THE EXTRATERRITORIAL EXTENSION OF EU STATE AID RULES TO THE UK THROUGH THE TRADE AND COOPERATION AGREEMENT AND THE NORTHERN IRELAND PROTOCOL: A COMPARISON WITH THE WTO SUBSIDY SYSTEM

Irene Agnolucci*

1. INTRODUCTION

The extraterritorial effect of EU law is a concept linked with the globalisation of markets, products, services and people's behaviours. The extraterritorial dimension of EU law has increasingly come to the attention of scholars and regulators to the point that many areas of EU law, such as environment, animal welfare, IP, technology and competition law, have already been investigated.[1] With regard to competition law, the literature mostly focuses on the extraterritorial consequences of merger control, abuse of dominance and cartels.[2] In applying policies in these areas, the EU often exercises its power to regulate and influence companies' behaviours even when they are not established in the EU.[3]

However, the extraterritorial dimension of EU State aid law remains largely overlooked in academic debate. The main reason is that State aid policy is aimed at protecting the internal market rather than deploying its effects beyond EU borders. EU State aid control is only capable of tackling aid involving domestic competitors. Indeed, two of the criteria on which the EU Commission assesses aid are whether national measures may have a negative effect on the internal market and whether they are capable of distorting competition between the Member States. It was only recently that the EU Commission began to look at foreign aid, i.e. aid granted by non-EU governments to companies operating in the EU. The Commission's proposal for a Regulation[4] acknowledged, for

* King's College London, PhD Candidate and Visiting Lecturer in EU law.

[1] A. Bradford, *The Brussels Effect* (Oxford: OUP 2020); M. Cremona, J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: OUP 2019); L. Prete, 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?). Application of EU Competition Rules' 9 *JECLAP* (2018), at 487; V. Moreno-Lax, C. Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Hart 2014), 1657-1683; J Scott, 'The New EU "Extraterritoriality"' 51 *Common Market Law Review* 2014, at 1343.

[2] Among others, see G. Monti, 'The Global Reach of EU Competition Law' in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019), pp. 174-196.

[3] The phenomenon is linked to the so-called 'Brussels effect' described by A. Bradford, *supra* note 1.

[4] Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market [2021] COM(2021) 223 final. See, in addition, the chapter by Bergamaschi.

the first time, the potential negative impact of foreign aid on the internal market. Although foreign aid will not be included in the analysis contained in this paper, the recent attention paid to this matter indicates the Commission's new approach towards a more comprehensive understanding of subsidies.

The significance of EU State aid control is multifaceted. Not only are State aid rules pivotal to the smooth functioning of the internal market, but they also play an important role in driving national budgets.[5] It is, therefore, unsurprising that State aid policy was one of the main stumbling blocks in the Brexit negotiations. On one side, the UK wanted to retain sovereignty over the management of its spending tools and to decide which sectors to aid and which policies to support. On the other side, the Union was concerned with the UK's geographical proximity to the EU, fearing European companies would find a favourable environment for establishing their businesses in the UK while trading in the EU.

This paper aims to investigate the role of State aid control outside the European Union through the lens of the Trade and Cooperation Agreement between the EU and the UK[6] (hereafter 'TCA'). Section II focuses on the extraterritorial effects of State aid rules, by entering into the debate around extraterritoriality and the extraterritorial extension of EU rules, including EU competition law and EU State aid. Section III will review the different systems of subsidy control, the Subsidies and Countervailing Measures Agreement under the WTO, on the one side, and the EU State aid regime, on the other side. The Section will then highlight some examples of subsidy provisions contained in trade agreements concluded by the EU with third countries.

Moreover, Section IV will examine specific provisions contained in the TCA, comparing them with the Subsidies and Countervailing Measures Agreement and EU State aid control. It will be argued that, although the language of the TCA appears to be close to the Subsidies and Countervailing Measures Agreement, it does actually draw upon EU law. A separate analysis will deal with the extension of EU State aid rules to Northern Ireland through the Northern Ireland Protocol. The paper will conclude that the architecture of EU State aid has, to some extent, been transposed into the TCA, except for some parts which reflect the provisions contained in the Subsidies and Countervailing Measures Agreement.

2. THE EFFECTS OF STATE AID LAW BEYOND EU BORDERS

Since the Treaty of Rome of 1958, State aid law has been protecting the common market by ensuring that companies and Member States can compete

[5] A. Biondi and E. Righini, 'An Evolutionary Theory of State Aid Control', in A. Arnull, D. Chalmers (eds.), *The Oxford Handbook of European Union Law* (OUP 2015), 670-689; A. Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' in *CYELS* 2012, 12, 35-52; L. Rubini, *The Definition of Subsidies and State Aid* (Oxford: OUP 2009), p. 40.

[6] 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, *OJ* [2021] L 149, 30.4.2021, p. 10-2539.

fairly. While EU competition law precludes distortive forms of cooperation between undertakings,[7] the EU State aid regime prevents Member States from granting economic benefits to national companies vis-à-vis their European competitors. Indeed, EU State aid control aims to avoid so-called 'deep pocket distortions',[8] which are connected to the Member States' different financial capacities to spend on aid and invest on specific sectors or industries. The Treaty on the Functioning of the EU (hereafter 'TFEU') envisages a general ban on State aid and lays down precise criteria to be met in order for a measure to be classified as aid. [9] For this purpose, according to Article 107(1) TFEU, aid must be granted by the State or through State resources in any form whatsoever, it must confer a selective advantage to an undertaking or a group of undertakings, and it must have an effect on trade between Member States and distort competition within the internal market. Although State aid control has been progressively contaminated by different public policy goals, the Court of Justice of the European Union (hereafter 'CJEU') has consistently held that the notion of aid is an objective one.[10] Hence, the Commission should evaluate the effects of aid on the internal market rather than its policy goals.[11]

Nevertheless, the role of EU State aid control outside the internal market is still ambiguous. Before analysing the effects of State aid control outside the EU territory, it is worth recalling the effects EU law might have beyond the Union's borders. According to Scott, the extraterritorial dimension of EU law can arise in two ways.[12] Firstly, *extraterritoriality* occurs when EU law is applied in countries other than the Member States, when there is no territorial connection between a regulated activity and a Member State in the application of a particular measure. On the contrary, the *extraterritorial extension* of EU rules requires a territorial connection with the EU but also an 'assessment of compliance with the law' to evaluate foreign conduct and/or third country law.[13]

---

[7] R. Whish and D. Bailey, *Competition Law* (Oxford: OUP, 9th edition 2018).

[8] Former Vice President of the EU Commission J. Almunia, 'Doing more with less – State aid reform in times of austerity: Supporting growth amid fiscal constraints', speech delivered at King's College London on 11 January 2013, available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_14>.

[9] For a comprehensive overview of the distinctive features of state aid control, see L. Hancher and J. J. Piernas López (eds.), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar 2021); P. Werner and V. Verouden, *EU State Aid Control. Law and Economics* (Alphen aan den Rijn: Wolters Kluwer 2017); H. Hofmann and C. Micheau, *State Aid Law of the European Union* (Oxford: OUP 2016); L. Rubini, *The Definition of Subsidies and State Aid* (Oxford: OUP 2009). H. W. Friederiszick *et al.,* 'European State Aid Control: An Economic Framework' in P. Buccirossi (ed.), *Handbook of Antitrust Economics* (MIT Press 2008), 625-669.

[10] ECJ, Case C-487/06 P, *British Aggregates Association v Commission* [2008] ECLI:EU:C:2008:757, paras. 92-93; ECJ, Case C-387/92, *Banco Exterior de España* [1994] ECLI:EU:C:1994:100; ECJ, Case C-173/73, *Italy v Commission* [1974] ECLI:EU:C:1974:71. See, also, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, *OJ* [2016] C 262/1, 19.7.2016.

[11] C. Quigley, *European State Aid Law and Policy* (Oxford: Hart, 3rd edition 2015), 15-16; T. Kleiner, 'Modernization of State Aid Policy', in E. Szyszczak (ed.), *Research Handbook on EU State Aid* (Elgar 2011), 1-27.

[12] Cremona, Scott, *supra* note 1, at 22.

[13] Cremona, Scott, *supra* note 1, at 22.

Another significant contribution to the literature is the 'Brussels effect' theory.[14] According to Bradford, the 'Brussels effect' explains how the EU is able unilaterally to regulate the global marketplace.[15] Two types of 'Brussels effect' commonly take place. Firstly, corporations may respond to EU law 'by adjusting their global conduct to EU rules' (*de facto* effect). As the level of regulation is generally higher in the EU than in other regional legal systems, it is more convenient for global companies to comply with EU standards so that they are able to penetrate the vast European market. Secondly, a *de jure* effect may occur when third countries adopt 'EU-style' regulations. The *de facto* and *de iure* effects are usually linked. Indeed, the latter frequently follow the former, as multinational companies have an interest in their domestic governments adapting regulations in light of EU rules with which they already comply.[16]

EU competition law has substantial extraterritorial consequences on undertakings, for instance, through merger control. Indeed, as the EU is able to review mergers between companies, including foreign ones, it has the power to halt the merger when it may be detrimental to the internal market. Such a decision may produce major economic consequences for the undertakings involved. When the Commission decides to stop a merger, it also 'enjoys a *de facto* global veto over a proposed merger'.[17] Indeed, if the merger is halted in the EU, the companies involved would have less of an interest in pursuing the merger elsewhere. As a result, undertakings are typically willing to comply with the Commission's requests if this means the Commission gives them the green light.[18]

The extraterritorial effects of EU State aid law are more blurred in comparison with those produced by other EU competition rules. This paper argues that while EU State aid law lacks extraterritoriality, it can nevertheless be extended to foreign jurisdictions when forms of territorial connection are in place. Typically, the EU takes advantage of a territorial connection to 'gain leverage over the content of third country law'.[19] The extraterritorial extension may arise at three different levels.[20] Firstly, at its narrowest level, the extraterritorial extension is applied to individual transactions or shipments of goods that are 'centred on the territory of the EU'.[21] Secondly, the overall assessment of compliance with EU law can be carried out within the organisation or governance of a specific firm ('firm level'). Thirdly, the provisions may be extended to the entire third country. Drawing on the latter case, the paper argues that the provisions of the TCA produce the extraterritorial extension of many EU State aid rules to the UK.

---

[14] Bradford, *supra* note 1.
[15] Bradford, *supra* note 1.
[16] Bradford, *supra* note 1.
[17] G. Monti, *supra* note 2, at 176; A Bradford, *supra* note 1.
[18] For instance, see Commission Decision 97/816/EC of 30 July 1997 (Case No IV/M.877–Boeing/McDonnell Douglas), *OJ* [1997] L 336/16, 30 July 1997, paras 11-12.
[19] J. Scott, 'The Global Reach of EU Law', in M. Cremona and J. Scott (eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford: OUP 2019) at 26.
[20] Scott, *supra*, note 19, at 22.
[21] Scott, *supra*, note 19, at 25.

3. TYPES OF SUBSIDY CONTROL BETWEEN STATES

a. **EU State aid versus SCM Agreement**

There are generally two types of subsidy systems worldwide. The first system is established by the Subsidies and Countervailing Measures Agreement (hereafter 'SCM') under the WTO. The second system is the one in place in Europe, namely the EU State aid regime enshrined in the TFEU. Several elements differentiate these two systems. Firstly, they have different goals. Indeed, the SCM is aimed at 'reconciling "mischief" protectionism with the redemption of legitimate domestic policy choices'[22] so that undertakings can operate freely in international markets. Conversely, EU State aid control ensures the smooth functioning of the EU internal market by preventing distortions between EU Member States, which are thereby prevented from granting unfair economic advantages to national companies over their European competitors.

Moreover, the two systems differ in terms of semantics, enforcement, justiciability and governance. While the SCM deals with subsidies, EU law bans State aid. Although the two concepts might overlap, they entail different legal arrangements, as the degree of differentiation may extend beyond the nomenclature. Overall, EU State aid control is a more sophisticated system in comparison to the WTO architecture. Firstly, EU law establishes clear governance. As State aid control is an exclusive competence of the EU pursuant to Article 3 TFEU, the EU Commission acts as the lawmaker, regulatory body and enforcer of the rules. For instance, Article 108 TFEU requires Member States to notify measures which may be covered by Article 107 TFEU in advance ('ex-ante notification'). At the same time, Member States may not implement aid while awaiting the Commission's decision on notified aid (so-called 'standstill obligation').

Secondly, the enforcement mechanisms are quite different. While the TFEU establishes strict ex-ante control on aid by the Commission, Part V SCM provides that states may invigilate only after the issuance of subsidies by other states. As there is no centralised body in charge of assessing subsidies ex-ante, the SCM establishes a system of ex-post control, by those states which suffered damage as a consequence of the subsidy. Lastly, justiciability of EU rules is ensured by the EU judiciary system. Hence, the Commission may bring cases against unlawful aid implemented by any Member State. At the same time, competing undertakings can file cases against distortive aid before the national courts, which may eventually be brought before the CJEU. Conversely, under the WTO regime, the Appellate Body – which is in charge of receiving appeals on points of law of decisions taken by the *ad hoc* panels established by the dispute settlement body – has proven to be quite ineffective. Besides being currently blocked[23] due to the US veto on the appointment of new mem-

[22] L. Rubini, *supra* note 5, at 30.

[23] B. Hoekman and P. Mavroidis, 'WTO Dispute Settlement and the Appellate Body Crisis: Back to the Future?' RSC Working Papers (2020).

bers, the number of cases heard before the Appellate Body has continuously fallen over the years.[24]

b. **Subsidy provisions in EU trade agreements**

Many trade agreements concluded by the EU with third countries contain provisions on subsidies. Trade agreements are signed for many reasons, whether economic, regulatory or just to preserve political ties with foreign governments. Third countries might be willing to sign trade agreements with the EU to take advantage of the size of the internal market. The EU, on the other hand, may wish to enter into trade agreements to expand its exports, opening up to new markets and businesses. For instance, the *Trade, Development and Cooperation Agreement*[25] between the EU and South Africa (hereafter 'TDCA') defined as unlawful 'aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party' under Article 41.1. The TDCA also established transparency obligations, requiring aid to be granted in a fair, equitable and transparent manner. Moreover, the agreement laid down a duty to 'provide information on aid schemes, on particular individual cases of public aid, or on the total amount and the distribution of aid given'.[26] Nevertheless, the TDCA allowed states to grant aid if 'specific public policy objectives' were pursued. Such a clause echoed the *rationale* behind the exemptions to the EU State aid ban under the TFEU.

The new generation of trade and investment agreements concluded after the entry into force of the Lisbon Treaty, or 'free trade agreements' (hereafter 'FTAs'), usually provide a deeper level of regulation in comparison with pre-Lisbon agreements. FTAs not only establish rules on tariffs and custom duties, but they also include 'significant regulatory cooperation and investment issues that may impact citizens and local authorities more directly'.[27] Given that the SCM normally constitutes the baseline for drafting subsidy provisions in bilateral agreements, FTAs generally entail an enhanced level of scrutiny.[28] The improvement of the trade regulatory framework might be aimed at fostering

---

[24] J. Hillman, 'Three Approaches to Fixing the World Trade Organisation's Appellate Body: The Good, the Bad and the Ugly?', Institute of International Economic Law Georgetown University Law Centre (2018); E. Fabry and E. Tate, 'Saving the WTO Appellate Body or Returning to the Wild West of Trade?', J Delors Notre Europe Policy Papers No. 225 (2018); WTO, 'Améliorer les disciplines relatives aux notifications de subventions' (2017) TN/RL/GEN/188.

[25] Council Decision 2004/441/EC of 26 April 2004 concerning the conclusion of the Trade, Development and Cooperation Agreement between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other part, *OJ* [2004] L 127/109, 29.4.2004.

[26] Article 43 of Council Decision 2004/441/EC*, supra*, note 25.

[27] I. Bosse-Platière and C. Rapoport, 'Negotiating and Implementing EU Free Trade Agreements in an Uncertain Environment' in I. Bosse-Platière and C. Rapoport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements* (Cheltenham: Edward Elgar 2019), at 2.

[28] L. Borlini and C. Dordi, 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral Preferential Trade Agreements' 23 The Columbia Journal of European Law 2017, 551-606, at 603.

protection for the playing field on which market forces operate.[29] Furthermore, while, at the WTO level, there is no general consensus around control of services,[30] provisions on services are usually included in FTAs. Lastly, trade agreements may go beyond negative control of subsidies, establishing a number of public policy objectives on the grounds of which subsidies might be cleared, for instance, regional development, R&D, services of general economic interest or equity purposes. Such objectives are already well-known among State aid experts, as they are found in Article 107 TFEU, in the Commission's practice and in the case law of the CJEU.

Numerous examples of FTAs containing subsidy provisions can be found. For instance, Article 10.4.2 Section B of the *Partnership Agreement with Vietnam*[31] provides for an 'illustrative list of public policy objectives' under which aid could be granted. It rephrases Article 107(1) TFEU and crystallises the Commission's practice on compatible aid, while incorporating the case law of the CJEU. Indeed, under the Vietnam Agreement, subsidies can be cleared if they are aimed at repairing the damage caused by natural disasters or exceptional occurrences, promoting the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, remedying a serious disturbance in the economy of one of the Parties; facilitating the development of certain economic activities or certain economic areas, including but not limited to, subsidies for clearly defined research, development and innovation purposes, for training or for the creation of employment; for environmental purposes or in favour of small and medium-sized enterprises and for promoting culture and heritage conservation.

Another agreement whose provisions resemble typical features of EU State aid control is the *Singapore Agreement*[32] signed in October 2018. Article 11.7 specifically identifies some types of prohibited subsidies, drawing on the practice of the EU Commission and the case law of the CJEU. For instance, prohibited grants are 'any support to insolvent or ailing undertakings in whatever form (such as loans and guarantees, cash grants, capital injections, provision of assets below market prices, tax exemptions) without a credible restructuring plan, based on realistic assumptions, with a view to ensuring the return of the ailing undertaking to long-term viability within a reasonable time, and without the undertaking itself significantly contributing to the costs of restructuring'. The

[29] Borlini, Dordi, *supra*, note 28.

[30] P. Sauvéé and M. Soprana, 'Learning By Not Doing: Subsidy Disciplines In Services Trade' (2015), available at <http://e15initiative.org/wpcontent/uploads/2015/04/E15_Subsidies_Sauve-and-Soprana_final.pdf>; G. Hufbauer, 'What Shapes Subsidy Disciplines in the GATT and WTO?', in L. Rubini and J. Hawkins (eds.), *What Shapes The Law? Reflections on the History, Law, Politics and Economics of International and European Subsidies Disciplines* (Florence: RSC Books 2016), 41-44.

[31] Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, *OJ* [2020] L 186/3, 12.6.2020.

[32] Free Trade Agreement between the European Union and the Republic of Singapore, *OJ* [2019] L 294/3, 14.11.2019.

language used in the text of the agreement replicates the wording of the Rescue and Restructuring Guidelines[33] published by the EU Commission in 2014.

The above examples illustrate how trade agreements may extend EU State aid rules outside EU borders. According to Scott,[34] EU rules are extended extraterritorially when a territorial link exists – e.g. the trade agreement between the EU and the third country – and whenever an assessment of third country law or foreign conduct is required, being envisaged by those trade agreements. Nevertheless, it is still unclear whether FTAs are able effectively to promote the application of EU State aid rules.[35] Indeed, along with trade agreements containing EU-style provisions on subsidies, many FTAs refer to more generic provisions, drawing on the WTO regime.

For instance, the Comprehensive Economic and Trade Agreement with Canada[36] (hereafter 'CETA') defines a subsidy according to the definition given in the SCM. Moreover, the CETA only compels the parties to respect basic rules under international investment law, such as the principle of fair treatment and non-discrimination of investors. Furthermore, Canada is at liberty to adopt domestic subsidy legislation but is not obliged to do so. In terms of the remedies, the agreement with Canada contains a non-binding consultation mechanism whereby either party 'may express its concerns to the other party and request consultations on the matter'.[37] Moreover, Chapter 29 sets out dispute settlement procedures to address issues that may arise from diverging interpretations and applications of the rules, including those on subsidies. Disputes should be submitted to an arbitration panel whose final report is binding on the parties.

The next section will focus on the TCA as a case study to analyse whether EU State aid rules have been extended to the UK. The TCA is the most recent example of trade agreements containing advanced subsidy provisions. The analysis of the TCA provisions will demonstrate the closer proximity to EU State aid rules in comparison with the SCM. Indeed, the EU footprint is to be found everywhere, from the definitions and the guiding principles in the application of subsidies to sector-specific rules, for instance, undertakings entrusted with services of general interest or banks, energy and aviation.[38]

---

[33] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty *OJ* [2014] C 249/1, 31.7.2014.

[34] Scott, *supra* note 19, at 22.

[35] Monti, *supra* note 2, at 194.

[36] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJ* [2017] L 11/23, 14.1.2017.

[37] Chapter 7, Article 7.3 of the CETA, *supra*, note 36.

[38] A. Biondi, 'The New Chapter on Subsidies Regulation in the EU-UK TCA: Some First Impressions', 20 *European State Aid Quarterly* 2021(1) 173-177, at 174.

4. SUBSIDY PROVISIONS IN THE TCA: SUBSIDY OR AID?

a. **The Agreement**

The TCA represents a peculiar example in international trade practice. Indeed, neither party entered into the negotiations willingly. From the EU's perspective, the Brexit referendum was a setback in the EU integration process. Thus, the traditional goals pursued through trade agreements, e.g. enhancement of export and opening up to new businesses, were replaced by the need to settle the pressing post-Brexit issues. The parties therefore struggled to reach an agreement on numerous issues, for example, the level playing field, services, border checks, fishery and Northern Ireland.

The TCA was signed as an EU-only agreement, as opposed to mixed trade agreements. While EU-only agreements are negotiated and signed by EU institutions only, mixed agreements are concluded by the Union and the Member States jointly and they require Member States' ratification in order to enter into force.[39] Mixed agreements are concluded when trade provisions fall within the competences of the Union and the Member States. They are underpinned by the principle of loyal cooperation between the EU and the Member States.[40] Thus, whenever a non-ratification scenario arises, the Member States and the Commission have a duty to collaborate in order to complete the ratification procedure.[41] Conversely, EU-only agreements cover matters under the exclusive competence of the EU. They enter into force quicker as they do not require further steps at national level. Nevertheless, the TCA covers EU and national competences, including security, police cooperation, air travel and criminal matters. Case law of the CJEU has confirmed that deciding between mixed and EU-only agreements is not just a matter of procedural law but also has impacts on the substance of law.[42] Notwithstanding the case law,[43] the leaked Council Legal Service Opinion[44] confirmed that the TCA could be adopted as an EU-

[39] P. Eeckhout, *EU External Relations Law* (Oxford: OUP, 2nd edition 2011), p. 212; A. Rosas, 'The European Union and Mixed Agreements' in A. Dashwood and C. Hillion (eds.), *The General Law of E.C. External Relations* (London: Sweet & Maxwell 2000), at 200.

[40] For a comprehensive overview of this point, see F. Casolari, 'EU Loyalty After Lisbon: An Expectation Gap to Be Filled?' in L. S. Rossi and F. Casolari (eds.), *The EU after Lisbon. Amending or Coping with the Existing Treaties*? (Heidelberg: Springer 2014), 93-133.

[41] G. Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' 23 *European Foreign Affairs Review* 2018, 21-40; S. Villani, 'Considerations on the judgement of the BVerfG on the conclusion of CETA' 1 Studi Tributari Europei 2017, 231-250.

[42] ECJ, Case C-137/12 *Commission* v *Council*, [2013] ECLI:EU:C:2013:675.

[43] See Case C-137/12 *Commission* v *Council*, *supra*, note 42; see, also, ECJ, Opinion 2/15, delivered on 16.5.2017, ECLI:EU:C:2017:376.

[44] S. Peers, 'The Brexit deal – Council Legal Service Opinion', *European Law Analysis* (2021), available at <http://eulawanalysis.blogspot.com/2021/01/the-brexit-deal-council-legal-service.html>; C. Eckes and P. Leino-Sandberg, 'In view of the exceptional and unique character' of the EU-UK Trade and Cooperation Agreement – an Exception to Separation of Powers within the EU?', *European Law Blog* (2021), available at <https://europeanlawblog.eu/2021/04/15/in-view-of-the-exceptional-and-unique-character-of-the-eu-uk-trade-and-cooperation-agreement-an-exception-to-separation-of-powers-within-the-eu/>.

only agreement under Article 217 TFEU on the grounds that it covered EU competences, whether exclusive or potential.

Chapter 3 in Title XI represents the most comprehensive body of norms on subsidies included in a trade agreement negotiated by the EU.[45] At the same time, Chapter 3 is one of the most controversial parts, as it establishes a compromise on different views on the level playing field. Indeed, the EU advocated the full application of EU State aid rules, including the ex-ante notification to the EU Commission and the CJEU's jurisdiction on disputes arising from the application of aid.[46] However, the UK demanded flexibility to establish its own national subsidy control compliant with the WTO framework but independent from the Commission's control over public investments.[47]

b. **The definition of subsidy**

At first glance, the wording of the TCA resembles the text of the SCM. For instance, under Title XI, Chapter 3, Art. 3.1 TCA 'subsidy' is defined as 'financial assistance', in the form of 'a direct or contingent transfer of funds such as direct grants, loans or loan guarantees', or 'the forgoing of revenue that is otherwise due', or 'the provision of goods or services, or the purchase of goods or services'. Similarly, under Article 1 SCM, a subsidy is 'a financial contribution by a government or any public body', involving a direct or potential transfer of funds or liabilities, or 'revenue that is otherwise due is foregone or not collected' or the purchase of goods or provision of goods or services by the government or, 'any form of income or price support'.

However, a closer look into the semantics reveals more proximity to the TFEU. Indeed, the four criteria for a measure to be classified as a subsidy enshrined in Article 3.1(b) TCA reflect EU law. Firstly, the subsidy must arise 'from the resources of the Parties', echoing the definition given in Article 107(1) TFEU according to which aid has to be granted 'by a Member State or through State resources'. Secondly, the subsidy has to 'confer an economic advantage on one or more economic actors'. The 'economic advantage' criterion is taken from the practice of the Commission and the case law of the CJEU.[48] Conversely, Article 1.1(b) SCM only provides that the subsidy should confer 'a benefit'. It is noted that the notion of 'advantage' is broader when compared to the one of

[45] Biondi, *supra* note 38; Borlini and Dordi, *supra* note 28.

[46] For instance, Press Statement by Michel Barnier following Round 6 of the negotiations for a new partnership between the European Union and the United Kingdom, available at <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1400>; see also, Brunsden J, Fleming S, Parker G, Foster P (2020) EU Capitals Urge Barnier to Take Tougher Line with UK, at <https://www.ft.com/content/d65e09da-bac5-4d27-bdc8-22949ce91be8>.

[47] Statement by Lord Frost, UK Chief Negotiator, after Round 9 of the negotiations (October 2020), available at <https://no10media.blog.gov.uk/2020/10/02/lord-frost-statement-after-round-9-of-the-negotiations/>.

[48] ECJ, C-579/16 P, *FIH Holding*, [2018] ECLI:EU:C:2018:159; Cases T-747/15, *EDF* v *Commission*, [2018] ECLI:EU:T:2018:6; C-224/12 P, *Commission* v *Netherlands and ING Groep NV* [2014] ECLI:EU:C:2014:213; C-124/10 P, *Commission* v *EDF*, [2012] ECLI:EU:C:2012:318; C-480/98, *Spain* v *Commission* [2000] ECLI:EU:C:2000:559; C-305/89, *Italy* v *Commission* [1991] ECLI:EU:C:1991:142; C-303/88, *Italy* v *Commission* [1991] ECLI:EU:C:1991:136.

'benefit', as the latter may exclude some governmental schemes, such as loans at market conditions, which may, on the other hand, be encompassed by the TFEU.[49] Furthermore, the third criterion requires subsidies to have a direct or potential effect on trade or investments between the parties. The effect on trade is indeed one of the criteria established by Article 107(1) TFEU, while the SCM contains no specific reference to the measurement of harmful effects in trade between states.

The fourth criterion might be the least evident, but it is indeed one of the most significant. The TCA requires 'specificity', 'insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services'. Although 'specificity' is the same term used by Article 2 SCM, the way in which the criterion is described resembles the notion of 'selectivity' under EU law.[50] According to established case law, State aid is selective when it is conferred to an undertaking or to a certain group of undertakings.[51] The Court has also refined its interpretation of selectivity and created a 'material selectivity test'.[52] Measures can be designed so as to benefit a particular undertaking or a group of undertakings which operate in a specific sector or share specific characteristics of functions (*de jure* selectivity). However, measures can still be selective when they are formally applicable to all undertakings and yet they affect particular ones due to their normative formulation (*de facto* selectivity). For these reasons, although Article 3.1(b) TCA borrows the term 'specificity' from the SCM, it nevertheless refers to the concept of 'selectivity' developed by the Commission and the CJEU.

The notion of selectivity also informs the TCA's approach to taxation. Article 3.1.2 TCA clarifies that specificity has to be found when certain businesses 'are treated more advantageously than others in a comparable position within the normal taxation regime'. Similarly, according to the CJEU, the selectivity assessment should be carried out by the Commission on undertakings in 'a comparable legal and factual position'.[53] Furthermore, under Article 3.1.2 TCA, a normal taxation regime 'is defined by its internal objective, by its features (such as the tax base, the taxable person, the taxable event or the tax rate) and by an authority which is autonomous institutionally, procedurally, economically and financially and has the competence to design the features of the taxation regime'.

---

[49] L. Rubini, 'State Aid and International Trade Law', in L. Hancher and J. J. Piernas López (eds.), *Research Handbook on European State Aid Law* (Cheltenham: Edward Elgar 2021), 103-133, at 109.

[50] See, for instance, ECJ, Case C-78/08 *Paint Graphos* [2011] ECLI:EU:C:2011:550; J. L. Buendía Sierra, 'Finding Selectivity or the Art of Comparison' 17 *EStAL* 2018, 85-92.

[51] See, for instance, cases ECJ, Cases C-518/13, *Eventech* [2015] ECLI:EU:C:2015:9, para. 36; T-512/11, *Ryanair v Commission* [2014] ECLI:EU:T:2014:989, para. 49; C-80/08, *Paint Graphos* [2011] ECLI:EU:C:2011:550; C-88/03, *Portugal v Commission* [2006] ECLI:EU:C:2006:511; C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECLI:EU:C:2001:598; Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, *OJ* [2016] C 262/1, 19.7.2016, para. 117.

[52] C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECLI:EU:C:2001:598.

[53] See caselaw cited *supra* note 51.

Similarly, the CJEU, in *Azores,* held that aid could be limited 'to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment', so that aid has to be adopted 'in the exercise of sufficiently autonomous powers […] from a constitutional point of view, a political and administrative status separate from the central government', when 'the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government'.[54]

Lastly, Article 3.1.2 TCA sets out the conditions for declaring aid not selective, i.e. subsidy 'to fight fraud or tax evasion, administrative manageability' or addresses 'the avoidance of double taxation, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, or the need to respect taxpayers' ability to pay'. The same justifications are listed in the Notice on the Notion of Aid issued by the Commission in 2016.[55]

c. **Guiding principles in the application of subsidies**

Article 3.4 TCA – which identifies the guiding principles to be followed in the application of subsidies – highlights additional layers of proximity to EU State aid rules. For instance, under Article 3.4(a), subsidies have to 'pursue a specific policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns'. Similarly, market failures are the main rationale for the implementation of EU State aid, such that governments may decide to use public resources in order to ease market failures, e.g. to address public goods, rent shifting and externalities.[56] Indeed, Article 107(2)(b) TFEU states that aid shall be compatible with the internal market if it has a social objective and is granted without discrimination to individual consumers or makes good the damage caused by natural disasters or exceptional occurrences. Moreover, under Article 107(3) TFEU, aid may be deemed to be compatible – upon the Commission's assessment – when it promotes the development of certain areas and cultural and heritage conservation, or it facilitates projects of common EU interest, or it remedies a serious disturbance in the economy of a Member State, if it does not adversely affect trading conditions or the EU's interest.

Pursuant to Article 3.4(b) TCA subsidies should be 'proportionate and limited to what is necessary to achieve the objective'. Once again, EU law is the benchmark for measuring the application of subsidies under the TCA. Indeed, the principle of proportionality – general principle of EU law contained in Article 5(4)

---

[54] ECJ, Case C-88/03, *Portuguese Republic v Commission* [2006] ECLI:EU:C:2006:511, paras. 66-67.

[55] Notice on the notion of State aid, *supra* note 51, at para 139; see, also, ECJ, Cases C.374/17, *A-Brauerei* [2018] EU:C:2018:1024; C-203/16 P, *Andres (Insolvenz Heitkamp BauHolding)* v *Commission* [2018] EU:C:2018:505.

[56] Notice on the notion of State aid, *supra* note 51; on environmental goals, see ECJ, case C-233/16, *ANGED* [2018] ECLI:EU:C:2017:852.

TEU – gained paramount importance in EU State aid law after the implementation of the 2012 State Aid Modernisation Package.[57] Indeed, the proportionality test is included in many of the Commission's guidelines. For instance, the R&D Guidelines[58] prescribe that 'mere compliance with a set of predefined maximum and intensities is not sufficient to ensure proportionality'. Thus, the Commission is called upon to check that aid is proportionate and that it does not give undertakings any added benefit. In *Ryanair*, the General Court found that the Commission failed to detect inconsistencies in how the authorities sought to achieve the aim, in that case to avoid double-taxation for airline passengers crossing the border.[59]

The guiding principles in the TCA are taken from the general principles on aid compatibility developed by the practice of the Commission when interpreting Article 107(3) TFEU.[60] Those principles are not only transplanted to the TCA, but they are also upgraded, being converted from principles declaring aid compatibility to principles reviewing the legality of subsidies.[61] The upgrade can clearly be seen, for instance, in Article 3.4(f) TCA, which states that a subsidy should represent a positive contribution towards the objective pursued, so that it 'outweighs any negative effects, on trade or investment between the Parties'. Article 3.4(f) incorporates the so-called 'balancing test' used by the Commission when deciding if aid is compatible with the internal market, as it looks at whether aid's positive effects outweigh its negative effects on trade and competition.[62]

The guiding principles will be particularly relevant when a dispute arises over the application of a subsidy. According to Article 3.12 TCA, either party may request consultation with the other party to evaluate whether any of the principles have been breached. Furthermore, pursuant to Articles 3.10 and 3.11 TCA, national courts might be called upon to evaluate whether those principles have been applied correctly by national authorities and possibly to order the recovery of unlawful subsidies. However, it is still unclear how national courts will achieve these objectives. As no *ad hoc* courts have yet been established, the Administrative Court in England and Wales and the Court of Session in Scotland would be called upon to deal with subsidy-derived litigation.[63] Such courts may lack the expertise required to deal with subsidies.[64] Moreover, the courts might draw their rulings from the CJEU's interpretation of the principles

[57] The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM) Commission COM(2012)209 final; ECJ, Cases *Paint Graphos* and *Ryanair v Commission, supra* note 51.

[58] Framework for State Aid for Research and Development and Innovation, *OJ* [2014] C 198/1, 27.6.2014, para. 86.

[59] See *Ryanair* case, *supra*, note 51, at para 51.

[60] See Biondi, *supra* note 38.

[61] See Biondi, *supra* note 38.

[62] The 'balancing test' was first conceived by the EU Commission in 2005, see European Commission, State Aid Action Plan (SAAP): Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005-2009, Brussels 7.6.2005, COM(2005)107 final.

[63] G. Peretz, 'The UK Subsidy Control Regime: Where Is It and Where Is It Going?' 20 *European State Aid Quarterly* 2021, 167-173, at 169.

[64] Peretz, *supra*, note 63.

of aid compatibility, with which the courts were already familiarised during the UK's membership of the EU.

d. Transparency requirements

Transparency rules under the TCA are inspired by those contained in the EU General Block Exemption Regulation[65] (hereafter 'GBER'). Once again, rules on compatible aid are used in the TCA to assess the legality of subsidies. In the GBER – which exempts certain aid from prior notification to the Commission – transparency requirements are needed to balance the leeway left to the Member States with compliance checks. Article 9 GBER compels Member States to publish information on individual awards, including the full text of aid measures, the beneficiary, amount, national authority conferring aid, policy objective and business sector, along with additional information on awards exceeding €500,000. The Commission has also implemented a *State Aid Transparency Public Search Page*[66] which identifies all national State aid awards and all relevant information to facilitate a spontaneous follow-up system at local level.

Similar transparency requirements are laid down by Article 3.7 TCA, as the Parties commit to publish information on subsidies assigned within 6 months from the granting date. This requirement can easily be respected by the EU through the above-mentioned *State Aid Transparency Public Search Page.* However, Article 3.7(5) TCA contains additional requirements to be met by the UK. Indeed, interested parties may request from the British granting authorities the full disclosure of information on aid, with the exclusion of sensitive personal data, commercial and IP clauses. The TCA establishes the right for interested parties to obtain a written response within 28 days. Therefore, any denial by the UK authorities or incomplete information would be reviewable before the national courts.

e. TCA provisions reflecting the WTO framework

Some provisions inevitably depart from the EU model, for instance, those on monitoring and dispute settlement procedures. Firstly, if either party believes a prohibited subsidy has been implemented by the counterparty, Articles 3.8 and 3.12 TCA establish a consultation mechanism similar to the one enshrined in Article 4 SCM. The latter establishes a 30-day consultation timeframe and – if no solution has then been agreed – it allows either party to refer the matter to the dispute settlement body. Under the TCA, either party can request information on how the subsidy has been implemented and on respect of the guiding principles and transparency requirements under Articles 3.4 and 3.7 TCA. However, if the party is not satisfied with the information received, it may request

[65] Commission Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, *OJ* [2014] L 187/1, 26.6.2014.

[66] Available at the Commission website, <https://webgate.ec.europa.eu/competition/transparency/public?lang=en>.

the consultation of the *Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development*.

If the consultation procedure fails, 'the requesting Party may unilaterally take appropriate remedial measures if there is evidence that subsidies cause or may cause a significant negative effect on trade or investment between the Parties', pursuant to Article 3.12(3) TCA. Both the SCM and the TCA focus on the appropriateness of the countermeasures, as remedies should be 'commensurate with the degree and nature of the adverse effects determined to exist' according to Article 7(9) SCM and 'restricted to what is strictly necessary and proportionate in order to remedy the significant negative effect caused or to address the serious risk of such an effect' pursuant to Article 3.12(8) TCA. However, the characteristics listed in Article 3.12 TCA are also reminiscent of the principle of proportionality under EU law, which is, in turn, incorporated in Article 3.4(b) TCA.[67]

As far as the dispute settlement system is concerned, Article 3.13 TCA refers to an arbitration tribunal having jurisdiction on the lawfulness and recovery of the subsidiaries, such that the tribunal has remedial powers which can be imposed on both sides. Although the TCA rules out the jurisdiction of the CJEU in principle, subsidies may, however, still be subject to the Commission's assessment and the CJEU's review in certain circumstances. For instance, Article 93 of the Withdrawal Agreement[68] enables the Commission to investigate aid for four years after the expiry of the transition period in December 2020. Furthermore, the CJEU still retains full jurisdiction on aid implemented in Northern Ireland, according to the Northern Ireland Protocol. This piece of legislation is indeed the clearest example of the extension of state aid rules.

f. **The Northern Ireland Protocol**

The Northern Ireland Protocol is a body of norms attached to the Withdrawal Agreement whereby the Union and the UK agreed on issues arising from the 'unique circumstances'[69] of Northern Ireland. The latter is indeed part of the UK politically and of the island of Ireland geographically. The Protocol recognises the existence of prior international commitments, such as the 1998 Good Friday Agreement,[70] and the respect of the principle of 'pacta sunt servanda' under international law. In order to avoid a hard border between the Republic of Ireland and Northern Ireland and to preserve peace, it was decided that Northern Ireland would remain in the EU internal market. Therefore, instead of establishing checks on goods at the border between the Republic of Ireland and Northern Ireland,

[67] See above Section IV, e.

[68] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ* [2019] C 384I/1, 12.11.2019.

[69] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *supra*, note 68.

[70] The 'Good Friday Agreement', also known as 'The Belfast Agreement', available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf>.

checks are carried out in the Northern Irish Sea between Great Britain and Northern Ireland. This arrangement was reached at the end of complex negotiations. On one side, the EU aimed to preserve political stability in the Irish region and to respect prior international agreements. On the other side, however, the UK wished to guarantee the political union between Northern Ireland and the rest of the UK.

Pursuant to Article 10 and 12 of the Protocol, Northern Ireland continues to be subject to EU law with regard to the internal market and the level playing field, EU Custom Code, EU rules on VAT in respect of goods, product standards, sanitary rules, and also EU State aid rules, including enforcement mechanisms and rules on jurisdiction. EU law will continue to apply on those matters to the whole UK territory, as long as UK measures have an actual or potential impact on trade in goods or electricity between Northern Ireland and the EU. Given that the entire Protocol has direct effect in UK law via Article 4 of the Withdrawal Agreement and Section 7A of the 2018 EU Withdrawal Act, the UK is required to abide by the Commission's control on aid and the CJEU's review.

The actual reach of the Northern Ireland Protocol for future EU-UK relationships could only be properly understood in light of two observations. Firstly, competing stakeholders will still be able to bring claims before the national courts if aid has been implemented unlawfully. Hence, the national courts have a duty to test aid against EU State aid rules and possibly to comply with the Commission's decisions and the CJEU's rulings. Secondly, the requirement that aid must have an effect on trade, in goods or electricity, whether actual or potential, might be a loose one. Indeed, the CJEU has consistently held that 'there is no threshold or percentage below which it may be considered that trade between Member States is not affected'.[71] Thus, the effect on trade criterion is usually met when aid is granted to undertakings and the cross-border element is evident from their business. However, it remains to be seen whether the Commission and the CJEU will adapt the 'effect on trade' criterion to a different context.

5. CONCLUSIONS

The paper has demonstrated that EU State aid law may be extended extraterritorially to foreign countries and jurisdictions through trade agreements concluded by the EU with third countries, particularly through the most recent FTAs with Singapore, Vietnam, Japan and, most notably, the UK. The analysis of the provisions enshrined in the TCA has highlighted a significant extraterritorial extension of EU State aid rules. Notwithstanding the explicit reference in the TCA's text to WTO language – for instance, it consistently refers to subsidy rather than aid – subsidy provisions reflect EU State aid control. The text is indeed the result of opposing views on subsidy control after Brexit. Even though the TCA carefully refrains from using State aid jargon, it replicates State aid rules in many ways. Overall, while the UK will control centrally most of its aid

[71] ECJ, case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECLI:EU:C2003:415.

implementation after Brexit, the TCA will still bind the UK government to respect EU-style rules. In addition, the whole EU state aid control will continue to apply when aid has an actual or potential effect on trade between Northern Ireland and the EU.

Lastly, it may be questioned whether the subsidy system envisaged in the TCA could become a new paradigm for EU trade agreements, as the TCA establishes enhanced provisions on subsidies when compared with previous trade agreements. A strict subsidy control – which mirrors EU rules rather than the SCM – ensures a higher degree of control over the level playing field. By accepting enhanced control on subsidies, the third country may secure extra accessibility to the internal market. Nevertheless, states may reject European interference over national spending. In conclusion, the extent to which the EU is able to influence the application of EU-style rules on State aid is linked to the degree of contractual power held by the EU in the negotiations. In other words, when the EU exercises its commercial strength, it is also able to impose rules which adhere more to EU standards, thus contributing to the global reach of EU law.