controlling the granting of subsidies, they all act as distinct mechanisms because of the different contexts in which they operate. Each regime is underpinned by distinct economic, legal, and political rationales, which in turn shape the specific regulatory mechanisms it employs.

II. WTO

This section offers an overview of the WTO's discipline on subsidies. It begins by examining the legal and political-economy justification underpinning this framework, then outlines its key normative and institutional features. By analysing its rationale and operational mechanisms, this section identifies the principles that shaped the UK's approach to negotiating subsidy control after Brexit.

Objectives

The analysis of the objectives of international control on subsidies can be approached from the perspectives of trade, competition, and welfare.[7]

Subsidies can distort international trade by creating barriers to imports or artificially enhancing exports. In particular, they create issues when they either restrict market access for foreign competitors (whether in the subsidizing country or third markets) or increase subsidized imports in other countries' markets.[8] As a result, subsidies can act as government-induced trade barriers, much like import tariffs. In other words, they can undermine the market access expectations established through tariff concessions under the WTO framework. This concern was the driving force behind the introduction of subsidy disciplines into the General Agreement on Tariffs and Trade (GATT), particularly under Articles VI and XVI.[9] Furthermore, subsidies often trigger retaliatory measures. When one country subsidizes its industries, others frequently respond by introducing their own subsidies to protect their domestic producers, triggering a subsidy 'war' among countries. This escalation leads to inefficient global resource allocation and heightened trade tensions.[10]

However, the impact of subsidies extends beyond trade as they may also influence the behaviour of economic actors, including both the recipients of subsidies and their competitors. Thus, in turn, subsidies can distort the competitive dynamics within the market, potentially affecting overall economic efficiency.[11] It is important to note here that international subsidy laws do not delve into a comprehensive competition analysis of all the negative and positive effects of subsidies, nor do they explicitly provide mechanisms for balancing these effects.[12] While it is well recognized that markets often fail to achieve optimal outcomes due to inefficiencies or inequalities,

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[7] This analytical framework was developed by Rubini; see Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2010) 38.

[8] See Steve Suranovic, *International Economics: Theory and Policy* (Saylor Foundation 2012) ch 7.

[9] Alan O Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (2010) 2 *Journal of Legal Analysis* 473, 496- 497.

[10] Douglas A Irwin, *Free Trade Under Fire* (5th edn Princeton University Press 2020) 257.

[11] Rubini (n 7) 58-59.

[12] Luca Rubini, 'State Aid and International Trade Law' in Leigh Hancher and Juan Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021) 104.

and that subsidies can serve important policy objectives, such as the reduction of greenhouse gas emissions, the international subsidy discipline does not formally acknowledge these benefits as normative justifications for subsidy use.[13]

Key elements

The international discipline on subsidies is primarily regulated under the SCM Agreement, which applies exclusively to trade in goods and does not extend to trade in services.[14] Under Article XV of the General Agreement on Trade in Services (GATS), Members agreed that they 'shall enter into negotiation with a view to developing the necessary multilateral disciplines to avoid (...) trade-distortive effects'.[15] Negotiations occurred but have not been completed. However, subsidies are already regulated under some provisions of the GATS, such as paragraph 1 of the same article, which states that 'Members recognize that, in certain circumstances, subsidies may have distorting effects on trade in services.'[16] In such situations, the GATS envisages a consultation obligation between the granting and the affected Members, but it does not impose any substantive prohibitions or limitations on subsidies.[17]

Subsidies granted by a WTO Member can only be challenged if they cause one or more of the adverse effects as described in Articles 5, 6, and 15 of the SCM Agreement.[18] Further, pursuant to Article 3 of the SCM Agreement, subsidies which require the use of domestic rather than imported goods, or that are contingent on export performance, are prohibited without the need to show adverse effects. If a subsidy is prohibited, it must be withdrawn.[19] If it is not prohibited, the subsidizing Member can eliminate the negative effects without the need to withdraw the subsidy(ies).[20]

As highlighted above, the SCM Agreement fails to consider the possible beneficial effects of the subsidies. Article 8 of the SCM Agreement, which expired by its own terms after five years, included as non-actionable subsidies those related to research and development (R&D), regional development, and environmental protection. [21]

The Subsidies and Countervailing Measure Committee is the body entrusted with the surveillance and notification processes under the SCM Agreement, but the effectiveness of the

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[13] Petros C Mavroidis, 'Come Together? Producer Welfare, Consumer Welfare, and WTO Rules' in James Harrison and Ernst-Ulrich Petersmann (eds), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (Oxford University Press 2005) 277; Marco M Slotboom, 'Do Different Treaty Purposes Matter for Treaty Interpretation?: The Elimination of Discriminatory Internal Taxes in EC and WTO Law' (2001) 4 *Journal of International Economic Law* 557, 579.

[14] For a general overview of the subsidy discipline under the SCM Agreement see Wolfgang Müller, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary* (Cambridge University Press 2017) 1-50.

[15] Art XV(1) GATS.

[16] Ibid.

[17] Rubini (n 12) 124.

[18] This section is based in part on research conducted for a book chapter: see Elettra Bargellini, 'Climate Change and Subsidies: Possible Options for Change' in Elisa Baroncini (ed), *The WTO as Major Driver of Sustainable Development and its Reform Process* (Dipartimento di Scienze Giuridiche, Università di Bologna 2025) 43-45 10.6092/unibo/amsacta/8513.

[19] Art 4(7) SCM Agreement.

[20] Art 7(8) SCM Agreement.

[21] Alan O Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures' (2003) Working Paper, p. 15 http://www.ssrn.com/abstract=415780.

Committee has been reduced by WTO Members' failure to fulfil their notification obligations.[22] Furthermore, Articles 24(3) of the SCM Agreement establish another body, the Permanent Group of Experts (PGE), which is 'composed of five independent persons, highly qualified in the fields of subsidies and trade relations'.[23] The PGE may be requested to assist a panel according to Article 4(5) of the SCM Agreement. Moreover, the PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be 'confidential and may not be invoked in proceedings under Article 7 of the SCM Agreement'.[24]

To counteract the adverse effects of subsidies and subsidized imports on domestic industries, WTO Members can adopt unilateral countervailing duty (CVD) measures.[25] These measures are governed by the provisions of Article 15 of the SCM Agreement, including definitions of subsidized imports, injury and causation. Another possibility is that Members can invoke the WTO's Dispute Settlement Mechanisms (DSM).[26] The reason for recourse to the DSM is that while CVD only applies to imports into the complaining Members' territory, the DSM also address the exporters' competing sales into the complaining Members' territory (similarly to CVD), into third countries, or within the exporters' own territory.

The DSM sets procedures for resolving disputes through consultations, possibly mediation, and binding decisions by a WTO dispute settlement panel and, if applicable, the WTO Appellate Body (AB), which is currently not operational.[27] It is worth noting that a panel decision, once adopted – mostly automatically – by the Dispute Settlement Body (DSB), made up of all WTO Members, is binding on all the parties. For example, a recent panel ruling on the highly controversial question of 'cross-border' subsidies, once adopted, has the same force as an AB opinion would have had.[28]

Private operators are forced to rely on individual WTO Members because they have no rights to contest the measures. In theory, they can file an *amicus curiae* brief, although in practice this has not had much impact.[29] Another important aspect is that neither the DSM nor CVD measures require the repayment of past subsidies.[30]

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[22] See Luca Rubini, 'The International Context of EC State Aid Law and Policy: The Regulation of Subsidies in the WTO' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004) 149–188; WTO, *Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements*, WTO Doc JOB/GC/204/Rev.2 (27 June 2019).

[23] Art 24(3) SCM Agreement.

[24] Art 24(4) SCM Agreement; see Elettra Bargellini, 'The impact of the Subsidy Control Act 2022 on the Effectiveness of the TCA: Lessons from EU State aid and WTO' (2025) 59(2) *Journal of World Trade* 213, 220.

[25] See Arts 10-23 SCM Agreement; Art VI GATT.

[26] See Art 30 of the Dispute Settlement Understanding (DSU).

[27] Based on the arbitration provision in Article 25 of the DSU, a group of WTO Members are parties to the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), an alternative appeal mechanism with a view to providing for review of panel reports in the absence of a functioning AB. The MPIA was agreed upon among its original 18 participating Members in April 2020. Currently 57/166 WTO members are parties to the MPIA; see Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) 22(5) *World Trade Review* 693.

[28] *European Union - Countervailing Duties on Imports of Biodiesel from Indonesia* - Notification of an appeal by the European Union under article 16.4 and article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the working procedures for appellate review.

[29] With some exceptions, such as the AB report in *EU-Sardines*, see European Communities – Trade Description of Sardines (26 September 2002) Report of the Appellate Body, AB-2002-3, para. 315 (b).

[30] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States,* WT/DS126/RW, adopted 11 February 2000.

III. EU State Aid

EU State aid law is the most advanced and comprehensive subsidy control system in existence. It applies exclusively to EU Member States and is justified by the need to preserve the integrity of the EU internal market (the world's most advanced free trade area). This section, after explaining the role of EU State aid in safeguarding competition and trade among EU Member States, examines its main substantive and procedural aspects. While the previous section examined the features (and weaknesses) of the WTO discipline in regulating subsidies, which the UK aimed to adhere to post-Brexit, this section shifts to the EU perspective. It highlights the effective enforcement mechanisms that define the EU system and which the EU sought to have the UK maintain after its withdrawal.

Objectives

Given the high degree of integration within the EU internal market, EU legislation focuses on ensuring its effective functioning by prohibiting measures that distort competition and trade.[31] State aid measures, in particular, have emerged as a critical concern because EU Member States possess differing financial capacities to support their domestic businesses, potentially creating market imbalances that undermine the free movement of goods, services, capital, and people. There is a debate over whether EU State aid should be interpreted primarily through an economic-oriented competition lens or an integration-focused internal market perspective.[32]

Proponents of the competition perspective advocate for an increased infusion of economic analysis into EU State aid law. This perspective considers State aid to be a barrier to competition within the internal market and argue that its regulation should align with the economic principles governing competition law. A stronger reliance would clarify the assessment of the positive and negative impacts of State aid, as economic indicators (such as market failures and distortions of competition) could be applied more rigorously.[33] Accordingly, this approach would shift the focus from legal disputes to debates about the impacts of an aid on the market, increasing awareness of its costs and benefits at both EU and Member State levels while enabling a more systematic approach to balancing these effects.[34]

The supporters of the internal market perspective perceive State aid as an obstacle to intra-community trade rather than primarily distorting competition.[35] They argue that State aid control is designed to mitigate negative spillover effects on other EU Member States affected by the aid, ultimately aiming to prevent Member States from retaliating with their own aid in response to

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[31] Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edition, Oxford University Press 2022).

[32] Andrea Biondi and Martin Farley, 'The Relationship between State Aid and the Single Market' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2011) ch 12; Rubini (n 7) 60-61.

[33] Claus-Dieter Ehlermann and Michelle Everson (eds), *European Competition Law Annual 1999: Selected Issues in the Field of State Aids* (Hart Publishing 2001) 55-56.

[34] Hans W Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'European State Aid Control: An Economic Framework' in P Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press 2007) 53-54; see Jose Luis Buendía Sierra, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law. Liber Amicorum in Honour of Francisco Santaolalla*, vol 36 (Kluwer Law International 2008).

[35] See e.g. Case 173/73 *Italian Republic v Commission of the European Communities* ECLI:EU:C:1974:71 para 13; Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* ECLI:EU:C:1996:285 para 58.

impacts on their domestic industries.[36] This approach underscores the distinction between competition rules, which concentrate on the competition among undertakings, and State aid rules, which take into account the macroeconomic rivalries among EU Member States.[37] According to this perspective, there is no need for a more refined economic analysis within EU State aid law. For instance, the presumption of a 'distortion of competition' should automatically arise as a necessary consequence of a measure meeting the other requirements of the definition of State aid; at the same time the *de minimis* rule should not apply, aligning with the principles of the internal market.[38]A clarification on how to interpret EU State aid law's objectives comes from Biondi and Eeckhout, who explain that trade and competition rules share a common goal: ensuring the free movement of goods under normal conditions of competition.[39]

It is crucial to recognize the existence of policy space within EU State aid law, which acknowledges that State aid can serve legitimate policy objectives despite its potential to distort competition and affect trade within the EU internal market. This perspective considers the aid's positive impacts beyond domestic concerns, situating it within the broader framework of the EU.[40] In line with this principle, the Commission has, in recent years, revitalized the approach it first adopted during the 2008 financial crisis, using State aid rules to assist EU Member States address unprecedented global challenges. Crises such as the Covid-19 and the war in Ukraine – combined with the need to achieve climate and technological transitions – have put significant pressure on EU Member States, underscoring the need for the EU to adapt its State aid policies to better address these economic and health challenges.[41] The Commission has acted as a *de facto* crisis-management authority, demonstrating how a dynamic interpretation of State aid rules better reflects their ability to adapt as the priorities in the EU internal market change.[42]

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[36] Leigh Hancher, Yvo de Vries and Francesco Maria Salerno, *EU State Aids* (6th edn, Sweet & Maxwell 2021) 34-35; Morris Schonberg, 'Continuity or Change? State Aid Control in a Post-Brexit United Kingdom' (2017) 16 *Competition Law Journal* 47, 51; Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' in Catherine Barnard and Okeoghene Odudu (eds), *Cambridge Yearbook of European Legal Studies*, vol 12 (Cambridge University Press 2010) 35-52.

[37] Richard Whish and David Bailey, *Competition Law* (10th edition Oxford University Press 2021) 256; Andrea Biondi and Elisabetta Righini, 'An Evolutionary Theory of EU State Aid Control' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015).

[38] Paris Anestis, 'State Aid and Antitrust Remedies: Anything in Common' (2012) 11 *European State Aid Law Quarterly* 551.

[39] Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004) 108; Andrea Biondi, 'State Aid and Free Movement' in Leigh Hancher and Juan Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021).

[40] Hussein Kassim and Bruce Lyons, 'The New Political Economy of EU State Aid Policy' (2013) 13 *Journal of Industry, Competition and Trade* 1; Michelle Cini and Erika Szyszcak, 'State Aid Control from a Political Science Perspective' in Erika Szyszcak (ed), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021); Andrea Biondi, Luca Rubini and Marta Andhov, *Regulating for a Sustainable and Resilient Single Market* (ETUI 2023) https://www.etui.org/publications/regulating-sustainable-and-resilient-single-market.

[41] These crises coincided with an acute crisis in the multilateral trading system (marked by the paralysis of the AB and the failure of the WTO framework to discipline subsidies effectively), and with an escalating competitiveness crisis, as highlighted in the Draghi report; Mario Draghi, The future of European competitiveness – In-depth analysis and recommendations (2024); See also Enrico Letta, Much More Than A Market (2024); Andrea Biondi, 'Did the NextGenEU Change State Aid Control?' (2024) 23 *European State Aid Law Quarterly* 99.

[42] Juan Jorge Piernas López and Michelle Cini, 'State Aid Control: Rule Making and Rule Change in Response to Crises' in Diane Fromage, Adrienne Héritier and Paul Weismann (eds), *EU Regulatory Responses to Crises: Adaptation or Transformation?* (Oxford University Press 2025) 92-114; László Szegedi and Bálint Teleki, 'EU Law Chapter on EU State Aid Rules: The Bumpy Ride from "Subsidy Control" to "Subsidy Governance"' in Zoltán Nagy (ed), *Economic Governance: The Impact of the European Union on the Regulation of Fiscal and Monetary Policy in Central European Countries* (Central European Academic Publishing 2024) 235- 238.

Key elements

The discipline of State aid is founded upon the provisions set forth in Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). Article 107(1) of the TFEU establishes that State aid is, in principle, incompatible with the internal market. However, this principle is not absolute. Paragraphs 2 and 3 of Article 107 provide some exemptions according to which State aid is, or may be considered, compatible with the EU internal market. These exemptions include: aid to promote economic development, aid for important European projects of common interest, aid to remedy severe disturbances in the economy of a Member State, aid to facilitate the development of specific economic activities or regions, and aid for cultural promotion and heritage preservation.[43] In addition, Article 106(2) of the TFEU complements this framework by establishing that 'Undertakings entrusted with the operation of services of general economic interest (...) shall be subject to the rules contained in the Treaties (...) in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.'[44] These exemptions acknowledge that, under certain circumstances, State aid can contribute positively to the functioning of the EU internal market and serve important public policy objectives.

The EU State aid discipline provides robust enforcement mechanisms. Article 108 of the TFEU states that EU Member States must notify the Commission of any new aid, or alteration of existing aid, prior to implementation (*ex ante* notification).[45] The Commission has exclusive authority to determine whether the aid (which, in principle, is prohibited) pursues a legitimate objective and can therefore be deemed compatible with the EU internal market. The Member State concerned shall not put into effect the planned measure until the Commission has completed its assessment (standstill obligation). In addition, according to Article 108(1) of the TFEU, the Commission carries out a regular examination of all existing aid schemes granted by EU Member States, which have an obligation to provide reports on existing aid. The Commission's authority in enforcing State aid rules is complemented by the role of national courts, which are also responsible for ensuring that EU Member States fulfil their notification obligations.

To reduce the burden on both EU Member States and the Commission, the General Block Exemption Regulation (GBER) exempts certain categories of aid from the notification requirement by automatically declaring them compatible with the internal market.[46] The GBER focuses on aid that is unlikely to cause significant distortions of competition, such as support for small and medium-sized enterprises (SMEs), aid targeted at R&D, aid dealing with natural disasters, key infrastructure, and the conservation of cultural assets. Moreover, the *de minimis* rule set a threshold of € 300,000 per undertaking over a three-year period below which aid is considered too small to significantly affect competition in the internal market and is thus exempt from State aid control.[47]

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[43] Massimo Merola, 'The Forces Shaping State Aid Control in the EU', in Luca Rubini and Jennifer Hawkins, *What Shapes the Law?: Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines* (EUI/University of Birmingham, 2016) 101.

[44] Art 106(2) TFEU.

[45] The rationale of the system, originally foreseen in the Spaak Report, Report of the Heads of Delegation to the Ministers of Foreign Affairs (21 April 1956) 57-59.

[46] Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.

[47] European Commission, Press release 'Commission adopts new general rules for small amounts of State aid and for services of general economic interest' https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6567.

If the Commission finds that aid is incompatible with the EU internal market, it must order its recovery.[48] Moreover, since EU Member States cannot grant aid without approval from the Commission, any aid granted before obtaining such approval is automatically considered unlawful. The fact that the aid is procedurally unlawful does not necessarily mean that it is also incompatible with the internal market; the Commission may still decide that the aid in question is compatible and that its recovery is not necessary. In such cases, the beneficiary may be required to pay interests on the aid amount from the date it was granted until the date of the Commission's approval.[49]

When a Member State fails to comply with a recovery decision within the specified deadline, Article 108(2) of the TFEU empowers the Commission to directly refer the matter to the Court of Justice of the European Union (CJEU).[50] Decisions made by the Commission are subject to judicial review by the CJEU.[51] It is important to note that the CJEU has increasingly recognized the right of private parties to challenge the Commission's decisions. For example, in cases where negative decisions regarding incompatible aid schemes are challenged, the CJEU has long held that companies can be considered individually affected if they can demonstrate that they are actual beneficiaries of the aid. Moreover, private parties have legal avenues beyond the action for annulment to challenge potentially illegitimate actions by the Commission. The action for failure to act is a viable option when the Commission fails to take action despite its obligation to do so, given its exclusive competence in assessing the compatibility of State aid.[52] Overall, the combination of the Commission's power to refer cases to the CJEU and the judicial review of its decisions gives the CJEU a crucial role in safeguarding the adherence to EU legal principles and ensuring compliance with EU State aid rules.

IV. TCA

The circumstances of the TCA are unique, as it not only represents a trade agreement between two parties engaged in an enormous amount of trade but also introduces a new type of FTA. Unlike traditional negotiations that aim to build closer economic integration, the TCA negotiations were marked by a shift away from it. This fundamental tension shaped the parties' opposing priorities for their future relationship: the UK prioritized sovereignty, rejecting regulatory alignment typically found in FTAs that facilitate reduced trade barriers, while the EU made the establishment of provisions for a strong level playing field a prerequisite for granting unprecedented zero-tariff, zero-quota market access. This section delves into what the EU-UK level playing field entails. Finally, this section briefly outlines the features of the TCA subsidy control regime.

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[48] The TFEU does not contain any explicit provision on the recovery of illegal state aid; however, the CJEU has ruled that recovery is the result of the general prohibition of State aid established by Article 107(1) TFEU and protects the effectiveness of the 'standstill obligation' enshrined in Article 108(3) TFEU. The relevant rules on the recovery obligation's functioning are contained in Regulation 2015/1589 Article 16 of the Procedural Regulation, which is the reference rule in this regard.

[49] Jan Blockx, 'New State aid Recovery Notice' (2019) 18 *European State aid Law Quarterly* 540.

[50] Art 108(2) TFEU.

[51] Art 263 TFEU.

[52] Art 265 TFEU; Anthony M Collins and Damian Collins, 'State Aid: The Effective Application of EU State Aid Procedures: From a Plan to Grant Aid to the Recovery of Illegal Aid - The Role of National Law and Practice' (2006) 13 *Irish Journal of European Law* 175.

Objectives

The EU-UK TCA differs from typical FTAs, which primarily aim to eliminate trade barriers and foster economic integration. Instead, it was designed to regulate a more restricted trade relationship following the UK's withdrawal from the EU. Given the UK's decision to leave the EU internal market while still seeking preferential access because of the deep economic interconnection between both economies, the EU made zero-tariff and zero-quota market access contingent on the inclusion of robust level playing field provisions in their trade agreement.[53]

The concept of a level playing field draws on a sports metaphor: just as sports teams compete on a field with fixed dimensions, under specific rules enforced by impartial referees, businesses operate within defined regulatory frameworks.[54] Stojanovic defines the level playing field as,

> a set of common rules and standards that are used primarily to prevent businesses in one country undercutting their rivals in other countries, in areas such as workers' rights and environmental protections [and] ... support other objectives such as sustainable development or meeting climate change commitments. The EU's internal market is the most developed example of a level playing field agreed between different countries, with the Commission and the CJEU responsible for overseeing and enforcing these rules.[55]

In essence, the level playing field ensures that companies can compete with each other by preventing either jurisdiction from adopting rules or standards that would confer its own companies an undue competitive advantage over those from the other jurisdiction.[56] However, the level playing field between the EU and the UK has unique characteristics, as it was initially shaped by the rules embedded in the EU legal order.[57] This situation contrasts with traditional trade agreements, where level playing field provisions are generally limited to broad principles.[58] Indeed, in the EU-UK context, any divergence from their previously shared regulatory framework risked distorting competitive conditions between the two economies.[59] Hence, the EU-UK level playing field could be described as a 'historic playing field': rather than creating a new framework, it seeks to preserve pre-existing constraints that define the parameters of post-Brexit competition.

Hestermeyer identified three key aspects that were essential to establish an EU-UK level playing field. First, it was necessary to secure previously shared standards. Second, enforcement

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[53] Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III: The Framework of New EU-UK Relationships* (Oxford University Press 2021) 93; For a comprehensive discussion of the different subsidies disciplines embodied in EU FTAs see Leonardo Borlini and Claudio Dordi, 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral PTAs' (2017) 23 *Columbia Journal of European Law* 551-606.

[54] Matilda Gillis, 'Let's Play?: An Examination of the "Level Playing Field" in EU Free Trade Agreements' (2021) 55 *Journal of World Trade* 715.

[55] Dan Ciuriak, 'Level Playing Fields and Rebalancing: A Comment' (2020) https://papers.ssrn.com/abstract=3756444.

[56] Biondi (n 3); Steve Peers, 'So Close, yet so Far: The EU/UK Trade and Cooperation Agreement' (2022) 59 *Common Market Law Review* 49,62; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn Oxford University Press 2020) 1232.

[57] David P Blake, 'Ensuring a Genuine Level Playing Field with the EU Post-Brexit' (Social Science Research Network, 14 March 2020) https://papers.ssrn.com/abstract=3554357.

[58] Marios Tokas, 'The Concept of the Level Playing Field in International Economic Law' (2024) 27 *Journal of International Economic Law* 558; see e.g. Aya Iino, 'Disciplining Subsidies Through Free Trade Agreements (FTAs): Emerging Developments in Japan's FTAs and Their Implications' (2023) 24 *German Law Journal* 179.

[59] Giulia Claudia Leonelli, 'From Extra-Territorial Leverage and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU–UK Trade and Cooperation Agreement' (2021) 33 *Journal of Environmental Law* 611.

mechanisms had to be established, either through domestic or specific procedures established under the agreement. Third, adequate safeguards were needed to address potential future regulatory divergences; without them neither party would be willing to unilaterally raise their standards (for example, in environmental or social areas), fearing that doing so would place its businesses at a competitive disadvantage relative to the other party.[60]

The provisions devoted to maintaining an EU-UK level playing field, contained under Title XI of Part Two of the TCA, cover competition policy, subsidy control, state-owned enterprises, taxation, labour and social standards, environment and climate, and trade and sustainable development. Article 355(1) of Title XI of the TCA establishes that,

> The Parties recognise that trade and investment between the Union and the United Kingdom under the terms set out in this Agreement require conditions that ensure a level playing field for open and fair competition between the Parties and that ensure that trade and investment take place in a manner conducive to sustainable development.[61]

While the TCA establishes common goals that reflect both EU and UK perspectives, it also affirms each party's autonomy in pursuing them. Thus, under Article 356 TCA 'The Parties affirm the right of each Party to set its policies and priorities in the areas covered by the Title, to determine the levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments under this Title.'[62] Moreover, Article 355(4) TCA states that 'the Parties recognise that the purpose of this Title is not to harmonize the standard of the Parties'[63] while declaring that the parties 'are determined to maintain and improve their respective high standards in the areas covered by this Title.'[64]

Notably, the right to regulate has the potential to significantly impact the economic relationship between the EU and UK. When one party chooses to diverge from previously shared standards, it may result in the other party implementing trade measures to restrict the diverging party's privileged access to its market. However, as discussed earlier, the recognition that both sides retain regulatory sovereignty while still adhering to certain commitments to maintain equal competition conditions was the only viable compromise with which to reach an agreement in these areas.

Title XI of the TCA, in addressing the various areas considered essential for maintaining an EU-UK level playing field, employs different combinations of legal tools, though not all tools are available across all areas. The sections on competition policy, subsidy control, state-owned enterprises, and trade and sustainability contain the most detailed provisions. However, the scope and the strength of enforcement mechanisms differ significantly between them. The chapter on competition policy is relatively brief, relying primarily on obligations of domestic enforcement.[65] Differently, the chapter on subsidy control is particularly extensive, making it the most regulated

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[60] Holger Hestermeyer, 'Leveling the Playing Field? Welcome to the TCA' [2021] *EU Law Live* https://kclpure.kcl.ac.uk/portal/en/publications/leveling-the-playing-field-welcome-to-the-tca(9157f9ec-6d02-44a5-b2c9-3afea769f5b0).html.

[61] Art 355(1) TCA.

[62] Art 356(1) TCA.

[63] Art 355(4) TCA.

[64] Art 355(4) TCA; Mariani and Sacerdoti (n 53) 114.

[65] Art 360 TCA; Biondi and Howard (n 6) 384.

area of the whole Level Playing Field Title.[66] It establishes detailed rules on domestic enforcement, subjects certain parts to the general TCA's DSM, and introduces the right to implement unilateral remedial measures when subsidies threaten or cause significant negative effects on trade or investment.[67] For taxation,[68] labour and social standards,[69] and environmental and climate policies,[70] the agreement primarily seeks to ensure a level playing field through non-regression clauses, which the TCA defines as any weakening or reduction of standards below the pre-Brexit levels that affects trade or investment between the parties. Notably, in taxation, non-regression is not subject to dispute settlement, which might seem surprising given concerns about the UK potentially becoming a low-tax jurisdiction.[71] However, the EU's limited competence in tax law, which already permits low-tax jurisdictions within the EU, restricted the Commission's negotiating position in this area.[72] Non-regression obligations are more robust for labour and social standards as well as for environmental and climate provisions.[73] These areas feature specific requirements for domestic enforcement and allow for DSM through a panel of experts, with the possibility to adopt countermeasures.[74]

Key elements

As a result of the right to regulate established under the TCA, both the EU and the UK are required to have an effective system of subsidy control, while adhering to the general principles set out in the agreement.[75] This represents the first example of 'domestification' of the TCA, as, with the approval and entry into force of the Subsidy Control Act (SCA) in 2023, the UK now has a domestic system of subsidy control.[76]

The TCA includes a very advance definition of subsidy, which covers both goods and services, extending significantly beyond WTO discipline on subsidies, which generally cover only goods. Article 363 defines a subsidy as any financial assistance that arises from the resources of the parties, confers a specific economic advantage on one or more economic actors, and has, or could have, an effect on trade or investment between the parties. Additionally, Chapter 3 contains many clarifications, such as a long list of prohibited subsidies: subsidies in the form of unlimited state guarantees, rescue and restructuring subsidies without a credible restructuring plan or contributions from current owners, subsidies not justified by social hardship or severe market failure resulting

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[66] George Peretz, 'The Subsidy Control Provisions of the UK-EU Trade and Cooperation Agreement: A Framework for a New UK Domestic Subsidy Regime – EU Relations Law' (28 December 2020) https://eurelationslaw.com/blog/the-subsidy-control-provisions-of-the-uk-eu-trade-and-cooperation-agreement-a-framework-for-a-new-uk-domestic-subsidy-regime.

[67] Chapter 3, Title XI, Heading One, Part Two, TCA.

[68] Chapter 5, Title XI, Heading One, Part Two, TCA.

[69] Chapter 6, Title XI, Heading One, Part Two, TCA.

[70] Chapter 7, Title XI, Heading One, Part Two, TCA.

[71] Art 385 TCA.

[72] See Peers (n 56) 63-65; Elena Ares and others, 'The UK-EU Trade and Cooperation Agreement: Level Playing Field' (House of Commons Library 2021) Briefing Paper 9190.

[73] Art 387 and 391 TCA.

[74] Art 389 and 396 TCA; Hestermeyer (n 60).

[75] Art 366 TCA.

[76] Subsidy Control Act 2022, c 23 (SCA); Biondi (n 3).

from business failure, export subsidies, subsidies contingent upon the use of domestic content, and subsidies to financial institutions unless granted on the basis of a credible restructuring plan or 'limited to what is needed to ensure their orderly liquidation and exit from the market'.[77]

Chapter 3 of the TCA places a strong emphasis on consultations and cooperation between the parties in monitoring subsidies. Transparency is a key element of the TCA's framework, as highlighted in Article 369 of the TCA. According to this provision, both parties must ensure transparency by making subsidy information publicly available within six months of its grant. The disclosed details must include the legal basis of the subsidy, the recipient's name, the grant date, the duration of the subsidy, and its amount. This transparency enables interested parties to access the information for the purpose of judicial review.[78]

The TCA also requires each party to establish an independent authority or body to oversee its subsidy control regime.[79] In the EU, this role is fulfilled by the Commission, while in the UK, oversight is entrusted to the Subsidy Advice Unit (SAU) within the Competition and Markets Authority (CMA). It is important to note that the TCA does not require prior authorization before a subsidy is granted.[80]

When it comes to enforcement, the focus of the TCA is very domestic. Article 372 of the TCA grants domestic courts the authority to ensure that subsidies are compatible with the general principles set out in Article 366 of the TCA (which are essentially the same principles the Commission has applied for over sixty years to assess the compatibility of national measures with EU State aid control) and to review decisions made by the independent subsidy control authorities. These courts have various tools at their disposal, including the suspension, prohibition or requirement of action by the granting authority, the award of damages, and the recovery of a subsidy from its beneficiary.[81] This is remarkable, because while the TCA seeks to demonstrate its public international law credentials by emphasizing that it does not create individual rights, it nevertheless allows private parties to bring actions before domestic courts against the same authority that granted the subsidy.[82] In the UK, jurisdiction has been conferred to the Competition Appeal Tribunal (CAT).[83]

In the event of subsidy disputes between the EU and UK, the TCA provides for the option of consultation. If one party believes that a subsidy has a negative effect on trade or investment, it can request explanations from the other party. If consultations fail to resolve the dispute and there is a serious risk of significant negative effects on trade or investment, the affected party may unilaterally adopt remedial measures, without going through the TCA dispute settlement mechanisms.[84] Still, the other party can then challenge these measures before an arbitration tribunal. If the tribunal finds that the other party's remedial measures are not proportionate under the terms of the TCA, it may

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[77] Art 367 TCA.

[78] Art 369 (5) TCA; Nicholas Crafts, 'Brexit and Control of Subsidies' (2022) 38 *Oxford Review of Economic Policy* 154.

[79] Art 371 TCA.

[80] Andrea Biondi, 'The New Chapter on Subsidies Regulation in the EU-UK TCA: Some First Impressions' (2021) 20 *European State Aid Law Quarterly* 173, 175-176.

[81] Bargellini (n 24) 224.

[82] Biondi (n 3).

[83] See *Max Recycle v Durham County* Council [2023] CAT 50.

[84] Art 374 TCA; Totis Kotsonis, 'The Squaring of the Circle' (2021) 20 *European State Aid Law Quarterly* 15.

allow the responding party to take countermeasures.[85] Beyond the remedies outlined in Chapter 3, the TCA includes a rebalancing clause in Article 411, which can be triggered when significant divergence in subsidy control causes a material impact on trade and investment between the parties.[86] Article 411 introduces two rebalancing processes. The first allows a party to take rebalancing measures if it can demonstrate a causal link between the other party's significant regulatory change and a material impact on trade or investment.[87] The second process enables either party to request a review and, ultimately, suspend the Trade Title of the TCA if the rebalancing mechanisms are triggered too frequently.[88]

V. Conclusion

Subsidies, broadly recognized as financial assistance provided by governments to support specific industries or economic activities, are regulated at both the WTO and EU levels. However, the objectives of these subsidy regimes differ, resulting in variations in the rules and procedures governing them.

At the international level, subsidies are primarily governed by the SCM Agreement, a key component of the WTO framework. The SCM Agreement aims to ensure that businesses and industries can operate freely in the global marketplace while allowing governments to pursue legitimate domestic policy choices. Under this framework subsidies are generally permitted unless they fall into the limited category of prohibited subsidies, which must be eliminated immediately by the granting Member. Other subsidies, classified as actionable subsidies, are not outright prohibited but may be challenged if they cause adverse effects. Enforcement of the SCM Agreement relies on a complaint-driven mechanism, as WTO Members are not required to notify subsidies in advance (*ex post* control). Thus, when a WTO Member believes a subsidy has an adverse effect on its market, it can either resort to the DSM or impose unilateral CVDs as a means to address the negative impacts resulting from the subsidies.

At the EU level, subsidies are governed by the rules set out in the TFEU, complemented by numerous regulations, guidelines and communications. This system, known as the EU State aid regime, is designed to ensure the smooth operation of the EU internal market by preventing distortions of competition and trade between Member States. Unlike the WTO system, the EU regime applies to both goods and services and is based on a general prohibition of State aid, with specific criteria that must be met for a measure to be considered as State aid. A key feature of EU State aid is that EU Member states are required to notify the Commission and obtain its approval before granting any aid (*ex ante* control). If unlawful aid is implemented, the Commission has the

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[85] Art 374(12) TCA; Stefano Fella, 'The UK-EU Trade and Cooperation Agreement: Governance and Dispute Settlement' (House of Commons Library 2021) Briefing Paper 09139 https://researchbriefings.files.parliament.uk/documents/CBP-9139/CBP-9139.pdf.

[86] The rebalancing clause applies to all the level playing field title and is especially relevant for labour and environmental standards.

[87] Art 411(2) TCA.

[88] Art 411(5) TCA; David Collins, 'Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement (TCA)' (2021) 12 *Journal of International Dispute Settlement* 617.

authority to initiate legal proceedings against the granting Member State, and if the aid is found to violate EU rules, it must be recovered from the beneficiary.

Through the examination of the rationale and overall functioning of the WTO and EU subsidy law, this article underscores the significant divergence in priorities that the parties had regarding the post-Brexit subsidy control regime. On the one hand, the WTO regime (which the UK aspired to align with after Brexit) is characterized by its limited scope and inherent weaknesses in its ability to regulate subsidies. On the other hand, the strict nature of EU State aid control, marked by the Commission's rigorous *ex ante* oversight and the CJEU's supranational authority, represented a level of control that was fundamentally at odds with the UK's post-Brexit emphasis on regulatory divergence and autonomy.

This article demonstrates that, while the continued application of EU State aid rules in the UK could no longer be justified by the existence of the internal market, the economic reality between the parties remained largely unchanged. The geographical proximity and complementarity in supply value chains meant that subsidies could distort competition and trade in ways similar to when the UK was an EU Member. This justified the EU's insistence that a WTO-based system on subsidies would be inadequate and stronger rules were necessary to prevent undue competition. Although the EU did not succeed in fully maintaining the EU State aid control system, it nevertheless managed to establish detailed subsidy rules within the TCA. These rules aim at preventing regulatory divergence from undermining competition and trade between the parties (the level playing field).

Understanding the political and economic reasons for including subsidy control under the TCA, and thus its objective in the context of the new bilateral relationship between the parties, is essential for a comprehensive analysis of the TCA's functioning. This is because all the technical elements of the TCA (substantive measures, monitoring and enforcement, and remedies) have been shaped with this objective in mind.

Because of the very close economic and financial ties between the EU and the UK, it is highly likely that the forces that drove the completion of the treaty will continue to drive changes as needed.