Subsidies Regulation in the EU-UK Trade and Cooperation Agreement: The post-Brexit arrangements in comparison with WTO and EU law

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List of Publications & Presentations

Publications

'The Remedial and Rebalancing Measures in the TCA: A Comparative Analysis of Countermeasures under WTO Law and the Recovery of EU State Aid'- Under review, Journal of International Economic Law(Q1) (Manuscript submitted on 10 December 2024; first review received on 13 January 2025).

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2025: Rebuilding a Prosperous European Economy, 'Subsidy control under the EU-UK Trade and Cooperation Agreement: The post Brexit arrangements in comparison with WTO and EU law', DCU Brexit Institute and the Dublin European Law Institute (**Dublin**, 22 January 2025).

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Table of Contents

List of Abbreviations ..... **vii**

Abstract ..... **xiv**

Introduction **1**

***Chapter I*: The Legal Basis of Subsidy Control under the TCA: WTO and EU Law** **6**
1. Introduction **6**
2. WTO **8**
2.1 Objectives 8
2.2 Evolution 9
2.3 Key elements 13
3. EU STATE AID **15**
3.1 Objectives 15
3.2 Evolution 17
3.3 Key elements 21
4. TCA **24**
4.1 Negotiating subsidy control after Brexit 24
4.2 Objectives 30
4.3 Key elements 33
5. Conclusion **36**

***Chapter II:* Substance** **38**
1. Introduction **38**
2. WTO **39**
a. Financial contribution by the government or any public body 39
b. Benefit 41
c. Specificity 42
d. Categories of subsidies 43
3. EU STATE AID **46**
a. State resources 46
b. Advantage 49
c. Selectivity 50
d. Effect on trade and distortion of competition 52
e. Compatibility 53
4. The TCA's substantive framework in comparison with WTO and EU law **57**
a. State resources 58
b. Advantage 58
c. Specificity 58
d. Effect on trade or investment between the parties 60
e. Compatibility 60
5. Conclusion **64**

Chapter III: **Monitoring and Enforcement** **66**
1. Introduction **66**
2. WTO **68**
2.1 Introduction 68
2.2 Notification and transparency 68
2.3 The Subsidies and Countervailing Measures Committee 71
2.4 The Permanent Group of Experts 72
2.5 Dispute settlement mechanism 73
3. EU STATE AID **83**
3.1 Introduction 83
3.2 Notification and transparency 83
3.3 The Commission 84
3.4 National courts 89
4. TCA **92**
4.1 Introduction 92
4.2 Transparency 92
4.3 The independent authorities or body 93
4.4 Private enforcement 94
4.5 Dispute settlement mechanism 94
4.6 The Subsidy Control Act 97
5. A comparative analysis between enforcement mechanisms under the WTO, EU and the TCA subsidy regimes **101**
5.1 Introduction 101
5.2 Transparency 101
5.3 The independent authority 102
5.4 Private enforcement 103
5.5 Dispute settlement mechanism 107
6. Conclusion **109**

Chapter IV: **Remedies** **110**
1. Introduction **110**
2. WTO **113**
2.1 Introduction 113
2.2 Substantive provisions 113
2.3 Procedural provisions 114
2.4 Types of countervailing measures 117
2.5 Reviews 120
2.6 The enforcement of WTO subsidy discipline over the years 121
3. EU STATE AID **125**
3.1 Introduction 125
3.2 Substantive provisions 125
3.3 Procedural provisions 127
3.4 Implementing the recovery decision 130
3.5 Infringement proceedings 132
3.6 Indirect challenges against a Commission decision 133
4. TCA **135**
4.1 Introduction 135
4.2 Remedial measures 135
4.3 Rebalancing measures 138

5. A comparative analysis between remedial and rebalancing measures under the TCA, countermeasures under WTO law, and the recovery of state aid 143
5.1 Introduction 143
5.2 Prospective v retroactive approach 143
5.3 Substantive rules 146
5.4 Procedural rules 150
6. Conclusion 156

Conclusion **..... 158**

Bibliography **..... 163**

Table of Legislation **..... 188**

List of Abbreviations

AA	Agreement on Agriculture
AT	Arbitration Tribunal
AB	Appellate Body
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
CAT	Competition Appeal Tribunal
CETA	Comprehensive Economic and Trade Agreement
Commission	European Commission
CVD	Countervailing duty
DSM	Dispute Settlement Mechanism
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GBER	General Block Exemption Regulation
GC	General Court
MEOP	Market Economy Operator Principle
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
MS	Member States
PGE	Permanent Group of Experts
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
R&D	Research and Development
SAAP	State Aid Action Plan
SAM	State Aid Modernization
SAU	Subsidy Advice Unit
SCA	Subsidy Control Act
SCM	Subsidies and Countervailing Measures
SGEI	Services of General Economic Interest
SOE	State-Owned Enterprise
Subsidies Committee	Subsidies and Countervailing Measures Committee
TCA	Trade and Cooperation Agreement
TCF	Temporary Crisis Framework
TCTF	Temporary Crisis and Transition Framework
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
UK	United Kingdom
US	United States
WA	Withdrawal Agreement
WTO	World Trade Organization

Table 1: Mapping the main features of the WTO, EU and TCA subsidy regimes

		WTO	**EU State Aid**	**TCA**
Chapter I	**Treaties**	GATT 1994 SCM Agreement	TFEU	Title XI, Heading One, Part Two of the TCA
	Background	Uruguay Round	Maastricht	Brexit
Chapter II	**Notion**	subsidy	state aid	subsidy
	Scope	goods	goods & services	goods & services
	Key term #1	financial contribution	aid	financial assistance
	Key term #2	government or any public body	granted by a member state or through state resources	resources of the parties
	Key term #3	benefit	advantage	advantage
	Key term #4	specificity	selectivity	specificity
	Key term #5	prohibited and actionable subsidy	effect on trade and distortion of competition	effect on trade or investment between the parties
	Exemptions	non-actionable subsidies (expired)	compatibility	compatibility
Chapter III	**Notification &Transparency**	*ex post* control	*ex ante* notification + standstill obligation	*ex post* control
	Surveillance	Subsidies and Countervailing Measures Committee + Permanent Group of Experts	European Commission	European Commission + Subsidy Advise Unit
	Private enforcement	x	national courts	national courts
	Dispute settlement	dispute settlement mechanism	EU courts	dispute settlement mechanism
Chapter IV	**Remedies**	countervailing measures	recovery	remedial and rebalancing measures

Table 2: Prohibited Subsidies (Article 4 SCM Agreement)

Request for consultation	Request for consultations, including statement of available evidence with regard to the existence and nature of subsidy (Art. 4.2).
Consultation procedure	Consultation as quickly as possible. If no solution is found within 30 days → referral to the DSB for immediate establishment of the panel (Art. 4.3).
PGE	The panel may request assistance from the PGE for binding advice on whether the measure at issue constitutes a prohibited subsidy (Art 4.5).
Panel Report	Circulation panel report within 90 days of date of composition and establishment of panels' terms of reference (Art 4.6). If the subsidy is found to be prohibited, the panel recommends that the member withdraw it without delay and within a specific time period (Art 4.7).
DSB Adoption	Within 30 days of circulation, the report shall be adopted by DSB, unless one of the parties decides to appeal (Art 4.8).
AB Review	AB must normally issue a decision within 30 days from notice of intention to appeal; in no event shall it take more than 60 days (Art 4.9).
Countermeasures	If DSB recommendation is not followed within the time-period specified by panel (which commences from date of adoption of the panel/AB report), the DSB authorizes the complaining member to take appropriate countermeasures (Art 4.10-11). Retaliatory measures are subject to Art 22.6 DSU (Art 4.11).

Table 3: Actionable subsidies (Article 7 SCM Agreement)

Request for consultation	Request for consultations, including statement of available evidence regarding: (a) the existence and nature of subsidy, (b) injury caused to the domestic industry, or nullification or impairment, or serious prejudice (Art. 7.2).
Consultation procedure	Consultation as quickly as possible. If no solution is found within 60 days → referral to DSB for the establishment of a panel; composition of panel and its terms of reference within 15 days (Art. 7.3-4).
Panel Report	Circulation of the panel report within 120 days from date of composition of the panel/establishment of its terms of reference (Art. 7.5). If the subsidy is found to be actionable, the panel recommends that the member take appropriate steps to remove the adverse effects or withdraw the subsidy (Art. 7.8).
DSB Adoption	Within 30 days of circulation, the report shall be adopted by the DSB, unless an appeal is filed (Art. 7.6).
AB Review	AB must normally issue a decision within 60 days from notice of intention to appeal; in no event shall it take more than 90 days (Art 7.7).
Countermeasures	If the member fails to fulfil the panel/AB reccomendation within six months from the date of the DSB's adoption, the DSB grants authorization to the complaining member to take appropriate countermeasures, commensurate with the degree and nature of adverse effects (Art 7.9). Retaliatory measures are subject to Art 22.6 DSU (Art 7.10).

Table 4: Countervailing Measures (Part V SCM Agreement)

Submission of application	Submission of a written complaint by the domestic industry to the importing country authorities that injurious subsidization is taking place (Art. 11)
Pre-initiation examination	Importing country authorities must determine whether the application contains sufficient evidence to justify an investigation before initiation (Art. 11.2)
Consultation	The importing member must engage in consultation with the exporting member to clarify the situation and arrive at a mutually agreed solution (Art. 13)
Investigations	Investigations shall be concluded within 1 year. If not, Art. 11.11 allows an extension up to 18 months.
Provisional Countervailing measures	Provisional countervailing measures may be applied only if a preliminary determination has been made that a subsidy exists and causes injury. These measures must not exceed 4 months (Art. 17).
Voluntary undertakings	Investigations may be suspended or concluded without applying provisional or definitive CVDs if satisfactory voluntary undertakings are made (Art. 18).
CVD	CVD may be imposed when it is determined that subsidies exist and the subsidized imports cause, or threaten to cause, injury to the domestic industry. CVDs must never exceed the subsidy amount; should be limited to the amount of injury caused; and must be collected in a non-discriminatory way (Art. 19)
Sunset Clause	CVDs shall be terminated after 5 years unless they are still necessary to avoid injury (Art. 21.3).
WTO Dispute Settlement	An investigation, determinations and/or CVDs can be challenged via WTO DSM. If found inconsistent, retaliation may be authorized.

Table 5: Remedial Measures (Article 374 TCA)

Written request	The requesting party may issue a written request for information; simultaneously, the parties enter into two months of consultations (Art 374.2).
Consultations	Consultations are deemed to be concluded 60 days after receiving the written request (Art. 374.2).
Implementation remedial measure	If no solution is found, and there is evidence that a subsidy causes, or there is a risk it will cause, a significant negative effect on trade or investment between the parties, remedial measures may be unilaterally applied (Art. 374.3).
Arbitration tribunal	The other party can challenge the remedial measures within five days. This request does not have a suspensory effect on the measures adopted (Art. 374.9). If the AT finds that the measure is consistent with Article 374 TCA, the remedial measures remain in place.
Countermeasures	If the AT determines that the remedial measures cause further distortion the other party may enact countermeasures to offset the negative effects of the remedial measure (Art 374.12).

Table 6: Rebalancing Measures (Article 411 TCA)

Notification	The concerned party must notify the other of its intention to adopt these measures via the Partnership Council and provide justification (Art. 411.3(a)).
Consultation	Consultations aim to find a mutually acceptable solution within 14 days from the date of the notification (Art. 411.3(a)).
Rebalancing Measures	If no solution is found, rebalancing can apply in 5 days (Art. 411.3(b) TCA). The rebalancing measures must be proportionate and strictly necessary to address the material impact on trade or investment caused by significant divergence (Art. 411.2).
Arbitration tribunal	The other party can challenge the rebalancing measure within five days. Arbitrators must rule within 30 days from the establishment of the tribunal, during which time the measures may not be applied. If the AT does not issue a ruling within the 30-day period, the concerned party may adopt its rebalancing measures three days after the end of the 30 days period. The other party can also take countermeasures until the tribunal gives its ruling (Art 411.3(c)). If the AT upholds the rebalancing measures, the concerned party may implement them permanently (or confirm them where they were provisionally applied). If the AT finds them inconsistent with Article 411(2) TCA, the concerned party must rectify them within 3 days (Art. 411.3(d)-(e)).
Countermeasures	Failure to rectify the measures can lead to 'return retaliation', where the other party takes countermeasures (Art. 411.3(d)-(e)).
Review	No earlier than four years after the TCA entered into force (or sooner if rebalancing measures have been applied frequently or for more than 12 months) either party may request a review of Heading One, Part Two on Trade. If, after one year of negotiations, no agreement is reached, either party may give three months' notice to terminate this Heading or any other Heading of the TCA that was added to the review (Art. 411.4-11).

Abstract

Subsidies Regulation in the EU-UK Trade and Cooperation Agreement: The post-Brexit arrangements in comparison with WTO and EU law

by Elettra Bargellini, PhD Candidate in European Law at Dublin City University

This PhD thesis deals with the subsidy control regime established by the Chapter 3, Title XI of the EU-UK Trade and Cooperation Agreement (TCA). Since 1 January 2021, the UK has fully left the EU regulatory system. The consequence of Brexit is that EU state aid rules no longer apply in the UK in terms of funding and other forms of support measures granted to businesses by public authorities. The only exceptions to this are set in the Ireland/Northern Ireland Protocol. The TCA, entered into force on the 1st of May 2021, whereby, the EU and the UK have agreed upon rules designed to ensure a level playing field for open and fair competition and sustainable development. In particular, the TCA has the most extensive set of provisions on subsidies seen in any free trade agreement to date. The purpose of this thesis is to analyze the TCA rules on subsidies, discussing in a comparative perspective how they work and exploring in interdisciplinary terms whether they are sufficient to maintain a level playing field between the EU and UK after Brexit. To achieve this objective, the thesis examines in detail the TCA mechanisms, comparing them with WTO subsidy law (in particular within the framework of the Subsidies and Countervailing Measures Agreement) and EU state aid law. Moreover, the thesis explains how economic and political dynamics within the EU-UK relationship have influenced the drafting and enforcement of the TCA subsidy control regime. Given that the UK is the first country to leave the EU, and that subsidy control was a true deal-breaker in the EU-UK negotiations, this thesis undertakes cutting-edge research. Thus, it fills a gap in the academic literature and seeks to contribute to explaining what the EU-UK post-Brexit trade deal means in practice.

Introduction

The Trade and Cooperation Agreement (TCA) concluded between the European Union and the United Kingdom post-Brexit represents an unprecedented agreement in the international legal landscape. Unlike traditional trade agreements, which primarily aim to liberalize trade beyond WTO commitments, the TCA was designed to separate two previously integrated markets and introduce trade barriers. Notably, the UK was not merely an EU trading partner but a country that had been fully integrated into the EU internal market for nearly 50 years. As this thesis seeks to demonstrate, such high level of integration meant that any future regulatory divergence in the UK could significantly impact the EU internal market unless the EU-UK trade deal incorporated sufficient safeguards to maintain a level playing field between the two parties.

This doctoral thesis examines the subsidy control regime established under the TCA. Subsidy control was one of the most contentious issues throughout the Brexit process. The EU feared that, after Brexit, UK companies could gain competitive advantages over EU companies through extensive government support, as the UK would no longer be subject to the EU state aid regime. Consequently, during negotiations of the future trade deal, the EU's willingness to grant high access to its internal market was conditioned on the UK's commitment to maintaining EU state aid rules and its broader implications, including oversight by the European Commission (Commission) and the jurisdiction of the Court of Justice of the European Union (CJEU). Conversely, UK negotiators viewed Brexit as an opportunity to overhaul subsidy control, granting the government greater flexibility to support domestic businesses and industries in ways that had been constrained under EU membership. To this end, the UK sought to establish a very minimalist subsidy control regime, aligned with the WTO subsidy framework, which would have allowed for a stronger focus on domestic priorities.

The negotiations remained at an impasse for months. The EU insisted that the outcome of Brexit on subsidy control with the UK should go beyond the standard applied by the 166 WTO members. Indeed, after 25 years of practice and jurisprudence, WTO subsidy rules have proven increasingly ineffective. Their only meaningful enforcement mechanism is the adoption of countervailing duties (CVDs), which comes with significant limitations as it is often misused for protectionist purposes and fails to address many types of market distortions. The UK, by contrast, strongly opposed being bound by EU state aid rules and principles in shaping its future regulatory framework. Given these opposing positions, reaching an agreement in this area was crucial – not only to establish a regime capable of safeguarding the level playing field between the parties but also

because, without such an agreement, a broader EU-UK trade deal would have been unattainable. In other words, the UK risked leaving the EU without any agreement in place. This deadlock ultimately made the development of a standalone subsidy control system the only viable path forward.

After ten months of negotiations, on Christmas Eve 2020, the parties reached an agreement on subsidy control, paving the way for the conclusion of the TCA. Crucially, the new EU-UK subsidy regime, outlined in Chapter 3 of Title XI of the TCA, is groundbreaking. It constitutes both the most heavily regulated area of the agreement dedicated to preserving the level playing field between the EU and the UK and the most comprehensive set of subsidy disciplines ever incorporated into a free trade agreement (FTA) to date. At its core, the TCA establishes that the EU and the UK will retain independent subsidy control systems while adhering to the agreement's overarching principles. However, the parties viewed the TCA's outcome on subsidy control through different lenses. For the EU, it represented a commitment to maintaining a robust level playing field through high protection standards, enforced via domestic mechanisms, binding dispute settlement, and remedial measures. On the contrary, the UK underscored the preservation of its sovereignty, arguing that while the TCA imposed broad constraints on subsidy control, both parties retained the right to shape their own laws. Indeed, the UK had to create an entirely new system to fulfil the requirements of the TCA: the 2022 Subsidy Control Act (SCA). The SCA notably represents the first example of 'domestication' of the TCA, as with its approval and entry into force in January 2023, the UK now has a domestic system of subsidy control.

Yet, this thesis seeks to answer the following research question: Are the TCA's rules on subsidies sufficient to maintain a level playing field between the EU and the UK after Brexit?

The purpose of this thesis is to analyze the TCA's rules on subsidies, discussing their operation from a comparative perspective and exploring in interdisciplinary terms whether they can ensure a level playing field between the EU and the UK. To achieve this, the thesis conducts a comparative analysis of subsidy disciplines under the WTO, EU, and the TCA. The WTO regime was selected as a benchmark because it represents the international subsidy framework with which the UK sought to align and which remains applicable in UK by virtue of its autonomous WTO membership. The EU state aid regime was chosen given its longstanding application in the UK for 47 years and the EU's insistence that the UK continue adhering to it, despite its new status as a third country. By analyzing the similarities and differences among these three regimes, this thesis assesses their legal and political implications for the implementation of the TCA's subsidy control discipline. Within the analysis of the TCA's chapter on subsidy control, this thesis also examines its implementation through the SCA. The thesis does not go into much detail in this regard, as its focus is not on assessing whether the SCA provides an efficient system of domestic public spending control, but rather on evaluating whether the TCA constitutes an effective level playing field guarantee system. Nevertheless, it considers how the UK has actually implemented (or failed to adequately implement) the TCA, as this has significant implications for the research question this thesis aims to answer.

This thesis deliberately focuses on a comparison between the WTO, EU and TCA subsidy regimes, thereby excluding other trade agreements from its comparative benchmark. As modern international trade agreements increasingly include chapters on subsidy control, this choice has been guided by the extensive body of existing research that explores how such agreements relate to WTO subsidy law and EU state aid law. Notable contributions include Borlini and Dordi's 'Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in the EU Bilateral PTAs' (2017) and Rubini's 'State aid and international trade law' (2021). Rubini, in particular, notes that while many PTAs merely replicate GATT/WTO subsidy rules, the most sophisticated subsidy control regimes are found in agreements signed by the EU or by countries that closely align with it. He identifies three models within EU PTAs: (i) those that strictly follow WTO subsidy disciplines, as seen in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and EU-Mercosur Agreement; (ii) those that build on WTO foundations while incorporating EU state aid elements, such as the agreements negotiated by the EU with Singapore, Vietnam, Japan, Mexico, New Zealand, as well as in the ongoing negotiations with Australia; and (iii) those that largely replicate the EU state aid framework, with the European Economic Area (EEA) Agreement containing provisions nearly identical to EU state aid law – an approach that extends to countries that have concluded association agreements with the EU, such as Ukraine, Georgia, and Moldova.

The TCA could initially appear to fit within the second category, as it reflects a pattern commonly found in this type of agreement: an advanced definition of subsidy that applies to both goods and services, a detailed list of exceptions, sector-specific provisions, and enhanced transparency requirements. However, other aspects found within the TCA's chapter on subsidies suggest that it goes even further. For example, Article 366 of the TCA lays out a set of compatibility principles that are nothing more than a copy-and-paste of those that the EU (including the UK until January 2021) had used for over 60 years to assess the compatibility of national measures with EU state aid control. Yet the TCA goes even further, as it elevates these principles into legal parameters. Another example of how the TCA's chapter on subsidies goes further than many international trade agreements can be found in its provisions on taxation. Despite the fact that one of the recurring themes during the Brexit debate was the idea of a 'Singapore on Thames', the TCA explicitly recognizes that if a government chooses not to tax certain activities, investors, or companies, this may qualify as a subsidy. In particular, Article 363 of the TCA contains detailed provisions clarifying that a tax measure constitutes a subsidy – and that even if it is a measure of general application, it is still considered a subsidy if it has a discriminatory effect or provides a selective advantage to certain undertakings. In accepting these rules, the UK has imposed a significant limitation on its regulatory powers, suggesting that the TCA's subsidy chapter may fall within the third category, according to Rubini's categorization.

As a result, the TCA's subsidy regime seems to sit somewhere between the second and third categories. What truly sets it apart from any other EU PTA is the requirement that both parties set up an effective system of subsidy control (which, as stated above, led to the introduction of the SCA).

Therefore, while one might argue that extending the scope of the comparative analysis to other PTAs – rather than focusing solely on WTO and EU state aid – would offer a more suitable approach for evaluating whether the TCA's mechanisms are sufficient to ensure a level playing field between the parties, this thesis contends that the TCA, while presenting elements that could usefully be compared with such agreements (such as dispute settlement mechanisms), is as ambitious as it is unprecedented in many other areas, such as private enforcement and remedies. This is a direct consequence of the level of economic interdependence between the EU and the UK prior to Brexit. As a matter of fact, it would be difficult to compare the political and economic stakes involved – stakes which ultimately shaped the design of the TCA's subsidy rules – with, for instance, those underpinning the EU-New Zealand agreement mentioned above.

Hence, this thesis adopts 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. The ability of international agreements in achieving their objectives also depends on their interpretation and implementation by civil servants. Therefore, this thesis employs a law-in-context approach, analyzing how geopolitical and market dynamics have influenced both the drafting and enforcement of the TCA subsidy control provisions. Furthermore, the thesis recognizes that, while defining the post-Brexit EU-UK trade relationship, the TCA simultaneously shapes the UK's position as an independent global economic actor. Indeed, the significance of the TCA extends beyond trade, serving not only as a framework for bilateral economic cooperation with the EU but also as an indicator of shifting power dynamics in the international economic landscape.

This thesis consists of four chapters, each following a structured approach. Chapter I adopts an economic and political science perspective rather than a purely legal one. It explains that while the WTO, EU, and TCA subsidy regimes formally share the goal of regulating subsidies, they operate as distinct mechanisms within their respective legal and economic contexts. Understanding the purpose of the TCA and the role of subsidy control within it serves as the foundation of this thesis comprehensive comparative analysis, as it influenced how all technical elements – both substantive and procedural rules – were developed. The subsequent chapters (II-IV) follow a consistent structure: each examines the WTO, EU, and TCA subsidy frameworks, followed by a comparative analysis between the three systems. Chapter II analyzes substantive provisions, focusing on the definition of subsidy/state aid and applicable exemptions across the three regimes. Chapter III examines monitoring and enforcement mechanisms, including notification and transparency requirements, the roles of the independent authorities, private enforcement mechanisms, and the dispute settlement procedures. This chapter also includes an analysis of the key aspects of how the SCA implements the TCA's provisions. Chapter IV explores the remedies available under the three regimes. While a

perfect overlap between these regimes is not possible due to their distinct nature and purposes, each chapter assesses whether the TCA regime ensures a level playing field between the EU and the UK by examining these three dimensions (substance, monitoring and enforcement, and remedies) and comparing them to the WTO and the EU subsidy frameworks through a law-in-context approach.

Chapter I: The Legal Basis of Subsidy Control under the TCA: WTO and EU Law

1. Introduction

Since 1 January 2021, the United Kingdom (UK) has fully left the European Union (EU) regulatory system. 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 (referred to as 'subsidy' control by the UK government after Brexit) could not have been further apart. The EU, concerned about the potential for UK firms to gain an unfair competitive advantage due to 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 favor 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.[2] They supported the adoption of a subsidy control regime aligned with World Trade Organization (WTO)[3] 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. Given the UK 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

[1] State Aid (Revocation and Amendments) (EU Exit) Regulations 2020, SI 2020/1470.
[2] 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.
[3] Marrakesh Agreement Establishing the World Trade Organization (WTO) (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, 33 ILM 1144.

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).[4] Interestingly, the TCA subsidy regime not only is the most detailed area devoted to maintaining a level playing field between the EU and the UK across the entire agreement but also represents the most extensive discipline on subsidies ever seen in any FTA to date.[5]

This chapter explores the rationale that guided EU and UK negotiators' approach to the design of the post-Brexit subsidy control framework. It explores 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, this chapter 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.

This chapter is structured as follows. Section 1 examines the objectives pursued by the WTO subsidy discipline, tracing its evolution from the General Agreement on Tariffs and Trade (GATT)[6] to the current framework under the WTO. It then provides an overview of the WTO subsidy control mechanisms, primarily contained in the Subsidies and Countervailing Measures (SCM) Agreement.[7] Section 2 focuses on EU state aid rules, outlining their role as fundamental pillar of the EU internal market and detailing their evolution. It also briefly touches the main features of the EU state aid control system. Lastly, section 3 delves into the negotiations between the EU and UK on the new subsidy control framework. It explores the rationale behind including subsidy control provisions in the TCA, 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.

This chapter argues 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 different economic, legal, and political reasons, which in turn shape the specific regulatory mechanisms it employs.

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[4] 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.

[5] 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.

[6] General Agreement on Tariffs and Trade (GATT 1947) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.

[7] Agreement on Subsidies and Countervailing Measures (SCM Agreement) (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement, Annex 1A, 1869 UNTS 14.

2. WTO

This section offers an overview of the WTO's discipline on subsidies. It begins by examining the legal, economic, and political justification underpinning its rules. It then traces the evolution of international subsidy regulation, from its origins under the GATT to the adoption of the SCM Agreement. Finally, it outlines its key normative and institutional features. By analyzing its rationale, historical development, and operational mechanisms, this section identifies the principles that shaped the UK's approach to negotiating subsidy control after Brexit.

2.1 Objectives

The analysis of the objectives of international control on subsidies can be approached from trade, competition, and welfare perspectives.[8]

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.[9] 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 GATT, particularly under Articles VI and XVI.[10] 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.[11]

However, the impact of subsidies extends beyond trade as they may also influence the behavior 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.[12] In this regard, it is important to note that international subsidy laws do not delve into a comprehensive competition analysis of all the negative and positive effects of subsidies,

[8] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2010) 38.
[9] See Steve Suranovic, *International Economics: Theory and Policy* (Saylor Foundation 2012) ch 7; James Brander and Barbara Spencer, 'Export Subsidies and International Market Share Rivalry' (1985) 18 Journal of International Economics 83.
[10] Alan O Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (2010) 2 *Journal of Legal Analysis* 473, 496- 497.
[11] Douglas A Irwin, *Free Trade Under Fire* (5th edn Princeton University Press 2020) 257; Wolfgang Müller, *WTO Agreement on Subsidies and Countervailing Measures: A Commentary* (Cambridge University Press 2017) 5.
[12] Rubini (n 8) 58-59.

nor do they explicitly provide mechanisms for balancing these effects.[13] While it is well recognized that markets often fail to achieve optimal outcomes due to inefficiencies or inequalities, and that subsidies can serve important policy objectives – such as reducing pollution, addressing climate change and environmental degradation, enhancing energy security, supporting research and development (R&D), fostering the development of disadvantaged regions, and facilitating the (re)integration of unemployed individuals into the labor market – the international subsidy discipline does not formally acknowledge these benefits as normative justifications for subsidy use.[14]

2.2 Evolution

The first modern international regulation of subsidies was established under the GATT, which entered into force on 1 January 1948.[15] The GATT served as the primary forum for multilateral trade negotiations, facilitating eight successive rounds aimed at lowering barriers to international trade.[16]

Subsidies were only partially addressed under the GATT framework, particularly through Articles VI, XVI and XXIII.[17] Article XVI GATT introduced a procedural discipline for notifying subsidies that either increase exports or reduced imports in the subsidizing country. It also established a consultation mechanism for affected countries if such subsidy caused or threaten to cause serious prejudice. To counteract the impact of foreign subsidies, two remedies were available.[18] First, Article VI of the GATT provided that contracting parties whose domestic industry was injured by subsidized imports were allowed to impose countervailing duties (CVDs) equivalent to the amount of the subsidy.[19] Second, under Article XXIII GATT, contracting parties could challenge new or unanticipated subsidies if these subsidies nullified or impaired previously granted tariff concessions.[20] Hence, this provision allowed countries to bring complaints when a domestic subsidy

[13] 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.
[14] 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; Raluca Dragusanu, Daniele Giovannucci and Nathan Nunn, 'The Economics of Fair Trade' (2014) 28 Journal of Economic Perspectives 217; 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; Müller (n 11) 7.
[15] See Douglas A Irwin, Petros C Mavroidis and Alan O Sykes, *The Genesis of the GATT* (Cambridge University Press 2008) 98-121.
[16] These rounds of negotiations are: Geneva 1947, Annecy 1949, Torquay 1950, Geneva 1956, Dillon 1960–1, Kennedy 1962–7, Tokyo 1973–9, and Uruguay 1986–94; Rubini (n 13) 105; See Gary C Hufbauer and Joanna Shelton-Erb, *Subsidies in International Trade* (MIT Press 1984) ch 1.
[17] Kyle Bagwell and Robert W Staiger, 'The World Trade Organization: Theory and Practice' (2010) 2 Annual Review of Economics 223.
[18] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures* (Cambridge University Press 2014) 23.
[19] Art VI:3 GATT.
[20] According to Article XXIII (b) GATT, any member can file a complaint about any measure that, 'whether or not it conflicts' with GATT rules, causes the 'nullification or impairment' of benefits obtained from the GATT—either directly or indirectly—or hinders the achievement of its objectives; Müller (n 11) 21.

undermined the value of a tariff concession, thereby frustrating legitimate market access expectations.[21]

During the 1945-55 Review Session of the GATT, Article XVI GATT was expanded to introduce restrictions on export subsidies. This revised version required the contracting parties to 'avoid granting subsidies on the export of primary products' or, at minimum, to ensure that such subsidies did not result in the contracting party having 'more than an equitable share of world export trade in that product.'[22]

Further developments in international subsidy regulation occurred during the Tokyo Round (1973–1979), leading to the creation of the first general comprehensive international framework governing the use of subsidies and the application of CVDs, known as the Tokyo Round Subsidies Code (Subsidies Code).[23] However, not all GATT contracting parties signed the Subsidies Code, highlighting a fundamental difference between the GATT system post-Tokyo Round and the later WTO systems.[24] While the WTO operates as an integrated framework with binding commitments for all members, the Tokyo Round produced a set of plurilateral agreements, including the Subsidies Code and eight other Tokyo Round Agreements. Each agreement had its own separate group of signatories, independent governing bodies, and distinct dispute resolution mechanism. The Subsidies Code established a dual-track approach to subsidy regulation: 'track I' (Article 2-6 of the Subsidy Code) defined the concept of injury and regulated in detail the procedure for the use of CVDs; and 'track II' (Article 8-9 of the Subsidy Code) strengthened the prohibition on export subsidies, introduced a new discipline for domestic subsidies, and expanded the obligations of Article XVI, establishing that, after consultations, the adoption of countermeasures 'as may be appropriate' could be authorized in response to non-compliant subsidies.[25] Recognized the ambivalent nature of subsidies, the Subsidies Code acknowledged that while they may cause adverse effects to the interests of other contracting parties, they could also serve legitimate social and economic policy objectives. In this regard, Article 11 of the Subsidies Code listed examples of goals that might be pursued by governments through domestic subsidies (such as reducing regional disparities, promoting employment policies, environmental protection and R&D, as well as supporting interests of

[21] Irwin, Mavroidis and Sykes (n 15) 172; see generally Gary N Horlick, 'John Jackson and the Development of GATT/WTO Subsidies Rules' in Marco Christian Eugène Joseph Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (Kluwer Law International 2000).

[22] Art XVI:3 GATT; See Petros C Mavroidis, *The Regulation of International Trade: The WTO Agreements on Trade in Goods* (The MIT Press 2016) 185-312.

[23] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code) (adopted 12 April 1979, entered into force 1 January 1980) BISD 26S/56.

[24] The Subsidy Code indeed was accepted only by twenty-four contracting parties.

[25] John Barceló III, 'The Two-Track Subsidies Code - Countervailing Duties and Trade Retaliation' in John Quinn and Philip Slayton (eds), *Non-tariff Barriers after the Tokyo Round* (Institute for Research on Public Policy 1982).

developing countries). At the same time the Subsidy Code urged contracting parties to avoid measures that could distort competition.[26]

Although the Subsidies Code added further substance to the international subsidy discipline, it preserved the key feature of the GATT: with the exception of export subsidies, the default rule remained that subsidies were allowed.[27] However, the concept of 'subsidy', undefined under the GATT, remained not explicitly defined in the Subsidies Code. Similarly, while Article 9 of the Subsidies Code prohibited export subsidies, it did not define what constituted an export subsidy. Instead, its Annex included an illustrative list of practices considered to fall into this category. This lack of clarity led many participants in the Uruguay Round's Negotiating Group on Subsidies to stress the importance of establishing a clear definition of what constitute a subsidy.

The Subsidies Code was replaced when the WTO came into force in 1995.[28] Under the WTO framework, subsidies became a central focus, with three key treaties addressing them: the SCM Agreement; the Agreement on Agriculture (AA),[29] and the General Agreement on Trade in Services (GATS).[30]

The WTO achieves major improvements in the subsidy regulatory framework in several ways.[31] It applies to all WTO members, it introduces the first comprehensive definition of a subsidy, it establishes a dispute settlement mechanism (DSM) as an alternative to unilateral CVD actions.[32]

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[26] David De Remer, 'The Evolution of International Subsidy Rules' (ECORE 2013) Discussion Paper 118 https://econpapers.repec.org/paper/ecawpaper/2013_2f153041.htm ; Juan J Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (Oxford University Press 2015) 21-44; Petros C Mavroidis, *The General Agreement on Tariffs and Trade: A Commentary* (Oxford University Press 2005) 178; John Barceló III, 'Subsidies, Countervailing Duties and Antidumping After the Tokyo Round' (1980) 13 Cornell Law Faculty Publications 257.

[27] John W Evans, 'Subsidies and Countervailing Duties in the GATT' (1977) 3 Maryland Journal of International Law 211.

[28] The Final Act of the Uruguay Round transformed the GATT into the WTO, a new international organization with legal personality, which came into being on 1 January 1995 through the Marrakesh Agreement. The WTO Agreement serves as a comprehensive treaty establishing the organizational framework, with specific multilateral agreements as annexes that constitute the substantive legal framework. To address GATT's fragmentation issues, the WTO adopted the single undertaking principle, requiring members to ratify all multilateral agreements attached to the WTO Agreement. By integrating the entire GATT acquis into its structure, the WTO established a coherent framework that upholds existing norms. The GATT 1947 Agreement was incorporated through GATT 1994; General Agreement on Tariffs and Trade 1994 (GATT 1994) (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement, Annex 1A, 1867 UNTS 190; Gerard Depayre, 'Subsidies and Countervailing Measures after the Uruguay Round: An Overview' in J Bourgeois, F Berrod, and E Gippini Fournier (eds), *The Uruguay Round Results: A European Lawyers' Perspective - Proceedings of an International Conference held at the College of Europe, Bruges* (PIE-Peter Lang SA, Éditions Scientifiques Internationales; New edition 1999) 247,255; Gary N Horlick and Peggy A Clarke, 'The 1994 WTO Subsidies Agreement' (1994) 17 World Competition 203.

[29] Agreement on Agriculture (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement, Annex 1A, 1867 UNTS 410.

[30] General Agreement on Trade in Services (GATS) (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement, Annex 1B, 1869 UNTS 183; See Gustavo E Luengo Hernandez de Madrid, *Regulation of Subsidies and State Aids in WTO and EC Law: Conflicts in International Trade Law* (Kluwer Law International 2007) ch 3.

[31] See Kyle Bagwell and Robert W Staiger, 'Will International Rules on Subsidies Disrupt the World Trading System?' (2006) 96 The American Economic Review 877.

[32] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021) 841-842; For a detailed negotiation history of the SCM Agreement, see Gary N Horlick, 'WTO Dispute Settlement and the Dole Commission' (1995) 29 Journal of World Trade 45.

In particular, while CVDs are limited to addressing subsidized imports, the DSM enables the parties to challenge subsidies that have adverse trade effects in either the domestic market of the subsidizing country or in third-country markets.[33]

According to the General Interpretative Note to Annex 1A of the WTO Agreement, if a conflict arises between the GATT 1994 and other agreements listed in Annex 1A, the provision in the other agreement takes precedence to the extent of the conflict. This means that when there is a conflict between the SCM Agreement and the GATT 1994, the SCM Agreement prevails. Despite that, when there is no conflict, the rights and obligations of both agreements exist in parallel. The Appellate Body (AB) in the *Brazil – Desiccated Coconut* case noted that the relationship between GATT 1994 and other Annex 1A agreements must be analyzed individually in each case. The AB also referred to Article 10 of the SCM Agreement, which requires WTO members to ensure that any CVDs they impose comply with Article VI of GATT 1994.[34]

As noted in the previous paragraph, subsidies are also regulated under the GATS.[35] Article XV of the GATS parallels Article XVI of the GATT 1994 by stating that 'Members recognize that, in certain circumstances, subsidies may have distorting effects on trade in services.'[36] 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. Subsidies may also fall under Article XVII of the GATS, which is applicable only to members that have made commitments to this effect in the Schedule annexed to the GATS. Article XVII requires these members to treat services and service providers from other members no less favorably than their own.[37]

Furthermore, the AA regulates subsidies for agricultural products, aiming to create 'a market-oriented trading system through progressive reductions in agricultural support.'[38] Unlike industrial subsidies, which fall exclusively under the SCM Agreement, agricultural subsidies are subject to both the AA and the SCM Agreement. Article 13 of the AA initially stipulated that agricultural subsidies were either exempt from challenges under the SCM Agreement or subject to 'due restraint' under its provisions. However, this provision ceased to apply in 2003, when the implementation period ended. Currently, no legal barrier prevents a subsidy that meets the requirements of the AA from being challenged under the SCM Agreement. The key issue lies in whether the measure is trade-distortive according to the SCM Agreement legal standards. The AA

[33] Valeria Di Comite, 'La nozione di sovvenzione nell'OMC alla luce dell'interpretazione offerta dai panels e dall'organo d'appello' (2005) 19 Diritto del commercio internazionale: pratica internazionale e diritto 245; Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach' (2000) 94 American Journal of International Law 335; Gary N Horlick, 'A Personal History of the WTO Subsidies Agreement' (2013) 47 Journal of World Trade 447.
[34] Appellate Body Report*, Brazil—Measures Affecting Desiccated Coconut* (adopted 20 March 1997) WT/DS22/AB/R.
[35] The special treatment of service subsidies is a significant example of the difference between the WTO and the EU legal orders. EU state aid law does not distinguish support to services from support to goods.
[36] Art XV GATS.
[37] Rubini (n 13) 124.
[38] Ibid 125.

framework distinguishes between domestic support and export subsidies. Export subsidies were initially permitted under Article 9(1) of the AA. However, since 2015, developed countries have been prohibited from providing such subsidies, while developing countries continue to operate under a more flexible regime. The domestic support is primarily represented by the Aggregate Measurement of Support, which reflects the annual monetary value of domestic support subject to reduction commitments, as outlined in Article 6 and Annex 3 of the AA. However, not all form of domestic support falls under reduction commitments. Notably, the AA provides more lenient rules for subsidies in developing countries under Articles 6(2) and 15, and excludes *de minimis* subsidies from reduction obligations under Article 6(4). Additionally, certain direct payments under production-limiting programs (Article 6(5) AA) and subsidies with minimal or no trade-distorting effects or impact on production (Article 7 and Annex 2 of the AA) are exempt from reduction commitments.[39]

2.3 Key elements

The subsidy discipline under the SCM Agreement apply exclusively to trade in goods and does not extend to trade in services.[40] Under this agreement, subsidies are generally permitted unless they fall into the specific category of prohibited subsidies. In particular, the SCM Agreement classifies subsidies based on their perceived impact on international trade and competition, following a traffic-light approach: prohibited subsidies (red-light), actionable subsidies (yellow-light), and non-actionable subsidies (green-light). However, since 1 January 2000, only the first two categories remain, as the category of non-actionable subsidies has expired.[41]

The SCM Agreement provides for *ad hoc* procedural rules and remedies for each category. Apart from subsidies that are contingent on export performance (export subsidies) or on the use of domestic rather than imported goods (local content subsidies), which are prohibited under Article 3 SCM Agreement and must be immediately withdrawn,[42] subsidies granted by a WTO member can only be challenged if they harm another member's interests. In other words, subsidies that are not prohibited fall into the residual category of actionable subsidies, which can be challenged only if the harm they cause constitutes either injury to the domestic industry in the importing country, as defined by Article 15 of the SCM Agreement, or causes one or more of the adverse effects listed in Articles 5 and 6 of the SCM Agreement. Moreover, unlike prohibited subsidies, when a WTO member provides actionable subsidies, it can merely eliminate their negative effects without the need to withdraw them.[43] Non-actionable subsidies, including support for regional, environmental

[39] See Luengo Hernandez de Madrid (n 30) ch 5.
[40] For a general overview of the subsidy discipline under the SCM Agreement see Müller (n 11) 1-50.
[41] Marrakesh Agreement Establishing the World Trade Organization, List of Annexes. The SCM Agreement is listed under 'Multilateral Agreements on Trade in Goods' (Annex 1A); Alan O Sykes, 'The Economics of WTO Rules on Subsidies and Countervailing Measures' (2003) Working Paper, p. 15 http://www.ssrn.com/abstract=415780.
[42] Art 4(7) SCM Agreement.
[43] Art 7(8) SCM Agreement.

protection, and R&D support, were permitted under the SCM Agreement as they were considered to have limited adverse effects on trade. The expiration of this category is believed to be linked to concerns expressed by developing members regarding the potential misuse of environmental measures by subsidizing members for advancing their industrial policies. As a result, the category of non-actionable subsidies no longer exists, and if such subsidies are specific, they are now classified as actionable subsidies. In terms of monitoring, the notification and surveillance procedures are governed by the Subsidies and Countervailing Measures Committee (Subsidies Committee). However, despite its intended role as a peer-control body, the effectiveness of the Subsidies Committee is hindered by the failure of members to fulfill their notification obligations.[44]

The SCM Agreement allows WTO members to adopt unilateral CVDs to counteract the adverse effects of subsidized imports on domestic industries. To impose these measures, members must demonstrate the existence of subsidized imports, prove that these imports are causing injury to the domestic industry, and establish a causal link between the subsidy and the injury suffered. As an alternative to the unilateral mechanism, when a WTO member suspects that another member is granting subsidies that do not comply with the obligations outlined in the SCM Agreement, it can initiate proceedings under the WTO's DSM. While CVDs can only be imposed if the prejudice occurs within the market of the importing country, the multilateral system can cover all subsidies, regardless of where the trade-distorting effects occur. This mechanism provides a framework for resolving disputes through consultations, mediation, and, if necessary, adjudication through a panel, and the AB.[45] However, private operators directly affected by inter-state disputes are not granted any *locus standi* within the multilateral DSM. As a result, the protection of their rights and interests relies entirely on the actions of individual WTO members.[46]

While in principle, both CVDs and DSM addressing adverse effects allow for the consideration of ongoing impacts from past non-recurring subsidies – in CVD cases, such subsidies are allocated over time, while in DS, a subsidy is understood to have a 'life', as illustrated in the *Aircraft* cases, making the two approaches fairly comparable – neither the unilateral nor the multilateral mechanism permits action based on past harm suffered, nor do they allow for the recovery of previously granted subsidies.[47]

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[44] 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.

[45] As explained in detail in chapter III of this thesis, the current functioning of the WTO's AB faces challenges, as the terms of its members have ended and vacant positions remain unfilled. In response, the EU and 53 other WTO members have initiated the Multi-Party Interim Appeal Arrangement (MPIA).

[46] Jennifer Hillman, 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly?' (Institute of International Economic Law 2018) Issue Briefs, Georgetown University Law Center https://georgetown.app.box.com/s/966hfv0smran4m31biblgfszj42za40b.

[47] Bernard Hoekman and Petros C Mavroidis, 'WTO Reform: Back to the Past to Build for the Future' (2021) 12 Global Policy 5; Debra P Steger, 'The Subsidies and Countervailing Measures Agreement: Ahead of Its Time or Time for Reform?' (2010) 44 Journal of World Trade 779.

3. 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).[48] This section, after explaining the role of EU state aid in safeguarding competition and trade among EU member states, examines how its implementation has evolved over the past 60 years, with particular attention on the EU's approach toward state aid as a key instrument in responding to recent global crises. This section concludes with an overview of the main aspects of EU state aid law. While the previous section examined the features and weaknesses of the WTO regime in regulating subsidies, which the UK aimed to adhere to post-Brexit, this section shifts to the EU perspective. It highlights the effective substantive and procedural enforcement mechanisms that define the EU system and that the EU sought to have the UK maintain after its withdrawal.

3.1 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.[49] 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

[48] Regulation 2016/1037, known as the Anti-Subsidy Regulation (ASR), based on the WTO's SCM Agreement, provides the EU with the tools to address subsidized imports from non-EU countries that cause material injury to the EU domestic industry. However, the ASR applies only to imports. In other words, subsidies granted by non-EU governments to companies operating within the EU internal market went unchecked, while subsidies granted by EU member states were subject to close scrutiny under EU state aid rules. To fill this regulatory gap, the Commission in 2023 introduced Regulation 2022/2560 on foreign subsidies distorting the internal market: the Foreign Subsidies Regulation (FSR). The FSR, which came into effect on 12 July 2023, is now one of the most powerful components of the EU's industrial strategy. Indeed, it provides a tool to address the distortive effects caused by foreign companies (particularly those of state-owned enterprises) allowing the EU to ensure a level playing field for all companies operating in the internal market. As this is a very recent regulatory area, there are currently only few relevant cases (see Case T-284/24 - *Nuctech* and Case FS. 100011 - *e&/PPF Telecom Group*); Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (Anti-Subsidy Regulation – ASR) [2016] OJ L 176/55; Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (Foreign Subsidies Regulation – FSR) [2022] OJ L 330/1; Jan Blockx and Pierfrancesco Mattiolo, 'The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?' (2023) 28 European Foreign Affairs Review 54-56; Isabelle Van Damme, 'Understanding the Foreign Subsidies Regulation' (2024) 9 University of Bologna Law Review 1.

[49] Adinda Sinnaeve, 'How the EU Manges Subsidy Competition' in Ann Markusen (ed), *Reining in the Competition for Capital* (WE Upjohn Institute 2007) 88; Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (7th edition, Oxford University Press 2022); Michelle Egan, *Single Markets: Economic Integration in Europe and the United States* (Oxford University Press 2015) 1-24.

debate over whether EU state aid should be interpreted primarily through an economic-oriented competition lens or an integration-focused internal market perspective.[50]

Proponents of the competition perspective advocate for an increased infusion of economic analysis into EU state aid law. This perspective considers state aid as 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.[51] 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.[52]

The supporters of the internal market perspective perceive state aid as an obstacle to intra-community trade rather than primarily distorting competition.[53] 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 impacts on their domestic industries.[54] 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.[55] According 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 state aid definition, as well as the *de minimis* rule

[50] 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 8) 31-33.

[51] Hans W Friederiszick, Damien J Neven and Lars-Hendrik Röller, 'Evaluation of the Effectiveness of State Aid as a Policy Instrument, Report to DG ECFIN' (DG ECFIN 2003) https://www.tse-fr.eu/publications/evaluation-effectiveness-state-aid-policy-instrument-railway-sector; 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.

[52] 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); Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly?' (2006) 29 World competition: law and economics review 89.

[53] 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; Joined Cases C-393/04 and C-41/05, *Air Liquide Industries Belgium SA v Ville de Seraing and Province de Liège* ECLI:EU:C:2006:403, para 27.

[54] 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; see 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.

[55] 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).

should not apply, aligning with the principles of the internal market.[56]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.[57]

Furthermore, 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.[58]

3.2 Evolution

EU state aid law is founded upon the provisions set forth in Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU).[59] While the wording of these articles has remained largely unchanged since the Treaty of Rome of 1958,[60] 'the patterns of enforcement of this EU policy have changed radically over the past 60 years.'[61] These shifts reflect the evolving objectives and challenges the EU's internal market has had to address.[62]

Since the Maastricht Treaty,[63] the EU has placed growing emphasis on the social dimension of the market, incorporating values such as the environmental protection, social cohesion, employment, R&D, equality, solidarity, and public health. This recognition was further reinforced by

[56] Paris Anestis, 'State Aid and Antitrust Remedies: Anything in Common' (2012) 11 European State Aid Law Quarterly 551; Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017).
[57] 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).
[58] 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.
[59] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326/1.
[60] Treaty of Rome, or Treaty Establishing the European Economic Community (signed 25 March 1957, entered into force 1 January 1958) 294 UNTS 3.
[61] Pier Luigi Parcu, Giorgio Monti and Marco Botta, *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2020) 5.
[62] Andrea Biondi and Irene Agnolucci, 'Il contributo della Corte di giustizia in materia di aiuti di Stato' [2019] AISDUE 350.
[63] Maastricht Treaty, or Treaty on European Union (signed 7 February 1992, entered into force 1 November 1993) [1992] OJ C191/1.

the Amsterdam Treaty[64] and, subsequently, the Lisbon Treaty,[65] which explicitly enshrined the objective of a social market economy in Article 3 of the Treaty on European Union (TEU).

Therefore, while the EU initially prioritized market and competition-oriented objectives, a later phase emerged, characterized by the pursuit of other broader policy goals.[66] During this period, the Commission introduced the State Aid Action Plan (SAAP) in 2005,[67] followed by the State Aid Modernization (SAM) reform in 2012.[68] According to the Commission, 'modernised State aid control should facilitate the treatment of aid that is well-designed, targeted at addressing identified market failures and objectives of common interest, and minimally distortive ('good aid').'[69] The SAM initiative pursued three key objectives: to foster growth within a strengthened, dynamic, and competitive internal market, particularly by encouraging state aid linked to objectives of common interest and aimed at addressing market failures; to prioritize enforcement on cases with the biggest impact on the internal market; and to simplify rules and decisions, enhancing the consistency of the EU state aid legal framework.[70]

As a result, the SAAP and SAM initiatives encouraged national state aid policies to align with the Commission's objectives and shifted state aid control beyond purely negative integration to a form of positive oversight over EU member states' interventions.[71] This development, however, has sometimes blurred the distinction between state aid control, which falls under the Commission's responsibility, and state aid policy, which remains a competence of the EU member states.[72]

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[64] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (signed 2 October 1997, entered into force 1 May 1999) [1997] OJ C340/1.

[65] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed 13 December 2007, entered into force 1 December 2009) [2007] OJ C 306/1.

[66] Holger P Hestermeyer, 'Trade Law in Europe' in Daniel Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (2nd edn, Oxford University Press 2022) 1623, 1624.

[67] Commission, 'State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009' (Consultation Document) COM(2005) 107 final.

[68] Commission, 'EU State Aid Modernisation (SAM)' (Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2012) 209 final; The SAM goals were also linked to the Europe 2020 strategy for growth; Commission, 'Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth' (Communication) COM(2010) 2020 final.

[69] Commission, 'EU State Aid Modernisation (SAM)' (Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2012) 209 final, p. 5.

[70] Commission, 'EU State Aid Modernisation (SAM)' (Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2012) 209 final, p.5; see Cristina Schepisi (ed), *La "modernizzazione" della disciplina sugli aiuti di Stato - Il nuovo approccio della Commissione Europea e i recenti sviluppi in materia di public e private enforcement* (G Giappichelli Editore 2011).

[71] Jose Luis Buendía Sierra, 'Quo Vadis Compatibility?' in Juan Piernas López, Luca Rubini and Leigh Hancher (eds), *The Future of EU State Aid Law: Consolidation and Expansion* (EU Law Live Publishing 2023) 80.

[72] Juan Jorge Piernas López, 'The Transformation of EU State Aid Law … and Its Discontents' (2023) 60 Common Market Law Review 1623,1626; See also Nicola Pesaresi and Rodrigo Peduzzi, 'State Aid Modernization' in Bruno Nascimbene and Alessia Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development* (Springer International Publishing 2018)17-42; Carlo Maria Colombo, 'State Aid Control in the Modernisation Era: Moving towards a Differentiated Administrative Integration?' (2019) 25 European Law Journal 292.

Building on the SAM initiative, a range of reformed rules and soft law instruments were introduced between 2012 and 2014.[73] The reform of the General Block Exemption Regulation (GBER) was one of the key pillars of the SAM initiative.[74] The SAM reform also included revisions to the Enabling Regulation,[75] the *De minimis* Regulation,[76] the Regional Aid Guidelines,[77] the Research, Development and Innovation Framework,[78] the Important Projects of Common European Interest Communication,[79] the Risk Finance Guidelines,[80] the Aviation Guidelines,[81] the Energy and Environmental Aid Guidelines,[82] the Broadband Aid Communication,[83] and the Rescue and Restructuring Guidelines.[84] Furthermore, in 2015, the Commission adopted a new procedural regulation (the 'Procedural Regulation'), along with its corresponding implementing regulation, to establish clearer and more transparent rules for the enforcement of state aid control.[85]

In 2019, the Commission carried out a 'Fitness Check' to assess whether the reformed rules and guidelines introduced under SAM were still 'fit for purpose', while also considering the EU's evolving priorities, including the European Green Deal and the new Digital and Industrial Strategies.[86] The assessment concluded that 'overall, the SAM architecture and State aid rules which were reformed under the SAM initiative, are broadly fit for purpose [and that] [t]here is no need to reform the State aid system of SAM as such.'[87]

In recent years, the Commission has revitalized the approach it 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

[73] For a description of the main EU state aid soft law provisions see Riccardo Vuillermoz, 'Vademecum sulla Disciplina dell'Unione Europea in Materia di Aiuti di Stato' (Istituto Universitario di Studi Europei 2016).
[74] Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation – GBER) [2008] OJ L 214/3; Commission Regulation (EU) 1224/2013 of 29 November 2013 amending Regulation (EC) 800/2008 as regards its period of application [2013] OJ L 320/22.
[75] Council Regulation (EU) 733/2013 of 22 July 2013 amending Regulation (EC) 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [2013] OJ L 204/11.
[76] Commission Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L 352/1.
[77] Commission Guidelines on Regional State Aid for 2014–2020 [2013] OJ C209/1.
[78] Commission, 'Framework for State Aid for Research and Development and Innovation' [2014] OJ C198/1.
[79] Communication, 'Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest' [2014] OJ C188/4.
[80] Commission, 'Guidelines on State Aid to Promote Risk Finance Investments' [2014] OJ C19/4.
[81] Commission, 'Guidelines on State Aid to Airports and Airlines' [2014] OJ C99/3.
[82] Commission, 'Guidelines on State Aid for Environmental Protection and Energy 2014-2020' [2014] OJ C200/1.
[83] Commission, 'Guidelines for the Application of State Aid Rules in Relation to the Rapid Deployment of Broadband Networks' [2013] OJ C25/1.
[84] Commission, 'Guidelines on State Aid for Rescuing and Restructuring Non-Financial Undertakings in Difficulty' [2014] OJ C249/1.
[85] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9 (the 'Procedural Regulation'); Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) 794/2004 as regards the notification forms and information sheets [2015] OJ L 325/1.
[86] Commission, 'A Green Deal Industrial Plan for the Net-Zero Age' (Communication) COM(2023) 62 final.
[87] Commission Staff Working Document, 'Fitness Check of the 2012 State Aid Modernisation Package, Railways Guidelines and Short-Term Export Credit Insurance' SWD (2020) 257 final, 20.

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. 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.[88]

In the absence of specific rules governing the distinct issues raised by each crisis, the Commission implemented three frameworks that temporarily loosened (though extended) the state aid regime. In doing so, 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.[89]

In March 2020, following the Covid-19 outbreak, the Commission introduced the Temporary Framework, which allowed to apply Articles 107(2)(b) and 107(3)(b) TFEU in a more flexible way.[90] Although this framework did not require any treaty amendment, it marked a significant departure from the strict prohibition of granting state aid under EU law, enabling EU member states to provide direct aid, loan guarantees, and other measures to sustain business liquidity and protect employment.[91]

Subsequently, in March 2022, in response to Russia's aggression against Ukraine, the Commission introduced the Temporary Crisis Framework (TCF)[92] to enable EU member states until 31 December 2022 to subsidize energy costs for households and businesses facing economic difficulties during the crisis. Amendments in July and October 2022 further expanded funding limits and aligned state aid measures with recently adopted regulations for emergency energy market interventions.[93]

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[88] Mario Draghi, The future of European competitiveness – In-depth analysis and recommendations (2024); Mario Draghi, The future of European competitiveness – A competitiveness strategy for Europe (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.

[89] 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.

[90] Commission, 'Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak' [2020] OJ C91 I/1.

[91] Andrea Biondi, 'Governing the Interregnum: State Aid Rules and the COVID-19 Crisis' (2020) 4 Market and Competition Law Review 17; Phedon Nicolaides, 'The Evolving Interpretation of Article 107(3)(b) TFEU' (2022) 21 European State Aid Law Quarterly 31.

[92] Commission, 'Temporary Crisis Framework for State Aid Measures to Support the Economy Following the Aggression Against Ukraine by Russia' [2022] OJ C131 I/1.

[93] Federico Fabbrini, 'The EU's Response to the War-Induced Energy Crisis: Legal and Budgetary Issues to "Insure Domestic Tranquility"' (2024) 51 Legal Issues of Economic Integration 349; Commission, 'Temporary Crisis Framework for State Aid Measures to Support the Economy Following the Aggression Against Ukraine by Russia' [2022] OJ C426/1.

In March 2023, the Commission revised the GBER and replaced the TCF with the Temporary Crisis and Transition Framework (TCTF).[94] The new framework placed greater emphasis on supporting the energy transition and industrial transformation. The TCTF allowed EU member states until 31 December 2023 to: '(i) grant limited amounts of aid to companies affected by the current crisis; (ii) ensure that sufficient liquidity remains available to businesses; (iii) compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices; and (iv) incentivize additional reduction of electricity consumption.'[95] Additionally, the TCTF authorized EU member states to provide state aid until 31 December 2025 to: '(i) accelerate the deployment of renewable energy, storage, and renewable heat aligned with REPowerEU goals; and (ii) support the decarbonization of industrial production processes.'[96]

Despite the frameworks' intention to minimize negative impacts – such as preventing the relocation of businesses between EU member states due to public support or providing assistance to companies already facing financial difficulties before the pandemic – these measures have raised concerns regarding potential competition distortion in the EU internal market. Due to the asymmetric financial capacities of EU member states, the temporary frameworks created tensions between the granting of more state aid and preserving the integrity of the EU internal market.[97]

To overcome these concerns, Piernas Lopez argues that the new architecture of EU economic governance should include more EU funding mechanisms to mitigate the impact of state aid on competition and cohesion in the internal market. Indeed, he explains that while based in the EU, the Recovery Fund's resources are classified as state resources under state aid laws, as member states retain discretion in their use, particularly in selecting of beneficiaries. Therefore, he contends that the issue extends beyond merely monitoring state aid's impact on the internal market to fostering a unified approach for growth and stability throughout the EU.[98]

3.3 Key elements

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

[94] Commission, 'Temporary Crisis and Transition Framework for State Aid Measures to Support the Economy Following the Aggression Against Ukraine by Russia' [2023] OJ C101/3.
[95] Fabbrini (n 93) 361.
[96] Commission, 'Amendment to the Temporary Crisis and Transition Framework for State Aid Measures to Support the Economy Following the Aggression Against Ukraine by Russia' C(2023) 8045 [2023]; Commission, 'Second Amendment to the Temporary Crisis and Transition Framework for State Aid Measures to Support the Economy Following the Aggression Against Ukraine by Russia' C(2024) 3123 [2024].
[97] Christos Gortsos and Wolf-Georg Ringe, Pandemic Crisis and Financial Stability (European Banking Institute 2020) https://papers.ssrn.com/abstract=3607930.
[98] Juan Jorge Piernas Lopez, 'State aid' in Federico Fabbrini and Christy Petit (eds), *Research Handbook on Post-Pandemic Economic Governance and NGEU Law* (Elgar 2024) 93; Piernas López (n 72) 1652.

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.[99] 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 or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, 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.'[100] 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).[101] 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).[102] 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.[103] 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 GBER exempts certain categories of aid from the notification requirement by automatically declaring them compatible with the internal market.[104] 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 EUR 200,000 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.[105]

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[99] 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.
[100] Art 106(2) TFEU.
[101] 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.
[102] Sabrina Armati, 'Il Ruolo Della Commissione a Tutela Dei Principi Di Concorrenza' (Dipartimento della Funzione Pubblica 2017) http://fondistrutturali.formez.it/sites/all/files/4_2_3_aas.pdf.
[103] Carlo Eugenio Baldi, 'Disciplina Comunitaria Degli Aiuti Di Stato e Politica Culturale Europea. Le Incoerenza Di Un Sistema Fortemente Burocratizzato' [2014] Aedon, no 3, <https://aedon.mulino.it/archivio/2014/3/baldi.htm>.
[104] 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.
[105] Commission Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L 352/1.

If the Commission finds that aid is incompatible with the EU internal market, it must order its recovery.[106] 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.[107]

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).[108] Decisions made by the Commission are subject to judicial review by the CJEU.[109] 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.[110] 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.

[106] 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 is the reference rule in this regard.
[107] Jan Blockx, 'New State aid Recovery Notice' (2019) 18 *European State aid Law Quarterly* 540.
[108] Art 108(2) TFEU.
[109] Art 263 TFEU.
[110] 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.

4. 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 section explores how this fundamental tension shaped the parties' opposing priorities for their future relationship: the UK prioritized sovereignty, rejecting regulatory alignment typically found in FTAs that facilitates reduced trade barriers, while the EU made the establishment of strong level playing field provisions a prerequisite for granting unprecedented zero-tariff, zero-quota market access. This section explains that the level playing field provisions, particularly those related to subsidy control, were among the most contentious aspects of the TCA negotiations. Therefore, it delves into what the EU-UK level playing field entails. Finally, this section briefly outlines the features of the TCA subsidy control regime.

4.1 Negotiating subsidy control after Brexit

The Withdrawal Agreement (WA) entered into force on 1 February 2020, marking the end of the UK's membership in the EU.[111] Since then, the UK became a third country and had to negotiate with the EU the terms of its future relationship.[112] The main challenge for parties was transforming the deepest form of economic integration between states – the EU single market and customs union – into a new form of economic cooperation that respected the 'red lines' of both parties while minimizing economic disruption.[113] The stake was high: failure to reach an agreement by 31

[111] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (WA) [2019] OJ C384 I/1; see generally Federico Fabbrini, 'Introduction', in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (Oxford University Press 2020); and also Jennifer Hillman and Gary N Horlick (eds), *Getting to Brexit: Legal Aspects of the Process of the UK's Withdrawal from the EU* (Institute of International Economic Law 2018).

[112] Under the WA a transitional period began, during which the UK continued to participate in the EU's single market and customs union, and benefit from EU policies and programs; Kenneth A Armstrong, 'The Transition' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (Oxford University Press 2020) 171; Joris Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020) 114 American Journal of International Law 443; Giorgio Sacerdoti, 'The United Kingdom's Post-Brexit Trade Regime with the European Union and the Rest of the World: Perspectives and Constraints' (2017) 20 Journal of International Economic Law 905.

[113] See Christopher Adam, 'The Emerging Contours of a Post-Brexit Britain' (2022) 38 Oxford Review of Economic Policy 1; see Marta Dassu and Edoardo Campanella, *Anglo Nostalgia: The Politics of Emotion in a Fractured West* (C Hurst & Co Publishers Ltd 2019); Sarah Wolff and Agathe Piquet, 'Post-Brexit Europeanization: Re-Thinking the Continuum of British Policies, Polity, and Politics Trajectories' (2022) 20 Comparative European Politics 513.

December 2020 would have resulted in the UK exiting the EU without a framework to govern their new relationship.[114]

Article 184 of the WA established an obligation for both parties to negotiate the agreements governing their future relationship 'in good faith' and 'in full respect of their respective legal orders', using the Political Declaration of 17 October 2019 as a guide and concluding negotiations by the end of the transition period. While the Political Declaration, unlike the WA, was not a legally binding international agreement, its explicit mention in Article 184 WA signified its intended role as a key framework for negotiations. In particular, with regard to their economic partnership, both parties committed to developing an ambitious, wide-ranging, and balanced relationship aimed at facilitating trade and investment to the extent possible. However, despite their shared vision outlined in the Political Declaration, differences emerged when both parties published their respective negotiating guidelines for their future agreement in February 2020.[115]

On the UK side, Boris Johnson's first strategic move was to disband the Department for Exiting the EU, which had led the withdrawal process, and centralize negotiations under a new task force. This task force was headed by David Frost, a long-standing political critic of the EU since the 1990s. In February 2020, Prime Minister Johnson and his chief negotiator Frost formally presented their negotiating priorities in an official document, marking a significant departure from the 2019 Political Declaration.[116] They adopted a more hardline stance on Brexit and its implications for the EU-UK relationship: sovereignty and independence were recurring themes, where sovereignty was 'the ability to get your own rules right to suit your own circumstances'.[117] The logical consequence of the UK setting its rules independently would have been divergence, aiming at securing a competitive advantage over the EU in emerging sectors.[118] Accordingly, in line with Prime Minister Johnson's vision, any future deal had to resemble a FTA similar to the CETA. The rationale behind the UK's choice was that there would be no need 'for a free trade agreement to involve accepting EU rules on competition policy, subsidies, social protection, the environment, or anything similar.'[119]

Moving to the EU's viewpoint, the European Council encouraged the Commission to submit to the Council a draft comprehensive mandate for negotiations with the UK and welcomed the

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[114] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (Oxford University Press, 2021) 1-2; Paola Mariani and Giorgio Sacerdoti, 'The Negotiations on the Future Trade Relations' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume II. The Withdrawal Agreement* (Oxford University Press, 2020) 211-232; Freya Baetens, '"No Deal Is Better than a Bad Deal"? The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net' (2018) 55 Common Market Law Review 133.

[115] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III. The Framework of New EU-UK Relations* (Oxford University Press 2021) 1-28.

[116] Ibid 5; HMG, The Future Relationship with the EU: The UK's Approach to Negotiations, CP211 (February 2020).

[117] Brigid Laffan, 'Sovereignty and Brexit: From Theory to Practice' in Federico Fabbrini (ed), *The Law & Politics of Brexit. Volume III: The Framework of New EU-UK Relationships* (Oxford University Press 2021) 240-259.

[118] Ibid.

[119] Johnson B., 2020, 'Address at Greenwich', 3 February, https://www.gov.uk/government/speeches/pm speech in greenwich 3 february 2020.

reappointment of Michel Barnier as EU Chief Negotiator.[120] Barnier was supported by the Task Force for Relations with the UK, along with various Directorates-General and Services of the Commission. On 3 February 2020, the Commission published its draft negotiating guidelines, which were formally adopted by the Council on 25 February 2020.[121]

The central role of sovereignty in the UK's negotiating stance conflicted with the EU's view as a regulatory power, both in Europe and globally.[122] This created a challenge for the EU: while it desired a close economic relationship with the UK, it could not risk undermining the balance between internal market access rights and corresponding obligations.[123] Thus, the EU aimed to follow the pan-Euro-Mediterranean (PEM) Convention model, which governs trade relations between the EU and 25 parties across Europe, the Middle East and North Africa.[124] Its objective was to have a comprehensive partnership with the UK, including both trade and security, based on a common level playing field, all within a single system of governance, dispute resolution, and enforcement.[125]

One of the most contentious issues the parties needed to agree on was subsidy control.[126] The UK sought regulatory autonomy in its future subsidy control regime,[127] criticizing EU state aid framework for hindering market-oriented national liberalization policies by imposing an overly bureaucratic structure.[128] The UK also argued that the EU system restricted the pursuit of socially oriented economic policies by limiting the state's role in their implementation.[129] As a result, the

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[120] Fabbrini (n 115) 4.

[121] Council Decision (EU, Euratom) 2020/266 of 25 February 2020 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement (Council 5870/20 and addendum, 25 February 2020).

[122] See generally Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[123] Laffan (n 117) 240-259.

[124] Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin (PEM Convention) (adopted 15 June 2011, entered into force 1 January 2012); These rules have been revised. The revised (PEM) Convention on preferential rules of origin entered into force on 1 January 2025.

[125] Mariani and Sacerdoti (n 114).

[126] Simon Hirsbrunner and Alice Lauterjung, 'Without EU State Aid Control No EU-UK Free Trade Deal?' (2017) 16 European State Aid Law Quarterly 288; George Peretz, 'A Star Is Torn: Brexit and State Aid' (2016) 15 European State Aid Law Quarterly 334.

[127] Nicholas Crafts, 'Brexit and State Aid' (2017) 33 Oxford Review of Economic Policy 105, 111; David Bell, 'Regional Aid Policies after Brexit' (2022) 38 Oxford Review of Economic Policy 127–139; Oxera points out that the UK's spending on state aid, measured as a percentage of GDP, remained consistently below EU averages from 2000 to 2016. Furthermore, the UK received only one negative ruling between 2000 and 2010 and only a few more throughout its EU membership. During the same decade, Germany received 32 negative rulings, Italy 26, Spain 11, France 10, and all other member states combined received 43. This shows that UK's was very compliant with EU state aid rules, having a strong approval rate under the notification procedure; Written evidence from Oxera (CMP0012), based on data from the European Commission's State Aid Scoreboard 2016, see https://www.oxera.com/wp-content/uploads/2018/07/Brexit-competition-and-State-aid-written-evidence_1.pdf.pdf; Barry Rodger and Andreas Stephan, *Brexit and Competition Law* (Routledge Focus 2022) 84-85.

[128] George Peretz, 'State Aid and Brexit: Reality Slowly Dawns' (2018) 17 European State Aid Law Quarterly 80, 81.

[129] As Biondi noted, these criticisms misunderstood the purpose of the EU system of state aid control, which is designed to prevent governments from enacting legislation that selectively benefits certain industries, while ensuring that financial support can be granted when aligned with certain public policies objectives; Andrea Biondi, 'Brexit and State Aid Control: Four Quartets' (2018) 17 Competition Law Journal 3, 12; Ferdi De Ville and Gabriel Siles-Brügge, 'The Impact of Brexit on EU Trade Policy' (2019) 7 Politics and Governance 7, 18;

UK's initial draft of the UK-EU Comprehensive Free Trade Agreement proposed using WTO subsidy regulations as the basis for cooperation on subsidies.[130] Under the UK's proposed terms, both parties would commit to notifying each other every six months about their respective subsidies. If one party had concerns that a subsidy might harm its interests, it could request consultations and the other party would then give due consideration and make every effort to address any adverse effects. However, these provisions would not be subject to the agreement's DSM.[131] The UK's only concession to the EU's demands was its agreement to extend subsidy control commitments to cover trade in services (the SCM Agreement applies only to trade in goods, and the GATS discipline on subsidies, as explained in the previous section of this thesis, is not effective). Despite this, the UK remained firm on a crucial point: it categorically rejected any jurisdictional role of the CJEU over UK law.[132]

On the contrary, the EU insisted on alignment with EU state aid rules to prevent UK subsidies from potentially harming EU businesses, given that such subsidies would originate from a third country and thus fall outside the scope of EU state aid control.[133] The EU proposed an 'Agreement on the New Partnership with the United Kingdom'[134] that required the UK to incorporate EU state aid legislation (along with any future amendments) into its domestic laws. Under this proposal, the UK would be required to establish an independent enforcement authority responsible for overseeing subsidy matters, while UK courts would be obligated to apply EU state aid rules and seek guidance from the CJEU on their interpretation. Moreover, the Commission would be granted legal standing in UK courts, allowing it to bring cases related to UK state aid measures. In the event of a dispute, a consultation mechanism would have been established within the Specialized Committee on Level

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see Stephanie J Rickard, *Spending to Win: Political Institutions, Economic Geography, and Government Subsidies* (Cambridge University Press 2018) 66-69; Kelyn Bacon, George Peretz and Isabel Taylor, 'Bringing State Aid Home: Could an Effective Domestic State Aid Regime Be Devised for the UK?' (May 2017) https://uksala.org/bringing-state-aid-home-could-an-effective-domestic-state-aid-regime-be-devised-for-the-uk/;

[130] Greg Messenger, 'EU-UK Relations at the WTO: Towards Constructive Creative Competition' in Juan Santos Vara, Ramses A Wessel and Polly R Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 135; Alan Weinberger, 'State Aid Regulations after Brexit: A Good Deal for the UK?' in Jennifer Hillman and Gary Horlick (eds), *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union* (Institute of International Economic Law 2017) 88, 91; Maria Segura, Egill Olafsson and Marianne Clayton, 'Brexit, the EEA and the EU State Aid Rules' (2019) 18 *European State Aid Law Quarterly* 3.

[131] Antony Seely and others, 'The UK-EU Future Relationship Negotiations: Level Playing Field' (House of Commons Library 2020) Research Briefing https://commonslibrary.parliament.uk/research-briefings/cbp-8852/.

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

[133] Crafts (n 127) 106; George Peretz and Kelyn Bacon, 'Paper on Post-Brexit Options for State Aid - UK State Aid Law Association' (16 November 2016) https://uksala.org/paper-on-post-brexit-options-for-state-aid/; Hestermeyer (n 66) 315; see Pablo Ibáñez Colomo and Damien J Neven, 'State Aid Control beyond the EU: Legal Convergence and Unilateral Expansion' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2024).

[134] Commission, UK Task Force, Draft Text of the Agreement on the New Partnership with the United Kingdom, UKTF (2020) 14.

Playing Field and Sustainability. If the consultations proved unsuccessful, the EU would have retained the option to implement interim measures.[135]

During the initial months of negotiations, the UK and the EU maintained firm positions on subsidy control, leading to a deadlock.[136] The UK strongly objected to being bound by future EU rules and principles, while the EU viewed the UK's WTO-modeled proposal inadequate for maintaining competition and trade between two deeply interconnected economies.[137] Consequently, the only viable solution was to establish a bespoke, self-standing regulation on subsidy control within the future agreement.[138]

On 7 October 2020, the UK proposed fundamental principles on subsidy control aimed at addressing concerns about the impact of subsidies on trade and investment between the parties while ensuring transparency and proportionality. These principles signaled the UK's willingness to engage in discussions and find common ground with the EU. However, the UK's proposal focused on overarching principles of subsidy control rather than specific details of its domestic subsidy system, maintaining that the structure of its domestic subsidy regime would be determined through future domestic legislation and would not be subject to negotiation with the EU.[139] Just before to the conclusion of the transition period, the parties reached an agreement on the crucial issue of subsidies,

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[135] Ali Shalchi and others, 'The UK-EU Trade and Cooperation Agreement: Level Playing Field' (House of Commons Library 2022) Research Briefing https://commonslibrary.parliament.uk/research-briefings/cbp-9190/; Eleanor Shearer and Thomas Pope, 'Taking Back Control of Subsidies: Replacing EU State Aid Rules in the UK' (Institute for Government 2021) https://www.instituteforgovernment.org.uk/sites/default/files/publications/taking-back-control-subsidies.pdf.

[136] A further development that added tension to the negotiations between the UK and the EU, creating challenges in reaching a consensus on various aspects, such as the level playing field provisions and particularly the subsidy control provisions, was the introduction of the UK Internal Market Bill in Parliament on 9 September 2020. The initial version of the Bill contained provisions that would grant ministers the power to unilaterally reinterpret and potentially override the state aid provisions outlined in the WA Protocol on Ireland/Northern Ireland. The inclusion of these provisions in the UK Internal Market Bill raised significant concerns regarding the UK's adherence to its legal obligations under the WA. The Commission initiated infringement proceedings against the UK, arguing that the provisions breached the obligations of good faith and the principle of sincere cooperation outlined in the WA. Following intense debates, the controversial provisions were eventually removed from the Bill during its passage through the UK Parliament. The Bill was subsequently enacted as the UK Internal Market Act without those specific provisions; Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume III: The Framework of New EU-UK Relations* (Oxford University Press 2021) 10-13; see generally Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland / Northern Ireland* (Oxford University Press 2022); Graham Butler, 'EU State Aid Law and the Northern Ireland Protocol: Extension of the Acquis and the "Effect on Trade"' (Brexit Institute Working Paper Series No 2/2022, 2022) https://www.ssrn.com/abstract=4003425; UK Internal Market Act 2020, c 27.

[137] Simon Hirsbrunner, 'How to Please Your Sweethearts When You Are Divorcing: The UK Government's Ability to Offer Incentives to Foreign Investors After Brexit' (2016) 15 *European State Aid Law Quarterly* 504; see Leonardo Borlini, 'Subsidies Regulation Beyond the WTO: Substance, Procedure and Policy Space in the "New Generation" EU Trade Agreements' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2016* (Oxford University Press 2016).

[138] Nicholas Crafts, 'Brexit and Control of Subsidies' (2022) 38 Oxford Review of Economic Policy 154; An interesting point, raised by Rubini, offers a different perspective. He argues that the UK should have adopted a more offensive approach in the negotiations by seeking to maintain involvement in the EU state aid system. This argument is based on the fact that the UK had historically played a crucial role in controlling the subsidy practices of other EU member states. While the narrative during negotiations suggested that the UK might become an aggressive subsidizer after Brexit, historical evidence showed that major subsidies had typically come from Germany and France, not the UK.

[139] Andrea Biondi and others, 'Subsidy Control - Designing a New Approach for the UK – Response to Public Consultations' (2021) Response to Public Consultations https://www.ssrn.com/abstract=3825585.

thereby allowing for the completion of a comprehensive agreement governing their future relationship.[140]

On 24 December 2020, the parties announced the successful conclusion of negotiations, marking the establishment of the EU-UK Trade and Cooperation Agreement. In order to ratify the treaty, the UK government drafted the EU Future Relationship Act 2020, which was approved by Parliament on 30 December 2020.[141] The House of Commons approved the legislation with a large majority of 521 to 73 – marking a significant contrast to the votes that had characterized Westminster's review of the WA, due in part to the Labor Opposition's decision to support the TCA.[142] The House of Lords approved it on the same day, and the Future Relationship Act 2020 received royal assent on 31 December 2020, immediately entering into force.[143]

The ratification process was longer on the EU side. First, the Commission confirmed that it had chosen Article 217 of the TFEU as the legal basis for concluding the TCA.[144] Under this provisions, agreements of this nature (EU-only agreements) are negotiated and signed exclusively by EU institutions on behalf of EU member states. Their adoption requires approval by the Council (by unanimity) and consent from the European Parliament.[145] Unlike mixed agreements, these agreements do not require individual ratification by EU member states to enter into force.[146] Under normal circumstances, the European Parliament's consent vote would have preceded the final approval by the Council. However, given the limited time available to organize a consent vote, the European Parliament agreed to provisional application of the TCA, requesting additional time to scrutinize the deal. The Council's approval was still needed for the provisional application of the agreement. Therefore, on 29 December 2020, the Council adopted a decision on the signing of the TCA and its provisional application as of 1 January 2021.[147]

On 30 December 2020, Charles Michel, President of the European Council, and Ursula von der Leyen, President of the Commission, signed the agreement on behalf of the EU, while Prime Minister Boris Johnson signed on behalf of the UK.

On 9 February 2021, the Commission proposed extending the provisional application of the TCA until 30 April 2021, which the UK accepted on 23 February 2021. This extension paved the

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[140] George Peretz, 'United Kingdom: The UK Subsidy Control Regime: Where Is It and Where Is It Going? News from the Member States' (2021) 20 European State Aid Law Quarterly 167.
[141] European Union (Future Relationship) Act 2020, c 29.
[142] Arabella Lang, 'Parliament's Role in Ratifying Treaties' (UK Parliament 2017) Briefing Paper 5855 https://researchbriefings.files.parliament.uk/documents/SN05855/SN05855.pdf.
[143] Fabbrini (n 136) 20.
[144] Peter Van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) 6 European Papers 785.
[145] EU-only agreements typically pertain to areas where the EU has exclusive jurisdiction, such as trade policy.
[146] See Jan Wouters and others, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (3rd edn, Oxford University Press 2021) ch 4.
[147] Council Decision (EU) 2020/2252 of 29 December 2020 on the signing, on behalf of the Union, and on the provisional application of the 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information [2020] OJ L444/2, Art. 12.

way for the European Parliament's formal approval of the TCA. After received reassurances from the Commission regarding its future role in overseeing the deal, the European Parliament gave its consent to the treaty on 28 April 2021, and it entered into effect on 1 May 2021.[148]

The TCA does not restore the level of cooperation that existed when the UK was part of the EU.[149] By moving away from the EU's ecosystem of common rules, surveillance and enforcement mechanisms, the UK can no longer enjoy the benefits of EU membership.[150] However, the TCA goes beyond standard FTAs that the EU has with third countries as it regulates a wide range of areas of EU interest, such as investment, competition, state aid, fiscal transparency, air and road transport, energy and sustainability, fisheries, data protection, and social security coordination, digital trade, intellectual property, public procurement, police and judicial cooperation in criminal matters, as well as the participation of the UK in certain EU programs. The TCA has a complex structure composed of seven parts, two of which include horizontal provisions (the institutional framework and dispute settlement), and four address specific fields. Each part is further divided into titles and chapters, for a total of 544 articles. The TCA also contains 46 annexes, appendices, and footnotes, all of which form an integral part of the agreement. Moreover, the agreement is supplemented by three protocols, respectively on: administrative cooperation and the fight against fraud in value added tax and mutual assistance for the recovery of claims relating to taxes and duties; mutual administrative assistance in customs matters; and social security coordination.[151]

4.2 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 due to the deep economic interconnection between both

[148] Fabbrini (n 115) 21.
[149] Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017) 3-14.
[150] See David Bailey, David Hearne and Leslie Charles Budd, 'People, Places and Policies beyond Brexit' (2023) 18 Journal of the Academy of Social Sciences 125; Christophe Hillon, 'Brexit Means Br(EEA)Xit: The UK Withdrawal from the EU and Its Implications for the EEA' (2018) 155 Common Market Law Review 135; Muhammad Riaz Shad, 'UK's Post-Brexit Economic Prospects in View of Its Trade and Cooperation Agreement (TCA) with the EU' (2021) 37 Journal of European Studies 20; Elisa Baroncini, 'La circolazione delle merci' in G Adinolfi, A Malatesta and M Vellano (eds), *L'Accordo sugli scambi commerciali e la cooperazione tra Unione europea e Regno Unito* (Giappichelli 2022).
[151] Fabbrini (n 115) 19; Daniel Ferguson and others, 'The UK-EU Trade and Cooperation Agreement: Summary and Implementation' (House of Commons Library 2020) Briefing Paper https://commonslibrary.parliament.uk/research-briefings/cbp-9106-2/; Yohannes Ayele and others, 'Taking Stocks of the UK-EU Trade and Cooperation Agreement: Trade in Goods' (UK Trade Policy Observatory 2021) Briefing Paper 52; Phedon Nicolaides, 'One Agreement, Two Parallel Systems: Subsidies in the Trade and Cooperation Agreement between the EU and the UK' (Lexxion) https://www.lexxion.eu/en/stateaidpost/one-agreement-two-parallel-systems-subsidies-in-the-trade-and-cooperation-agreement-between-the-eu-and-the-uk/.

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.[152]

The concept of a level playing field draws from 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.[153] 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.'[154] 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.[155] 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.[156] This situation contrasts with traditional trade agreements, where level playing field provisions are generally limited to broad principles.[157] Indeed, in the EU-UK context, any divergence from their previously shared regulatory framework risked distorting competitive conditions between the two economies.[158] 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.

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[152] 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; Andrew Glencross, 'The Origins of "Cakeism": The British Think Tank Debate over Repatriating Sovereignty and Its Impact on the UK's Brexit Strategy' (2023) 30 Journal of European Public Policy 995; 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.

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

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

[155] Biondi (n 2) 219; 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.

[156] 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; Zach Meyers, 'The EU Needs a Bigger Playing Field – Not a Level Playing Field' (Centre for European Reform 2022) Policy Brief https://www.cer.eu/publications/archive/policy-brief/2022/eu-needs-bigger-field-not-level-playing-field .

[157] 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.

[158] 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.

Hestermeyer identified three key aspects essential to establish an EU-UK level playing field. First, it was necessary to secure previously shared standards. Second, enforcement 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 (e.g., in environmental or social areas), fearing that doing so would place its businesses at a competitive disadvantage relative to the other party.[159]

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, labor 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'.[160]

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.'[161] 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'[162] while declaring that the parties 'are determined to maintain and improve their respective high standards in the areas covered by this Title.'[163]

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 for reaching an agreement in these areas.[164]

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

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[159] 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; Robert E Hudec, 'Differences in National Environmental Standards: The Level-Playing-Field Dimension' (1996) 50 Minnesota Journal of International Law 1.
[160] Art 355(1) TCA.
[161] Art 356(1) TCA.
[162] Article 355(4) TCA.
[163] Article 355(4) TCA; Mariani and Sacerdoti (n 152) 114.
[164] Susana Moreno, 'The EU-UK Relationship: Regulatory Divergence and the Level Playing Field' (Banco de España 2022) Occasional Paper No 2221 https://www.ssrn.com/abstract=4248065.

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.[165] On the contrary, the chapter on subsidy control is particularly extensive, making it the most regulated area of the whole Level Playing Field Title.[166] 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.[167] For taxation,[168] labor and social standards,[169] and environmental and climate policies,[170] the agreement primarily seeks to ensure a level playing field through non-regression clauses. The TCA defines non-regression 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.[171] 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.[172] Non-regression obligations are more robust for labor and social standards as well as for environmental and climate provisions.[173] These areas feature specific requirements for domestic enforcement and allow for DSM through a panel of experts, with the possibility to adopt countermeasures.[174]

4.3 Key elements

As a result of the right to regulate established under the TCA, both the EU and UK can maintain their respective subsidy control systems while adhering to the general principles set out in the agreement.[175] This flexibility allowed the UK to establish its own subsidy control regime through the SCA, which came into force in January 2023.[176]

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[165] Art 360 TCA; Biondi and Howard (n 5) 384.
[166] 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.
[167] Chapter 3, Title XI, Heading One, Part Two, TCA.
[168] Chapter 5, Title XI, Heading One, Part Two, TCA.
[169] Chapter 6, Title XI, Heading One, Part Two, TCA.
[170] Chapter 7, Title XI, Heading One, Part Two, TCA.
[171] Art 385 TCA.
[172] See Peers (n 155) 63-65; Elena Ares and others, 'The UK-EU Trade and Cooperation Agreement: Level Playing Field' (House of Commons Library 2021) Briefing Paper 9190.
[173] Art 387 and 391 TCA.
[174] Art 389 and 396 TCA; Hestermeyer (n 159).
[175] Art 366 TCA.
[176] Subsidy Control Act 2022, c 23 (SCA).

One of the peculiarities of the TCA's subsidy control regime is that it applies to both goods and services, extending significantly beyond WTO rules on subsidies, which generally cover only goods.[177] Under Article 363 of the TCA, a subsidy is defined any financial assistance which 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, certain types of subsidies are strictly prohibited, including: 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 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'.[178]

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.[179]

The TCA also requires each party to establish an independent authority or body to oversee its subsidy control regime.[180] 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.[181]

In addition, Article 372 of the TCA grants domestic courts the authority to ensure that subsidies comply with the general principles set out in Article 366 of the TCA 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.[182]

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[177] It is also notable that the Northern Ireland Protocol requires that EU state aid rules apply to trade between Northern Ireland and the EU, but the Protocol only covers goods (to avoid the need for a hard border on the island of Ireland) and not services. Protocol on Ireland/Northern Ireland annexed to the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384 I/1; Revised Protocol to the Withdrawal Agreement (New Protocol on Ireland / Northern Ireland) (17 October 2019), Article 10.

[178] Art 367 TCA.

[179] Art 369 (5) TCA; Crafts (138).

[180] Art 371 TCA.

[181] 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.

[182] Ibid; This is the first time that a bilateral EU trade agreement incorporates 'vertical' remedies that, in principle, allow businesses and other interested parties to challenge subsidy measures in the domestic courts of the granting authority's jurisdiction.

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.[183] Still, the other party can then challenge these measures before an arbitration tribunal. If the tribunal finds that the other party remedial measures are not proportionate under the terms of the TCA, it may allow the responding party to take countermeasures.[184] 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. 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.[185] 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.[186]

[183] Art 374 TCA; Totis Kotsonis, 'The Squaring of the Circle' (2021) 20 European State Aid Law Quarterly 15.
[184] 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.
[185] Art 411(2) TCA.
[186] 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; Simon Lester, 'A Few Quick Thoughts on the "Rebalancing" Provisions in the "Level Playing Field" Section of the UK-EU Trade Agreement' (International Economic Law and Policy Blog, 26 December 2020) https://ielp.worldtradelaw.net/2020/12/a-few-quick-thoughts-on-the-rebalancing-provisions-on-the-level-playing-field-in-uk-eu-trade-agreeme.html.

5. 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 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 chapter 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 chapter 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 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 have been shaped with this objective in mind. Accordingly, the following chapters of this thesis will provide a detailed analysis of the technical aspects of Chapter 3, Title XI of the TCA. Specifically, separate chapters will be devoted to three core dimensions of the TCA subsidy discipline: substantive measures, monitoring and enforcement, and remedies. By analyzing the similarities and differences between the TCA and the corresponding aspects of the WTO and EU subsidy frameworks, this thesis will assess their implications for the TCA's implementation, addressing the key question of whether the TCA can achieve its goal of ensuring a level playing field between the EU and UK after Brexit.

Chapter II: Substance

1. Introduction

The definition of subsidy is of utmost importance, as it determines the scope of application of each subsidy control regime and shapes the rules governing its implementation. In the EU, the concept of subsidy is referred to as state aid, whereas, following Brexit, the UK adopted the term subsidy, aligning its terminology with the WTO framework. This lexical choice may reflect an attempt to minimize the influence of EU case law in interpreting the TCA's provisions.[187] However, beyond these formal distinctions, it is crucial to examine the substantive content and underlying principles of the TCA's subsidy regime.

This chapter provides a comparative analysis of the definition of subsidy and the scope of subsidy control under the WTO, EU, and TCA frameworks. By exploring TCA's subsidy definition in depth, this chapter lays the foundation for the first dimension of this thesis's three-part analysis. The subsequent dimensions will focus on monitoring and enforcement mechanisms, as well as available remedies, to evaluate the efficiency of the TCA subsidy regime in maintaining a level playing field between the EU and UK post-Brexit.

This chapter is structured as follows. Section 2 examines the definition of subsidy under the SCM Agreement, complemented by an analysis of the most significant panel and the AB reports in this regard. Section 3 explores the substantive foundations of EU state aid law, focusing on how the notion of state aid has been interpreted by EU courts and the Commission over the past six decades. Finally, section 4 analyzes the substantive rules of the TCA, offering a comparative analysis of the definition and scope of subsidy control across the WTO, EU and TCA subsidy frameworks.

This chapter argues that, while the TCA adopts WTO trade terminology, its definition of a subsidy essentially parallels the EU definition of state aid. By highlighting the similarities between the TCA and the EU framework, this chapter contends that the TCA preserves key principles from the EU state aid regime within the UK, despite the latter's status as a third country.

[187] Kotsonis (n 183).

2. WTO

This section examines the definition of a subsidy as provided under the SCM Agreement. It focuses on the elements used to identify and evaluate subsidy measures, including the financial contribution, benefit, and specificity. It then analyzes the various categories of subsidies established in the SCM Agreement, which classifies them based on their perceived impact on international trade. Article 1 of the SCM Agreement sets out the legal definition of a subsidy as follows:

> 1.1. For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government'), i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred. 1.2. A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II [prohibited subsidies] or shall be subject to the provisions of Part III [actionable subsidies] or V [countervailing duties] only if such a subsidy is specific in accordance with the provisions of Article 2.[188]

Hence, Article 1 of the SCM Agreement establishes that for a measure to be considered a subsidy the presence of a 'financial contribution' and its 'benefit' must be demonstrated.[189]

a. Financial contribution by the government or any public body

Article 1(1)(a)(1) of the of the SCM Agreement lists the types of conduct that constitute a financial contribution. In *US–Export Restraints*, the Panel held that this list is exhaustive, meaning that any measure that does not fall within the scope of the four subparagraphs specified in Article 1(1) cannot be considered a subsidy.[190] Put differently, a transaction need only fall under one of these

[188] Art 1 SCM Agreement.
[189] See Appellate Body Report, *Brazil—Export Financing Programme for Aircraft* (adopted 20 August 1999) WT/DS46/AB/R, para 157; Gary N Horlick, 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures' (2013) 8 Global Trade and Customs Journal 297; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, 'Subsidies' in *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 301; This definition does not include any reference to the specificity of the measure or to its effects. Both are dealt with under separate provisions, namely Article 2 and Articles, 3, 5, and 6 SCM Agreement; Rubini (n 13) 109; see Marc Benitah, *The WTO Law of Subsidies: A Comprehensive Approach* (Kluwer Law International 2019) ch 1.
[190] Panel Report, *United States—Measures Treating Export Restraints as Subsidies* (adopted 23 August 2001) WT/DS194/R.

subparagraphs to meet the financial contribution criterion.[191] This interpretation provides a high level of certainty and predictability regarding government practices that may qualify as subsidies. On the one hand, Article 1(1)(a)(1)(i) to (iii) of the SCM Agreement delineates the circumstances in which a government or a public entity operates directly, including: i) direct transfers of funds and potential direct transfers of funds or liabilities; ii) fiscal incentives;[192] and iii) the provision of goods or services and purchases of goods.[193] Notably, the terms 'government' and 'public entity' are not explicitly defined within the SCM Agreement itself.[194] Regarding the term 'government', contextual arguments suggest it refers to federal, state, or provincial authorities, taking into account the overall framework and objectives of the SCM Agreement. As for the term 'public entity', the Panel in *Korea – Commercial Ships* defined it as any entity controlled by the government, regardless of its ownership.[195] However, in *US – AD/CVD*, the AB adopted a narrower approach, ruling that public bodies are restricted to entities that perform governmental functions or are vested with and exercise the authority to carry out such functions. This interpretation, which prioritizes 'governmental authority' over 'control' as the primary criterion, has been widely criticized for potentially complicating the regulation of State-Owned Enterprises' (SOEs) actions.[196] On the other hand, Article 1(1)(a)(1)(iv) of the SCM Agreement addresses situations in which the government operates indirectly. This provision covers cases where a funding mechanism is employed or when the government entrusts or directs a private party to carry out practices that would otherwise qualify as subsidies under subparagraphs (i), (ii), or (iii).[197]

Moreover, Article 1(1)(a)(2) of the SCM Agreement includes 'any form of income or price support' as a type of financial contribution. In *China – GOES,* the Panel observed that while 'price support' entails the direct setting and maintaining of a price, it does not extend to price changes that are merely an unintended side effect of government measures. This interpretation implies that, despite its potentially broad scope, Article 1(1)(a)(2) applies only to government actions that directly

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[191] Even if a transaction could potentially align with more than one type of financial contribution, it does not affect the fulfilment of the financial contribution requirement; see Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector* (adopted 24 May 2013) WT/DS412/AB/R.

[192] As concerns test for determining whether a tax measure constitutes a financial contribution see Appellate Body Report, *United States—Tax Treatment for 'Foreign Sales Corporations*' ('*US – FSC'*) (adopted 20 March 2000) WT/DS108/AB/R; Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) (adopted 23 March 2012) WT/DS353/R, para 7.120; Appellate Body Report, *United States—FSC—Recourse to Article 21.5 of the DSU* (adopted 29 January 2002) WT/DS108/AB/RW, para 91; Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) (adopted 23 March 2012) WT/DS353/AB/R.

[193] Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea ('US – DRAMS'*) (adopted 20 July 2005) WT/DS296/AB/R, paras 110–11.

[194] Di Comite (n 33) 245; Dukgeun Ahn, 'Why Reform Is Needed: WTO "Public Body" Jurisprudence' (2021) 12 Global Policy 61.

[195] See generally Legal Affairs Division, *World Trade Organization, WTO Analytical Index: Guide to WTO Law and Practice* (3rd edition Cambridge University Press 2012).

[196] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ('US – AD/CVD') (adopted 25 March 2011) WT/DS379/AB/R, para 290.

[197] Alan Sykes, *The Law and Economics of International Trade Agreements* (Edward Elgar Publishing 2023) 365.

and immediately raise price or income. As a result, Article 1 SCM Agreement places greater emphasis on the nature of the government's action rather than its effects.[198]

b. Benefit

The SCM Agreement does not provide clear guidelines on what constitutes a benefit, leading to considerable controversy.[199] The AB addressed this issue in *Canada – Aircraft*, stating that a measure confers a benefit when the recipient is better off than it would have been in the absence of the subsidy.[200] The assessment of the benefit is made in relation to the marketplace, requiring a comparison between what the recipient received from the government and what it could have obtained under market conditions.[201] The presence of a benefit can be demonstrated in various ways. For instance, if a government action results in the foregoing of public revenue and the beneficiary incurs lower costs than it would under normal circumstances, the existence of a benefit becomes apparent. However, the assessment becomes more complex when the government's conduct involves a transfer of funds or the provision of goods or services, as it requires determining whether the beneficiary received a public contribution on more advantageous terms than those available in the market.[202] Consequently, to determine whether a measure constitutes a subsidy, it is crucial to evaluate whether the public or publicly directed financial contribution is provided under the same conditions that a private market player would offer. If the contribution is granted on equivalent terms,

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[198] Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (adopted 16 November 2012) WT/DS414/R, para 7.86; Rubini (n 8) 123.

[199] Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* ('US—Softwood Lumber IV') (adopted 17 February 2004) WT/DS257/AB/R, para 106; Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ('US – AD/CVD') (adopted 25 March 2011) WT/DS379/AB/R, paras 435–47; More recently, the Appellate Body has demanded caution in reaching the conclusion that governmental intervention discards in-country prices see Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* ('US – Countervailing Measures') (adopted 19 December 2014) WT/DS436/AB/R, paras 4.147–4.177; Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China* ('US – Countervailing Duties') (adopted 16 January 2015) WT/DS437/AB/R, para 4.85.

[200] Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft* (adopted 20 August 1999) WT/DS70/AB/R, para 157.

[201] Marco Slotboom, 'Subsidies in WTO Law and in EC Law: Broad and Narrow Definitions' (2002) 36 Journal of World Trade 517, 534-535.

[202] Appellate Body Report*, Canada—Measures Relating to the Feed-In Tariff Program* (adopted 24 May 2013) WT/DS426/AB/R ('*Canada – Renewable Energy/FIT'*); In *Canada—Renewable energy/FIT* both the Panel and the AB carried out an innovative construction of the notion of benefit. They essentially put into question the established 'market-orientation' of the benefit test and, at the same time, inserted the consideration of public policy objectives in the analysis of the benefit. After defining the relevant product market as including renewable (i.e. wind and solar) energy only, the AB introduced a distinction between government interventions that 'create' markets that would not otherwise exist - crucially, this is not subject to subsidy law scrutiny if certain conditions of proportionality are satisfied - and government interventions in support of certain players in markets that already exist, which would, by contrast, be fully subject to subsidy laws and market benchmarking; Luca Rubini, 'The Wide and the Narrow Gate: Benchmarking in the SCM Agreement after the *Canada–Renewable Energy/FIT* Ruling' (2015) 15 World Trade Review 211; Steve Charnovitz and Carolyn Fischer, 'Canada–Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies' (2015) 14 World Trade Review 177.

the measure does not constitute a subsidy.[203] Market-related benchmarks are also used to evaluate the benefit of governmental action, particularly in the context of CVD investigations. The calculation of a subsidy, specifically in terms of the benefit conferred, is addressed under Article 14 of the SCM Agreement. In *EC – Countervailing Measures on DRAM Chips*, the Panel highlighted that the benefit assessment must be conducted from the recipient's perspective rather than that of the provider.[204]

c. Specificity

Article 2 of the SCM Agreement introduces the concept of specificity in relation to measures classified as subsidies under Article 1. According to this provision, a measure is subject to the WTO provisions on actionable subsidies (Part II of the SCM Agreement) or countervailing measures (Part V) only if it is specific to an enterprise, industry, or group of enterprises or industries within the jurisdiction of the granting authority.[205] The rationale behind the specificity requirement is that when a subsidy is available to a broad group of companies or industries, it is less likely to cause distortions in the allocation and efficient use of resources. In such cases, the potential negative effects on international trade and competition are considered to be minimal, and therefore there is no need to subject these subsidies to WTO rules.[206]

Article 2(1) of the SCM Agreement sets out three principles for determining the specificity of a subsidy. The first principle, known as *de jure* specificity, applies when a measure restricts access to the subsidy to certain enterprises, as determined by the granting authority or the legislation governing its operation.[207] The second principle states that a subsidy is deemed not specific if it is granted based on objective criteria or conditions that are economic in nature and applied horizontally (e.g., the number of employees or the size of enterprises).[208] The third principle recognizes that, even if a subsidy is generally available and designed in a non-specific manner according to the law, it may still be considered specific if it is *de facto* applied to certain enterprises and not to others. In such cases, additional factors are taken into account, though not necessarily all at once. These factors include the limited use of a subsidy program by specific enterprises, the predominant use by certain

[203] Panel Report, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea* (adopted 3 August 2005) WT/DS299/R, para 7.175.
[204] See Coppens (n 18) 59-90; Mavroidis (n 22).
[205] Coppens (n 18) 39; It must be noted that prohibited subsidies, even if they are available to all enterprises, are subject to the discipline of Part II and V of the SCM Agreement.
[206] In the *US—Softwood Lumber IV* dispute Canada argued that a subsidy available to companies in 23 industries producing 200 separate products could not be specific. The Panel rejected the argument and held that measure was correctly found to be specific; Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada ('US—Softwood Lumber IV')* (adopted 17 February 2004) WT/DS257/AB/R.
[207] Article 2(1)(a) SCM Agreement; Claus-Dieter Ehlermann and Martin Goyette, 'The Interface between EU State Aid Control and the WTO Disciplines on Subsidies' (2006) 5 European State Aid Law Quarterly 695.
[208] Article 2(1)(b) SCM Agreement.

enterprises, the granting of disproportionately large subsidy amounts to certain enterprises, and the exercise of discretion by the granting authority in awarding the subsidy.[209]

The Panel in *US – Cotton* observed that specificity is a general concept and that its scope, whether broad or narrow, cannot be strictly defined in quantitative terms.[210] Instead, it must be assessed on a case-by-case basis. Moreover, the number of economic sectors benefiting from the measure in question is of lesser significance if the subsidy is not 'sufficiently broadly available throughout the economy.'[211]

d. Categories of subsidies

The SCM Agreement classifies subsidies into two distinct categories: prohibited subsidies and actionable subsidies, each governed by distinct substantive and procedural rules. A third category, non-actionable subsidies, was originally established under the agreement but expired on 1 January 2000.

1. Prohibited subsidies

Article 3 of the SCM Agreement, in its first paragraph, provides the definition of prohibited subsidies:

> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: subsidies contingent, in law or in fact, whether solely or as one of several conditions, upon export performance, including those illustrated in Annex I; subsidies contingent, whether solely or as one of several conditions, upon the use of domestic over imported products.

Prohibited subsidies, also known as red-light subsidies, are those granted contingent on export performance (export subsidies) or on the use of domestic goods instead of imported goods (import-substitution subsidies).[212] These subsidies are prohibited because they are considered inherently trade distorting and likely to harm other countries' trade interests. As a result, there is no need to demonstrate any adverse effects they create and once granted they must be withdrawn without delay.[213]

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[209] Article 2(1)(c) SCM Agreement; Van den Bossche and Zdouc (n 32) 870.
[210] Panel Report, *United States—Subsidies on Upland Cotton* (adopted 21 March 2005) WT/DS267/R.
[211] Ibid, para 7.1142.
[212] Lorenzo Rotunno and Michele Ruta, 'Trade Spillovers of Domestic Subsidies' (International Monetary Fund 2024) Working Paper 2024/041 https://www.elibrary.imf.org/view/journals/001/2024/041/article-A001-en.xml.
[213] As concerns export subsidies, Annex I to the SCM Agreement contains a non-exhaustive list; Illustrative List of Export Subsidies; Benitah (n 189) ch 3; Kyle Bagwell and Robert W Staiger, 'Strategic Export Subsidies and Reciprocal Trade Agreements: The Natural Monopoly Case' (1997) 9 Japan and the World Economy 491.

Article 3(1) of the SCM Agreement prohibits both *de jure* and *de facto* export contingent subsidies. The legal standard of the word 'contingent' is the same for both *de jure* and *de facto* contingency, with the difference lying in the evidence required to prove it.[214] A subsidy is considered *de jure* export contingent when the relevant legislation, regulation, or other legal instruments explicitly requires exportation as a condition to receive support.[215] Conversely, a subsidy is deemed *de facto* export contingent if the facts demonstrate that it is tied to actual or anticipated exportation or export earnings, as stated in footnote 4 of the SCM Agreement. Therefore, merely granting a subsidy to an export-oriented company does not automatically qualify it an export subsidy.[216] Regarding import-substitution subsidies, Article 3(1)(b) of the SCM Agreement defines them as subsidies contingent upon the use of domestic products instead of imported ones.[217]

2. Actionable subsidies

The second category of subsidies is known as actionable subsidies, or yellow-light subsidies. Unlike prohibited subsidies, actionable subsidies are not defined by their nature but by their effects. A subsidy is considered actionable when it causes adverse effects to the interests of another WTO member. However, if it does not result in adverse effects or if these effects are eliminated, it is permissible.[218] Article 5 identifies three types of conduct that may lead to adverse effects: (a) injury to the domestic industry of another member; (b) nullification or impairment of benefits accruing directly or indirectly to other members under the GATT 1994; or (c) serious prejudice to the interests of other members.[219]

Article 6 of the SCM Agreement contains detailed rules governing the circumstances under which serious prejudice may be determined.[220] In particular, Article 6(3) of the SCM Agreement establishes that serious prejudice, which must be assessed by the complaining member, can take various forms. Specifically, it may: 'displace or impede imports of a like product of another member into the market of the subsidizing Member;' or 'displace or impede exports of a like product of another Member from a third country market;' or cause 'a significant price undercutting of the subsidized product as compared with the price of a like product of another Member', or 'significant

[214] As expressed by the Appellate Body in *Canada-Aircraft*; Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft* (adopted 20 August 1999) WT/DS70/AB/R.
[215] Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft* (adopted 1 June 2011) WT/DS316/AB/R, paras 1036 et seq.
[216] According to the Panel in the *Australia - Automotive Leather* case, the fact that a member is aware that its domestic market is too small to absorb domestic production of a subsidized product may indicate that the subsidy is granted on the condition that the product is exported; Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather* (adopted 16 June 1999) WT/DS126/R; Sykes (n 197) 386.
[217] Art 3(1)(b) SCM Agreement.
[218] See Marc Benitah, *The WTO Law of Subsidies: A Comprehensive Approach* (Kluwer Law International 2019) ch 5.
[219] Sykes (n 197) 396.
[220] Under Article 6(1) SCM Agreement, for a five-year period expiring in 1999, certain subsidies were deemed to result in serious prejudice. This provision has now lapsed and has not been revived.

price suppression, price depression, or lost sales in the same market;' and 'increase in the world market the share of the subsidizing Member in a particular subsidized primary product'.[221]

3. Non-actionable subsidies

The third category of subsidy identified by the SCM Agreement was non-actionable subsidies, or green light subsidies. These subsidies were regulated by Article 8 of the SCM Agreement, which established that certain subsidies, even if they were specific and caused one of the harms outlined in Articles 5 and 6, were deemed unlikely to cause adverse effects on trade. The subsidies covered under Article 8(2) of the SCM Agreement included specific R&D subsidies, as well as certain regional and environmental subsidies. Consequently, if the criteria outlined in Article 8 of the SCM Agreement were met, these subsidies were exempt from challenges under the SCM Agreement.[222] It is important to stress two additional points in this regard. First, for a subsidy to qualify as non-actionable, it needed to be officially notified to the WTO; failure to do so would render the measure subject to challenge. Second, according to Article 9 of the SCM Agreement, even if a subsidy fell within the non-actionable category, it could still be subject to scrutiny if it resulted in adverse effects.[223]

As previously mentioned, the non-actionable subsidies category was initially established for a limited five-year period. In the absence of an agreement to extend or amend it, the category expired at the end of 1999.[224] Due to this, if such subsidies are specific, they are now regarded as actionable subsidies.[225] The reasons for the expiration of this category remain unclear, but one possible explanation is the concern among developing countries that subsidizing members might use environmental measures as a pretext for advancing industrial policies.[226]

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[221] Art 6(3) SCM Agreement; This assessment, just like the 'injury' analysis, may be usefully contrasted with the 'distortion of competition' and 'effect on trade' requirements, characteristic of the EU notion of state aid, which, as it will be explained in section 2 on Eu state aid of this chapter, are usually presumed to exist when the other requirements of the notion of state aid are satisfied; Sykes (n 41) 15.

[222] This system was analogous to the block exemptions system under EU state aid law. A stark difference between the two systems is the fairly limited scope of the WTO exceptions, when compared to the current broad array of EU justifications.

[223] Sykes (n 41) 16.

[224] Similar to the provision addressing subsidies presumed to cause serious prejudice (Article 6(1) SCM Agreement).

[225] Calls for reform of subsidy rules have been numerous in recent years; see Elena Cima and Daniel C Esty, 'Making International Trade Work for Sustainable Development: Toward a New WTO Framework for Subsidies' (2024) 27 Journal of International Economic Law 1.

[226] Coppens (n 18) 187-189; John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 2000).

3. EU STATE AID

This section explores the notion of state aid under EU law, analyzing its key elements – state resources, advantage, selectivity, distortion of competition, and effect on trade between member states – while examining how their interpretation has evolved through relevant case law. Article 107(1) of the TFEU establishes that:

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market.[227]

Hence, for a measure to qualify as aid, it must: (i) entail an effective burden on the state or a public authority (granted by the state or through state resources); (ii) confer an advantage to the beneficiary (advantage); (iii) favor certain undertakings (selectivity); (iv) strengthen the position of the undertaking in the market (distortion of competition); and (v) have an actual or potential effect on the internal market (effect on trade between member states).[228] While Article 107(1) TFEU establishes a general prohibition, the abovementioned criteria are cumulative, meaning that if any one of them is not satisfied, the measure cannot be considered state aid. The EU state aid regulatory framework also recognizes that national interventions can be beneficial and should, in certain cases, be safeguarded. As a result, the assessment of whether a measure distorts competition between member states must take into account not only the four criteria of Article 107(1) TFEU, which are to be interpreted on the basis of objective factors, but also the subjective elements outlined in paragraphs 2 and 3 of Article 107.[229]

a. State resources

The first 'gatekeeper' criterion for qualifying a measure as state aid under EU law is that it must come from state resources and be imputable to the state.[230] According to CJEU case law, the concept of 'granted by the state or through state resources' entails a direct or indirect transfer of state resources

[227] Article 107(1) TFEU; see Gustavo E Luengo Hernández De Madrid, 'Conflicts Between the Disciplines of EC State Aids and WTO Subsidies: Of Books, Ships and Aircraft' (2008) 13 European Foreign Affairs Review 1.

[228] 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' [2016] OJ C262/1; Case 30/59, *Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* ECLI:EU:C:1961:2; see Kelyn Bacon, *European Union Law of State Aid* (3rd edn, Oxford University Press 2017) ch 2; Richard Plender, 'Definition of Aid' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004).

[229] Andrea Biondi, 'State Aid Is Falling down, Falling down: An Analysis of the Case Law on the Notion of Aid' (2013) 50 Common Market Law Review 1719,1723; Francesco Dal Pozzo Rossi, *Codice degli aiuti di Stato* (Giappichelli 2019) 223.

[230] Andrea Biondi, 'Some Reflections on the Notion of "State Resources" in European Community State Aid Law' (2006) 30 Fordham International Law Journal 1426.

to an undertaking, creating a financial burden on public finances. However, imputability cannot simply be presumed; it must be demonstrated based on objective factors that establish a clear connection to the state.

There are two interpretations of this criterion. According to the first approach, the two requirements must be considered separately. The second approach suggests that they should be assessed together. Over time, the reasoning of the CJEU has evolved through its decisions, and sometimes it seems that there was no consistency in what it had decided.[231] For instance, in *Italy v Commission*, the CJEU held that funds financed through compulsory charges imposed by state legislation and managed in accordance with that legislation could qualify as state resources, even if handled by entities separate from public authorities.[232] Subsequent case law continued to interpret the two criteria set out in the treaty's definition of state aid – granted by the state or through state resources – as alternatively sufficient. However, this interpretation evolved in the *Sloman Neptun* case, where the CJEU required a closer connection between the state's actions and the use of state resources, thereby narrowing the scope of the state aid definition.[233] The CJEU thereafter held that only advantages granted directly or indirectly through state resources are to be regarded as state aid within the meaning of the TFEU. The *PreussenElektra v Schleswag* case marked another significant development.[234] The CJEU ruled that Germany's law, which required private undertakings to purchase electricity generated from renewable sources within their supply area at a fixed price above market value, did not constitute state aid. The CJEU pointed out that the measure did not involve a direct or indirect transfer of state resources, as the financial burden was borne entirely by private electricity supply undertakings rather than public finances. This decision reflected the cumulative approach, which required both state intervention and a financial burden on state resources for a measure to qualify as state aid. Therefore, the CJEU clarified that the mere imposition of obligations by national law does not suffice, the measure must also entail a transfer of resources constituting a burden on public finances.[235] The *Stardust Marine* case, on the other hand, addressed whether the resources of publicly owned undertakings could automatically be considered state resources.[236] The CJEU clarified that the key criterion is whether the state, by exercising its predominant influence over such undertakings, is capable of directing the use of their resources to finance specific advantages in favor of other undertakings. Even if the funds in question are not held by the treasury, they can still qualify as state resources if they remain under public control and are available to national authorities. However, the CJEU emphasized that imputability cannot be presumed

[231] Case 82/77, *Kingdom of the Netherlands v van Tiggele* ECLI:EU:C:1978:10; Case 290/83, *Commission of the European Communities v French Republic* ECLI:EU:C:1985:37; Case C-189/91, *Petra Kirsammer-Hack v Sidal GmbH* ECLI:EU:C:1993:907.
[232] Case 173/73, *Italian Republic v Commission of the European Communities* ECLI:EU:C:1974:71.
[233] Cases C-73/91, *Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* ECLI:EU:C:1993:97; Slotboom (n 201) 523.
[234] Case C-379/98, *PreussenElektra AG v Schleswag AG* [2001] ECLI:EU:C:2001:160; Case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* ECLI:EU:C:2009:124.
[235] Slotboom (n 201) 528-530.
[236] Case C-482/99, *French Republic v Commission of the European Communities* ECLI:EU:C:2002:294.

automatically, even when the state has the ability to control a public undertaking. The imputability of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was adopted.[237] Other relevant indicators for determining whether an aid measure taken by a public undertaking is imputable to the state include the undertaking's integration into the structures of the public administration, the nature of its activities, whether those activities are carried out under normal market conditions in competition with private operators, and the legal status of the undertaking.[238] The *Bouygues* case further refined the understanding of the notion of state aid.[239] The CJEU asserted that a sufficiently direct link must exist between, on the one hand, the advantage granted to the beneficiary and, on the other, a reduction of the state budget or a sufficiently concrete economic risk of burdens on that budget. However, it is not necessary for such a reduction or risk to correspond or be equivalent to the advantage granted, nor must the advantage have as its counterpart such a reduction or risk, or be of the same nature as the commitment of state resources from which it derives. Even measures that reduce burdens on businesses without directly involving public funds may qualify as state aid if they produce equivalent effects. The interesting fact is that the CJEU has adopted a broader notion of state aid, basing its reasoning on an effects-based approach. In particular, it stated that the measure must be assessed as a whole, and that the advantage granted and the commitment of state resources shall be analyzed pragmatically.[240]

If one were to summarize 15 years of EU case law in a few sentences, it would be as follows: when aid is paid from the budget of a public authority, there is both state control and attribution to the state; when aid is paid by a company owned or controlled by the state or a state agency, there is state control, but there may not be attribution to the state if the company or the agency acts independently of the state; when aid is paid by third parties compelled to do so by the state and it transits through a channel set up by the state, there is both state control and attribution to the state, regardless of whether that channel is managed or operated by a private entity; when aid is paid by third parties compelled to do so by the state and transits through a channel that has not been set up

[237] Case C-206/06, *Essent Netwerk Noord BV and others v Aluminium Delfzijl BV and others* ECLI:EU:C:2008:413. This case concerns a dutch law providing a surcharge on the price for electricity to pay certain stranded costs, which are some investment costs that cannot be recovered after the liberalization. These surcharges, levied by net operators from customers, were paid to a private company that was entitled by the law to transfer them to four private regional generating companies. Even though the mechanism is quite complex, the CJEU noticed that the burden is not directly on the private undertaking, in this case, there is a moment in which the money is in public hands (public control) and it cannot be used for other purposes, so the outcome is the same; the CJEU ruled the incompatibility of such method with the Treaties.

[238] Biondi (n 229) 1726-1729.

[239] Joined Cases C-399/10 P and C-401/10 P, *Bouygues SA and Bouygues Télécom SA v European Commission and Others* ECLI:EU:C:2013:175

[240] Marie Walter, 'One Year into the State Aid Modernisation Initiative: Proceedings of the 11th EStALI Experts' Forum, Brussels, 6-7 June 2013' (2013) 12 European State Aid Law Quarterly 757, 759.

or otherwise controlled by the state, there is no state control, even though the measure is attributed to the state.[241]

b. Advantage

The second condition is that the measure must provide the beneficiary with an economic advantage that they could not have obtained under normal business conditions.[242] The relevant benchmark for assessing this advantage is not merely a hypothetical 'ideal' market investor whose actions can be measured econometrically. Rather, its effective use lies instead in the necessity of carrying out a comparison between the state's actions with those of a private market investor (referred to as the 'market economy operator principle', or MEOP) under market circumstances as close as possible to those surrounding the measure in question.[243] It follows that if the state has acted as a private investor when implementing the measure, it would not be considered an advantage. However, the CJEU has gradually shifted its approach, focusing more on whether the measure passes an 'economic rationality test' rather than solely relying on the private market investor's behavior. This test evaluates whether the measure would be deemed acceptable by a private investor and whether it enhances the likelihood of recovering the injected capital.[244]

[241] Case C-329/15, *ENEA S.A. v Prezes Urzędu Regulacji Energetyki* ECLI:EU:C:2017:671; Joined Cases T-98/16, T-196/16, and T-198/16, *Italian Republic and Others v European Commission* ECLI:EU:T:2019:167*;* The requirement of imputability gained a lot of importance if we compare this approach to the previous ones in which it was quasi automatically satisfied.

[242] See Julie Bousin and Juan J Piernas López, 'Developments in the Notion of Selectivity' (2008) 7 European State Aid Law Quarterly 634; Bousin and Piernas, 'Developments in the notion of selectivity', 4 *European State Aid Law Quarterly* (2008) 634; Andreas Bartosch, 'Is there a need for a rule of reason in European State Aid law?: Or how to arrive at a coherent concept of material selectivity?' (2010) 47 Common Market Law Review 729; José Luís da Cruz Vilaça, 'Material and Geographic Selectivity in State Aid – Recent Developments: A Personal View' (2009) 8 European State Aid Law Quarterly 443.

[243] Case C-480/98, *Kingdom of Spain v Commission of the European Communities* ECLI:EU:C:2000:559; Case T-296/97, *Alitalia-Linee Aeree Italiane SpA v Commission* [2000] ECR II-387; Joined Cases C-71/09 P, C-73/09 P, and C-76/09 P, *Comitato 'Venezia vuole vivere' and Others v European Commission* ECLI:EU:C:2011:368; Richard Plender QC, 'Definition of Aid' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), The Law of State aid in the European Union (Oxford University Press 2004); Joined Cases T-268/08 and T-281/08, *Land Burgenland and Republic of Austria v European Commission* ECLI:EU:T:2012:90.

[244] Case C-224/12 P, *European Commission v Kingdom of the Netherlands and ING Groep NV* ECLI:EU:C:2014:213, para 213; Nicole Robins and Laura Puglisi, 'The Market Economy Operator Principle: An Economic Role Model for Assessing Economic Advantage' in Leigh Hancher and Juan Jorge Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021) 15.

c. Selectivity

Selectivity relates to the economic advantage granted to specific undertakings[245] or a class of undertakings.[246] It can be categorized into two types: material selectivity and geographic (or territorial) selectivity. Material selectivity, as outlined in Article 107, refers to the favoring of 'certain undertakings or the production of certain goods.'[247] This aspect is particularly important in the field of taxation, as the distinction between a general measure and a selective tax is not always straightforward. Geographic or territorial selectivity, on the other hand, applies to measures that benefit only a limited territorial or regional area within a member state. A measure is not considered territorially selective if it applies uniformly across the entire territory of a member state. In other words, the selectivity assessment considers the member state as a whole, and requires an evaluation of whether the measure is selective when compared to the rest of the system.[248]

Selectivity can manifest in different ways. *De jure* selectivity arises when legal provisions explicitly designate specific beneficiaries. *De facto* selectivity occurs when provisions, while appearing to apply universally, in practice benefit only certain undertakings.[249]

Article 107 TFEU does not distinguish between different forms of state intervention based on their underlying causes or objectives but rather assesses them in relation to their effects.[250] As consistently reiterated by the CJEU, the fact that a measure benefits a large number of undertakings or applies across various economic sectors does not, in itself, negate its selective nature.[251]

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[245] State aid rules only apply if the recipient is an undertaking which, according to the settled case law of the CJEU, means any entity engaged in an economic activity, i.e. in any activity consisting in offering goods and/or services in a given market, see Case 118/85, *Commission of the European Communities v Italian Republic* ECLI:EU:C:1987:283, para 2610; In C-74/16 *Congregación de Escuelas Pias*, the CJEU explained that the concept of 'undertaking' covers any entity engaged in economic activity, regardless of its legal status and the way in which it is financed. It follows that the public or private status of the entity engaged in the activity in question has no bearing on the question as to whether or not that entity is an 'undertaking'. Any activity consisting in offering goods or services on a given market is an economic activity. There could be also situations in which the undertaking runs more than one activity, and so it makes it necessary to distinguish between economic and non-economic activities, underlining how such activities are carried out and especially how they are funded (Case C-82/01 P, *Aéroports de Paris v Commission of the European Communities* ECLI:EU:C:2002:617).

[246] Vittorio Di Bucci, 'Comments on the Paper Selectivity, Economic Advantage, Distortion of Competition and Effect on Trade' in Jacques Derenne and Massimo Merola (eds), *Economic analysis of State aid rules - contributions and limits, Proceedings of the third annual conference of the Global Competition Law Centre, College of Europe, 21-22 September 2006* (Lexxion 2007) 157; see Juan Jorge Piernas López, 'The Notion of State Aid and Regulation in the EU: Drawing the Shape of a Moving Target' (2010) 2 Cuadernos De Derecho Transnacional 173-201.

[247] Art 107(1) TFEU.

[248] Case C-88/03, *Portuguese Republic v Commission of the European Communities (Azores case)* ECLI:EU:C:2006:511.

[249] 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' [2016] OJ C262/1, para. 121; Andrea Biondi and Oana Stefan, 'The Notice on the Notion of State Aid: Every Light Has Its Shadow' in Bruno Nascimbene and Alessia Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development* (Springer International Publishing 2018) 58.

[250] Case 173/73, *Italian Republic v Commission of the European Communities* ECLI:EU:C:1974:71.

[251] See Cases C-20/15 P, *European Commission v World Duty Free Group SA and Others* ECLI:EU:C:2016:981

The *Adria Wien* judgment affirmed that the correct test for selectivity follows a three steps approach.[252] The initial step involves identifying the objective of the measure and describing the normal or standard framework (benchmark) within which the measure operates. The second step entails comparing undertakings that are in the same legal or factual situation and explaining why they are treated differently.[253]According to Buendia, this is the most critical stage of the selectivity test, as it fundamentally determines whether a measure is selective. In fact, when applied rigorously, it may render the third step unnecessary. The third step concerns examining whether the differential treatment can be justified by the logic of the provision. At this stage, the burden of proof rests with the member state, which must demonstrate that the measure is justified by specific factors and aligns with the general scheme of the system.[254]

As regards the first step, in *British Aggregates*, the CJEU stressed that member states cannot, at the stage of defining the scope of the notion of aid, do what they are permitted to do at the level of justifications.[255] The CJEU further clarified that no distinction is made between the causes or objectives of a measure, as state aid is defined solely by its effects.[256] Similarly, in *Netherlands v Commission,* the CJEU held that environmental concerns are not relevant when determining the existence of aid under Article 107(1) TFEU.[257] Instead, such considerations are pertinent when assessing the compatibility of state aid under Article 107(3) TFEU. This ruling is significant as it clarified that selectivity does not necessarily result only from arbitrary differentiation; it can also arise from objective and reasonable distinctions between undertakings in comparable situations.[258]

As regards the second step, in *Italian Coops*, Italy enacted a law providing corporate tax rebates to cooperatives operating in specific sectors.[259] The CJEU observed that cooperatives are not in a comparable factual and legal situation to that of commercial companies: while commercial companies are characterized by a profit-oriented aim and a corporate structure, cooperatives focus on mutual assistance and lack such a corporate structure. As a result, the CJEU ruled that fiscal exemptions of this kind can be justified by the nature or general scheme of the national tax system, provided that they form an inherent part of the essential principles of the tax system applicable in the member state concerned and comply with the principles of consistency and proportionality.[260]

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[252] Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* ECLI:EU:C:2001:598.

[253] Phedon Nicolaides and Ioana Eleonora Rusu, 'The Concept of Selectivity: An Ever Wider Scope' (2012) 11 European State Aid Law Quarterly 791; John Temple Lang, 'The Gibraltar State Aid and Taxation Judgment – A "Methodological Revolution"?' (2012) 11 European State Aid Law Quarterly 805.

[254] Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* ECLI:EU:C:2001:598.

[255] Case C-487/06 P, *British Aggregates Association v Commission of the European Communities and United Kingdom* ECLI:EU:C:2008:757.

[256] The CJEU cited the complemented formula in subsequent cases, such as Joined Cases C-106/09 P and C-107/09 P, *European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, para 87.

[257] Case C-279/08 P, *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2011:551, para 51

[258] Ibid.

[259] Joined Cases C-78/08 to C-80/08, *Ministero dell'Economia e delle Finanze and Others v Paint Graphos Società Cooperativa arl and Others* ECLI:EU:C:2011:550.

[260] Francesco Rossi Dal Pozzo, *Codice degli aiuti di Stato* (Giappichelli 2019) 1080.

As regards the third step, in *EC v World Duty Free and Banco Santander*, the CJEU stated that, to classify a national tax measure as selective, the Commission must first identify the ordinary or 'normal' tax system applicable in the member state concerned.[261] It must then demonstrate that the tax measure in question constitutes a derogation from that ordinary system, insofar as it differentiates between operators who, in light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation.[262]

Recent case law reveals a gradual departure from the traditionally broad scope attributed to the effects-based definition of aid.[263] This shift is particularly evident in the CJEU's approach to fiscal aid cases, as illustrated in the *Fiat*, *Hungary*, and *Poland* judgments.[264] Advocate General Kokott has argued that EU institutions should only verify whether member states have acted consistently and non-abusively in exercising their fiscal sovereignty.[265] However, this perspective risks creating a quasi-presumption of non-aid in fiscal measures, limiting the Commission's powers in state aid enforcement and reinforcing member states' autonomy in tax matters.[266]

d. Effect on trade and distortion of competition

The final two conditions for a measure to qualify as state aid are often referred to as 'negative conditions', as they are relatively easy to satisfy.[267] The distortion of competition condition is met when a state measure has the potential to enhance the competitive position of the recipient in comparison to other competing undertakings.[268] As for the effect on trade, it is sufficient to demonstrate that the aid could impact trade between member states, without the need to establish any specific threshold or percentage below which such an impact would be deemed negligible.[269] The CJEU underlined that even a relatively small amount of aid or the modest size of the recipient undertaking does not automatically exclude the possibility of affecting trade between member states.[270] In *Escuelas Pías Betania,* the CJEU reiterated that, to classify a national measure as state

[261] Cases C-20/15 P, *European Commission v World Duty Free Group SA and Others* ECLI:EU:C:2016:981.
[262] Rossella Miceli, 'La funzione degli aiuti di Stato europei nella fiscalità del XXI secolo' (2021) 11 Studi Tributari Europei 18.
[263] Case C-702/20, *SIA "DOBELES HES"* ECLI:EU:C:2023:1, para 73.
[264] Joined Case C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europe and Ireland v European Commission* ECLI:EU:C:2022:859; Case C-562/19 P, *European Commission v Republic of Poland* ECLI:EU:C:2021:201; Case C-596/19 P, *European Commission v Hungary* ECLI:EU:C:2021:202.
[265] AG Kokott Opinion in Case 169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna,* paras 127-128.
[266] Piernas López (n 72) 1648; Ruth Mason, 'Tax Competition and State Aid' (2023) 42 Yearbook of European Law 262, 263; see also Claire Micheau, *State Aid, Subsidy and Tax Incentives Under EU and WTO Law* (Kluwer Law International 2014) Ch 4.
[267] Case C-172/03, *Wolfgang Heiser v Finanzamt Innsbruck* ECLI:EU:C:2005:130
[268] Biondi and Righini (n 55).
[269] Case C-142/87, *Kingdom of Belgium v Commission of the European Communities* (Tubemeuse) ECLI:EU:C:1990:125; Joined Cases C-278/92, C-279/92 and C-280/92, *Kingdom of Spain v Commission of the European Communities* ECLI:EU:C:1994:325
[270] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* ECLI:EU:C:2003:415; Michael Sánchez-Rydelski, *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (Cameron May 2006) 55.

aid, it is not necessary to prove that the aid has an actual effect on trade between member states or that competition is actually being distorted. Instead, it is sufficient to demonstrate whether the aid is capable of affecting trade and distorting competition. Specifically, when aid granted by a member state strengthens the position of certain undertakings compared to others competing within the internal market, trade must be regarded as affected. Notably, the beneficiary undertakings do not need to engage directly in trade between member states. Where a member state grants aid to undertakings, their internal activity may be sustained or increased as a result, thereby reducing the opportunities for undertakings established in other member states to access the market of that member state.[271] The CJEU also stressed that the Commission should adopt a more proactive role in identifying sectors and measures that should not to be considered as aid because they are irrelevant to the internal market (a form of *de facto* filtering).[272]

e. Compatibility

Prima facie, every state aid measure is considered unlawful. However, the Commission may approve a measure under specific circumstances, allowing a distinction to be drawn between 'good' and 'bad' state aid. The Commission's assessment follows a two-step approach. It first determines whether the measure qualifies as state aid according to Article 107(1) TFEU. Then, if the measure is deemed state aid, the Commission assesses its compatibility with the internal market in accordance with Articles 107(2) and 107(3) TFEU.[273] In particular, Article 107(2) of the TFEU allows the Commission to:

> declare that specific State aid measures are compatible with the internal market. The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the European Commission, may adopt a decision repealing this point.[274]

Moreover, according to Article 107(3) of the TFEU:

> The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of

[271] Case C-74/16, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe (Escuelas Pías Betania)* ECLI:EU:C:2017:496
[272] See Biondi and Stefan (n 249) 55-56.
[273] Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2012) ch 2.2.
[274] Art 107(2) TFEU.

aid as may be specified by decision of the Council on a proposal from the European Commission.[275]

It follows that under Article 107(2) TFEU, the Commission must authorize the aid once it has determined that the measure falls under one of the listed categories. By contrast, Article 107(3) TFEU only provides that the different categories of aid listed may be authorized.[276] The assessment of compatibility under Article 107(3) has evolved significantly over the years. It consists of determining whether the aid is aimed at a well-defined objective of common interest; and of conducting a 'balancing test' to determine whether the proposed aid is a well-designed instrument to deliver that objective.[277] In *Philip Morris*, the CJEU explained that the compatibility of the aid in question must be determined in the context of the EU as a whole, rather than from the perspective of an individual member state.[278] However, recent decisions may signal a shift in the approach taken over the past two decades where member states have increasingly aligned their aid measures with horizontal EU objectives.[279] In the *Hinkley* judgment, through its textual interpretation of Article 107(3)(c) TFEU, the CJEU conveys an important 'teleological message' regarding the primary role of the Commission in state aid control.[280] It underlined that the Commission, as the enforcer of state aid rules, must ensure that 'the application of the State aid rules must never result in an outcome that contradicts the specific provisions of the Treaty or the general principles of Community law, such as the principle of equal treatment.'[281] This interpretation may limit the Commission's capacity to promote 'good aid' by directing member states' resources toward objectives of common interest. This is particularly relevant at a time when the Commission appears eager to guide national funding toward digital and green transitions and to promote the Green Industrial Plan through the relaxation of the EU state aid rules.[282]

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[275] Art 107(3) TFEU.
[276] Ehlermann and Goyette (n 207).
[277] Michael Blauberger, 'Of "Good" and "Bad" Subsidies: European State Aid Control through Soft and Hard Law' (2009) 32 West European Politics 719; see Cini and Szyszcak (n 58).
[278] Case 730/79, *Philip Morris Holland BV v Commission of the European Communities* ECLI:EU:C:1980:209, para 26; Cristina Schepisi, 'La Valutazione Della Compatibilità Di Un Aiuto Di Stato. Alcune Riflessioni Sulla Discrezionalità e Sui Limiti Della Commissione' (2019) 19 Rivista della Regolamentazione dei Mercati https://www.rivistadellaregolazionedeimercati.it/aiuto-di-Stato-discrezionalita; Stig Eidissen, 'Common Interest as a Condition for State Aid Compatibility' (2020) 19 European State Aid Law Quarterly 452, 454.
[279] Case C-594/18 P, *Republic of Austria v European Commission* ECLI:EU:C:2020:742; Case C-284/21 P, European Commission v Braesch and Others ECLI:EU:C:2023:58, para 96; Case T-177/07, *Mediaset SpA v European Commission* ECLI:EU:T:2010:233, para 125; Leigh Hancher, 'Euratom, State Aid and Environmental Protection: Hinkley Point' (2021) 58 *Common Market Law Review* 1491,1522.
[280] Juan Jorge Piernas López, 'The COVID-19 State Aid Judgments of the General Court … Every Man for Himself? Cases T-238/20 and T-259/20 *Ryanair v Commission*' (2021) 20 European State Aid Law Quarterly 258, 269.
[281] Case T-238/20, *Ryanair DAC v European Commission* ECLI:EU:T:2021:91, paras. 68–69; See Case C-113/00, *Kingdom of Spain v Commission of the European Communities* ECLI:EU:C:2002:507, para 67.
[282] Piernas López (n 72) 1629-1631; Leigh Hancher and Antonios Bouchagiar, 'Hinkley Point C: Trimming the SAM, While Extending the Reach of Wider EU Law Infringements?' (2021) 20 European State Aid Law Quarterly 529; See also Buendía (n 71).

To ensure a consistent and transparent decision-making process under Article 107(3) TFEU, the Commission has developed both binding legal instruments, as well as soft law instruments, such as guidelines, notices, and communications.[283]

Among the most significant exemptions to state aid rules are the *De minimis* Regulation and the GBER. The *de minimis* rule exempts small amounts of assistance that can be determined in advance (i.e., less than EUR 200,000 per business over three years) from state aid control.[284] Similarly, the GBER provides exemptions from the general prohibition on state aid for specific types of aids that are deemed less likely to distort competition.[285] These aids encompass various areas such as aid for supporting small and medium-sized enterprises in addressing market failures, promoting research, development, and innovation, facilitating employment and training for disadvantaged residents and workers with disabilities, fostering investment and employment in less developed regions of the EU, investing in local infrastructure and broadband, promoting environmental protection and climate change mitigation, supporting cultural heritage conservation, and providing assistance in response to natural disasters. Thus, if a subsidy falls within one of these exemptions, it can be granted without prior notification, reducing the administrative burden and allowing the Commission to focus on cases which are more likely to cause serious distortion of competition.[286] Today, more than 90 percent of new state aid measures are not subject to *ex ante* control by the Commission. As state aid experts have noted '[b]ecause of the increased scope of the GBER, the Commission moves from an ex ante approach to an ex post approach.'[287]

As part of the SAM initiative, the Commission has further elucidated the principles that guide its assessment of aid measures. It has codified seven common principles that are applicable to the compatibility evaluation of all types of aid. These common principles include ensuring that the aid serves a common interest objective while addressing a market failure, assessing the necessity of the aid, verifying its incentive effect, ensuring proportionality, avoiding undue negative effects on competition and trade, and promoting transparency.[288]

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[283] Phedon Nicolaides, 'A Critical Review of the Commission Notice on the Notion of State Aid' (2016) 23 Maastricht Journal of European and Comparative Law 842.

[284] This threshold is lower in two sectors, namely, in the road transport sector it is less than €100,000, and for agriculture it is less than EUR 15,000. Also a Services of General Economic Interest (SGEI) de minimis Regulation was adopted for compensation granted to SGEI providers which does not exceed EUR 500,000 over any period of three fiscal years. Recent Commission proposals aim to increase the general de minimis ceiling to EUR 275,000 and the SGEI de minimis ceiling to EUR 650,000. References to the consultations open for the review of the *de minimis* rules can be found at competition-policy.ec.europa.eu/public-consultations/2023-sgei_en.

[285] Since the disappearance of the concept of non-actionable subsidies, the SCM Agreement recognizes no exception to its disciplines on the basis of the objectives of a measure.

[286] Biondi (n 129) 9.

[287] Ramona Ianus, 'Aid Deemed to be Compatible with the Internal Market: The General Block Exemption Regulation (GBER)' in Herwig CH Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 329; Jerònimo Maillo, 'Balancing Environmental Protection, Competitiveness and Competition: A Critical Assessment of the GBER and the EEAG' (2017) 16 European State Aid Law Quarterly 4.

[288] 'Guidelines on national regional aid for 2007-2013 (Text with EEA relevance) *OJ C 54, 4.3.2006, p. 13–44*; see Phedon Nicolaides, 'A More Economic Approach to the Control of State Aid' in Bruno Nascimbene

A separate set of EU state aid rules applies to funding for Services of General Economic Interest SGEI.[289] Under EU law, SGEIs are economic activities that deliver outcomes for the overall public good that, in the absence of public intervention, would not be available at all or 'would not satisfy the standard in terms of quality, safety, affordability, equal treatment or universal access'.[290] Examples of SGEIs include: electricity supply, postal services, and social housing, among others. It is up to the public authorities to define which services they consider as SGEIs, which may vary across member states depending on their specific market conditions.[291] To exempt SGEIs from state aid rules, the following three conditions must be met. First, the public services must be clearly defined and explicitly entrusted to an undertaking that will provide the service. Second, the amount of compensation provided should be calculated using an objective methodology and should not exceed the costs incurred in providing the service. Finally, when selecting a provider for the service, a public tender process should be conducted.[292]

and Alessia Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development* (Springer International Publishing 2018) 63-74.

[289] Commission, 'European Union Framework for State Aid in the Form of Public Service Compensation' [2011] OJ C8/15.

[290] Ilze Jozepa, 'EU State Aid Rules and WTO Subsidies Agreement' (UK Parliament 2021) Research Briefing https://commonslibrary.parliament.uk/research-briefings/sn06775/.

[291] In any case, the Commission and the CJEU can find that the evaluation as SGEIs is wrong and distorts the level playing field for other EU member states' businesses.

[292] Elisabetta Righini, 'The Reform of the State Aid Rules on Financing of Public Services' (2012) 11 European State Aid Law Quarterly 3; See Erika Szyszczak, 'Services of General Economic Interest' in Bruno Nascimbene and Alessia Di Pascale (eds), *The Modernisation of State Aid for Economic and Social Development* (Springer International Publishing 2018) 91-121.

4. The TCA's substantive framework in comparison with WTO and EU law

This section focuses on the substantive framework under the TCA, providing a comparative analysis of the definition of a subsidy and the scope of subsidy control under the WTO, EU state aid, and the TCA. According to Article 363(1)(b) of the TCA, a subsidy is a form of financial assistance that:

> (i) arises from the resources of the Parties, including: (A) a direct or contingent transfer of funds such as direct grants, loans or loan guarantees; (B) the forgoing of revenue that is otherwise due; or (C) the provision of goods or services, or the purchase of goods or services; (ii) confers an economic advantage on one or more economic actors; (iii) is specific 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; and (iv) has, or could have, an effect on trade or investment between the Parties.[293]

Prima facie, the definition of subsidy in the TCA appears to align closely with that of the SCM Agreement. This resemblance can be partially attributed to the share use of the term subsidy in both agreements, in contrast to the EU distinct term of state aid.[294] Additionally, Article 363 TCA defines a subsidy as a form of 'financial assistance', encompassing 'a direct or contingent transfer of funds such as direct grants, loans, or loan guarantees', 'the forgoing of revenue that is otherwise due', or the 'provisions of goods or services or the purchase of goods or services'.[295] Similarly, Article 1 of the SCM Agreement defines a subsidy as 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 provisions of goods or services by the government or 'any form of income or price support'.[296] However, a deeper analysis reveals a stronger connection to the TFEU framework. Notably, the conditions set out in Article 363 TCA for determining the applicability of subsidy rules – namely state resources, advantage, specificity, and actual or potential effect on trade or investment between the parties – closely mirror to the criteria established in Article 107 TFEU. Indeed, under Article 107(1) TFEU, state aid rules apply when a measure is granted by the state or through state resources, confers an advantage, is selective, distorts competition, and affects trade between member states.[297]

[293] Art 363(1)(b) TCA.
[294] Kotsonis (n 183).
[295] Art 363 TCA.
[296] Art 1 SCM Agreement.
[297] Irene Agnolucci, 'The Extraterritorial Extension of EU State Aid Rules to the United Kingdom through the Trade and Cooperation Agreement and the Northern Ireland Protocol: A Comparison with the WTO Subsidy System' [2022] CLEER Papers 227, 236.

a. State resources

First, the TCA's reference to financial assistance that 'arises from the resources of the Parties' draws from the same terminology used in Article 107(1) TFEU, which describes a measure as being 'granted by the State or through state resources.' At the same time, it echoes Article 1 of the SCM Agreement, which refers to 'a transfer of economic resources'.[298] Whether adopting the EU or the WTO interpretation of this criterion has significant implications as while Article 107 TFEU 'granted by the State or through state resources' criterion necessitates a clear financial burden on the state or a *de facto* control, requiring an inquiry into both the origin and use of resources, Article 1 of the SCM Agreement does not impose such a requirement, allowing for a broader concept of subsidy. In particular, the SCM Agreement extends its scope to cases where a government 'entrusts or directs a private body to carry out one or more functions typically performed by the government,' even if such actions deviate from the usual governmental practices. If interpreted in line with EU law, the TCA's formulation would more effectively safeguard the regulatory autonomy of both the UK and the EU.[299]

b. Advantage

Second, Article 363(b)(ii) of the TCA requires that a subsidy must 'confer an economic advantage on one or more economic actors'. In this context, the term 'economic actors' should be interpreted as equivalent to the EU concept of undertaking, due to the fact that Article 363(b)(i)(c) TCA explicitly refers to 'the provision of goods or services, or the purchase of goods or services'.[300] Furthermore, the use of the term 'economic advantage' under the TCA mirrors the concept of 'economic advantage' as developed in the Commission's practice and case law of the CJEU. While conceptually similar, the SCM Agreement under Article 1(1)(b) only refers to the requirement of 'benefit', which has a narrower scope than the EU concept of advantage. This stems from the fact that under the WTO regime certain government measures, such as loans granted at market conditions, may not qualify as a benefit under WTO rules but could still fall within the broader EU definition of advantage.[301]

c. Specificity

Third, the TCA stipulates that a subsidy must be specific. Leaving aside the fact that the TCA once again adopts a WTO terminology, the TCA articulation of specificity closely aligns with the concept of selectivity under EU law.[302] This alignment is evident from Article 363(1)(b)(iii) of the TCA,

[298] Biondi and Howard (n 5) 393.
[299] Ibid; Ehlermann and Goyette (n 207).
[300] Biondi (n 181).
[301] Agnolucci (n 297) 237.
[302] Emily Lydgate and others, 'Taking Stock of the UK-EU Trade and Cooperation Agreement: Governance, State Subsidies and The Level Playing Field' (UK Trade Policy Observatory 2021) Briefing Paper 54

which states that a measure 'is specific 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'.[303] The TCA language reflects the interpretation of the CJEU on selectivity, which requires a legal and factual comparison between the undertakings affected by a given measure. Further reinforcing this parallel between the TCA and the EU regimes as concerns selectivity requirement, Article 363(2) of the TCA introduces detailed provisions on fiscal subsidies that extend beyond the definition of specificity in Article 2(2) of the SCM Agreement. The TCA sets a higher threshold, stating that a tax measure is specific if 'those economic actors are treated more advantageously than others in a comparable position within the normal taxation regime'.[304] This directly echoes EU jurisprudence on selectivity, which applies to undertakings in a comparable factual and legal situation.[305]

Furthermore, Article 363(2)(b) TCA provides circumstances under which a subsidy would not be considered specific. These justifications align with EU criteria for determining whether a tax measure is non-selective and include factors such as combating fraud or tax evasion, ensuring administrative manageability, avoiding double taxation, maintaining tax neutrality, preserving the progressive nature of income tax and its redistributive purpose, and respecting taxpayers' ability to pay. These conditions reflect the principles underpinning to the design of the general tax system, as outlined in the Commission's 2016 Notice on the Notion of Aid.[306]

The TCA's approach to specificity within taxation is a particularly noteworthy, given the UK government's historical reluctance to accept external scrutiny over its national fiscal policy. In practice, this provision could serve as a deterrent to future aggressive tax policies by either party. However, Article 373(5) of the TCA provides certain exemptions the obligation to recover unlawful subsidies, specifically shielding acts of the UK Parliament and EU legal acts adopted by the Council. As argued by Biondi, this creates a structural asymmetry between the two parties, as it is less likely that EU institutions would introduce tax benefit measures compared to the UK Parliament. As a result, the TCA grants additional protection to tax schemes embedded in UK primary legislation. This includes, for example, the UK Government's decision to extend tax reliefs already available in freeport sites to investment zones. Nevertheless, individual tax rulings and tax assessments can still be classified as individual subsidies and thus remain under the framework of Article 363 of the TCA.[307]

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https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-EU-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/ .

[303] Art 363(1)(b)(iii) TCA.

[304] Art 363(2)(a)(ii) TCA.

[305] See 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' [2016] OJ C262/1.

[306] See Joined Cases T-778/16 and T-892/16, *Ireland and Others v European Commission ('Apple case')* ECLI:EU:T:2020:338; Peretz (n 166).

[307] See The Special Tax Sites (Applicable Sunset Date) Regulations 2024 (SI 2024/574); Biondi and Howard (n 5) 394.

d. Effect on trade or investment between the parties

The fourth criterion, while sharing similarities with the corresponding provisions in the TFEU, introduces notable distinctions. In particular, the effect on trade requirement under the TCA imposes a significantly higher evidential threshold to demonstrate that the subsidy has, or could have, a negative impact on trade. Article 363(1)(b)(iv) of the TCA exempts subsidies that have 'no material effect on trade or investment'. In other words, a subsidy falls outside the scope of the TCA if it does not have a material effect on trade or investment. By contrast, EU state aid rules apply a lower threshold, requiring only that the aid may affect trade between member states, without the need to establish a specific threshold or percentage below which trade would be deemed unaffected.[308]

It is also important to note that the subsidy control commitments in the TCA focus specifically on addressing the potential impact of subsidies on trade or investment between the UK and the EU. They do not extend to the effects of a subsidy on the domestic competition of the party granting the subsidy. As a result, the TCA adopts a more targeted approach compared to the more comprehensive one taken by the EU state aid systems, which covers all measures that have the potential to distort or disrupt competition in the internal market. In this regard, the SCM Agreement does not contain specific references to assessing the adverse effect of subsidies on trade between its members.[309] Thus, to establish an actual or potential effect on trade, the parties must provide compelling evidence that the subsidy results in a significant negative impact. Article 374(5) of the TCA explicitly requires that such claims be substantiated with facts rather than mere allegations, conjecture, or remote possibilities. Moreover, any supporting evidence must be linked to identifiable goods, service suppliers, or other economic actors, including in cases involving subsidy schemes.[310]

e. Compatibility

There are notable similarities between the TCA and EU state aid rules also regarding the limitation of what qualifies as a subsidy. Article 364(4) TCA narrows the scope of a subsidy by specifying that Chapter 3 on subsidy control 'does not apply to subsidies where the total amount granted to a single economic actor is below 325,000 Special Drawing Rights over a period of three fiscal years', aligning with the general principles of compatibility outlined in Article 107 TFEU.[311] Notably, the threshold

[308] Nicolaides (n 151).
[309] At first sight, these requirements go beyond those of the WTO, potentially leading to certain EU measures not being classified as state aid while still qualifying as subsidies under the SCM Agreement. However, this appears to be more of a theoretical concern than a practical one as the Commission and EU courts have adopted a broad interpretation of the requirement. Moreover, it is difficult to envision a scenario where financial support that is either de minimis, does not impact trade between member states, or does not distort competition in the internal market would ever be subject to a WTO challenge; Biondi and Farley (n 50).
[310] Art 374(5) and (6) TCA.
[311] Art 364(4) TCA; Biondi (n 181) 174-175.

set in the TCA is approximately twice as high as the EU *de minimis* threshold of EUR 200,000 over the same period.

The TCA also excludes subsidies that serve as compensation to an economic actor carrying out tasks in the public interest, provided that the amount does not exceed 750,000 Special Drawing Rights over a three-fiscal year period. This provision demonstrates a strong link with EU law for two reasons. Firstly, the heading of Article 365 TCA, titled 'Services of public economic interest' bears resemblance to the words 'Services of General Economic Interest' (SGEI) under the EU state aid framework. Secondly, Article 365 TCA states that these types of subsidies are subject to Article 366 TCA, as long as applying of the principles outlined in that article does not hinder the economic actor from fulfilling their assigned tasks. This mirrors the provision in Article 106(2) TFEU, which provides that state aid rules do not apply where their enforcement would prevent an undertaking from performing SGEIs. In other words, under both frameworks, these subsidies are permissible if applying the subsidy rules would impede the economic actor from carrying out their duties.[312] In this case as well, the threshold set by Article 365(3) TCA is more generous than the *de minimis* threshold prescribed under EU state aid (EUR 500,000 over the same period), resulting in a broader scope of application for the TCA provisions.[313]

Other categories of subsidies are partially exempted from the TCA subsidy control regime, meaning they are subject to certain requirements but are not obligated to comply with specific provisions. One such category includes subsidies granted to compensate for damage caused by natural disasters or other exceptional non-economic occurrences (Article 364(3) TCA).These subsidies must meet transparency requirements outlined in Article 369 TCA, but they are exempt from the subsidy principles (Article 366 TCA), the conditions rendering a subsidy prohibited (Article 367 TCA), and cannot be subject to remedial measures (Article 374 TCA). However, these subsidies 'shall be targeted, proportionate, and effective' in addressing the specific economic emergency at hand.[314]

Certain types of subsidies are strictly prohibited, including: 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 from business failure, export subsidies, subsidies contingent upon the use of domestic content, and subsidies to financial institutions unless granted on the basis of credible restructuring plan or are 'limited to what is needed to ensure their orderly liquidation and exit from the market'.[315]

[312] Lydgate (n 302).
[313] Peretz (n 166).
[314] Art 364(3) TCA.
[315] Art 367(3) TCA.

Outside those categories, Article 366 of the TCA outlines a set of principles that must be adhered to in order to ensure that a subsidy does not violate the agreement.[316] These principles encompass:

> a) subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns ("the objective"); (b) subsidies are proportionate and limited to what is necessary to achieve the objective; (c) subsidies are designed to bring about a change of economic behavior of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided; (d) subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy; (e) subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means; (f) subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.[317]

These six principles represent the clearest example of EU influence within the TCA. The language used here is deeply embedded in EU law – particularly in the Commission's interpretation of Article 107(3) TFEU. Terms such as market failure, equity rationale, proportionality, and incentive effect exemplify this connection. More than merely reflecting the Commission's practice, the TCA establishes it as a benchmark for assessing the legality of subsidies. The impact on domestic regulatory autonomy is unmistakable: the Commission's approach to evaluating state aid compatibility has shaped the spending policies and decision-making of EU member states, effectively setting a *de facto* legislative standard. By incorporating this framework within the TCA, the parties – particularly the UK– have effectively accepted these principles as external constraints on their sovereign authority over regulation and subsidization. Hence, if these principles are satisfied, a subsidy will be considered not to have material impact on trade or investment between the parties. However, despite the alignment between the TCA and EU state aid principles in determining when a subsidy may be granted, differences remain in their application. Under EU state aid, the Commission, when assessing the balance between the negative effects on trade or competition and its contribution to the common interest objective, must take into account the broader implication for all EU member states, not just the one granting the aid. In contrast, under the TCA, it is a UK authority that determines whether the public policy objective outweighs the adverse effects on trade or investment.[318] As a result, it may be comparatively easier to justify a measure in the UK than to establish the compatibility of state aid within the EU internal market.[319]

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[316] Furthermore Article 366(3) TCA states that 'It is for each Party to determine how its obligations under paragraphs 1 and 2 are implemented in the design of its subsidy control system in its own domestic law, provided that each Party shall ensure that the obligations under paragraphs 1 and 2 are implemented in its law in such a manner that the legality of an individual subsidy will be determined by the principles'.
[317] Art 366(1) TCA.
[318] Article 366(f) TCA; Bell (n 127).
[319] Kotsonis (n 183).

Beyond these subsidy principles, the parties have issued a non-legally binding Joint Declaration that provides concise guidance. This declaration reflects their mutual understanding on appropriate subsidy policies in the areas of regional development, transport, and research and development. By considering these guiding principles, the parties aim to ensure adherence to the subsidy principles and mitigate the potential impact of any subsidy granted by either party on trade or investment between them.[320]

Finally, the TCA also sets out an extensive set of rules applicable to specific sectors, including banking, energy, and aviation. This framework can be seen as a codification of the evolution of EU state aid control, as shaped by the Commission's differentiated application of rules to various economic sectors.[321]

[320] See Biondi (n 181).
[321] Art 364(6) TCA; Biondi and Howard (n 5) 394.

5. Conclusion

Article 1 of the SCM Agreement defines a subsidy as a 'financial contribution' involving 'a direct transfer of funds' or potential direct transfers of funds or liabilities', or 'revenue that is otherwise due is foregone or not collected', or the purchase or provisions of goods or services by the government, or 'any form of income or price support'. Similarly, Article 363 of the TCA establishes that a subsidy is '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 provisions of goods or services, or the purchase of goods or services'. On the surface, the definition of a subsidy under the TCA appears nearly identical to that in the SCM Agreement. However, appearances can be deceptive. Through a comparative analysis of the WTO, EU and the TCA definition of subsidy/state aid, this chapter demonstrates that the TCA's approach aligns more closely with EU state aid law than with the SCM Agreement.

More specifically, Article 363 of the TCA outlines the conditions under which a measure qualifies as a subsidy, including the use of state resources, the conferral of an advantage, specificity, and an actual or potential effect on trade or investment between the parties. These criteria bear a remarkable resemblance to those stipulated in Article 107(1) of the TFEU, which defines state aid as aid granted by the state or through state resources, that confers an advantage, is selective, distorts competition, and affects trade between member states.

This chapter also argues that fully incorporating the EU state aid substantive framework into the UK legal system post-Brexit would have been unrealistic. For instance, regarding the effect on trade criterion, the CJEU has consistently held that there is no predetermined threshold or percentage below which trade within the EU internal market is deemed unaffected. In other words, the impact on trade between member states is not negated simply because of the limited scale of its effects. This reasoning, therefore, was not transposed into the TCA, where stricter requirements apply, as subsidies must not have a material effect on trade or investment between the parties.[322]

Additionally, this chapter shows that while the *de minimis* threshold under the TCA is more lenient than the one set by EU state aid, the criteria for assessing compatibility under Articles 364 and 365 TCA largely mirror those in Article 107(2) and (3) of the TFEU. The same applies to the fundamental principles that guide the evaluation of subsidies – such as the presence of a specific public policy objective, proportionality, and the promotion of changes in economic behavior – which are outlined in Article 366 of the TCA and align with the general principles of compatibility developed by the Commission in its interpretation of Article 107(3) TFEU.

In summary, this chapter reveals that while the TCA adopts WTO terminology, using 'subsidy' instead of 'aid' and 'specificity' instead of 'selectivity', its substantive framework, *mutatis mutandis*, closely resembles the EU regime. Consequently, despite the parties' divergent views on

[322] Biondi and Howard (n 5) 395.

subsidy control post-Brexit, the TCA ensures the continuation of key elements of the EU state aid regime within the UK. The strong alignment between the substantive elements of the TCA and EU State aid law implies that the new agreement does not introduce significant changes compared to the pre-Brexit regime that could undermine the level playing field between the parties.

Chapter III: Monitoring and Enforcement

1. Introduction

Compliance with any set of rules depends heavily on the effectiveness of its enforcement mechanisms. Without effective enforcement, compliance is unlikely. This principle is evident when we compare the EU and WTO subsidy systems. While the EU state aid regime includes rigorous mechanisms for preventing illegal aid, such as the *ex ante* control mechanism and the role of the Commission as a formal regulator, these tools are completely absent under the WTO regime. In the case of a lack of voluntary implementation, the only way to enforce WTO subsidy law is for members to raise complaints. Consequently, if a member decides not to pursue action (either multilateral or unilateral) against another member's illegal subsidy, there are no other means to enforce WTO requirements.[323]

As discussed in chapter I of this thesis, replicating the EU state aid enforcement mechanisms within the TCA was a much desired outcome for the EU but ultimately unattainable. The UK was very determined to avoid any role for the Commission and the CJEU over its public spending after its withdrawal. It aimed to establish a less administratively onerous regime, something in line with the WTO subsidy framework, which would have allowed for a greater focus on domestic priorities. However, the EU insisted that the outcome of Brexit on subsidy control with the UK should go beyond what applies to 166 members under the WTO subsidy framework[324]

Thus, this chapter constitutes the second dimension of this thesis's three-part analysis by comparing and evaluating the enforcement mechanisms under the WTO, EU state aid, and the TCA to assess the TCA's ability to maintain a level playing field between the EU and the UK post-Brexit.

In section 2, this chapter sets out the SCM Agreement's monitoring and enforcement mechanisms, detailing the notification and surveillance system to monitor the implementation of subsidies among its members. Moreover, it looks at the WTO DSM, arguing that although members

[323] Chapter IV of this thesis will delve into the topic of countervailing measures.
[324] Weinberger (n 130) 88; Robert Gulotty, 'WTO Subsidy Disciplines' (2022) 21 World Trade Review 330.

have this tool at their disposal, the system is ineffective (emphasis added on the recent block of the functioning of the AB) and the enforcement of WTO subsidy law largely depends on a member's ability to impose countervailing measures. In section 3, this chapter examines the EU state aid framework. This section focuses on the obligation of prior notification and approval by the Commission of all new aid measures. In addition, it looks at the power of EU courts to review all decisions and procedural conduct of the Commission, as well as the role of national courts in protecting the rights of individuals faced with breaches of Article 108(3) of the TFEU. Then, section 4 reviews the TCA enforcement mechanisms, exploring the roles of the independent authority or body, the role of domestic courts, and the DSM. To pursue this analysis, this section also delves into the specifics of the subsidy control discipline enshrined in the SCA. In conclusion, section 5 provides a comparative analysis of the monitoring and enforcement mechanisms of the WTO, EU state aid and TCA regimes.

This chapter argues that while the substance of the TCA is very similar to EU state aid law, the TCA adopts a different approach to monitoring and enforcing subsidy control. In particular, it highlights that one of the main weaknesses of the TCA subsidy regime is the absence of an ex-ante control mechanism for subsidies. Furthermore, the analysis shows that the role of the DSM is very limited, with enforcement primarily occurring at the domestic level. Additionally, UK and EU firms will only be able to bring claims before the courts and tribunals where they have standing. If they are affected by a subsidy in the other jurisdiction but have no standing there, their only recourse will be to make a complaint to the UK government or the Commission to dispute the subsidy on their behalf. These factors could severely undermine the ability of the TCA to maintain the level playing field between the EU and the UK. This chapter concludes that much will depend on the effectiveness[325] of the UK domestic subsidy system.

[325] This chapter embraces Phedon Nicolaides definition of effectiveness: 'the ability of the system to prohibit unnecessary aid while permitting Member States to implement aid measures that can support their needs and public policy objectives' in Phedon Nicolaides, 'The Design of Enforcement Institutions' (2021) 20 European State Aid Law Quarterly 370, 371.

2. WTO

2.1 Introduction

This section begins by examining the notification and surveillance mechanisms established under the SCM Agreement, with a particular emphasis on the role played by the Subsidies Committee and the Permanent Group of Experts (PGE). Due to the absence of substantial penalties for non-notification, this section shows that WTO members rarely fulfill this obligation in its entirety. Subsequently, the section delves into the role of dispute settlement as a tool for enforcing WTO subsidy law. This system allows members to challenge another member's subsidy before a neutral arbiter. However, private operators directly affected by inter-state disputes are not granted any *locus standi*, as the protection of their rights relies entirely on individual WTO members. From this analysis emerges that WTO members may be disincentivized to initiate a dispute settlement procedure if they believe their own subsidies could also be challenged. Moreover, even when they decide to take action, the dispute settlement process is notoriously slow. Since 2019, the blockage of the AB has further exacerbated the enforcement problems of WTO law. This section concludes by examining the functioning of the interim mechanism created to preserve the functioning of the WTO dispute settlement system (the Multi-Party Interim Appeal Arbitration Arrangement), highlighting some key innovations introduced to enhance the efficiency of appeal proceedings.[326]

2.2 Notification and transparency

The basic subsidies notification requirement is contained in Article 25 of the SCM Agreement and in Article XVI of GATT 1994. Under Article 25(2) of the SCM Agreement, 'any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2',[327] as well as any other subsidy which causes increased exports or decreased imports within the meaning of Article XVI of the GATT 1994, must be notified.[328] Initially WTO members were required to submit a new and full subsidy notification every three years and updating notifications in years two and three.[329] However, in 2005, the Subsidies Committee extended its previous provisional decisions from 2001 and 2003,

[326] MPIA, 4th preambular paragraph.
[327] Art 25(2) SCM Agreement.
[328] See Panel Report, *United States—Subsidies on Upland Cotton* (Recourse to Article 21.5 of the DSU by Brazil) (adopted 20 June 2008) WT/DS267/RW; Panel Report, *India—Measures Concerning Sugar and Sugarcane* (adopted 14 December 2021) WT/DS579/R, WT/DS580/R, WT/DS581/R; Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft* (adopted 20 August 1999) WT/DS70/R.
[329] WTO, Note by the Secretariat, Working Party on Notification Obligations and Procedures, 'Timing Aspects for the Notification Requirements in the Agreements in Annex 1A of the WTO Agreement' (21 November 1995) G/NOP/W/5, 2.

which required that comprehensive notifications be submitted biennially.[330] Consequently, the new cycle requires subsidy notifications every second year, with no updates. Article 25(3) of the SCM Agreement clarifies that notifications should include information such as the form of a subsidy, the subsidy per unit or the total amount of a subsidy, the purpose of a subsidy, its duration, and statistical data to assess the trade effects of the subsidy.[331] The crucial feature of the WTO notification system is encapsulated in paragraph 7 of Article 25 of the SCM Agreement, which asserts that 'notifying a measure does not imply a judgment on its legal status under the GATT 1994 or this Agreement, its effects, or the measure's nature'.[332] This principle was underscored in the *Brazil – Aircraft* case, where the AB pointed out that 'Article 25 aims to promote transparency by requiring Members to notify their subsidies, without prejudging the legal status of those subsidies'.[333] Unfortunately, due to the lack of any substantial penalty for failing to notify subsidies, WTO members almost never fully comply with this obligation.[334]

Therefore, the effectiveness of Article 25 SCM Agreement hinges on the vigilance of other members to ensure adherence to subsidy notification requirements.[335] According to Article 25 of the SCM Agreement, members possess the authority to either counter-notify or seek details regarding a subsidy that has been issued. Specifically, Article 25(8) articulates that 'any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member, or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.'[336] Additionally, Article 25(9) mandates that 'Members so requested shall provide such information as quickly as possible.'[337] It also offers a remedy for members who believe that the requested information has not been adequately supplied, permitting them to 'bring the matter to the attention of the Committee.'[338] Lastly, Article 25(10) offers a mechanism for members to act if they believe a subsidy has not been duly notified, stating that 'any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of

[330] Committee on Subsidies and Countervailing Measures, 'Minutes of the Regular Meeting Held on 14 April 2005' (14 April 2005) G/SCM/M/53, paras 31-34.
[331] Art 25(3) SCM Agreement; See also Committee on Subsidies and Countervailing Measures, 'Questionnaire Format for Subsidy Notifications under Article 25 of the Agreement on Subsidies and Countervailing Measures and under Article XVI of GATT 1994' G/SCM/6/Rev.1; Ronald Steenblik and Juan Simón, 'A New Template for Notifying Subsidies to the WTO' (International Institute for Sustainable Development 2011) Working Paper https://www.iisd.org/publications/report/new-template-notifying-subsidies-wto.
[332] Art 25(7) SCM Agreement.
[333] Appellate Body Report, *Brazil—Export Financing Programme for Aircraft* (adopted 20 August 1999) WT/DS46/AB/R, para 149.
[334] Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 9 World Trade Review 551.
[335] Vincent Verouden, 'EU State Aid Control: The Quest for Effectiveness' (2015) 14 European State Aid Law Quarterly 459; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 399.
[336] Art 25(8) SCM Agreement.
[337] Art 25(9) SCM Agreement.
[338] Ibid.

GATT 1994 and this Article may bring the matter to the attention of such other Member.'[339] If the subsidy remains not notified following such a warning, the concerned 'Member may itself bring the alleged subsidy in question to the notice of the Committee.'[340]

Despite retaining this power, members have rarely taken such actions.[341] There have even been dispute settlement consultation requests that included failure to notify under Article 25 SCM Agreement, but such claims have never been addressed by a panel. *De facto*, it is challenging, if not impossible, to enforce Article 25 SCM Agreement requirements within the WTO system. Thus, to overcome this issue, various proposals have been made, notably by the EU, US, and Japan, to establish rebuttable presumptions of inconsistency for non-notified subsidies;[342] but (so far) none of them have been adopted.[343]

Beyond the obligation to notify subsidies, Article 25(12) of the SCM Agreement mandates the notification of domestic authorities competent to initiate and conduct CVDs investigations, as well as the domestic procedures that govern the initiation and conduct of these investigations. This includes providing the Subsidies Committee with details such as the name, address, phone and fax numbers, and email addresses of the authority conducting the investigation.[344] Article 32(6) of the SCM Agreement mandates that members notify the complete texts of their CVD laws, regulations, and administrative procedures in one of the WTO's official languages, with such notifications reviewed during the regular sessions of the Subsidies Committee.[345] Pursuant to Article 25(12) SCM Agreement, this should be notified only once and any future modifications introduced should be notified on an *ad hoc* basis.

The final element subject to the notification requirement includes preliminary and final actions regarding CVDs, as mandated by Article 25(11) of the SCM Agreement. These actions must be promptly reported to the Subsidies Committee. Document G/SCM/3/Rev.1 outlines the minimum standard list of actions that must be notified, including necessary details for these reports.[346] Article 25(11) of the SCM Agreement also requires members to file a semi-annual report on the countervailing measures implemented in the past six months, whether or not any actions have been implemented. Members that lack a competent authority for initiating and conducting CVDs

[339] Art 25(10) SCM Agreement.
[340] Ibid.
[341] Rare but not totally absent e.g., Committee on Subsidies and Countervailing Measures, 'Request from the United States to China Pursuant to Article 25.10 of the Agreement' (11 October 2011) G/SCM/Q2/CHN/42.
[342] See General Council, 'Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements' (5 March 2020) JOB/GC/204/Rev.3.
[343] Bernard Hoekman and Douglas Nelson, 'Rethinking International Subsidy Rules' (2020) 43 World Economy 3104, 3123; Bernard Hoekman and Robert Wolfe, 'Reforming the World Trade Organization: Practitioner Perspectives from China, the EU, and the US' (2021) 29 China & World Economy 1.
[344] Committee on Anti-Dumping Practices - Committee on Subsidies and Countervailing Measures, 'Notification of Competent Authorities' (1996) G/SCM/N/18, para 1.
[345] Panel Report, *United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* (adopted 1 August 2008) WT/DS345/R.
[346] Committee on Subsidies and Countervailing Measures, 'Minimum Information to be Provided Under Article 25.11 of the Agreement on Subsidies and Countervailing Measures in the Reports on All Preliminary or Final Countervailing Actions – Revision' (2 November 2009) G/SCM/3/Rev.1.

investigations, and those who have not taken nor plan to take any such actions, can meet their notification obligations by providing 'one-time notifications' instead of the regular semi-annual reports every six months.[347]

During the Subsidies Committee meeting held on 27 October 2023, the Chair highlighted the crucial role of transparency in WTO members' trade measures for the Subsidies Committee's operations. He pointed out that the particularly low compliance rates with the notification requirements of the SCM Agreement significantly undermines the Agreement's effectiveness.[348] Additionally, he presented alarming figures: as of the 30 June 2023 deadline, 101 members had not submitted their 2023 notifications; 85 members had yet to submit their 2021 notifications, now more than two years overdue; and 73 members had not submitted their 2019 notifications, overdue by over four years.[349]

The Chair made a strong appeal to all members falling short in their notification duties to quickly submit their overdue notifications, highlighting the mutual benefits of a collective commitment to timely and comprehensive notifications.[350]

2.3 The Subsidies and Countervailing Measures Committee

The SCM Agreement, under Article 24, establishes the Subsidies and Countervailing Measures Committee, also referred to as the Subsidies Committee. The Subsidies Committee, is composed of representatives from each of the WTO members. Governments with observer status in the WTO's General Council are similarly granted observer status within the Subsidies Committee.

One key task of the Subsidies Committee is to examine the notifications of subsidy measures and ensure the alignment of members' domestic laws, regulations, and actions with the provisions set out in the agreement. According to Article 24(1) of the SCM Agreement, the Subsidies Committee 'shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this

[347] A format for these reports, with detailed instructions adopted by the SCM Committee, can be found in document 'Committee on Subsidies and Countervailing Measures, 'Format for Semi-Annual Reports of Countervailing Duty Actions Pursuant to Article 25.11 of the Agreement on Subsidies and Countervailing Measures – Revision' (2 November 2009) G/SCM/2/Rev.1' The first should be submitted by mid-February covering the period July–December of the previous calendar year (the Secretariat issues a request for the notification in December of a given year and a reminder in January of the subsequent year), while the second should be submitted by mid-August and should cover the period January-June of the same calendar year (the Secretariat issues a request for the notification in June and a reminder in July of the same year). If no actions were taken during a given reporting period, the member concerned should submit a simple nil notification whereby the format would not be used. However, if the member concerned did not have any actions to report during a given reporting period but has pending actions such as ongoing investigations or proceedings during previous reporting periods, or has measures in force, etc., the format should be used to report those.

[348] See WTO, 'Notification Provisions under the Agreement on Subsidies and Countervailing Measures' (31 March 2017) G/SCM/W/546/Rev.8.

[349] See WTO, 'Transparency Concerns Highlighted during Discussions at Subsidies Committee Meeting' (WTO, 27 October 2023) https://www.wto.org/english/news_e/news23_e/scm_27oct23_e.htm.

[350] See Committee on Subsidies and Countervailing Measures, 'Report (2023) of the Committee on Subsidies and Countervailing Measures' (27 October 2023) G/L/1506, G/SCM/168.

Agreement at the request of any Member'.[351] During these meetings, members have the opportunity to address concerns about notified subsidy programs, the omission of program notifications, or the absence of any notifications.[352] It follows that the effectiveness of the Subsidies Committee depends on the suitability of the subsidy notifications from WTO members. However, as explained in the previous paragraphs, due to the absence of any substantial penalty for non-notification, WTO member tend not to fulfil their notification obligations. Consequently, the responsibility falls on the WTO members themselves to exert pressure on those failing to comply with notification requirements. Although WTO members have the option to issue counter-notifications regarding other members' subsidies, such actions have been rare.[353] As a consequence, the members' inadequate compliance with the Article 25 SCM Agreement obligation significantly weakens the Subsidies Committee's capacity to function as an effective monitoring mechanism.[354]

2.4 The Permanent Group of Experts

In addition, Article 24(3) of the SCM Agreement mandate the Subsidies Committee to establish a Permanent Group of Experts (PGE) 'composed of five independent persons, highly qualified in the fields of subsidies and trade relations'.[355] Article 24 further provides for the Subsidies Committee to elect experts to the PGE, with one of the five experts being replaced every year. The election to replace an expert whose term has expired is normally taken by the Subsidies Committee during its regular spring meeting in the year following the expiration.[356]

The SCM Agreement outlines three main functions for the PGE. First, to issue a binding ruling, upon request from a dispute settlement panel, on whether a measure constitutes a prohibited subsidy. Second, to provide, upon request from the Subsidies Committee, 'an advisory opinion on the existence and nature of any subsidy.'[357] Third, to offer, at the request of a member, a confidential advisory opinion on the nature of any subsidy that the member plans to introduce or is currently maintaining. These advisory opinions are 'confidential and may not be invoked in proceedings under Article 7 of the SCM Agreement'.[358]

In its nearly 30 years of existence, the PGE has never been asked to perform any substantive function by a dispute settlement panel, the Subsidies Committee or a WTO member. Various factors

[351] Art 24(1) SCM Agreement.
[352] Van den Bossche and Zdouc (n 32) 948.
[353] See Committee on Subsidies and Countervailing Measures, 'Request from the United States to China Pursuant to Article 25.10 of the Agreement' (11 October 2011) G/SCM/Q2/CHN/42.
[354] The US proposal aimed at reinforcing the processes for reviewing subsidy notifications; The Office of the United States Trade Representative and The United States Department of Commerce, *Subsidies Enforcement Annual Report to the Congress* (Joint Report 2023) p. 27 https://esel.trade.gov/CongressReports/seo-annual-report-2023.pdf.
[355] Art. 24(3) SCM Agreement.
[356] Ibid.
[357] Ibid.
[358] Art 24(4) SCM Agreement; Van den Bossche and Zdouc (n 32) 949.

have contributed to this outcome. Firstly, despite the confidentiality of the PGE's reports, WTO members are reluctant to disclose sensitive information, such as those related to their public spending. Second and more importantly, there is a perception that any endorsement by the PGE would confer a significant advantage if the case is brought before a panel, thereby interfering with the panel's decision.[359]

2.5 Dispute Settlement Mechanism

Article 1(1) of the Dispute Settlement Understanding (DSU) specifies that the rules and procedures of this Understanding apply to disputes initiated under the consultation and dispute settlement provisions of the agreements listed in Appendix 1 (referred to as the 'covered agreements').[360] This extensive list of agreements, which includes issues related to customs duties, sanitary and phytosanitary measures, subsidies, market access for services, and the enforcement of intellectual property rights, highlights the broad jurisdictional scope of the WTO DSM.[361]

Thus, the DSU establishes a single dispute settlement system for handling disputes under any of the covered agreements, marking a departure from the pre-WTO era where each of the GATT agreements operated within their own dispute resolution systems.[362] Nonetheless, certain covered agreements incorporate specific rules and procedures 'designed to deal with the particularities of

[359] Damon Vis-Dunbar, 'A New Role for the Permanent Group of Experts on Subsidies?' (International Institute for Sustainable Development 29 December 2006) <https://www.iisd.org/gsi/commentary/new-role-permanent-group-experts-subsidies>.

[360] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement, Annex 2, 1869 UNTS 401; These are listed under Art 1(2) DSU: Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Implementation of Article VI of GATT 1994; Agreement on Implementation of Article VII of GATT 1994; Agreement on Subsidies and Countervailing Measures; General Agreement on Trade in Services; Decision on Certain Dispute Settlement Procedures for the GATS; David Palmeter, Niall Meagher and Petros C Mavroidis, 'Jurisdiction' in *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 53.

[361] Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico* (adopted 25 November 1998) WT/DS60/AB/R; Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (5th edn, Cambridge University Press 2021) 355.

[362] 'The object and purpose of the WTO dispute settlement system is for Members to settle disputes with other members through the multilateral procedures of the DSU, rather than through unilateral action. Article 23(1) of the DSU states: According to the Appellate body in *US – Certain EC Products* (2001), Article 23(1) of the DSU imposes a general obligation to redress a violation of WTO law through the multilateral DSU procedures, and not through unilateral action. Pursuant to Article 23(2) of the DSU, WTO Members may not make a unilateral determination that a violation of WTO law has occurred and may not take retaliation measures unilaterally in the case of a violation of WTO law. While unilateralism remains a concern, in recent years, it is the proliferation of free-trade agreements containing their own DSM that have been considered as a threat to the multilateral WTO dispute settlement. To date, however, WTO Members have been far more likely to have recourse to the WTO dispute settlement system, rather than to the dispute settlement systems under free trade agreements.'; Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities* ('*US – Certain EC Products*') (adopted 10 January 2001) WT/DS165/AB/R Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (5th edn, Cambridge University Press 2021) 375-377; see Petros Mavroidis, *The WTO Dispute Settlement System: How, Why and Where?* (Edward Elgar Publishing 2022), ch 2.

dispute settlement relating to obligations arising under a specific covered agreement.'[363] In line with Article 1(2) of the DSU, these specialized rules take precedence over the general DSU provisions in instances of discrepancy. This principle was affirmed by the AB in *Guatemala – Cement I*, highlighting that when the provisions of the DSU and the special or additional rules of a covered agreement do not conflict and can be interpreted as complementary, they both apply; however, if they cannot be reconciled, the special or additional provisions take precedence.[364]

2.5.1 Dispute settlement mechanisms under the SCM Agreement

The DSU establishes a single dispute settlement system for handling disputes under any of the 'covered agreements'.[365] Nonetheless, some of these agreements incorporate rules and procedures which take precedence over the general DSU provisions in instances of discrepancy.[366] Under the SCM Agreement these provisions are principally found under Articles 4 and 7.[367] In *Korea – Commercial Vessels*, the Panel stated that: 'We begin our consideration of these issues by noting that Articles 4.2, 4.4, 7.2 and 7.4 of the SCM Agreement are identified as 'special or additional rules and procedures'.[368] If possible, these provisions should therefore be read so as to complement the relevant provisions of the DSU.[369]

The subsequent paragraphs will explore the dispute resolution procedures for both prohibited and actionable subsidies. Although the timelines differ, the SCM Agreement dispute procedures adhere to the DSU scheme: the initial step in both instances is the consultation phase. If these consultations fail to resolve the issue, a dispute settlement panel is convened. In case of an appeal, the matter may be escalated to the AB.[370]

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[363] WTO, *DSU– Article 1/Appendix 1 & 2* (DS reports).
[364] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (5th edn, Cambridge University Press 2021) 374.
[365] Art 1(1) DSU; See generally Petros C Mavroidis, 'Dispute Settlement in the WTO' (European University Institute, Robert Schuman Centre for Advanced Studies 2016) Working Paper RSCAS 2016/04 https://cadmus.eui.eu/bitstream/handle/1814/38657/RSCAS_2016_04.pdf?sequence=1&isAllowed=y ; David Palmeter, Petros C Mavroidis and Niall Meagher, *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 153-242.
[366] Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico* (adopted 25 November 1998) WT/DS60/AB/R, para 64; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 298; Coppens (n 18) 198.
[367] Panel Report, *Korea—Measures Affecting Trade in Commercial Vessels* (adopted 11 April 2005) WT/DS273/R, para 7.2; See Mavroidis, Messerlin and Wauters (n 189) 298; Jan Wouters and Dominic Coppens, 'An Overview of the Agreement on Subsidies and Countervailing Measures – Including a Discussion of the Agreement on Agriculture' in George A Bermann, Kyle W Bagwell and Petros C Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge University Press 2009)55.
[368] Panel Report, *Korea—Measures Affecting Trade in Commercial Vessels* (adopted 11 April 2005) WT/DS273/R, para 7.2.
[369] Wouters and Coppens (n 367) 55.
[370] Since 2019 the Appellate Body is not functioning. A new mechanism has been created, the MPIA, which is described in section 2.5.2.

A. Prohibited Subsidies

The SCM Agreement sets out the dispute settlement procedures for prohibited subsidies, including both export subsidies and import substitution subsidies, in Article 4. A key distinction between the Article 4 procedures of the SCM Agreement and those of the DSU is the timeline for dispute resolution. The timelines specified under Article 4 are significantly shorter, amounting to only half of the duration of those prescribed in the DSU. While the DSU allocates six months for 'ordinary' panel proceedings, Article 4 of the SCM Agreement reduces this period to three months.[371]

Article 4 of the SCM Agreement states that when a member believes that another member is granting or maintaining prohibited subsidies, it is entitled to initiate consultations with the other member. This process begins with a formal request for consultations, accompanied by a detailed statement of available evidence regarding the existence and nature of the suspected subsidy.[372] Following this request, the accused member is expected to engage in consultations 'as quickly as possible', with the objective of 'the facts of the situation and to arrive at a mutually agreed solution'.[373]

Then, 'If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ('DSB') for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel'.[374] Unlike the standard DSU procedures, the establishment of the panel may occur at the first meeting.[375] Additionally, the panel has the authority to request assistance from the PGE to determine whether the measure in question constitutes a prohibited subsidy. If this is the case, the PGE is required to deliver its findings on the presence of a prohibited subsidy to the panel within a deadline set by the panel itself. The PGE's findings must be accepted by the panel as they are, without modifications.[376]

Following this, the panel is responsible for presenting its final report to the involved parties, ensuring that it is distributed to all members within 90 days from the date when the panel was formed and its mandate defined.[377]

The panel's report shall be adopted by the DSB unless, within 30 days of the report being shared with all members, one of the parties to the dispute decides to appeal the decision or the DSB

[371] Parties can agree on an extension of these special timeframes; See Art 4(1)2 of the SCM Agreement. Also, when a complainant brings claims under both the SCM Agreement and other WTO Agreement the shorter timeframes under the SCM Agreement do not apply; Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 420.
[372] Art 4(1) SCM Agreement.
[373] Art. 4(3) SCM Agreement; See Gary N Horlick, 'The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View' (1998) 32 The International Lawyer 685,687.
[374] Art 4(4) SCM Agreement.
[375] See Manfred Elsig, Bernard Hoekman and Joost Pauwelyn (eds), *Assessing the World Trade Organization. Fit for Purpose?* (Cambridge University Press 2017) 97-200.
[376] Art 4(5) SCM Agreement.
[377] Art 4(6) SCM Agreement.

collectively decides not to proceed with the adoption of the report.[378] In such a case, the AB 'shall issue its decision within 30 days from the date when the party notifies its intention to appeal'.[379]

If the AB anticipates a delay beyond 30 days, it must notify the DSB in writing, explaining the reasons of the delay and providing an estimated time frame for delivering its report, ensuring that the process does not extend beyond 60 days. 'The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.'[380]

If a panel finds a measure to be a prohibited subsidy, Article 4(7) of the SCM Agreement states that 'the panel shall recommend that the subsidising Member withdraw the subsidy without delay.'[381] This obligation under Article 4(7) SCM Agreement differs from the obligation under Article 19(1) of the DSU in two key aspects. First, unlike the DSU, there is no option to leave the losing party free to determine how to bring its measure into compliance with WTO law.[382] The only option available to the subsidizing member is to withdraw the subsidy. In this regard, the AB in the *Brazil – Aircraft* case clarified that withdrawal means the removal of the subsidy itself.[383] In practical terms, this could involve eliminating the export or other conditionalities attached to the subsidy so that it is no longer considered prohibited. Second, the subsidizing member is not given 'a reasonable period of time' to bring its measure into conformity with WTO rules, as provided under the DSU. Instead, the measure must be withdrawn within the time period set by the panel.[384]

A highly sensitive issue is whether the term withdraw can include the repayment of previously granted prohibited subsidies. While the general principle under WTO law is that remedies are only prospective, the panel in the *Australia – Automotive Leather* case determined that fulfilling the obligation to withdraw a prohibited subsidy required the repayment of the received subsidy.[385] Consequently, it concluded that Article 4(7) of the SCM Agreement mandates a retroactive remedy, obliging the recipient of a one-time prohibited subsidy to repay it to the subsidizing member.[386] The rationale behind that decision was that, otherwise, WTO members could bypass the disciplines on prohibited subsidies by providing nonrecurring subsidies. However, this panel ruling was met with substantial criticism from WTO members due to its retrospective nature and its perceived deviation

[378] Art 4(8) SCM Agreement; Strictly speaking, the DSB could also decide by consensus not to adopt the report although, of course, that has never happened.
[379] Art. 4(9) SCM Agreement.
[380] Ibid.
[381] Art 4(7) SCM Agreement.
[382] David Palmeter, Niall Meagher and Petros C Mavroidis, 'Jurisdiction' in Dispute Settlement in the World Trade Organization (3rd edn, Cambridge University Press 2022) 64-65.
[383] WTO, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU* (21 July 2000) WT/DS70/AB/RW [45]; Wouters and Coppens (n 367) 57.
[384] Ibid.
[385] Article 19(1) of the DSU requires a Panel or the Appellate Body to 'recommend that the Member concerned bring the measure into conformity with that agreement.' It does not explicitly state that only prospective remedies are covered; WTO, Australia - *Subsidies Provided to Producers and Exporters of Automotive Leather - Recourse to Article 21.5 of the DSU by the United States* (21 January 2000) WT/DS126/RW.
[386] Ibid.

from the general principle under Article 19(1) of the DSU.[387] To date, no subsequent panel has adopted this approach.

In cases involving prohibited subsidies, panels delineate the timeframe within which the subsidy must be withdrawn, exemplified in the *Korea – Commercial Vessels* case.[388] So far various panels have determined a three-month period for the withdrawal of a prohibited subsidy. However, in *US – FSC*, the panel allowed a longer timeframe, extending over a year, to enable the United States to enact the required fiscal legislation.

If DSB's recommendation to withdraw the subsidy is not fulfilled within the indicated time frame, Article 4(10) of the SCM Agreement authorizes the injured member to take appropriate countermeasures.[389] Article 4(11) provides for arbitration under DSU Article 22(6) to 'determine whether the countermeasures are appropriate.'[390]

[387] Ibid; Gavin Goh and Andreas R Ziegler, 'Retrospective Remedies in the WTO after Automotive Leather' (2003) 6 Journal of International Economic Law 545,564.

[388] Panel Report, *Korea—Measures Affecting Trade in Commercial Vessels* (adopted 11 April 2005) WT/DS273/R.

[389] Art 4(10) SCM Agreement; Should a recommendation to withdraw a subsidy not be adhered to within the timeframe established by the panel, the DSB must, upon request from the original complainant(s) and through a reverse consensus process, authorize appropriate countermeasures. In disputes concerning prohibited subsidies, these appropriate countermeasures take the place of the suspension of concessions or other obligations, which are the retaliation measures typically available in cases of non-implementation in other WTO disputes. The distinction between appropriate countermeasures and retaliation measures lies in the potential for 'appropriate countermeasures' to be equivalent to the amount of the prohibited subsidy, rather than reflecting the level of any trade effects or the nullification or impairment caused; Mavroidis (n 362) ch 7.

[390] David Palmeter, Niall Meagher and Petros C Mavroidis, 'Remedies' in *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 505; Coppens (n 18) 204.

Table 2: Prohibited Subsidies (Article 4 SCM Agreement)

Request for consultation	Request for consultations, including statement of available evidence with regard to the existence and nature of subsidy (Art. 4.2).
Consultation procedure	Consultation as quickly as possible. If no solution is found within 30 days → referral to the DSB for immediate establishment of the panel (Art. 4.3).
PGE	The panel may request assistance from the PGE for binding advice on whether the measure at issue constitutes a prohibited subsidy (Art. 4.5).
Panel Report	Circulation panel report within 90 days of date of composition and establishment of panels' terms of reference (Art. 4.6). If the subsidy is found to be prohibited, the panel recommends that the member withdraw it without delay and within a specific time period (Art. 4.7).
DSB Adoption	Within 30 days of circulation, the report shall be adopted by DSB, unless one of the parties decides to appeal (Art. 4.8).
AB Review	AB must normally issue a decision within 30 days from notice of intention to appeal; in no event shall it take more than 60 days (Art. 4.9).
Countermeasures	If DSB recommendation is not followed within the time-period specified by panel (which commences from date of adoption of the panel/AB report), the DSB authorizes the complaining member to take appropriate countermeasures (Art 4.10-11). Retaliatory measures are subject to Art 22.6 DSU (Art. 4.11).

B. Actionable subsidies

Article 7 of the SCM Agreement outlines the dispute settlement procedure for actionable subsidies, which, like the DSM for prohibited subsidies, diverges from those provided in the DSU. However, compared to the discipline for prohibited subsidies, the timeframes for addressing actionable subsidies are extended, and there is no involvement of the PGE.[391]

Under Article 7(3) of the SCM Agreement, 'the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible.'[392] Article 7(4) of the SCM Agreement, in fact, grants the parties 60 days from the beginning of consultations to find an agreement. Then, if a solution is not achieved, 'any Member party to such consultations may refer the matter to the DSB for the establishment of a panel'.[393] Article 7(4) also mentions that 'the composition of the panel and its terms of reference shall be established within 15

[391] Petros C Mavroidis, Patrick A Messerlin and Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Edward Elgar Publishing 2008) 451.
[392] Art 7(3) SCM Agreement.
[393] Art 7(4) SCM Agreement.

days from the date when it is established,'[394] allowing for the extension of time by mutual agreement.[395]

According to Article 7(5) of the SCM Agreement, 'the panel shall review the matter and shall submit its final report to the parties to the dispute.'[396] This report is to be shared with all members within 120 days of the date of the composition and establishment of the panel's.

Subsequently, 'within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB, unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report'.[397]

Regarding appeals, Article 7(7) specifies that if a panel report is appealed, the AB shall issue its decision within 60 days. If a delay is anticipated, the AB must inform the DSU and ensure that the appellate process does not exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the members.[398]

Finally, Article 7(8) mandates that in cases where a subsidy is found to have adverse effects, 'the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.'[399] The AB has clarified that the obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy' applied only to 'subsidies that continue to be 'grant[ed] or maintain[ed]' by the implementing member at the end of the implementation period.[400] This action must be taken within six months from the DSB's adoption of the report.[401] Instead of withdrawing the subsidy or mitigating its adverse effects, the subsidizing member may choose to negotiate compensation with the complaining member.[402]

If, within six months from the report's adoption, the subsidy is neither withdrawn nor its adverse effects addressed, nor is an agreement on compensation reached, the DSB must, upon the complaining member's request and via reverse consensus, authorize the complaining member to implement countermeasures.[403] Article 7(10) of the SCM Agreement specifies that in an arbitration under Article 22(6) of the DSU, the arbitrator must assess whether the countermeasures are

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[394] Art 7(4) SCM Agreement.
[395] The Annex V process, contrary to the PGE, is a unique mechanism that has actually been used with some success to address the particularly acute evidentiary challenges in adverse effects cases.
[396] Art 7(5) SCM Agreement.
[397] Art 7(6) SCM Agreement.
[398] Art 7(7) SCM Agreement.
[399] Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry* (adopted 23 July 1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; Panel Report, *United States—Subsidies on Upland Cotton* (Recourse to Article 21.5 of the DSU by Brazil) (adopted 20 June 2008) WT/DS267/RW; Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union) (adopted 11 April 2019) WT/DS353/RW; Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft* (Recourse to Article 21.5 of the DSU by the European Union) (adopted 2 December 2019) WT/DS316/RW2.
[400] David Palmeter, Niall Meagher and Petros C Mavroidis, 'Adoption and Implementation of Reports' in *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 454.
[401] Art 7(8) SCM Agreement.
[402] Van den Bossche and Zdouc (n 32) 924.
[403] Art 7(9) SCM Agreement.

proportionate to with 'the degree and nature of the adverse effects.'[404] In *US – Large Civil Aircraft,* the AB clarified that 'Article 7.9 establishes that, for countermeasures to be authorized with respect to a particular subsidy, that subsidy must still cause adverse effects in the post-implementation period.' The scope of 'the adverse effects determined to exist' in Articles 7(9) and 7(10) is interpreted as referring only to adverse effects occurring after the implementation, arising from a subsidy where the respondent has failed to comply with prior DSB recommendation and rulings.[405]

Table 3: Actionable subsidies (Article 7 SCM Agreement)

Request for consultation	Request for consultations, including statement of available evidence regarding: (a) the existence and nature of subsidy, (b) injury caused to the domestic industry, or nullification or impairment, or serious prejudice (Art. 7.2).
Consultation procedure	Consultation as quickly as possible. If no solution is found within 60 days → referral to DSB for the establishment of a panel; composition of panel and its terms of reference within 15 days (Art. 7.3-4).
Panel Report	Circulation of the panel report within 120 days from date of composition of the panel/establishment of its terms of reference (Art. 7.5). If the subsidy is found to be actionable, the panel recommends that the member take appropriate steps to remove the adverse effects or withdraw the subsidy (Art. 7.8).
DSB Adoption	Within 30 days of circulation, the report shall be adopted by the DSB, unless an appeal is filed (Art. 7.6).
AB Review	AB must normally issue a decision within 60 days from notice of intention to appeal; in no event shall it take more than 90 days (Art 7.7).
Countermeasures	If the member fails to fulfil the panel/AB reccomendation within six months from the date of the DSB's adoption, the DSB grants authorization to the complaining member to take appropriate countermeasures, commensurate with the degree and nature of adverse effects (Art 7.9). Retaliatory measures are subject to Art 22.6 DSU (Art 7.10).

[404] David Palmeter, Niall Meagher and Petros C Mavroidis, 'Adoption and Implementation of Reports' in Dispute Settlement in the World Trade Organization (3rd edn, Cambridge University Press 2022) 455.
[405] See Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)* (adopted 11 April 2019) WT/DS353/AB/RW.

2.5.2 The Multi-Party Interim Appeal Arbitration Arrangement

Today, when we speak of the AB, we cannot omit the fact that it is currently non-functional.[406] The AB crisis started in 2016 and culminated in 2019 when the US government blocked the appointment of new members. The US raised two main objections. First, it argued that the AB had repeatedly overstepped its mandate by creating new rules not envisioned by the signatories. Second, it raised criticisms against the practice of taking on new cases before clearing the backlog of existing ones – despite the fact that the AB is required to accept all appeals submitted by WTO members and complete them within short time limits, which is clearly an impossible task in many cases.[407]

Thus, in April 2020, a group of 19 WTO members (at the time of writing they are 27) out of 136 (counting the EU and its 27 member states as one) notified the WTO of the creation of a mechanism to resolving disputes in the absence of a functioning AB, namely the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).[408]

In their formal communication, these members indicated that their goal was to preserve the system's 'binding character and two levels of adjudication'.[409] The MPIA participants committed to 'not pursue appeals under Articles 16.4 and 17 of the DSU' and instead to use the alternative of appeal arbitration, explicitly foreseen in Article 25 of the DSU, as an alternative mechanism for appeals.[410]

As concerns the MPIA procedures, they differ from the appellate proceedings within the DSB. In particular, when a case involving two MPIA parties arises at the WTO, the parties must formally submit a joint notification (notice of appeal) to the DSB under Article 25 of the DSU. This notification states their intention to use MPIA procedures to resolve the dispute should it reach the

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[406] See Peter Van den Bossche, 'The Uncertain Future of WTO Dispute Settlement: An Appraisal of the February 2024 Consolidated Text Resulting from the Molina Process on Dispute Settlement Reform' (World Trade Institute 2024) Working Paper 2.

[407] USTR Report on the Appellate Body of the World Trade Organization (February 2020) https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; See also Bernard M Hoekman and Petros C Mavroidis, 'WTO Dispute Settlement and the Appellate Body Crisis: Back to the Future?' (Bertelsmann Stiftung 2020) Working Paper 8/03/2020 https://cadmus.eui.eu/handle/1814/70208; Petros C Mavroidis, 'The Future of Dispute Resolution and Arbitration at WTO' in Julien Chaisse and Cristian Rodriguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar Publishing 2023); E Baroncini, 'The EU and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) - A Contingency Tool to Save the WTO Appellate Stage' in Andrea Gattini and Bruno Barel (eds), *Le prospettive dell'export italiano in tempi di sfide e crisi globali. Rischi e opportunità* (Giappichelli 2021).

[408] Multi-Party Interim Appeal Arbitration Arrangement (MPIA) (30 April 2020) WTO Doc JOB/DSB/1/Add.12; Another measure available to the EU in light of the WTO situation is the Enforcement Regulation. The Enforcement Regulation (which expanded the scope of the 2014 Enforcement Regulation) has addressed some gaps following the dismantling of the AB. It is part of the EU's strategy which aims to encourage the use of the MPIA instead of allowing parties to avoid their obligations after a Panel report by appealing into 'the void'; Folkert Graafsma, 'The Revised Enforcement Regulation (No 2021/167) and Some Possible Effects on EU Trade Disputes' (2022) 17 Global Trade and Customs Journal 289.

[409] See Petros C Mavroidis, 'The Gang That Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate body' (2016) 27 European Journal of International Law 1107.

[410] This alternative mechanism involves 10 arbitrators. In any WTO dispute between participants where a party triggers an appeal against a WTO panel report, three members of the pool are selected randomly to hear an appeal under the MPIA; MPIA, footnote 4.

appellate stage. Prior to the paralysis of the AB, this step would not have been necessary, as all WTO members were already obliged to use the AB in case of appeal, although the option of using Article 25 of the DSU. Thus, if a party wishes to appeal, it can request the suspension of panel proceedings up to 10 days before the final panel report is circulated to all members. This suspension ensures that the panel's ruling does not take effect until the MPIA appeal arbitration process is completed.[411] The MPIA panel must submit a decision within 18 days from the day of the notice of appeal. Third parties to the dispute (whether or not they are MPIA participants) have an additional 4 days to submit their observation. The oral hearing takes place between day 30 and day 45, and within a maximum of 90 days, the MPIA arbitrators must issue their award to the parties.[412]

The MPIA appeal award includes both the panel's not appealed findings and any decisions made by the arbitrators. Pursuant to Article 25(3) of the DSU, arbitration awards must be notified to the DSB, where any WTO member may raise any points relating to the award. The binding effect of the MPIA is established by Article 25(3) of the DSU, which states that 'the parties to the proceeding shall agree to abide by the arbitration award.'[413] Article 25(4) of the DSU also states that Articles 21 and 22 on the implementation and enforcement of WTO panel/AB rulings shall apply *mutatis mutandis* to arbitration awards. As a result, an MPIA award is treated in the same manner as an adopted panel or AB report.[414]

[411] MPIA, Annex 1, para 4. Joost Pauwelyn, 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?' (2023) 22 World Trade Review 693.
[412] MPIA, Annex 1, para 11- 12; WTO Plurilaterals, 'Multi-Party Interim Appeal Arbitration Arrangement (MPIA)' (WTO Plurilaterals) https://wtoplurilaterals.info/.
[413] Art 25(3) DSU.
[414] Panel Report, *China—Anti-Dumping and Countervailing Duty Measures on Barley from Australia* (adopted 24 August 2023) WT/DS598/R; Panel Report, *Australia—Anti-Dumping and Countervailing Duty Measures on Certain Products from China* (adopted 30 April 2024) WT/DS603/7; Bernard Hoekman and Petros C Mavroidis, 'To AB or Not to AB? Dispute Settlement in WTO Reform' (Social Science Research Network, 1 May 2020) https://papers.ssrn.com/abstract=3688359; Bruce Hirsh, 'Resolving the WTO AB Crisis, Proposals on Precedent, Appellate Body Secretariat and the Role of Adjudicators' (National Foreign Trade Council 2020) https://www.nftc.org/archive/Trade%20Policy//WTO_Issues/Resolving%20the%20WTO%20AB%20Crisis%20vol2%2006042020.pdf.

3.EU STATE AID

3.1 Introduction

The EU state aid system is underpinned by a comprehensive system of *ex ante* control, as delineated in Article 108(3) of the TFEU. This provision implies that EU member states, first, notify the Commission of 'any plans to grant or alter aid'.[415] Second, it mandates them to wait for the Commission's approval of the measure's compatibility with the internal market before implementing it. Failure to notify renders the non-notified aid unlawful.

This section begins by providing an overview of the Commission's exclusive competence in assessing the compatibility of state aid with the internal market. It then continues by examining the role of national courts in enforcing EU state aid law. Their roles, distinct yet complementary to that of the Commission, involve addressing all potential implications arising from violations of the standstill obligations under Article 108(3) of the TFEU. The section concludes with an overview of the existing legal proceedings available for challenging EU state aid decisions.

This section underscores that the supranational role of the Commission in enforcing EU state aid law, along with its close cooperation with member states and oversight by EU courts, is essential for ensuring an effective and uniform application of state aid rules across EU member states.

3.2 Notification and transparency

In accordance with Article 108(3) TFEU, any plans to grant new aid have to be notified to the Commission and should not be put into effect before the Commission has authorized it (this is known as the 'standstill obligation').[416] The obligation to notify fall exclusively on EU member states and never on the recipients of the measure.[417] This requirement applies even when a member state considers the measure compatible with the internal market under to Article 107(2) and 107(3) TFEU. However, if a measure does not qualify as new aid, member states are permitted to implement it without prior notification to the Commission.[418]

Nonetheless, several exemptions to the notification requirement established under Article 108(3) exist. As explained in detail in chapter II of this thesis, these include the *De minimis*

[415] Art 108(3) TFEU.
[416] Case C-493/14, *Dilly's Wellnesshotel GmbH v Finanzamt Linz* ECLI:EU:C:2016:577, para 54.
[417] Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA v Commission of the European Communities* ECLI:EU:T:2003:217, para 64.
[418] Existing aid is not subject to the notification obligation. It is exclusively for the Commission to assess whether an existing aid is still compatible with the internal market and propose appropriate measures where it considers that a scheme is no longer compatible.

Regulation,[419] which exempts certain aid measures from notification and approval when they are considered too small to influence trade between EU member states or to distort or potentially distort competition. Furthermore, the GBER exempt specific categories of aid measures from the notification requirement when they meet criteria for compatibility with the internal market pursuant to Article 107(2) or 107(3) TFEU. In addition, Commission Decision 2012/21/EU on SGEI and Regulation (EC) No 1370/2007 of the European Parliament and of the Council – particularly concerning public passenger transport services by rail and road[420] – exempt from notification any compensation for public service obligations that meets specific conditions, in accordance with Articles 106(2) and 93 TFEU. Also, EU state aid schemes that have already been approved by the Commission, such as the Temporary Frameworks introduced after Covid-19 and the Ukraine crises, do not require prior notification.

To ensure greater transparency within the EU, national authorities are required to disclose details regarding any allocated aid within six months of its granting. According to Article 9(1) and Annex III of the GBER, this information include: a description of the exempted state aid measures, the full text for each individual aid award exceeding EUR 500,000, the identity of the recipient and its size, the region and sector in which the recipient is active, the amount of aid and the purpose for which it is given, the type of aid instrument, the date of award, and the identity of the authority granting the aid.[421]

3.3 The Commission

In the context of EU state aid regime, the principal enforcement body is the Commission. Its status as a supranational entity, institutionally and politically independent from the granting authorities, ensures the effective and uniform application of state aid rules within the EU.[422]

The Commission competence in assessing the compatibility of state aid derives from Article 107(2)-(3) TFEU. Typically, its examination occurs in two steps. First, it identifies if the measure

[419] Such regulations are adopted on the basis of the enabling Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid [2015] OJ L 248/1; Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others* ECLI:EU:C:2006:644, para 38; Case C-1/09, *CELF and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* ECLI:EU:C:2010:136, para 26; Case C-505/14, *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen* ECLI:EU:C:2015:742, para 21.

[420] European Parliament and Council Regulation (EC) 1370/2007 on public passenger transport services by rail and by road [2007] OJ L 315/1.

[421] Art 9 and Annex III General Block Exemption Regulation; The information submitted by the authorities in fulfilment of the transparency obligations in state aid, or an indication of where such information can be found, is available on the consolidated website: https://webgate.ec.europa.eu/competition/transparency/public/search/home/; Competition Directorate–General of the European Commission, State aid transparency: Why? What? When? Where? How? (Policy Brief, 2016).

[422] Elisabetta Righini and Flavia Tomat, 'State Aid Procedures' in Leigh Hancher and Juan Jorge Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021) 255; See generally Rubini (n 8) Ch 4.

constitutes state aid according to Article 107(1) of the TFEU. This phase is a competence shared by both the Commission and national courts, as national courts may need to ascertain whether a measure falls under the standstill obligation. Second, it evaluates through a 'balancing test' whether the measure can be declared compatible with the EU internal market, and therefore be granted. This assessment falls, instead, within its exclusive power.[423]

The centralization of state aid compatibility decisions within the Commission had sparked debates on whether this imposes an excessive workload for a single entity. However, while decentralization has proven effective in antitrust enforcement,[424] the unique dynamics of state aid law, which target measures adopted by public administrations rather than the behavior of market participants, justify the Commission's role as the sole competent entity.[425]

The Commission determines a measure's compatibility through either a preliminary examination, if it has no doubts about the measure's compatibility with the internal market, or through a formal investigation if concerns arise.[426] When initiating a formal investigation, which is envisaged by Article 108(2) of the TFEU, the Commission issues a decision that outlines its initial evaluation concerning the nature of the measure and its doubts about the measure's compatibility with the internal market (this is called the 'opening decision'). Even before the preliminary investigation, the Commission has established as a best practice to informally discuss the economic and legal aspects of the aid with the granting member state before its implementation (the so-called pre-notification phase).[427]

3.3.1 Pre-notification phase

The Commission and the member states may start engaging in informal discussions about a proposed aid measure even before its formal notification. This phase aims to reduce the risk of submitting an incomplete notification, which could delay the examination procedure of the notified measure. Although the Commission may request additional information if the initial submission is deemed incomplete, the General Court clarified that the aim of this phase 'is not to assess the compatibility

[423] Case C-385/18, *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti* ECLI:EU:C:2019:1121, para 83; Case C-587/18 P, *CSTP Azienda della Mobilità SpA v European Commission* ECLI:EU:C:2020:150; Case C-586/18 P, *Buonotourist Srl v European Commission* ECLI:EU:C:2020:152, paras 90–91.
[424] Before the modernization reform in 2003 of the competition rules applicable to undertakings, a prior authorization procedure existed in the form of individual exemptions, negative clearances and comfort letters issued by the Commission upon notification of agreements by the parties thereto. The new regime provides for ex post facto control in which national courts, national competition authorities and the Commission play a role.
[425] Righini and Tomat (n 422) 254-256; Alberto Heimler, 'State Aid Control: Recent Developments and Some Remaining Challenges' in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2020).
[426] Art 4(3) Procedural Regulation; Biondi (n 54).
[427] Commission, 'Notice on the Enforcement of State Aid Rules by National Courts' [2021] OJ C305/1, para. 35; see Bacon (n 228) 18.

of the notified measure with the internal market.'[428] It emphasized that such an evaluation occurs only during the actual preliminary examination process.

The duration of the pre-notification phase is largely influenced by the case's complexity. Nonetheless, the Commission's Code of Best Practices generally limits this phase to a maximum of six months.[429] Despite this guideline, the General Court's jurisprudence indicates that the length of pre-notification does not automatically imply that the Commission has doubts about the compatibility of the measure. This was exemplified in the *NMTA* case, where the General Court deemed a nine-month pre-notification period reasonable, given the specific context of the case.[430]

3.3.2 Preliminary investigation

The preliminary examination process can be initiated in three ways: (i) upon receiving a detailed notification from a member state, (ii) through the Commission's acknowledgment of a credible complaint,[431] or (iii) when the Commission uncovers information related to unlawful aid (*ex officio*).[432]

Regarding formal notifications from a member state, if the Commission deems the notification incomplete, it may request additional information. Article 5(3) of the Procedural Regulations states that if the member state does not respond to this request within the specified timeframe, the notification is considered withdrawn. The second scenario occurs when the Commission decides to pursue a complaint submitted by an interest party regarding alleged unlawful aid or misuse of aid.[433] According to Article 24(2) of the Procedural Regulation, if the Commission, after a *prima facie* examination, finds insufficient evidence of unlawful aid, it must inform the interested party. Additionally, the Commission must request the interested party to submit comments within a prescribed period, typically one month. If the interested party does not respond within this timeframe, the complaint is deemed withdrawn. Finally, as outlined in Article 12(1) of the Procedural Regulation, the Commission may also examine information on unlawful aid from any source *ex officio*.[434]

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[428] Case T-793/14, *Tempus Energy Ltd and Tempus Energy Technology Ltd v European Commission* ECLI:EU:T:2018:790, para 267.
[429] Commission, 'Code of Best Practices for the Conduct of State Aid Control Procedures' [2018] OJ C253/14, para 16.
[430] Case T-140/13, *Netherlands Maritime Technology Association v European Commission* ECLI:EU:T:2014:1029.
[431] Art 24(2) Procedural Regulation.
[432] Art 12(1) Procedural Regulation.
[433] Procedural Regulation recital 32-33.
[434] Anna Nowak, 'Evidence Requirements in the State Aid Compatibility Assessment' (2018) 17 European State Aid Law Quarterly 212, 212.

The Commission has a two-month period to conduct its preliminary examination, and timeframe is binding.[435] At the conclusion of the preliminary investigation, the Commission must decide whether: the measure does not constitute aid within the context of EU rules and can thus be implemented; the aid is compatible with EU rules because its positive effects outweigh any distortion of competition, and therefore, may be implemented; there are serious doubts regarding the compatibility of the notified measure with EU state aid law, prompting the Commission to initiate an in-depth investigation pursuant to Article 108(2) of the TFEU.[436] In the latter situation, the measure cannot be implemented until the formal investigation has been concluded.[437] The duration of a preliminary examination may indicate doubts or serious difficulties, necessitating the Commission to initiate a formal investigation. However, this decision must be assessed based on the specific circumstances of the case, taking into account its context, the procedural steps required, its complexity, and its significance to the parties involved.[438]

3.3.3 Formal investigation procedure

According to Article 6 of the Procedural Regulation 'the decision to initiate the formal investigation procedure shall summarize the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the internal market.'[439] Member states and interested third parties are given one month to submit comments on the Commission's preliminary findings.[440] The member state in question may also be required to respond to the comments made by interested parties.[441]

If the information gathered by the Commission during the preliminary examination is insufficient, it may request supplementary information from 'any other Member State, an

[435] Joined Cases T-239/04 and T-323/04, *Italian Republic and Brandt Italia SpA v Commission of the European Communities* ECLI:EU:T:2007:260, paras 86–90; According to Articles 4(5) and (6) of the Procedural Regulation, authorization of the notified aid is deemed to be given where the Commission failed to take a decision within two months following the receipt of a complete notification, and has not taken an ultimate decision within 15 working days after having been given prior notice by the member state that it would proceed to the implementation of the measure in question.
[436] Case C-487/06 P, *British Aggregates Association v Commission of the European Communities and United Kingdom* ECLI:EU:C:2008:757, para 113.
[437] See Art 4(2), (3) and (4) and Art 15 the Procedural Regulation; Case T-27/02, Kronofrance SA v Commission of the European Communities ECLI:EU:T:2004:348, para 51; Case T-475/04, *Bouygues SA and Bouygues Télécom SA v Commission of the European Communities* ECLI:EU:T:2007:196, para 89; Case T-73/98, *Société chimique Prayon-Rupel SA v Commission of the European Communities* ECLI:EU:T:2001:94, para 43.
[438] Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08, *Regione Autonoma della Sardegna and Others v European Commission* ECLI:EU:T:2011:493; Case T-58/13, *Club Hotel Loutraki AE and Others v European Commission* ECLI:EU:T:2015:1, para 61.
[439] Art 6(1) Procedural Regulation. This decision is disclosed in the EU's Official Journal.
[440] Article 1 of the Procedural Regulation states that an interested party is defined as any person, undertaking, association, or even another member state, whose interests might be affected by the granting of the aid and include, in particular, any beneficiary of the aid and its competitors.
[441] Art 6 Procedural Regulation.

undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete its assessment.'[442]

During its investigation or before reaching a final decision, the Commission has the authority to impose interim measures. These measures may comprise issuing an information injunction, a suspension injunction, or a recovery injunction. The procedure for issuing information injunctions unfolds in two distinct phases. Initially, the Commission contacts the member state in question, requesting information. If the member state fails to respond or submits only partial information despite receiving a reminder, the Commission may issue an information injunction.[443] This injunction specifies the required information and sets a deadline for its submission. Article 14 of the Procedural Regulation specifies that if the member state does not comply with an information injunction, the Commission has the authority to issue a decision based on the available information. Thus, the issuance of an information injunction represents a crucial preliminary measure when the Commission must base its decision on incomplete information.[444] As an alternative, the Commission may also opt for a suspension injunction. This measure allows the Commission to demand that a member state immediately suspend the disbursement of any aid deemed unlawful. This is done only after providing the member state with a chance to present its comments. Specifically, Article 13(1) of the Procedural Regulation stipulates that 'after giving the Member State concerned the opportunity to submit its comments, the Commission may adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market ('suspension injunction').'[445] Since Article 108(3) of the TFEU already establishes the standstill obligations, the additional legal effect of a suspension injunction is to empower the Commission to refer the matter directly to the CJEU, seeking a declaration that a member state's failure to comply amounts to a breach of the TFEU. Recovery injunctions, on the other hand, require member states to provisionally recover the aid pending the Commission's decision on its compatibility. However, the application of recovery injunctions is infrequent, as it is constrained by stringent criteria, such as the absence of doubts about the measure's status as aid, the urgency to act, and a serious risk of substantial and irreparable damage to competition.[446]

[442] Art 7(1) Procedural Regulation.
[443] Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post AG and Federal Republic of Germany v European Commission* ECLI:EU:C:2011:656, paras 44 and following.
[444]Case T-196/02, *MTU Friedrichshafen GmbH v Commission of the European Communities* ECLI:EU:T:2007:252, para 41.
[445] Art 13(1) Procedural Regulation.
[446] Art 13(2) Procedural Regulation.

3.3.4 Final decision

The Commission concludes its formal investigation by issuing a final decision.[447] The duration of this formal procedure is not fixed by law, as it varies depending on factors like the complexity of the case, the quality of information provided, and the level of cooperation from the member state concerned. Ideally, the Commission aims to make a decision within 18 months of initiating the formal procedure.

The investigation may conclude with a 'positive decision', indicating either that the measure does not constitute state aid or, if it does, that the aid is compatible with the internal market.[448] Alternatively, a 'conditional decision' may find the aid compatible, subject to certain conditions being met prior to its implementation.[449] There is also the possibility of a 'negative decision', declaring that the aid is incompatible with the internal market and thus cannot be implemented.[450] If the measure was notified before implementation, a negative decision requires its cessation by the member state. In cases where the Commission investigates an unlawful aid, a negative decision mandates the member state to recover the aid from the beneficiary, unless such recovery would contravene a general principle of EU law.[451]

3.4 National courts

Regarding the role of national courts in overseeing member states' adherence to their obligations under EU state aid law, they play a complementary yet distinct role from that of the Commission.[452] National courts lack the authority to determine the compatibility of state aid with the internal market. However, they can rule on whether a measure qualifies as aid and, if so, they are empowered to address all potential implications arising from violations of the notification and standstill obligations under Article 108(3) of the TFEU.[453]

When national courts assess whether state aid has been granted in accordance with Article 108(3) TFEU, they scrutinize the nature of the measure to determine if it constitutes state aid. They have the authority to interpret and apply Articles 107(1) and 108(3) of the TFEU. In the absence of

[447] Art 9 Procedural Regulation.
[448] Art 9(3) Procedural Regulation.
[449] Art 9(4) Procedural Regulation.
[450] Art 9(5) and 15 Procedural Regulation.
[451] Art 16 Procedural Regulation.
[452] See Leonardo Armati and Federico Macchi, 'The Commission Adopts the New Notice on the Enforcement of State Aid Rules Before National Courts' (2022) 21 European State Aid Law Quarterly 3.
[453] Case C-199/06, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)* ECLI:EU:C:2008:79, para 36; Case C-536/19 P (I), *EDP España SA v European Commission* ECLI:EU:C:2019:965, paras 37–38; see James Flynn, 'The Role of National Courts' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004); Fernando Pastor-Merchante and Giorgio Monti, 'The functions of national courts in the private enforcement of State aid law' in Parcu, Monti and Botta (n 61) 121.

a decision from the Commission regarding a specific aid measure, national courts rely exclusively on the objective notion of state aid to determine its existence. Conversely, when there is not yet a decision but the Commission has initiated its investigation, national courts must consider the Commission's preliminary assessment, and cannot conclude that a measure does not constitute state aid as per Article 107(1) TFEU. Thus, if the measure is recognized as state aid, national courts are then required to determine if it is subject to the standstill obligation.[454] To do so they need to assess whether the measure fulfils the criteria established in a block exemption regulation or qualifies as existing aid. If an aid measure meets all the conditions specified in a block exemption regulation, it is exempt from the requirement of prior notification to the Commission and is presumed to be compatible with the internal market. Existing aid, while exempt from the notification obligation imposed on member states under Article 108(3) TFEU, is subject to a separate review process by the Commission, as outlined in Article 108(1) of the TFEU.[455]

The adoption of block exemption regulations does not aim to shift the assessment of state aid compatibility with the internal market to member states, as this responsibility remains exclusively with the Commission. Nonetheless, it is the duty of national courts to ensure that national authorities have granted aid in strict compliance with both the general and specific conditions set out in the applicable block exemption regulation.[456]

3.4.1 Safeguarding the rights of individuals faced with the breach of the standstill obligation

To protect the rights of individuals from the unlawful implementation of state aid, national courts have the authority to implement various remedies based on the specific circumstances.[457] They may, for example, suspend or terminate the implementation of the measure, order the recovery of the sums already disbursed or adopt different provisional measures to otherwise safeguard the interests of the parties concerned. Additionally, they may be requested to deliberate on compensating damages incurred by third parties due to the unlawful implementation of the state aid.[458] National courts are

[454]Case C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon v French Republic* ECLI:EU:C:1991:440, para 11; Case C-284/12, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH and Others* ECLI:EU:C:2013:755, para 34.

[455] Fernando Pastor-Merchante, 'The Private Enforcement of State Aid Law' in Leigh Hancher and Juan J Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021).

[456] Righini and Tomat (n 422).

[457] See Bacon (n 228) ch 20.

[458] Commission, 'Notice on the Enforcement of State Aid Rules by National Courts' [2021] OJ C305/1, para 71; Daniele Gallo, 'Aiuti di Stato e risarcimento del danno' (2019) 3 Eurojus 10; Simone Donzelli and Bernadette Willemot-Nieuwenhuys, 'New trends in State aid enforcement by national courts: damages claims and the State aid cooperation tools' in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2020) 141.

obligated to ensure that individuals have a clear expectation that all necessary measures will be enacted, in line with domestic legislation, to address breaches of Article 108(3) of the TFEU.[459]

3.4.2 Cooperation between national courts and the Commission

In line with Article 4(3) of the TEU, the Commission is required to assist national courts in their crucial role in enforcing EU state aid law. Similarly, national courts have the ability to seek support from the Commission while dealing with state aid rules in ongoing cases. This collaboration ensures a more uniform and effective application of state aid regulations throughout the EU. Under Article 29 of the Procedural Regulation, national courts may request the Commission to share relevant information it possesses.[460] While adjudicating cases involving state aid, national courts must follow relevant EU regulations and the case law established by the EU courts. Although the ultimate interpretation of the treaties falls to the EU courts, national courts can seek guidance on applying EU state aid rules from the Commission's decision-making practices, as well as from relevant notices and guidelines issued by the Commission. Additionally, national courts may refer to prior opinions or observations made by the Commission, which are available on its website, especially when the issues being considered are similar to those previously addressed by other national courts.[461]

[459] Walter Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501.
[460] Article 29(1) of the Procedural Regulation also states that the Commission can ask for information from national courts that is necessary to make its assessment on the aid at issue. The same is true for national courts, which can seek support from the Commission while dealing with state aid rules in ongoing cases.
[461] Commission, 'Notice on the Enforcement of State Aid Rules by National Courts' [2021] OJ C305/1, para 71, 100-130.

4. TCA

4.1 Introduction

In terms of monitoring and enforcement, the TCA subsidy regime provides for various mechanisms. These encompass transparency requirements, the establishment of an independent authority or body, mechanisms of private enforcement before national courts, and recourse to the TCA's DSM. However, while the TCA explicitly requires its obligations to be implemented effectively, it leaves the parties free to determine how to regulate them within their own subsidy control systems.[462] For the EU, the relevant system is enshrined under EU state aid law, whereas the UK has implemented its own subsidy control regime under the SCA.

This section, after describing the tools to enforce subsidy control delineated by the TCA, delves into the key features of the SCA. It highlights that the UK subsidy control regime is enforced through a system of referrals to the SAU for expert advice regarding the most distortive subsidies, and through private enforcement mechanisms that allow challenges to subsidy measures deemed not compatible with the SCA.

This section underscores that the enforcement of subsidies under the TCA primarily relies on the domestic mechanisms of each party, with the TCA dispute settlement processes playing a limited role. Moreover, an examination of the UK's domestic subsidy regime reveals that compliance with the subsidy control principles depends largely on the self-assessment of public authorities, with limited grounds for review before the Competition Appeal Tribunal (CAT).

4.2 Transparency

Article 369(1) of the TCA establishes that both parties are committed to disclosing the legal basis and purpose of the subsidy, the name of the recipient of the subsidy when available, the date of the grant of the subsidy, the duration of the subsidy, and its amount.[463] For the EU, this information shall be made publicly available 'on an official website or a public database, that allows interested parties to assess compliance with the principles set out in Article 366'.[464] National websites, the Commission's State Aid Transparency website,[465] and the ISEF case search[466] are among the tools that may be used to ensure transparency.

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[462] Art 366 TCA.
[463] Art 369(1) TCA.
[464] Art 369(4) TCA.
[465] Commission's State Aid Transparency website: https://webgate.ec.europa.eu/competition/transparency/public/search/home/.
[466] Competition case search: https://competition-cases.ec.europa.eu/latest-updates/SA.

The UK, in turn, faces more stringent obligations compared to the EU in terms of transparency. Specifically, Article 369(5) of the TCA provides that 'if any interested party communicates to the granting authority that it may apply for a review by a court or tribunal of: (i) the grant of a subsidy by a granting authority; or (ii) any relevant decision by the granting authority or the independent body or authority; then (b) within 28 days '…' the granting authority, independent body or authority shall provide that interested party with the information'.[467] This mechanism is designed to empower interested parties with the necessary details for evaluating the subsidy's adherence to the principles outlined in Article 366 of the TCA, enabling them to decide whether to pursue judicial review.[468] An interested party is defined under Article 369(6) as 'any natural or legal person, economic actor or association of economic actors whose interest might be affected by the granting of a subsidy, in particular the beneficiary, economic actors competing with the beneficiary or relevant trade associations.'[469]

4.3 The independent authorities or body

Under Article 371(1) of the TCA, the EU and the UK agreed that 'Each arty shall establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime' and that this authority must act impartially.[470] Since Article 371 TCA does not specify what constitutes an 'appropriate' role, the EU and UK had the flexibility to define the powers and responsibilities of their independent authorities.[471] Article 371(2) of the TCA also requires cooperation between the parties' respective subsidy authorities.[472] Hence, in order to meet Article 371 TCA obligation, the EU nominated the Commission as competent authority, while the UK gave this role to the SAU within the CMA.[473]

[467] Art 369(5) TCA.
[468] Ben Holles de Peyer and Marija Momic, 'State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement' (2021) 42 European Competition Law Review 365, 368.
[469] Art 369(6) TCA.
[470] Art 371(1) TCA.
[471] Nicolaides (n 325) 377.
[472] Article 371(2) TCA states that '[the] Parties shall encourage their respective independent authorities or bodies to cooperate with each other on issues of common interest within their respective functions (...) within the limits established by their respective legal frameworks. The Parties, or their respective independent authorities or bodies, may agree upon a separate framework regarding cooperation between those independent authorities.' The rationale behind this provision is similar to that of Article 29(1) of the Procedural Regulation, as they both promote cooperation between authorities with the objective of ensuring a uniform interpretation of the subsidy regime.
[473] S. 65 SCA.

4.4 Private enforcement

Article 372 of the TCA requires the parties to empower their courts and tribunals to scrutinize any decisions made by either the granting authority or the independent authority or body, in order to assess the lawfulness of the subsidies in accordance with the general principles of Article 366 of the TCA. This provision allows challenges to be initiated by interested parties who have legal standing. Courts and tribunals are given the jurisdiction to grant any appropriate remedy, including the suspension, prohibition, or requirement of action by the granting authority, the award of damages, and the recovery of the subsidy from its beneficiary. Under Article 372(2), the EU can appear as an intervening party in any court action in the UK concerning the subsidy rules (and *vice versa*).[474]

4.5 Dispute settlement mechanism

The general dispute resolution system is outlined in Part Six, Title I and is applicable across the whole Agreement except for certain specified areas.[475] These areas are characterized either by the absence of specific dispute resolution procedures (which, like all other matters, can be escalated to the Partnership Council) or by being subject to alternative mechanisms.[476]

The TCA's general DSM requires exclusivity: 'The Parties undertake not to submit a dispute between them regarding the interpretation or application of provisions of this Agreement or of any supplementing agreement to a mechanism of settlement other than those provided for in this Agreement.'[477] However, it is acknowledged that for issues covered by the TCA that might also be actionable under other legal disciplines, an alternative route for dispute settlement can be utilized. This is further elaborated in Article 737 of the TCA which states that:

> If a dispute arises regarding a measure allegedly in breach of an obligation under this Agreement or any supplementing agreement and of a substantially equivalent obligation under another international agreement to which both Parties are party, including the WTO Agreement, the Party seeking redress shall select the forum in which to settle the dispute.

[474] Biondi and Howard (n 5) 383-402.
[475] Art 735 TCA.
[476] 'The TCA further specifies that the Partnership Council may adopt decisions to issue interpretations of the provisions of Part Two (covering trade and investment). The understanding of vague phrases (such as 'material impact') may benefit from constructive dialogue which promotes evolutionary and sustainable interpretations, preventing confrontations and potentially forestalling withdrawal from the instrument altogether. States have so far been reluctant to seek joint interpretations of FTAs even in cases where there is significant legal uncertainty. This is somewhat surprising given that issuing a joint declaration is relatively easy for parties. If a more permanent arbitration system comes into being under the TCA or if even if there are repeat arbitrators, then a system of informal precedent is likely to emerge. While this could add to predictability, the gravitas of a permanent adjudicatory body could conceivably increase the risk of 'judicial activism' undermining rights and obligations enshrined in the treaty text, and could exacerbate political tensions between the parties. One of the advantages of formal adjudication in FTAs is that it can help de-politicize disputes, distilling them into legal issues for which there are technical solutions arrived upon by specialists' in Collins (n 186) 635.
[477] See Art 736 TCA.

> 2. Once a Party has selected the forum and initiated dispute settlement procedures either under this Title or under another international agreement, that Party shall not initiate such procedures under the other international agreement with respect to the particular measure referred to in paragraph 1, unless the forum selected first fails to make findings for procedural or jurisdictional reasons.[478]

Consequently, if a party wants to use a different legal system for resolving disputes outside of the TCA, it must make sure its arguments are specifically designed for that alternative system and do not mention the TCA. Article 737 of the TCA, while aiming to prevent a party from attempting to resolve the same dispute across multiple legal systems, still allows a party to submit multiple complaints if the initially chosen forum declines to make a judgment based on the merits of the case. Paragraph 4 of Article 737 of the TCA clarifies that 'nothing in this Agreement or any supplementing agreement shall preclude a Party from suspending obligations authorised by the Dispute Settlement Body of the WTO or authorised under the dispute settlement procedures of another international agreement to which the Parties are party. The WTO Agreement or any other international agreement between the Parties shall not be invoked to preclude a Party from suspending obligations under this Title.'[479] Hence, while the parties are mandated to ensure that their international commitments are in line with the TCA, these obligations should not detract from the effectiveness of the agreement's enforcement mechanism.[480]

A pivotal aspect of the DSM within the TCA is that decisions and rulings made by the arbitration tribunal are binding exclusively on the EU and the UK, without bestowing any direct rights or obligations upon natural or legal persons. This principle is enshrined in Article 754(3) and 754(4) of the TCA which state that:

> Decisions and rulings of the arbitration tribunal cannot add to or diminish the rights and obligations of the Parties under this Agreement or under any supplementing agreement. 4. For greater certainty, the arbitration tribunal shall have no jurisdiction to determine the legality of a measure alleged to constitute a breach of this Agreement or of any supplementing agreement, under the domestic law of a Party. No finding made by the arbitration tribunal when ruling on a dispute between the Parties shall bind the domestic courts or tribunals of either Party as to the meaning to be given to the domestic law of that Party.[481]

The TCA's main arbitration process includes mandatory consultations followed by formal arbitration within a strict timeframe. During consultations, each party shall provide the other party with sufficient information in its possession to allow a full examination of the matters raised. Each

[478] Art 737 TCA.
[479] Art 737(4) TCA.
[480] Totis Kotsonis, 'TCA Dispute Resolution Mechanisms and Subsidy Control Commitments' (2021) Briefing Paper 58 https://blogs.sussex.ac.uk/uktpo/publications/tca-dispute-resolution-mechanisms-and-subsidy-control-commitments/.
[481] Art 754(3) and 754(4) TCA.

party shall endeavor to ensure the participation of personnel of their competent authorities who have expertise in the matter subject to the consultations.[482]

4.5.1 Dispute settlement and subsidy control

In certain areas of Title XI, the usual dispute settlement rules are either fully excluded (such as some of the general rules, competition, certain subsidy rules, and taxation) or modified (for instance, Article 760 of the TCA, which establishes special procedures for remedial and rebalancing measures). Additionally, various other aspects of Title XI are governed by modified dispute settlement rules specific contained within Title XI itself. As concerns subsidy control, Article 375 of the TCA states that 'Title I of Part Six applies to disputes between the Parties concerning the interpretation and application of this Chapter, except for Articles 371 and 372.'[483]

The TCA's dispute settlement process includes mandatory consultations followed by formal arbitration.[484] In particular, Article 370 of the TCA establishes a consultations mechanism that either party may resort to if it suspects that a subsidy granted by the other party 'has or could have a negative effect on trade or investment' between them.[485]

The procedure begins when a party request the other to provide within 60 days an explanation on how the TCA subsidy principles apply to the subsidy at issue. If these explanations are insufficient to allay the requesting party's concerns, the latter may request consultations within the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development. This body seeks to reach a mutually satisfactory solution. If a solution is not found, either party may request the establishment of an arbitration panel.[486] Article 375 of the TCA in this respect states:

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[482] Lydgate E and others, 'Taking Stock of the UK-EU Trade and Cooperation Agreement: Governance, State Subsidies and The Level Playing Field' (UK Trade Policy Observatory 2021) Briefing Paper 54 https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/.

[483] Art 375 TCA.

[484] The arbitration tribunal is composed of three arbitrators. The composition of the arbitration panel must be agreed upon by the parties within 10 days following the initiation request for an arbitration tribunal. Within 180 days from the TCA coming into effect, sub-lists of arbitrators, which cannot be citizens of either the EU or the UK, have been appointed. Moreover, an additional lists of experts in specific sectors has been created, consisting of separate sub-lists nominated by the EU and UK. Those included in these lists must not hold positions as members, officials, or servants within EU institutions, the government of any EU member state, or the government of the UK. Furthermore, individuals on these lists must possess qualifications suitable for appointment to high judicial offices in their respective countries or demonstrate recognized competence. Arbitrators are also required to demonstrate expertise in law and international trade. However, flexibility may be allowed concerning expertise requirements based on the nature of a particular dispute; Kotsonis (n 480).

[485] Art 370 TCA.

[486] See Case C-284/16, *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158. The CJEU 'unfriendly' approach to arbitration has been confirmed in the recent judgment in *Slovak Republic v. Achmea*, where it was held that an arbitration clause contained in the Netherlands/Slovakia Bilateral Investment Treaty was incompatible with EU law because it breached its 'autonomy'; Kai Struckmann and others, 'EU State Aid and Arbitration' in Leigh Hancher and Juan Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing 2021) 163.

> An arbitration tribunal shall have no jurisdiction regarding: (a) an individual subsidy, including whether such a subsidy has respected the principles set out in Article 366(1), other than with regard to the conditions set out in Article 367(2), Article 367(3), (4) and (5), Article 367(8) to (11) and Article 367(12) [Unlimited state guarantees], (3) to (5) [Rescue and restructuring], (8) to (11) [Export subsidies] and (12) [Subsidies contingent upon the use of domestic content]); and (b) whether the recovery remedy within the meaning of Article 373 has been correctly applied in any individual case.[487]

Thus, the arbitration panel's authority on subsidy issues is significantly limited, as it is not competent when the dispute concerns the independent bodies or authorities,[488] judicial review processes,[489] or the examination of individual subsidies (with a few exceptions primarily related to export subsidies).[490] Moreover, while the outcome of arbitration is binding (and of course it is binding exclusively on the EU and the UK), it does not have automatic domestic effect. As a result, governments may delay or even ignore its full implementation. Unlike the CJEU, which has the power to impose fines directly on EU member states, arbitration under the TCA lacks this kind of power and the implications for non-compliance are limited to mitigating measures or suspending parts or all of the trade agreement.[491]

4.6 The Subsidy Control Act

The UK implemented its TCA obligations through the EU (Future Relationship) Act 2020.[492] However, Article 366 of the TCA also requires both parties to establish an effective domestic regime for subsidy control. Since the EU already has its state aid framework in place, this requirement primarily concerned the UK. Consequently, the UK introduced the SCA, which received Royal Assent on 28 April 2022 and fully came into effect on 3 January 2023. The rationale behind the SCA was to create a more flexible and less bureaucratic system than EU state aid, enabling the UK to achieve new economic, social and environmental objectives while still preventing harmful subsidies.[493]

The following paragraphs examine the key elements of the SCA and assess whether it adequately fulfils the obligations that the TCA imposes on the UK. This analysis reveals that, since each party was free to decide what type of model to adopt, the UK chose not to follow the EU model. As a result, the new UK subsidy regime does not include a prior notification mechanism or an

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[487] Art 375 TCA.
[488] Art 371 TCA.
[489] Art 372 TCA.
[490] Art 375(2) (a) TCA; By implication, 'subsidy schemes' are not excluded; Biondi (n 2) 229.
[491] Rodger and Stephan (n 127) 93.
[492] EU (Future Relationship) Act 2020 (c 29).
[493] Andreas Stephan, 'Will the New UK Subsidy Control Regime Help "Level Up" the Economy?' (2024) 87 *The Modern Law Review* 172, 174; Lee McGowan, 'State Aid Policy in the United Kingdom Post-Brexit: A Case of de-Europeanisation as Orbiting Europeanisation' (2023) 30 Journal of European Public Policy 2372; Kieron Beal, '"More Flexible and Less Bureaucratic" or Carte Blanche? The Enforcement of Subsidy Control Post-Brexit' (*The European Advocate*, 14 July 2022) https://bareuropeangroup.org/2022/07/14/more-flexible-and-less-bureaucratic-or-carte-blanche-the-enforcement-of-subsidy-control-post-brexit/.

independent regulator with binding powers (it only requires the SAU to provide non-binding advice on subsidy decisions). Instead, it establishes a new system of self-assessment, under which each public authority must comply with the six principles listed under Article 366 of the TCA, along with a seventh principle concerning the potential effects of the subsidy on trade and investment within the UK. Furthermore, it assigns a role to the CAT in resolving subsidy disputes.

From this section's overview, it becomes evident that the powers of the CAT are limited, as they are confined to judicial review. Consequently, the enforcement of the new UK subsidy regime primarily relies on self-assessment by the granting authorities. However, this assessment may prove challenging, as determining whether there is a distortion of competition requires conducting a relevant market analysis – an exercise that involves collecting information that are often hard to obtain. This raises concerns about the overall effectiveness of the SCA.

Potential future issues may also arise from what is not covered by the SCA, in light of Article 373(5) TCA, which (as discussed in chapter I of this thesis) excludes acts of the UK Parliament from the obligation to recover unlawful subsidies. Concerns in this regard have already been raised by the Commission in relation to initiatives such as the Great British Energy Act, which entered into force on 15 May 2025, and the National Wealth Fund Bill, announced in the King's Speech of 17 July 2024 and also expected to be enacted through primary legislation.

4.6.1 The independent authority

To comply with Article 371 of the TCA, the UK established the SAU within the CMA. The role of the SAU is to provide advisory opinions on whether a public authority's decision regarding a subsidy complies with the requirements of the SCA. Therefore, this assessment does not evaluate whether the subsidy itself complies with the SCA principles but rather whether the authority's assessment of compliance is appropriate. As a consequence, even if the SAU raises concerns about the authority's assessment, the final word on whether to proceed with awarding the subsidy remains with the authority itself.[494] Section 55(2) of the SCA specifies that only a subsidy of particular interest necessitates consultation with the SAU ('mandatory referrals'). These mandatory referrals include subsidies in excess of GBP 10 million per beneficiary, or GBP 5 million in certain sensitive sectors. In addition, the Secretary of State may request a report from the SAU if there is a risk that the proposed subsidy or scheme may not respect the SCA's subsidy control requirements or 'may create negative effect on competition or investment within the United Kingdom'.[495]

Crucially, although the system provides some support to public authorities, as they can actually submit proposals to the SAU, the SAU's reports are not binding. Furthermore, the specific unit within the CMA does not have the authority to investigate, block, or order the recovery of illegal

[494] Stephan (n 493) 184-185; See Subsidy Advice Unit (Part of the Competition and Markets Authority), Guidance on the Operation of the Subsidy Control Functions of the Subsidy Advice Unit (11 November 2022) ('SAU Guidance') para 2(2)-(3).
[495] S 55(2) SCA.

subsidies.[496] Beyond the role of the SAU, the CMA is also responsible for monitoring the effectiveness of the SCA.[497]

There are quite a few doubts as to whether the SAU can be considered an independent regulator, as required by the TCA. Indeed, the SCA is rather cautious in this respect, limiting references to the TCA to what is strictly necessary. Although one of the subsidy control principles listed in Article 366 of the TCA states that public authorities must assess whether the beneficial effects of a measure outweigh its negative effects with regard to international trade or investment, in most cases the SCA seems primarily focused on the impact on competition or investment within the UK. For instance, the SAU is expressly directed to consider only the effects of the proposed subsidy or scheme on competition or investment within the UK, with no reference to any possible impact on trade or investment outside the UK. Thus, it could be argued that the whole focus of the SCA is overly domestic, raising the question of whether it is sufficient to meet the TCA's obligations.

4.6.2 Transparency

The UK incorporated specific transparency provisions within the SCA by requiring all subsidy decisions exceeding GBP 100,000 to be published in a public subsidy database.[498] Section 33(3)(b) of the SCA mandates public authorities to upload information about a subsidy or scheme 'within three months of confirmation of the decision to give the subsidy or make the subsidy scheme'.[499]

Among the information which must be included in the subsidy database there is: the power under which the subsidy is given; its policy objective; the name of the beneficiary; the date the public authority confirms the decision to give the subsidy or make the scheme; its duration; any time limits or other conditions attached to the use of the subsidy or scheme; its amount; and the location of any other publicly available information relating to it.[500] Additionally, for subsidy schemes, the database must include: the categories of beneficiaries eligible to receive subsidies under the scheme, the terms and conditions for subsidy eligibility, and the basis for the calculation of the subsidy, including any relevant conditions relating to subsidy ratios.[501]

Interestingly, although the SCA does not impose penalties on the measure itself for non-compliance with the transparency obligations, it does affect the time limit for legal challenges. Specifically, the one-month time limit for challenging a subsidy before the CAT is not applicable in case of 'inaccurate, absent or incomplete uploads to the subsidy database'. The 2024 report by the

[496] S 67 SCA.
[497] Joe Tomlinson and Liza Lovdahl Gormsen, 'Stumbling Towards the UK's New Administrative Settlement: A Study of Competition Law Enforcement After Brexit' (2019) 20 Cambridge Yearbook of European Legal Studies 233.
[498] S 33(2)(c) SCA. The UK database can be accessed at https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government.
[499] S 33(3)(c) SCA.
[500] S 34 SCA.
[501] S 34(2) SCA.

Department for Business and Trade highlights several persistent weaknesses in the transparency regime established under the SCA. A key concern is the lack of understanding (particularly among small local authorities or sub-central government bodies that lack the expertise or budget to seek external support) regarding the legal obligations to record subsidies in the public database. To be more explicit, some may not even know what constitutes a subsidy under the recently introduced SCA. Even when subsidies are uploaded, essential information is often missing, such as the objective of the measure, its legal basis, or the technical details necessary for other parties to verify its lawfulness. This lack of data undermines the ability of potential challengers to identify and ultimately contest distortive subsidies before the CAT. As a result, as long as these transparency gaps remain unaddressed, the UK's subsidy regime risks remaining insufficiently accountable and therefore unable to meet the requirements set out in the TCA.[502]

4.6.3 Judicial review by the CAT

Article 372 of the TCA requires the parties to provide for judicial review of subsidy decisions. This is remarkable as the TCA consistently seeks to affirm its public international law character: it repeatedly states that it does not confer rights on individuals. Yet under the subsidy chapter, there is a provision allowing private parties to bring actions before a court against the very authority that granted the subsidy. In the UK, jurisdiction has been conferred to the Competition Appeal Tribunal (CAT). The SCA provides for a time frame of one month for challenging a subsidy decision. This period begins either on the date when the interested party learnt about the subsidy decision (or should have learnt about it) or on the date of entry into the subsidy database. This implies that interested parties need to frequently monitor the transparency database to ensure they can take timely action. Since the decision to initiate a dispute depends exclusively on the parties' willingness to pursue the matter, factors such as the legal costs involved and the desire to maintain a good relationship with the granting authority may play a role in this decision.[503] The CAT's task is to review whether the public authority carried out its duties under the SCA. However, the CAT will not enter into the merit of the effects of the subsidy itself on competition and investment, but will only decide on whether the authorities has considered the relevant subsidy control principles.[504]

[502] Department for Business, Energy and Industrial Strategy, Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022 (11 November 2022) ('BEIS') para. 12(31); Stephan (n 493) 186; Alex Kynoch and Angelica Hymers, 'The Transparency Regime Under the Subsidy Control Act – How It Could Be Improved' (UK Subsidy Control Insider, Lexxion, 21 May 2024).
[503] Ibid.
[504] S 70 SCA; Biondi (n 2) 230; see generally Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edition, Bloomsbury Publishing 2022) ch 22.

5. A comparative analysis between enforcement mechanisms under the WTO, EU and the TCA subsidy regimes

5.1 Introduction

This section offers a comparative analysis of the monitoring and enforcement mechanisms within the WTO, EU state aid, and the TCA subsidy framework. In particular, it provides a comparative analysis of the transparency obligations under the WTO, EU state aid, and the TCA, also examining its implementation under the SCA. Furthermore, it focuses on the powers of the independent authorities under each system: the Subsidies Committee and the PGE under the SCM Agreement, the Commission under EU state aid, and the SAU under the SCA. This section also concentrates on private enforcement, highlighting the peculiarities under the WTO (multilateral), EU state aid (regional), TCA (bilateral), and SCA (national) frameworks regarding the standing of private parties to invoke their rules. Finally, it delves into dispute settlement, comparing the processes under the WTO and the TCA for resolving subsidy disputes.

5.2 Transparency

Transparency is crucial for any system of subsidy control. Only through effective provisions on transparency can government activities that confer advantages to one firm over others be detected.[505]

One can observe that the WTO, EU state aid, and the TCA subsidy framework all mandate similar levels of transparency. In particular, the obligation under Article 369(1) TCA is reminiscent, on the one hand, of the principles found in Article 9(1) and Annex III GBER, and on the other hand, of those in Article 25(3) SCM Agreement and XVI GATT 1994, as they all mandate the notification of specific details of the subsidy, such as its form, amount, purpose, and duration.[506] As a result, in order to assess the effectiveness of the TCA in ensuring transparency, the focus should not be on the level of detail required, but rather on the consequences when transparency is not provided, and on the level of implementation actually achieved. Given that the key difference between WTO and EU systems is that, in the EU, failure to notify makes the non-notified measure unlawful, one could argue that the TCA aligns more closely with WTO by not establishing any consequences regarding the legality of the measure in the case of non-compliance. Yet, by looking at the UK subsidy regime, there are hopes that the granting authorities will fulfil the transparency requirements better than under

[505] Stephan (n 493) 182.
[506] Anna Nowak-Salles, 'The Optimal Assessment Rule for EU State Aid Procedure' (2020) 43 World Competition 87, 106.

WTO practice, due to the effect of non-notification on the timing for bringing legal challenges before the CAT.[507] It will also be interesting to see whether UK domestic courts have the power to impose real sanctions when, for example, a granting authority fails to provide the requested information within 28 days.[508]

5.3 The independent authority

The next essential element for an effective control of subsidies is having a body that is, first, independent from the granting authority or administration, and second, endowed with sufficient powers to ensure consistency in the application of the subsidy regime.[509]

A comparison can be drawn between the functioning of the SAU and the PGE. On the one hand, they both have an advisory task, lacking any veto power over the decision to grant a subsidy. On the other hand, while the PGE has proved to be ineffective, mainly due to WTO members' concerns about the role its opinions might play in dispute settlement procedures, the current functioning of the SAU suggests there is no such reluctance by granting authorities in resorting to it. In fact, since its establishment, the SAU has been reviewing public authority assessments for over 30 subsidies. It seems, therefore, that the authorities are willing to seek the SAU's opinion before granting the measures. Interestingly, within its reports, the SAU often identified areas where the authorities' assessments could have been improved.[510]

To some extent, there are also resemblances between the role played by the SAU and the Commission's role during the pre-notification phase. But the parallelism between the SAU and the Commission ends there, as the powers of the former are clearly more limited than those of the latter. The SAU, indeed, has no investigative powers, no authority to assess whether a measure complies with subsidy control requirements, and no blocking or recovery powers.[511]

Hence, the UK's decision to confer such limited powers to the SAU is a legitimate policy choice.[512] However, to understand whether the SAU effectively impacts subsidy control or if its advisory role falls short of ensuring effective monitoring, it must be observed if it has an actual influence on the behavior of the granting authorities (i.e., if they will grant the subsidy even in the case of a negative report) and the CAT (i.e., if it will consider the SAU's reports as proof even though they are not binding). So far, in at least one instance, criticism within a SAU report led a public

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[507] See Department for Business, Energy and Industrial Strategy, Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022 (11 November 2022) ('BEIS') para. 12(31).
[508] See Art 369(5) TCA.
[509] Phedon Nicolaides, *The Design of Enforcement Institutions,* 20 (3) EStAL 370, 382.
[510] See https://www.gov.uk/government/publications/uk-subsidy-control-statutory-guidance
[511] SCA, s 52; See CMA, Statement of Policy on the Enforcement of the SAU's Information Gathering Powers (11 July 2022) CMA164con https://assets.publishing.service.gov.uk/media/62cc0a6ce90e07747eb9b29b/SAU_SoP_Enforcement_of_Info_Gathering_Powers_DRAFT_.pdf.
[512] Biondi (n 2) 228.

authority to decide not to grant the measure due to concerns that the report might provide grounds for a successful challenge in the CAT if the subsidy had been granted.[513] This suggests that the SAU may be able to fulfil the requirements of Article 371 of the TCA.

5.4 Private enforcement

WTO subsidy law, EU state aid law, and the TCA significantly differ in terms of private parties' standing to invoke their rules.[514] Under WTO law, only member governments can initiate proceedings within the dispute resolution process.[515] Indeed, although private parties can lobby their governments to take action, the final decision to pursue a case rests with national governments. As Sykes observed, 'trading nations will often prefer to act as 'political filters' by denying standing to private parties and thereby retaining the ability to block private enforcement actions that can reduce joint political welfare'.[516] Nevertheless, many members support a more limited role for private actors to participate in the WTO dispute process as *amicus curiae*.[517] It is unclear, however, if in practice panels or the AB rely much on *amicus curiae* submissions, with the exception of the AB report in *EU – Sardines*, which referred to *amicus curiae* briefs (specifically, one submitted by a private individual and another by the Kingdom of Morocco).[518]

The situation is different within the EU state aid regime. Private parties can resist the enforcement of laws that violate EU state aid law in the national courts of member states. Indeed, while national courts lack the authority to determine the compatibility of state aid with the internal market, they can rule on whether a measure qualifies as aid and, if so, they are empowered to address all potential implications arising from violations of the notification and standstill obligations under Article 108(3) of the TFEU.

Since the TCA is an international agreement between the EU and the UK, it lacks the direct effect and supremacy that characterize EU law and that were replicated under the WA.[519] Article 5(1)

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[513] See Subsidy Advice Unit 's Report on a Proposed Subsidy to Warrington LiveWire Referred by Warrington Borough Council (20 June 2023) https://assets.publishing.service.gov.uk/media/649074f7103ca6001303a1f0/_Final_report__.pdf.

[514] Luigi Daniele, 'La disciplina della risoluzione delle controversie' [2021] Eurojus.it http://rivista.eurojus.it/la-disciplina-della-risoluzione-delle-controversie/.

[515] David Palmeter, Niall Meagher and Petros C Mavroidis, 'Jurisdiction' in *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 65.

[516] Alan O Sykes, 'Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy' (2005) Working Paper 235, 39 http://www.ssrn.com/abstract=671801.

[517] Ibid 12.

[518] Appellate Body Report, *European Communities—Trade Description of Sardines* (adopted 23 October 2002) WT/DS231/AB/R, para 315(b); Joseph Keller, 'The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments' (2005) 33 International Journal of Legal Information 449, 469; David Palmeter, Niall Meagher and Petros C Mavroidis, 'Jurisdiction' in *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 73-75.

[519] See Art 4 WA and Art 5 TCA. The WA is an international treaty between the EU and the UK. It has been ratified by both parties and is binding on them under international law. Beyond the standard provisions of

of the TCA explicitly states that 'nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.'[520]

Nevertheless, Article 372(1) of the TCA enables interested parties to challenge any 'decisions taken by a granting authority or, where relevant, the independent authority or body for compliance with that Party's law implementing Article 366'.[521] Thus, domestic courts will not determine whether the subsidy fulfils the TCA principles but will review the decisions made by the granting authorities or independent bodies (the Commission in the EU, the SAU in the UK) regarding the subsidy. Article 372 allows challenges to be initiated by interested parties (as defined by Article 369(6) TCA) who have legal standing, which means that UK and EU firms can pursue a case only if they are affected by a subsidy which is in the firm's jurisdiction. Otherwise, their only recourse is to file a complaint with the UK government or the Commission to dispute the subsidy on their behalf. Interestingly, Article 372(2) of the TCA allows the EU to participate as an intervening party in any UK court proceedings concerning subsidy rules, and *vice versa*.

Courts and tribunals are empowered to offer any suitable remedy, including the suspension or prohibition or requirement of action by the granting authority, awarding damages, and ordering the recovery of the subsidy from its beneficiary.[522] On the EU side, the competent courts are the General Court and the Court of Justice, although, as explained above, national courts also have the authority to adjudicate certain state aid issues. The UK, instead, has established an entirely new jurisdiction where interested parties can bring actions before the CAT.[523] This entails a distinct framework for addressing subsidy control disputes in the UK, ensuring that such cases are handled by a specialized body with expertise in competition law and subsidy control. The CAT is entitled to review a single subsidy or a scheme, and it applies the standard rules of judicial review.[524] This means that it will not enter into the merits of the effects of the subsidy itself on competition and investment within the UK internal market, but will only decide whether the authorities have fulfilled their duty to consider the relevant principles under the SCA. The SCA provides for a time frame of only one

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international law, the WA incorporates additional features, notably the principles of direct effect and supremacy. These principles are explicitly detailed in Article 4 of the WA, which states: 'The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the UK the same legal effects as those which they produce within the Union and its Member States.' This clause ensures that the WA continues the effect of EU law in the UK as far as the content of the WA even after its withdrawal. Direct effect rarely occurs in 'dualist' countries (such as the UK) indeed the CJEU has excluded direct effect from some international trade agreements to avoid trade imbalances between the trading partners; See André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25(1) European Journal of International Law 105, 125; see Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2020) 157, 174.

[520] Art 5(1) TCA.

[521] Art 372 TCA.

[522] Art 373 TCA; Biondi and Howard (n 5) 401.

[523] Part V SCA.

[524] Department for Business, Energy and Industrial Strategy, Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022 (11 November 2022) ('BEIS') para 13(6).

month from the date when the interested party learnt about the subsidy decision (or should have learnt about it) or the date of entry into the subsidy database to challenge the subsidy decision.[525]

So far, the CAT has issued only one decision; another case is under review. The first case, which involved waste disposal activities by *Durham Council*, was initiated by a competitor, *Max Recycle*, on 3 February 2023.[526] The proceeding was particularly fast as the hearing took place on 3 and 4 July, with the judgment delivered on 27 July. The CAT found the Council's decision did not entail a subsidy scheme. In making the judgment, the CAT did not mention any EU legislation.[527] The second case concerns loans granted by the *Greater Manchester Combined Authority* (GMCA) to the *Renaker Group*. The competitor *Weis Group* claimed that the total lending to *Renaker* by *GMCA* amounts to GBP 745 million at state subsidized lending rates. Here the CAT will examine whether there have been manifest breaches of the lending terms.[528] Some first impressions can be drawn from the first judgment. First, the CAT's review in *Duram Council* 'was extensive and on the merits'.[529] Second, the swift resolution of the case suggests that the CAT places a strong emphasis on the necessity for subsidy decision reviews to be conducted expeditiously.[530] In fact, Sir Marcus Smith, President of the CAT, commented on the functioning of the CAT in subsidy issues, highlighting the need to minimize disclosure, witness, and expert evidence to limit costs and increase efficiency.[531]

For completeness, it should be noted that the UK implemented the TCA through the EU (Future Relationship) Act 2020, with Section 29(1) providing immediate effect to the TCA.[532] It follows that arguments directly based on the Chapter 3, Title XI of the TCA can be raised either in a straight judicial review action or before the CAT.[533] The High Court heard two cases regarding TCA subsidy provisions. In *British Sugar* the claimant argued that a government tariff applicable to imports on raw cane sugar in the UK violated TCA subsidy control and constituted unlawful state aid under the Northern Ireland Protocol.[534] The Court's assessment, which focused on whether the measure was selective/specific, found that the tariff at issue was neither unlawful state aid nor a subsidy under the TCA. The second complaint under the TCA was brought by *British Gas, Scottish*

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[525] Department for Business, Energy and Industrial Strategy, Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022 (11 November 2022) ('BEIS') para 13(15).
[526] *Max Recycle v Durham County* Council [2023] CAT 50.
[527] George Peretz, *Given that Durham was not appealed, can you confidently rely on the CAT's reasoning over the conferral of an economic advantage,* white paper (25 Jun 2024) https://whitepaper.co.uk/documents/subsidycontrol24; Marcus Smith and Charlotte McLean, 'Subsidy Control: The First Year' (Lexxion 20 December 2023) https://www.lexxion.eu/en/uksci/subsidy-control-the-first-year/.
[528] Dan Whelan, *Manchester Landowner to Sue GMCA over Renaker Loans*, Place North West (28 June 2024) https://www.placenorthwest.co.uk/gmca-faces-legal-challenge-over-renaker-loans.
[529] Biondi (n 2) 231.
[530] Ibid.
[531] Sir Marcus Smith, President of the Competition Appeal Tribunal, Subsidy Control: a view from the Competition Appeal Tribunal, 19 April 2023 https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.11%20Subsidy%20Control%20Speech_V2.pdf.
[532] Peretz (n 140) 169.
[533] Biondi (n 2) 232.
[534] *R (British Sugar) v Secretary of State for International Trade* [2022] EWHC 393 (Admin).

Power and E.ON.[535] They challenged the government's funding for the sale of *Bulb to Octopus*, claiming it violated TCA subsidy control principles. The Court here dismissed the challenge due to delay but noted the 'light touch' review required in commercial contexts and indicated it would have granted permission on subsidy control grounds raised under the TCA.[536] Interestingly, in both judgments, the High Court demonstrated its willingness to consider CJEU case law, BEIS Statutory Guidance, WTO case law, and Commission's Notices. This approach, which contradicts the one the CAT adopted in *Durham Council*, shows that EU legal sources have been taken into account by UK courts, even after the UK withdrawal.[537]

In sum, the SCA represents a shift towards greater private enforcement compared to the WTO system. As contended by Biondi, this method of private enforcement, which gives the TCA a sort of 'vertical direct effect', may create an effective and swift judicial forum, in particular when compared to the more complex dispute settlement process.[538] Still, there are a few concerns about the new procedure before the CAT. First, the SCA provides for a time block of one month to raise the issue before the CAT, which implies that interested parties need to constantly monitor the transparency database to ensure they can take judicial action in time. Second, since the decision to initiate a dispute depends exclusively on the parties' willingness to pursue the matter, factors such as the costs involved and the desire to maintain a good relationship with the granting authority may play a role. Lastly, the SCA system confers only limited grounds for review, as it grants individuals the right to challenge the authorities' decisions before the CAT, but not the subsidies themselves.[539] In other words, the CAT's task is not to review whether the public authority made the correct decision in granting the subsidy, but rather to examine whether the subsidy decision was within the authority's powers and procedurally legitimate. Consequently, when compared to EU state aid private enforcement (in terms of the scope of the regime) there are substantial divergences as EU state aid grants national courts the power to interpret Articles 107(1) and enforce violations of Article 108(3) of the TFEU.

Hence, the standard applied by the CAT in practice (i.e. whether it will be limited to judicial review or if it will concern the merits of the subsidy as well) will be pivotal in determining whether it serves as a meaningful check on subsidization or merely acts as a rubber stamp.

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[535] *R (British Gas & Ors) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin).
[536] Ibid paras 167-169.
[537] Subsidy Control: a view from the Competition Appeal Tribunal Sir Marcus Smith, President of the Competition Appeal Tribunal 19 April 2023, paras 3.1-3.6 https://www.catribunal.org.uk/sites/cat/files/202304/2023.04.11%20Subsidy%20Control%20Speech_V2.pdf.
[538] Biondi (n 2) 231; JJAM Korving and JC van der Have, 'Brexit: The Direct and Indirect Effect of the EU-UK Trade and Cooperation Agreement' (2022) 50 Intertax 28; Kotsonis (n 183).
[539] Stephan (n 493) 186-188.

5.5 Dispute settlement mechanism

During the TCA negotiations, the UK firmly rejected any oversight for the EU courts on the UK (except in relation to Northern Ireland).[540] As a consequence, for the purpose of this comparative analysis, this section focuses on a comparison between the WTO and TCA mechanisms for disputing subsidies.

Therefore, in terms of dispute settlement, the TCA opted for a system aligned with the WTO. In fact, Article 370 TCA includes mandatory consultations (similar to the one enshrined in Article 4(1) and Article 7(1) of the SCM Agreement), potentially followed by the establishment of a panel (which reminds the mechanism under Article 4(4) and 7(4) SCM Agreement).[541]

The TCA's general DSM requires exclusivity. Article 736 states that: 'The Parties undertake not to submit a dispute between them regarding the interpretation or application of provisions of this Agreement or of any supplementing agreement to a mechanism of settlement other than those provided for in this Agreement'.[542] Article 737 TCA adds that 'If a dispute arises regarding a measure allegedly in breach of an obligation under this Agreement or any supplementing agreement and of a substantially equivalent obligation under another international agreement', an alternative route for dispute settlement can be utilized.[543] Here it is crucial to understand the implications of 'substantially equivalent obligation' within the context of the TCA, as this phrase can vary in interpretation and application, particularly when comparing different legal frameworks such as the TCA and WTO. As such, there is a need to carefully compare the obligation under each regime to determine to what extent there is an overlap that forces a choice between the various fora. On this matter, it becomes essential to reflect on why the first (and only) EU-UK subsidies dispute was brought outside the TCA. This is even more interesting considering the move towards dispute settlement under regional trade agreements (RTAs) in recent times given the challenges to multilateral dispute systems.[544] In the case at issue, the EU accused the UK of breaching WTO commitments by applying discriminatory local content criteria in a renewable energy support scheme, particularly favoring national offshore

[540] 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 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; Billy Melo Araujo, 'UK Post-Brexit Trade Agreements and Devolution' (2019) 39 Legal Studies 555, 578; Damian Chalmer, Gareth Davies and Giorgio Monti, European Union Law: Text and Materials (4th edn, Cambridge University Press 2019) 199.
[541] Peers (n 155) 69.
[542] Art 736 TCA.
[543] Article 737 only allows to submit multiple complaints when the initially chosen forum declines to make a judgment based on the merits of the case.
[544] See Giorgio Sacerdoti and Niall Moran, 'A Comparative Introduction' in *International Trade and Investment Dispute Settlement. From Rise to Crisis and Reform* (Routledge, 2025) Ch 7; Bernard Hoekman and Charles Sabel, 'Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time' (2021) 12 Global Policy 49.

wind farms.[545] It was settled before reaching the panel stage. But why did the EU challenge the UK in WTO dispute settlement when it could have relied on the TCA dispute resolution mechanism? There are two main reasons that can explain the EU's choice. First, a challenge within a multilateral context would provide greater visibility for the EU's than a bilateral context., Second, the WTO process may have offered a less confrontational forum, especially given the tensions in the EU-UK relationship caused by other ongoing legal challenges at the time initiated by the Commission against the UK.[546] Furthermore, the EU's choice becomes even more striking when considering that, had the UK filed an appeal, the process could have resulted in an appeal into the void due to the paralysis of the AB and the UK's refusal to join the MPIA. Such a scenario would have prevented enforcement and undermined the credibility of the EU's legal strategy.

It is worth noting that the UK is now subject to both TCA and WTO rules. In contrast, an EU member state cannot, in practice, be subjected to a WTO case by another EU member state.

[545] Consultation Request, *United Kingdom - Measures Relating to the Allocation of Contracts for Difference in Low Carbon Energy Generation - Request for consultations by the European Union* (28 March 2022) G/L/1428 WT/DS612/1.

[546] Biondi (n 2) 232; Commission, 'Commission launches infringement proceedings against the UK for breaking international law and provides further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland' (Brussels, 15 June 2022).

6. Conclusion

This chapter offers a comparative analysis of the TCA's enforcement mechanisms and their implementation through the SCA, WTO subsidy law and EU state aid law. Starting from transparency requirements, the TCA, unlike EU state aid, does not establish any consequences for the legality of measures in case of non-compliance. Despite that, the fact that non-notified subsidies prejudice the application of the one-month limit to bring a case before the CAT may be an incentive for UK authorities to satisfy their transparency obligations. Further, the SAU has significantly fewer powers compared to those of the Commission, appearing closer to the PGE. However, as opposed to the WTO body, practice shows that the SAU's referral system has so far been actively utilized by the UK granting authorities to seek guidance on their subsidy decisions. The TCA also incorporates provisions which enable interested parties to pursue subsidy violations in the domestic courts (which is possible under EU state aid but not under the WTO). In particular, the UK implemented a new procedure, allowing interested parties to challenge the decisions of granting authorities or the independent body or authority before the CAT. This may become a more effective mechanisms to enforce disputes compared to the TCA DSM. Indeed, when it comes to dispute settlement, the TCA regime avoids any reference to the EU courts. While inspired by the WTO DSU framework, which requires a period of consultation between the parties and possible recourse to an arbitration panel, it has a very narrow scope, as it cannot resolve disputes over individual subsidies. It could be argued that the TCA system has been designed to ensure that the domestic subsidy system operates effectively, as the review of the subsidies occurs primarily at the domestic level.

In conclusion, the TCA enforcement mechanism significantly departs from EU state aid due to the absence of a prior authorization system that requires a formal regulator to assess TCA compliance, and the very limited scope for dispute settlement. Despite that, this chapter suggests that if the tools to enforce subsidy control introduced in the UK to implement the TCA prove to work, effective control of subsidies between the EU and the UK can still be achieved. It follows that whether the subsidies will be diligently notified, whether the SAU will be considered capable of meeting the requirements of Article 371 TCA, and whether the CAT will, in practice, pursue a full review of the subsidy measures is crucial not only for preventing harmful subsidy awards within the UK but also for the overall control of subsidies between the parties after Brexit. In this regard, the political climate resulting from the transition to a Labor government could play a significant role in the implementation of the SCA.

Chapter IV: Remedies

1. Introduction

Under the WTO framework, when the panel/AB finds non-compliance, it must recommend that the member withdraw the subsidy or remove its adverse effects. In addition, the GATT 1994 and the SCM Agreement regulate the possibility that the subsidy will be maintained and CVDs are imposed. However, the scope of CVDs is confined to mitigating the adverse impact of a subsidy within the domestic market of the imposing member. Consequently, the effects of the subsidy on third countries' market access remain beyond their scope of application.[547]

Within EU state aid law, under no circumstances may EU member states implement unilateral defensive measures to protect themselves against state aid granted by other member states. In cases where state aid is either unlawful or incompatible with the internal market, it must be repaid in full, along with interest. This process of aid recovery can be initiated following a decision by the Commission and/or a national court. By mandating the recovery of illegal and incompatible aid, EU law seeks to fully restore the market conditions that existed before the aid's allocation. As evidenced by the case law of the CJEU, the recovery of aid is a vital element provided under EU state aid law in maintaining competition and the smooth functioning of the internal market.

Within Chapter 3 of Title XI, the TCA introduces a state-to-state remedy in the form of remedial measures. These measures are applicable when a subsidy causes, or is at risk of causing, 'a significant negative effect on trade or investment' between the EU and the UK.[548] Beyond these specific Chapter 3 remedies, the TCA provides for the possibility to implement rebalancing measures under Article 411. This remedy applies to the entire Level Playing Field Title of the TCA, encompassing labor and social standards, environmental or climate protection, in addition to subsidy control. Article 411 TCA establishes that in cases of significant divergence between the parties among

[547] Wouters and Coppens (n 367) 54; Coppens (n 18) 196.
[548] Art 374 TCA.

one of the abovementioned regulatory areas, a party can implement appropriate rebalancing measures to address the situation. However, such rebalancing measures are not designed to counteract the effect of an individual subsidy but are applicable only if the overall system is deemed ineffective.

This chapter examines the third dimension of this thesis' three-part analysis by looking into the international remedies available to address violations of the TCA provisions on subsidy control. Hence, it does not delve into the mechanisms of private enforcement, as these are inherently domestic in nature. Nor does it address the TCA's general DSM,[549] which, as analyzed in detail in chapter III of this thesis, has a very limited scope of application due to the fact that it does not cover issues concerning independent bodies or authorities, judicial review processes, or the examination of individual subsidies.[550] In addition, even when applicable, it lacks the authority to impose fines or other sanctions for non-compliance, with the only recourse being the possibility of retaliatory measures.[551] Instead, this chapter focuses on the unilateral remedial (Article 374 of the TCA) and rebalancing measures (Article 411 of the TCA) that one party may adopt to address the harmful effects of subsidies on trade or investment. Its purpose is to offer insights into how the remedial and rebalancing mechanisms might be applied in the future, highlighting their efficiency in maintaining a level playing field between the EU and the UK after Brexit. It seeks to achieve this goal by comparing them with the remedies provided under WTO and EU state aid.

This chapter is structured as follows: section 2 focuses on the WTO's CVDs as regulated under Article VI of the GATT 1994 and Part V of the SCM Agreement. It scrutinizes both the substantive and procedural aspects of enforcing countervailing measures, enriched with statistical data to illustrate their application by WTO members since 1995. Section 3 delves into the EU state aid framework, particularly examining the mechanisms for recovering unlawful and incompatible state aid. Notably, while the TFEU does not explicitly regulate the aid recovery, this section mainly explores the Procedural Regulation, which outlines the rules for aid's recovery.[552] Additionally, it discusses the updated Recovery Notice, issued by the Commission in 2019,[553] which provides further guidance on the recovery process. Section 4 explores the TCA's provisions on remedial and rebalancing measures, with a focus on the specifics of Article 374 TCA for remedial measures and Article 411 TCA for the rebalancing mechanism. Finally, section 5 offers a comparative analysis between the TCA's remedial and rebalancing measures, the WTO's countervailing measures, and the EU mechanism for aid recovery.

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[549] Part Six, Title I, TCA.
[550] Art 375(2) TCA.
[551] Phedon Nicolaides, 'The Dispute-Settlement Provisions of the EU-UK Trade and Cooperation Agreement: Are They Adequate for the Task?' (LUISS SEP 2021) Working Paper 15 https://leap.luiss.it/wp-content/uploads/2022/06/WP15.21-The-Dispute-Settlement-Provisions-of-the-EU-UK-Trade-and-Cooperation-Agreement.pdf .
[552] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9 (the 'Procedural Regulation').
[553] Commission, 'Notice on the Recovery of Unlawful and Incompatible State Aid' [2019] OJ C247/1 ('2019 Recovery Notice').

This chapter underscores that the drafters of the TCA have departed from the EU approach in favor of the WTO model when it comes to remedies. Hence, the TCA's remedial measures closely align with the logic of WTO CVDs, while the rebalancing measures function similarly to the suspension of equivalent concessions (referred to as countermeasures in the SCM Agreement context) that can be adopted for failures to bring actionable or prohibited subsidies into compliance with WTO agreements.[554] Moreover, this chapter points out that Article 411 of the TCA introduces an innovative element, not found in either WTO law or EU law, by providing a mechanism for periodic reviews of the TCA's overall trade provisions, which could ultimately result in its termination. This chapter argues that, by relying on additional trade barriers rather than ensuring the recovery of subsidies, the TCA may mitigate distortions but fail to fully restore a level playing field between the parties.

[554] See chapter III of this thesis.

2. WTO

2.1 Introduction

WTO members can impose CVDs only if subsidized imports cause or threaten to cause material injury to the domestic industry of the importing country or materially retard the establishment of such an industry. By levying such duties, WTO members can neutralize the unfair advantage that foreign exporters gain through subsidization.[555]

This section examines the substantive and procedural provisions governing the application of countervailing measures. The authority to implement such measures is derived from Article VI of the GATT 1994 and Article 10 of the SCM Agreement. Moreover, Articles 11-23 of the SCM Agreement provide a comprehensive procedural framework for their implementation. This section outlines the three types of countervailing measures that may be adopted (provisional countervailing measures, voluntary undertakings, and definitive CVDs) and concludes with a review the enforcement of WTO CVDs from 1995 to the present.

This section acknowledges that CVDs are aimed at preventing foreign subsidies from overwhelming the domestic market rather than restoring a level playing field on a global scale.[556] The reasons for this are multifaceted. While CVDs can restrict market access within the importing country and serve as a deterrent against the continuation of subsidies, they do not necessarily guarantee the complete cessation of the subsidies. Moreover, although designed to mitigate the negative effects of subsidized imports on the domestic industry, CVDs do not tackle the issue of market access in third countries. Consequently, in scenarios where the distortion of competition extends beyond national borders, it becomes imperative to turn to the DSM for resolution.

2.2 Substantive provisions

Article 10 of the SCM Agreement, in conjunction with Article VI of the GATT 1994, establishes the essential framework for the implementation of CVDs. In particular, Article VI, paragraph 3, of the GATT 1994, defines a CVD as 'a special duty levied for the purpose of offsetting any subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.'[557] Article 10 of the SCM Agreement further stipulates that WTO members must ensure that the imposition of a CVD on any product imported from the territory of one member into another member's territory aligns with both Article VI of the GATT 1994 and the terms of the SCM

[555] Joseph Francois, 'Subsidies and Countervailing Measures: Determining the Benefit of Subsidies' in Kyle W Bagwell, George A Bermann and Petros C Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (1st edn, Cambridge University Press 2009) 107; Ehlermann and Goyette (n 207) 711.
[556] Rubini (n 8) 70.
[557] Art VI GATT 1994.

Agreement. It also clarifies that CVDs may only be imposed following investigations initiated and conducted as per the provisions of the SCM Agreement. In examining the relationship between Article VI of the GATT 1994 and the SCM Agreement, the AB in *Brazil – Desiccated Coconut* relied on Article 10 and declared that 'from reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the SCM Agreement.'[558] In reaching this decision, the AB also took into consideration Articles 32(1) of the SCM Agreement.[559] Thus, pursuant to Article VI of GATT 1994 and Articles 10 and 32(1) of the SCM Agreement, WTO members may impose CVDs if three cumulative conditions are met. The first condition is the presence of subsidized imports, which must be specific under Articles 1 and 2 of the SCM Agreement. The second condition requires a demonstration of material injury, or at least the threat thereof,[560] to the domestic industry[561] producing the like product to the subsidized imported products,[562] in accordance with Articles 15 and 16 of the SCM Agreement. The third and final condition necessitates a causal link between the subsidized imports and the injury sustained by the domestic industry, ensuring that such injury cannot be ascribed to other factors.[563]

2.3 Procedural provisions

Before a WTO member can apply a countervailing measure against subsidized imports, it must satisfy specific requirements outlined in Articles 11-13 of the SCM Agreement. These provisions are intended to ensure transparency during investigations, guarantee all relevant parties have equal

[558] Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut* (adopted 20 March 1997) WT/DS22/AB/R.
[559] Ibid.
[560] To determine 'injury', authorities conduct a thorough analysis of the volume of subsidized imports and their pricing impact on like products in the domestic market, along with an evaluation of the negative effects on domestic producers. This assessment requires an appraisal of various economic indicators, such as production, sales, market share, profits, capacity utilization, and financial health indicators like cash flow, inventory, employment, and wages. Additionally, to consider the 'threat of material injury', it's imperative to examine factors like the nature and scope of the subsidy in question, the rate of increase in subsidized imports, the capacity for expansion in the exporter's market that could lead to a surge in imports, and the expected influence on domestic price levels of the investigated product; see Peggy A Clarke and Gary N Horlick, *The Agreement on Subsidies and Countervailing Measures* (World Scientific Connecting Great Minds 2013) ch 17.
[561] Article 16 of the SCM Agreement specifies 'domestic industry' as domestic producers as a whole of like products, or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. In cases where domestic producers themselves import the subsidized product or have affiliations with the exporters or importers of the subsidized imports, they may be excluded from this definition, and the focus shifts to the independent producers within the domestic market. However, exclusion of importers/affiliated parties is not mandatory, and if the domestic producer's principal interest is in domestic production, they will likely not be excluded. This is for example the case in the ongoing CVD investigation on imports from China.
[562] The term 'like product' is defined in Footnote 46 of the SCM Agreement as a product identical in all respects to the one under investigation or, in the absence of such a product, another closely resembling it in characteristics.
[563] Art 15(5) SCM Agreement; See Coppens (n 18) 220; Van den Bossche and Zdouc (n 32) 928; Müller (n 11) 2.

opportunities to safeguard their interests, and require authorities to provide thorough justifications for their decisions.[564]

2.3.1 Initiation procedures

Under the SCM Agreement, a CVD investigation generally begins with a written complaint, as per Article 11(1), indicating that injurious subsidization is taking place. This application is submitted by, or on behalf of, the domestic industry allegedly injured by the subsidized imports. Article 11(2) SCM Agreement mandates that this application must contain sufficient evidence of: (a) the existence of a subsidy and, if possible, its amount; (b) injury or the threat of such injury to the domestic industry; and (c) a causal link between the subsidized imports and the alleged injury.[565]

Furthermore, Article 11(3) SCM Agreement establishes that the investigating authority must decide whether the evidence presented is 'sufficient' to justify the commencement of an investigation.[566] This decision-making process includes evaluating the accuracy and adequacy of the evidence provided. In assessing the adequacy of evidence for initiating a CVD investigation, the Panel in *China – GOES* highlighted the investigating authority's role in weighing two competing interests: the domestic industry's interest in initiating an investigation against the respondents' interest in preventing investigations based on unjustified or groundless claims.[567] However, since Article 11(3) SCM Agreement does not provide any details on the nature of this review, it is difficult for panels to judge whether importing country authorities have fully complied with Article 11(3).

The process for initiating a CVD investigation involves an application to be submitted either directly by the domestic industry that claims to have been injured by the subsidized imports, or on its behalf. This requirement is specified in Article 11(4) of the SCM Agreement, which details the criteria (often referred to as the 'standing test') determining whether the domestic industry of the importing member is eligible to file such an application. In essence, an application is deemed valid if it receives support from domestic producers whose combined production exceeds 50 percent of the total output of the like product by domestic producers expressing support for or opposition to the application. However, if the segment of the industry explicitly in favor of the application represents less than 25 percent of the total production of the like product, the initiation of an investigation is not permitted. Article 11(6) SCM Agreement establishes that investigating authorities, when they have sufficient evidence of the existence of a subsidy, injury, and causal link, may also decide to initiate CVD investigations *ex officio*.[568]

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[564] Peggy A. Clarke and Gary N. Horlick, 'The Agreement on Subsidies and Countervailing Measures in Macrory' in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005) 708,714.
[565] Art 11(2) SCM Agreement.
[566] Mere allegations without substantiating evidence do not fulfill the 'sufficient evidence' standard.
[567] Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (adopted 16 November 2012) WT/DS414/R.
[568] Van den Bossche and Zdouc (n 32) 930.

Article 13 of the SCM Agreement mandates that, before initiating a CVD investigation, the importing member must engage in consultations with the exporting member. The purpose of these consultations is to clarify the issues at hand and seek a mutually agreeable solution. In practice, as evidenced by the US and the EU jurisdictions, these pre-initiation consultations can help to filter out subsidy programs that clearly do not meet the criteria for countervailability, such as those that are not specific or not actually utilized by the exporters in question.[569]

Article 11(9) of the SCM Agreement requires the investigating authorities to dismiss an application to start an investigation, or to halt an ongoing one, should they determine the absence of sufficient evidence of subsidization or injury to justify further action. An immediate cessation of the investigation is mandated if the amount of the subsidy is *de minimis* (i.e. less than 1 percent *ad valorem*) or if the extent of subsidized imports, whether actual or potential, or the impact thereof, is negligible. In *US – Carbon Steel*, the AB addressed the *de minimis* threshold set out in Article 11(9) SCM Agreement, explaining that if *de minimis* subsidization is found to exist, authorities must conclude their inquiry, thereby precluding the imposition of CVDs.[570]

2.3.2 Conduct of investigation

Upon deciding to launch an investigation, the investigating authorities are bound by a series of procedural responsibilities designed to safeguard the interests of all parties involved. Initially, they are required to issue a public notice announcing the start of the investigation, and to make sure all parties with a stake in the investigation (which includes the interested members, the exporters of the subsidized products, and the domestic producers of similar products) are promptly informed about what information the authorities need.[571] These parties should have a minimum period of 30 days to respond to any questionnaires disseminated by the investigating authorities.[572] Moreover, the investigating authorities have an obligation to facilitate the participation of industrial users of the product in question, as well as representative consumer organizations, especially when the product is one that is regularly sold directly to consumers, ensuring these groups can submit information that may influence the investigation's outcome.[573] But only on subsidization, injury and causation, as there is no requirement they be allowed to present their own interests to the authorities, since a public interest assessment is not required.[574] The investigating authorities have also a duty to disclose all

[569] Mavroidis, Messerlin and Wauters (n 189) 381.
[570] Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (adopted 19 December 2002) WT/DS213/AB/R, para 83; The AB expressed this thought very carefully because it's only after an advanced finding of *de minimis* subsidization that this is true. For example, in the US the DOC makes a preliminary determination of subsidization. That might be negative, but the investigation continues because the US (unlike the EU) does verification only after the preliminary determination.
[571] Art 22 SCM Agreement.
[572] Art 12(1) SCM Agreement.
[573] Art 12(10) SCM Agreement.
[574] Van den Bossche and Zdouc (n 32) 932.

non-confidential information to all interested parties involved.[575] However, any information whose disclosure could unduly benefit competitors or cause significant harm to the information providers (e.g., information on customers, pricing and costs) should be treated as confidential, provided there is a valid reason for such confidentiality.[576]

When investigating authorities are unable to acquire all the necessary information despite diligent attempts, they are authorized to base their decisions on the best information available. Article 12(7) of the SCM Agreement provides cases in which any interested member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. In such situations, preliminary and final determinations, whether affirmative or negative, may be made on the basis of the facts available. The AB in *US – Supercalendered Paper* noted that Article 12(7) of the SCM Agreement allows for the application of 'facts available' under three distinct conditions: if an interested party or member 'refuses access to necessary information within a reasonable period', 'otherwise does not provide necessary information within a reasonable period', or 'significantly impedes the investigation'.[577] Investigations must normally be concluded within one year and should not exceed eighteen months, although, in practice, this does not happen.[578]

2.4 Types of countervailing measures

Article 32(1) of the SCM Agreement restricts unilateral actions by a member to counteract subsidization to those explicitly provided for in the GATT 1994 and the SCM Agreement. This was confirmed by the AB in *US – Offset Act (Byrd Amendment)*, which established that measures against a countervailable subsidy must be confined to the forms specified in the GATT 1994 or the SCM Agreement.[579] These measures encompass provisional measures, voluntary undertakings, definitive CVDs, and countermeasures authorized through the DSM. No alternative responses to subsidization are allowed.[580]

2.4.1 Provisional countervailing measures

Following a preliminary assessment that a subsidy is causing or threatening to cause injury to a domestic industry, an importing member may impose provisional countervailing measures on the

[575] Art 12(3) SCM Agreement.
[576] Art 12(4) SCM Agreement.
[577] Appellate Body Report, *United States—Countervailing Measures on Supercalendered Paper from Canada* (adopted 5 March 2020) WT/DS505/AB/R, para 5.71.
[578] Art 11(11) SCM Agreement.
[579] Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000* (adopted 27 January 2003) WT/DS217/AB/R, WT/DS234/AB/R.
[580] Victor Crochet and Marcus Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law' (2021) 20 World Trade Review 343.

subsidized imports. These measures are taken if the authorities determine that they are necessary to prevent injury during the time of the investigations. Provisional countervailing measures can take the form of provisional CVDs, backed by either cash deposits or bonds, corresponding to the provisionally calculated subsidy amount.[581] However, such provisional measures may not to be applied before 60 days have elapsed since the investigation commenced. Moreover, they should remain in effect only for the briefest period necessary and, under no circumstances, should they extend beyond a duration of four months.[582]

2.4.2 Voluntary undertakings

Investigations may be suspended or concluded without applying provisional or definitive CVDs if satisfactory voluntary undertakings are made. These commitments can take two forms: first, the exporting member's government agreeing to eliminate or limit the subsidy, or implement other actions to mitigate its effects; second, the exporter consenting to adjust prices to the extent that the investigating authorities deem the injurious impact of the subsidy to be eliminated.[583] It is important to note that, as per Article 18(2) of the SCM Agreement, such commitments should not be accepted without a preliminary affirmative finding of subsidization and injury caused by that subsidization. Furthermore, when commitments come from exporters, they must be accompanied by approval from the exporting member. Article 18(4) specifies that even if a commitment is accepted, the investigation into subsidization and injury should still reach a conclusion if the exporting member or the importing member deems it necessary.[584]

2.4.3 Definitive countervailing duties

Members may impose definitive CVDs only after making a final determination that a countervailable subsidy exists and that the subsidized imports cause, or threaten to cause, injury to the domestic industry. In respect to the amount of the CVD imposed on subsidized imports, Article 19(4) of the SCM Agreement provides that 'No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.'[585] Therefore, the amount of the countervailable subsidies must be determined per unit of the subsidized product. However, the method of calculation – whether to

[581] Peggy A Clarke and Gary N Horlick, 'The Agreement on Subsidies and Countervailing Measures' in Patrick FJ Macrory, Arthur E Appleton and Michael G Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer US 2005) 718.
[582] Art 17 SCM Agreement; Panel Report, *United States—Preliminary Determinations with Respect to Certain Softwood Lumber from Canada* (adopted 1 November 2002) WT/DS236/R.
[583] Art 18(8) SCM Agreement.
[584] Alan O Sykes, 'Subsidies and Countervailing Measures' in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005).
[585] Art 19(4) SCM Agreement.

distribute the total subsidy value across the product's production, sales, or export levels – is not explicitly defined.[586] For example, EU investigating authorities have consistently chosen to apportion the subsidy amount based on sales turnover. Typically, the chosen method hinges on the specific characteristics of the subsidy in question.[587]

In *Japan – DRAMs (Korea)*, a key question was whether the presence of a subsidy must be current at the time a CVD is applied, as stated in Article 19(4) of the SCM Agreement, or whether it is sufficient for a subsidy to have been 'found to exist' at an earlier time. The Panel ruled that CVDs are permissible only if the subsidization is ongoing at the moment the duty is applied.[588] On appeal, the AB examined the language of Article 19(4) of the SCM Agreement, which refers to a subsidy that is 'found to exist'.[589] It determined that there is no directive within Article 19(4) obliging an investigative authority to undertake a new investigation or to renew its previous determination when imposing a CVD to ensure the subsidy is still ongoing. However, the AB did clarify that, in cases where the subsidy is non-recurring, a CVD should not be levied if the investigative authority determines during its investigation that the subsidy has ceased by the time a final decision on imposing the duty is made.[590] This is because a CVD in such scenario would exceed the subsidy found to exist, thereby violating Article 19(4) of the SCM Agreement.[591]

Article 19(3) of the SCM Agreement mandates that any imposed CVD shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of the product from all sources found to be subsidized and causing injury. This implies that CVDs are applied impartially to all subsidized imports that cause injury, except for those from suppliers who have withdrawn the subsidies in question or from which undertakings have been accepted.[592] Regarding Article 19(3) of the SCM Agreement, a notable point pertains to instances where duties are levied against the same imports under both the Anti-Dumping Agreement and the SCM Agreement. In *US – Anti-Dumping*

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[586] Calculating the amount of subsidy and value of a subsidy presents complex accounting issues. Once the investigating authority establishes that a subsidy is countervailable, intricate formulas are employed to determine how the subsidy be allocated over the production of the like product. In general terms, the per unit subsidy is determined by dividing the subsidy by the number of units produced (in the case of domestic subsidies). The benefits or effects of the subsidy may extend beyond the amount of subsidization. According to Article 19(2) SCM Agreement, members can impose duties by matching the level of subsidy paid, or enough to counteract the injury suffered. This is also called the principle of the lesser duty rule which allows the imposition of a duty less than the amount of subsidization where such lesser duty is sufficient to remove the injury; Francois (n 555)110-111.

[587] Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (6th edn Kluwer Law International 2019) 697.

[588] Panel Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea* (adopted 17 December 2007) WT/DS336/R, paras 7.351–7.357.

[589] Appellate Body Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea* (adopted 17 December 2007) WT/DS336/AB/R, para 210.

[590] Ibid.

[591] See Wolfgang Müller, 'Imposition and Collection of Countervailing Duties' in *WTO Agreement on Subsidies and Countervailing Measures: A Commentary* (Cambridge University Press 2017) 522-531.

[592] Art 19(3) SCM Agreement; Andrew Green and Michael Trebilcock, 'Enforcing WTO Obligations: What Can We Learn from Export Subsidies?' (2007) 10 Journal of International Economic Law 653, 667.

and Countervailing Duties, the AB determined that applying dual remedies in such a manner contravenes the stipulations of Article 19(3) of the SCM Agreement.[593]

2.4.4 Some exceptions: retroactive application of countervailing duties

In line with Article 20(1) of the SCM Agreement, CVDs may not be applied retroactively. Typically, such duties are imposed only on imports that enter after a formal determination of both subsidy and injury has been made. However, the SCM Agreement allows for retroactive application of definitive duties in specific, limited circumstances as detailed in Article 20. There are two distinct scenarios where retroactivity is permitted. One scenario occurs when a final determination confirms injury, or in cases of threat of injury, where the absence of provisional measures would have led to injury. In such case the WTO member may retroactively adopt CVDs to cover the period during which provisional measures were in force. The second scenario applies in cases of critical circumstances, where CVDs may be imposed on imports that were entered for consumption no more than 90 days before the application of provisional measures.[594] Critical circumstances are defined where there is a finding of material injury that is difficult to remedy, caused by a rapid increase in subsidized imports, provided the subsidies are paid or granted in a manner inconsistent with GATT 1994 and the SCM Agreement. Retroactive duties, in such cases, are considered necessary to prevent the recurrence of injury.[595]

2.5 Reviews

The SCM Agreement recognizes three types of reviews of CVDs measures. First, Article 19(3) of the SCM Agreement requires importing country authorities to promptly – and in accelerated manner – carry out reviews requested by newcomers, i.e. exporters which are subject to a definitive CVD but who were not actually investigated (other than for refusal to cooperate). Second, Article 21 of the SCM Agreement provides for what can be called interim and expiry reviews. Regarding interim reviews, Article 21(1) of the SCM Agreement outlines that CVDs should be imposed only for the period and to the extent required to counteract the injurious effects of subsidization. In interpreting this article during the *US – Carbon Steel* case, the AB indicated that the application of a CVD must be guided by considerations of both its duration – implying it should last only as long as necessary to address the injury – and its magnitude – meaning it should not exceed what is necessary to

[593] There is a more general rule in GATT Art VI:5, but it only applies in the case of export subsidization; Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ('US – AD/CVD') (adopted 25 March 2011) WT/DS379/AB/R, para 583.
[594] Rubini (n 13) 126.
[595] Art 20(2) and 20(6) SCM Agreement; Müller (n 11) 554; Alan O Sykes, 'Subsidies and Countervailing Measures' in Patrick F. J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005).

counteract the effects of the subsidy in question.[596] Article 21(1) therefore emphasizes the necessity for periodic reviews of CVDs, stressing the importance of certain criteria to be considered during such reviews. This distinction led the AB to differentiate between the original investigation, which deals with the initial application of a CVD, and the subsequent review process as set out in Article 21(2) of the SCM Agreement. If, after the review, the investigating authorities determine that the rationale for maintaining the CVD no longer exists, its immediate termination is required. Conversely, if they decide that the CVD is still needed, its enforcement will persist, though its amount may be adjusted if appropriate. Concerning the expiry reviews, Article 21(3) of the SCM Agreement introduces a 'sunset clause', stipulating that all definitive CVDs must expire no later than five years from their date of imposition or their most recent review. Nonetheless, if the investigating authorities determine that ending the duty would likely result in the continuation or recurrence of subsidization and injury, the duty will remain in effect.[597]

2.6 The enforcement of WTO subsidy discipline over the years

WTO subsidy rules have predominantly been enforced through CVDs for several reasons.[598] First, CVDs can be imposed more swiftly than pursuing a resolution through the WTO's dispute settlement process.[599] In fact, serious prejudice cases can take five to six years to resolve.[600] On the one hand, market displacement in third countries/price effects require time to occur and to be adequately demonstrated; on the other hand, the litigation process within the DSM requires time to occur. The issue here is that, by the time the offending member achieves compliance, subsidized producers may have managed to establish a dominant market position. As such, the effectiveness of the multilateral remedy is compromised.[601]

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[596] Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (adopted 19 December 2002) WT/DS213/AB/R, para 70.

[597] Claudio Dordi, 'The Appellate body Interpretation of 'Sunset Reviews' Provisions of Anti-Dumping and Countervailing Measures Agreements: A Critical Analysis' in Bagwell KW, Bermann GA, Mavroidis PC (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge University Press 2014mo).

[598] Sykes (n 197) 403; Meredith A Crowley and Jeffrey J Dunoff, 'Why Are Safeguards Needed in a Trade Agreement?' in Kyle W Bagwell, George A Bermann and Petros C Mavroidis (eds), *Law and Economics of Contingent Protection in International Trade* (Cambridge University Press 2009).

[599] When WTO members initiate investigations for the adoption of CVDs, they also follow their own internal regulations. These CVDs laws are notified by the members under Art 25(1)2 SCM Agreement and reviewed in the Subsidies Committee. For instance, the EU's regulations are detailed in the EU's Basic Anti-Subsidy Regulation, currently Regulation (EU) 2016/1037, which outlines the procedures for the EU to impose CVDs. These regulations are designed to be consistent with the WTO's SCM Agreement but are specific to the legal and administrative framework of the EU; Mavroidis (n 407); Michel Cartland, Gerard Depayre and Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46 Journal of World Trade 979.

[600] There are indeed numerous steps (panel, appeal, compliance) before you can utilize countermeasures; Emmanuel Nyahoho, 'The Limited Effectiveness of the Agreement on Subsidies and Countervailing Measures (SCM) in WTO' (2004) 29 The Journal of Social, Political, and Economic Studies 87.

[601] Elisa Baroncini, 'La proposta europea di riforma dell'OMC' in Pietro Manzini and Michele Vellano (eds), *Unione europea 2020 – I dodici mesi che hanno segnato l'integrazione europea* (Wolters Kluwer 2021).

Second, the CVD framework is perceived to offer enhanced prospects of success due to the weight of national interest considerations in the decision to impose such duties. Even if these measures may be subject to scrutiny by dispute settlement panels, the member that imposes them holds a preliminary advantage by being able to implement them and, subsequently, by being able to address any potential retaliatory actions from the affected exporting member.

Third, while both CVDs and the DSM offer tools for addressing the ongoing effects of non-recurring subsidies – through allocation over time in CVD cases and the concept of a subsidy's 'life' in DSM, as demonstrated in the *Aircraft* cases, making the two approaches relatively comparable – neither the unilateral nor the multilateral mechanism allows for action based on past harm suffered, nor do they permit the recovery of previously granted subsidies.[602] Instead, the general principle dictates that remedies are only prospective.[603] The key issue with the DSM, as stated above, lies in the duration of proceedings, which further exacerbates the inability to secure compensation for past harm, making this limitation particularly problematic.[604]

However, under certain circumstances, resorting to the WTO's DSM remains the only available tool. This is because the scope of CVDs is limited to mitigating the adverse effects of a subsidy within the domestic market of the imposing member;[605] their application does not extend to the subsidy's impact on market access in third countries or within the territory of the member providing the subsidy.[606]

Many trade experts contend that CVDs measures are unlikely to produce any positive effect.[607] They are often viewed as instruments used by import-competing industries seeking protection rather than a systematic means of discouraging wasteful subsidy practices.[608] Furthermore, imposing such duties could negatively impact the export sales of the member applying them, as CVDs may redirect subsidized products to other markets where they compete.[609] Hillman and Manak argue that WTO remedies on subsidies could be significantly strengthened if the WTO would adopt

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[602] Müller (n 11) 236-243.

[603] See e.g. Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union) (adopted 11 April 2019) WT/DS353/AB/RW

[604] David Palmeter, Niall Meagher and Petros C Mavroidis, 'Adoption and Implementation of Reports' in *Dispute Settlement in the World Trade Organization* (3rd edn, Cambridge University Press 2022) 454; See Appellate Body Report, *Brazil—Export Financing Programme for Aircraft, Recourse to Article 21.5 of the DSU by Canada* (adopted 4 August 2000) WT/DS46/AB/RW; Rubini (n 44) 156.

[605] There is a mechanism in Article VI:6(b) GATT that allows a member to request that another member impose CVDs where its export interests are threatened. It has never been successfully used.

[606] See Luca Rubini, 'The Age of Innocence: The Evolution of the Case-Law of the WTO Dispute Settlement. Subsidies as Case-Study' in Manfred Elsig, Bernard Hoekman and Joost Pauwelyn (eds), *Assessing the World Trade Organization. Fit for Purpose?* (Cambridge University Press 2017) 276-318.

[607] Sykes is at the fringe, see Alan O Sykes, 'Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach' (1990) 21 Law and Policy in International Business 699; Wouters and Coppens (n 367) 54.

[608] See Sykes (n 10) 484.

[609] Alan O Sykes, 'Countervailing Duty Law: An Economic Perspective' (1989) 89 *Columbia Law Review* 199, 263; Petros C Mavroidis, George A Bermann and Mark Wu, *The Law of the World Trade Organization (WTO) : Documents, Cases & Analysis* (St Paul, MN : Thomson/West 2010) 583; Petros C Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 European Journal of International Law 763.

the EU's approach to state aid breaches, which mandates that beneficiaries of unlawful aid repay the full amount received. Although this would represent a shift from the WTO's traditional emphasis on preserving future trade opportunities rather than addressing past harm, such a measure is not entirely unprecedented (as seen in the *Australia – Leather* case).[610]

The WTO provides statistics on the frequency of CVD investigations initiated and the measures actually imposed by its members.[611] In the interval from 1995 to 2024, China faced the highest number of CVD investigations (224), accounting for nearly 30% of all initiated measures.[612] The US led these investigations, initiating nearly half (355) of the total 733 cases, followed by the EU, which launched 98 investigations.[613] The EU, in turn, has also been a frequent target of CVD investigations, particularly from the US, which has initiated 45 CVD cases against the EU since the WTO's inception.[614]

According to the most recent data, the use of trade remedies by G-20 countries has reached its highest level since the WTO's establishment in 1995. As of June 2024, 55 CVD investigations were ongoing, with a total of 295 countervailing measures in force. These figures are expected to rise further as governments respond to the proliferation of subsidies driven by broader shifts in industrial policy.[615]

Indeed, the 28th Global Trade Alert report highlights that more than half of all industrial policy interventions worldwide are implemented through subsidies, underscoring their pivotal role in shaping economic and environmental objectives. However, due to the lack of effectiveness of the

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[610] Jennifer Hillman and Inu Manak, 'Rethinking International Rules on Subsidies' (Council on Foreign Relations 2023) Special Report No.96, p. 28 https://www.cfr.org/report/rethinking-international-rules-subsidies; Rubini (n 13) 127; Raymond H C Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation* (Maastricht University 2003) 195.

[611] The data on countervailing measures I am referring, which span from January 1, 1995, to June 2024, are based on reports by WTO members and may not be exhaustive due to the fact that members have not submitted reports, or have submitted incomplete reports.

[612] See generally Petros C. Mavroidis and Andrè Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press 2021) 38.

[613] Obviously, there are fewer measures than there are investigations, since authorities sometimes reach negative determinations; WTO, 'Home - Trade Remedies Data Portal' https://trade-remedies.wto.org/en.

[614] Although the EU has often been the focus of foreign countervailing measures, it has challenged such countervailing measures imposed on its exports United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (see Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (adopted 19 December 2002) WT/DS213/AB/R); United States – Countervailing Measures Concerning Certain Products from the European Communities (see Appellate Body Report, *United States—Countervailing Measures Concerning Certain Products from the European Communities* (adopted 8 January 2003) WT/DS212/AB/R); United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (see Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (adopted 7 June 2000) WT/DS138/AB/R).

[615] Simon Evenett and others, 'The Return of Industrial Policy in Data' (International Monetary Fund 2024) Working Paper 4697821 https://www.imf.org/en/Publications/WP/Issues/2023/12/23/The-Return-of-Industrial-Policy-in-Data-542828.

WTO subsidy disciplines and the absence of international cooperation on subsidy control, a pattern of copycat behavior among countries and a growing reliance on CVDs are already emerging.[616]

Table 4: Countervailing Measures (Part V SCM Agreement)

Submission of application	Submission of a written complaint by the domestic industry to the importing country authorities that injurious subsidization is taking place (Art. 11)
Pre-initiation examination	Importing country authorities must determine whether the application contains sufficient evidence to justify an investigation before initiation (Art. 11.2)
Consultation	The importing member must engage in consultation with the exporting member to clarify the situation and arrive at a mutually agreed solution (Art. 13)
Investigations	Investigations shall be concluded within 1 year. If not, Art. 11.11 allows an extension up to 18 months.
Provisional Countervailing measures	Provisional countervailing measures may be applied only if a preliminary determination has been made that a subsidy exists and causes injury. These measures must not exceed 4 months (Art. 17).
Voluntary undertakings	Investigations may be suspended or concluded without applying provisional or definitive CVDs if satisfactory voluntary undertakings are made (Art. 18).
CVD	CVD may be imposed when it is determined that subsidies exist and the subsidized imports cause, or threaten to cause, injury to the domestic industry. CVDs must never exceed the subsidy amount; should be limited to the amount of injury caused; and must be collected in a non-discriminatory way (Art. 19)
Sunset Clause	CVDs shall be terminated after five years unless they are still necessary to avoid injury (Art. 21.3).
WTO Dispute Settlement	An investigation, determinations and/or CVDs can be challenged via WTO dispute settlement. If found inconsistent, retaliation may be authorized.

[616] Petros C. Mavroidis 'The future of dispute resolution and arbitration at WTO' in Julien Chaisse and Cristian Rodriguez-Chiffelle (eds), *The Elgar Companion to the World Trade Organization* (Edward Elgar Publishing 2023) 691-706; Leonardo Borlini, 'The COVID-19 Exogenous Shock and the Crafting of New Multilateral Trade Rules on Subsidies and State Enterprises in the Post-Pandemic World' (2023) 24 German Law Journal 72; Simon J Evenett and Johannes Fritz, 'Subsidies and Market Access Towards an Inventory of Corporate Subsidies by China, the EU and the US' (2021) The 28th Global Trade Alert Report https://www.hinrichfoundation.com/research/wp/trade-distortion-and-protectionism/gta-28-report-subsidies-market-access-corporate-subsidies-by-china-eu-us/.

3. EU STATE AID

3.1 Introduction

The recovery of aid serves as 'a pivotal mechanism to uphold the integrity of the general prohibition on state aid delineated in Article 107.1 TFEU, as well as the 'standstill' obligation under Article 108.3 TFEU.'[617] The recovery order is not a penalty but rather a necessary consequence of the aid's unlawfulness.

This section examines the EU state aid framework governing the recovery of unlawful and incompatible state aid.[618] It focuses on the Commission's role in rigorously assessing state aid and ordering its recovery by the granting member state within specified timeframes when found incompatible with the internal market. Additionally, this section clarifies the role of national courts in overseeing recovery processes following the Commission's decision. Moreover, as discussed in chapter III of this thesis, national courts play a key role in the private enforcement of EU state aid law. In this regard, third parties (such as competitors) may initiate legal proceedings based on the standstill clause outlined in Article 108(3) TFEU. Thus, they may demand the recovery of aid granted unlawfully, a process that operates independently of the compatibility assessment conducted by the Commission.

This section underlines that the recovery of unlawful and incompatible aid is a central element of the EU state aid discipline, aimed at fully removing the distortions of competition caused by the aid. The effective enforcement of these rules is, indeed, vital for the EU to achieve its economic, social, and cohesion goals while safeguarding competition and trade within the internal market. Nevertheless, it should also be noted that, while it is crucial to restoring the level playing field, the recovery process remains structurally slow and complex, often hindered by national enforcement difficulties, and the time-consuming nature of judicial review.

3.2 Substantive provisions

Pursuant to Article 107(1) of the TFEU, state aid is, in principle, prohibited. To introduce new aid, member states are required to notify any plan to grant new aid to the Commission, as prescribed by Article 108(3) TFEU. Additionally, Article 108(3) TFEU imposes a standstill obligation, precluding member states from implementing any proposed aid measures until the Commission has rendered a

[617] Case C-142/87, *Kingdom of Belgium v Commission of the European Communities (Tubemeuse)* ECLI:EU:C:1990:125, para 66.

[618] Unlawful aid includes aid which has not been notified or was implemented before the Commission's approval, while incompatible aid is aid which does not comply with the EU internal market rules and thus cannot be granted.

final decision regarding their compatibility with the EU internal market. The Commission has exclusive competence to assess the compatibility of state aid with the internal market. This power is detailed in Article 108(2) TFEU and involves a compatibility assessment guided by criteria outlined in Articles 107(2) and 107(3), as well as Articles 42, 93, 106(2), 108(2), and 108(4) TFEU.

Thus, if state aid is implemented without notification or approval by the Commission, it is deemed unlawful. Under such circumstances, the jurisprudence of the CJEU, which holds exclusive power to review the legality of the Commission's decisions (Article 263(1) TFEU), dictates that the member state must cease the aid's implementation and, if already granted, order its recovery.[619]

The Commission, for its part, must also establish the incompatibility of the unlawful aid with the internal market before ordering its recovery. Nevertheless, should the Commission find that aid granted prior to its approval is ultimately compatible with the internal market, such aid is still deemed unlawful for the period preceding the approval. Consequently, the beneficiary is obligated to pay interest covering the period up to the date on which the Commission's approval is granted.

Due to the lack of an explicit provision for the recovery of unlawful aid, the CJEU has explicitly stated that 'recovery […] is the logical consequence of the finding that [the aid] is unlawful. Consequently, the recovery is a pivotal mechanism to uphold the integrity of the general prohibition on state aid delineated in Article 107.1, as well as the standstill obligation as per Article 108.3 TFEU.'[620]

The beneficiary, by repaying the aid, forfeits any undue competitive advantage gained *vis a vis* its competitors, reestablishing the *status quo* of the EU internal market that existed before the granting of the aid. Hence, the recovery cannot be deemed disproportionate to the objectives of the EU state aid regime, nor can it be construed as resulting in unjust enrichment for the member state, as it involves only the return of the amount that was allocated to the beneficiary. Moreover, to neutralize any secondary benefits derived from the unlawful aid, the beneficiary is required to repay not just the aid but also any interest accrued from the time the aid was made available until it is fully repaid. This ensures that the beneficiary does not financially benefit from the duration for which the funds were available.[621]

[619] Thus Article 107 prohibition provides both a prospective remedy (the abolition of the aid) and a retrospective remedy (the recovery of the aid already provided); Lilian V. Faulhaber, 'Beyond Apple: State aid as a model of a roubust anti-subsidy rule' (2017) 48 Georgetown Journal of International Law 381, 387.
[620] Case C-142/87, *Kingdom of Belgium v Commission of the European Communities* (Tubemeuse) ECLI:EU:C:1990:125, para 66.
[621] Hancher, de Vries and Salerno (n 54).

3.3 Procedural provisions

The Treaty of Rome did not provide any sanctions for non-compliance with the obligation to notify new aid and this has remained unchanged in the TFEU. This gap was partially addressed by the case law of the CJEU in the 1970s (notably in the *Kohlegesetz* judgment).[622] However, it was only with the adoption of the 1999 Procedural Regulation that some rules on recovery were introduced into legislation.[623] Specifically, Article 14 of this Regulation, later succeeded by Article 16 of the 2015 Procedural Regulation (hereinafter the 'Procedural Regulation'), mandates that following a negative decision regarding unlawful aid by the Commission, member states are obliged to recover the aid, along with interest accruing from the time the aid was first received until its fully repayment. Despite these regulations, the enforcement of such Commission's decisions often experienced delays or were incomplete. To address this, the Commission, in 2007, issued its first notice towards an effective implementation of Commission's decisions ordering member states to recover unlawful and incompatible state aid.[624] Further refinements were necessitated due to the evolving nature of state aid measures and related case law from the CJEU. Thus, the Commission revised the 2007 Notice, culminating in the publication of the updated Recovery Notice at the end of July 2019.[625] The updated notice was designed to support member states in their duty to enforce state aid rules correctly, to foster improved cooperation between the Commission and member states, and to enhance the predictability of the Commission's actions and contribute to a robust enforcement of competition policy.[626] However, the purpose of the Recovery Notice was not to offer an exhaustive summary of the Commission's practices, as these are not legally binding and the outcome from one case cannot be automatically applied to another. Instead, the notice extensively references and relies on the CJEU case law, which is binding.[627]

3.3.1 The Commission recovery order

As mentioned in the previous paragraph, the Procedural Regulation sets out the norms to be followed for recovering unlawful and incompatible state aid, with Article 16 being the pivotal rule for this

[622] Case C-70/72, *Commission of the European Communities v Federal Republic of Germany (Kohlegesetz)* ECLI:EU:C:1973:87, para 13.
[623] Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L 83/1.
[624] Commission, 'Notice from the Commission -Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' [2007] OJ C 272/4 (2007 Recovery Notice).
[625] Commission, 'Notice on the Recovery of Unlawful and Incompatible State Aid' [2019] OJ C247/1('2019 Recovery Notice'); Jan Blockx, 'New State Aid Recovery Notice: Obtaining a Pound of Flesh (Without a Jot of Blood?)' (2019) 18 European State Aid Law Quarterly 540.
[626] 2019 Recovery Notice, paras 7-8.
[627] See generally Leo Flynn, 'Remedies in the European Courts' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2003) 283-301.

process. Article 16(1) specifies that when the Commission adopts a decision that identifies the aid as being incompatible with the internal market (a so-called negative decision), it has no discretion and must order the recovery, unless such an order would be contrary to a general principle of EU law.[628] Since the purpose of recovery is not to impose a penalty but to re-establish the situation that existed in the internal market before the aid was granted, the beneficiary will only be obliged to repay all the funds it received, along with the interest accrued until the date of its actual recovery.[629] The Implementing Regulation specifies the methodology for calculating these recovery interests.[630] Meanwhile, Article 16(3) of the Procedural Regulation stipulates that recovery must be enforced without delay and in accordance with the national law of the member state concerned, provided that such procedures allow the immediate and effective execution of the Commission's recovery decision.[631]

3.3.2 Limits to the obligation to recover

The obligation to recover the aid is subject to limitations based on the general principles of EU law, as well as the limitation period set by the Procedural Regulation under Article 17. Several fundamental principles of EU law play a crucial role in the recovery of state aid and may act as constraints on this obligation. These include the principles of legal certainty, the principle of legitimate expectations, and the principle of *res judicata*.

The principle of legal certainty protects member states and aid recipients against recovery if there is a breach of legal certainty.[632] However, EU courts typically uphold the obligation to recover unless there are exceptional circumstances. They have emphasized that the principles of the primacy and effectiveness of EU law establish that member states and beneficiaries of aid are not permitted to use the principle of legal certainty as grounds to limit the recovery actions when there is an apparent conflict with national law. In such cases, EU law prevails, requiring national laws to be set aside or interpreted in a way that ensures the effectiveness of EU law.[633]

Second, the principle of legitimate expectations safeguards member states and aid beneficiaries who have reasonably relied on the expectation that aid would not be subject to the Commission's recovery order. Nevertheless, this principle does not preclude the recovery of the aid when the latter has been granted in contravention of the standstill obligation, thereby ensuring the

[628] Marek Rzotkiewicz, 'The General Principles of EU Law and Their Role in the Review of State Aid Put into Effect by Member States' (2013) 12 European State Aid Law Quarterly 464.
[629] Simone Donzelli, 'The Commission's New Recovery Notice' (2019) 18 European State Aid Law Quarterly 528,531.
[630] Case C-69/13, *Mediaset SpA v Ministero dello Sviluppo Economico* ECLI:EU:C:2014:71, para 21.
[631] Paul C Adriaanse, 'Appropriate Measures to Remedy the Consequences of Unlawful State Aid' (2009) 2 Review of European Administrative Law 73.
[632] Case C-63/93, *Duff and Others v Minister for Agriculture and Food, Ireland, and the Attorney Genera*l ECLI:EU:C:1996:51, para 20.
[633] Case T-452/08, *DHL Aviation and DHL Hub Leipzig v European Commission* ECLI:EU:T:2010:427, paras 34 and 41.

effectiveness of Articles 107 and 108 TFEU.[634] In addition, EU courts have recognized that situations where the Commission has failed to responded to a notified aid measure or there has been a prolonged period of inactivity by the Commission regarding an aid measure, do not create legitimate expectations that would prevent recovery.[635]

Third, the principle of *res judicata* affirms that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights, can no longer be called into question.[636] However, the CJEU has clarified that this principle cannot be invoked in a manner that compromises the primacy of EU law, justify violations of EU law, or obstructs the recovery of state aid.[637] National courts are required to adhere to EU law, even within the scope of their procedural autonomy, to ensure that previous judgments do not hinder the enforcement of the standstill obligations.[638]

Moreover, Article 17(1) of the Procedural Regulation establishes a ten-year period within which the Commission must order the recovery of unlawful aid. As specified by Article 17(2), this limitation period commences on the date the unlawful aid is provided to the beneficiary. Article 17(3) also states that any aid past its limitation period is classified as existing aid, thereby preventing the recovery of aid granted over a decade prior to the Commission's first intervention.[639]

3.3.3 Absolute impossibility to recover

Recovery of state aid can only be avoided when it is absolutely impossible.[640] The concept of absolute impossibility has been strictly interpreted by EU courts, requiring member states to demonstrate that they have made all reasonable efforts to recover the aid and worked in cooperation with the Commission to overcome any obstacles, in accordance with Article 4(3) of the TEU. Difficulties of a political or legal nature at the national level cannot exempt EU member states from executing a recovery order.[641] The burden of proof to justify any failure to recovery or partial recovery of incompatible aid lies with the member state, which must also implement the necessary corrective

[634] Joined Cases C-465/09 to C-470/09, *Diputación Foral de Vizcaya and Others v European Commission* ECLI:EU:C:2011:372, para 150.
[635] Case C-81/10 P, *France Télécom SA v European Commissio*n ECLI:EU:C:2011:811, paras 58–60; Joined Cases C-471/09 P to C-473/09 P, *Diputación Foral de Vizcaya and Others v European Commission* EU:C:2011:521, paras 64–65, 68, 75–77.
[636] 2019 Recovery Notice, para 43; Case C-507/08, *European Commission v Slovak Republic (Frucona Košice)* ECLI:EU:C:2010:802, para 59.
[637] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* ECLI:EU:C:2007:434, paras 61–63.
[638] Case C-349/17, Case C-349/17, E*esti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* ECLI:EU:C:2019:172, paras 138–139; 2019 Recovery Notice, paras 45-46.
[639] Art 17 Procedural Regulation.
[640] Case 94/87, *Commission of the European Communities v Federal Republic of Germany* ECLI:EU:C:1989:46, para 7.
[641] 2019 Recovery Notice, para 51.

measures. Economic difficulties of the aid recipient generally do not prevent recovery, except when the beneficiary has been liquidated with no remaining assets or legal or economic successors.[642]

Claims of absolute impossibility to recover aid are typically made after the adoption of a recovery decision but according to the Recovery Notice they may be also established during the formal investigation procedure, as confirmed by Commission practice and EU court rulings.[643]

3.4 Implementing the recovery decision

A key innovation in the Recovery Notice is the shift from a strict division of responsibilities between the Commission and the member states towards a greater emphasis on sincere cooperation. This cooperation extends to all aspects of the recovery process. When member states have legal obligations, the Commission has a corresponding duty to assist and cooperate in fulfilling these obligations, and *vice versa*.

3.4.1 The complementary role of the Commission and the member states

When the Commission determines that aid is incompatible with internal market rules, it requires the member state concerned to abolish and recover it.[644] The Commission's recovery decision may provide the member state with the necessary details about the recipients of incompatible aid and the total amount to be recovered, thereby facilitating the latter in the recovery process; however, the Commission has no legal obligation to provide such details. Indeed, when is not possible the direct identification of the aid recipients (e.g., in aid schemes involving hundreds or thousands of beneficiaries) or where the exact amount to be recovered cannot be determined, the Commission's decision instead outlines a methodology for the member state to identify beneficiaries and calculate the amount to be recovered.[645]

Additionally, the Commission sets two key deadlines in its recovery decision. The first requires the member states to submit a report, typically within two months of notification, detailing comprehensive information including the identities of the beneficiaries (if not already specified in the recovery decision), the exact recovery amount, and the national procedures to be used for

[642] Case C-499/99, *Commission of the European Communities v Kingdom of Spain* ECLI:EU:C:2002:408, para 37.
[643] Donzelli (n 629).
[644] Article 288 TFEU states that decisions are binding in their entirety upon whom they are directed. In state aid cases, the Commission's decisions are directed to the respective member state, which must fully comply by employing all necessary measures for execution, including interim measures. These Commission decisions are assumed to be lawful and remain binding also during legal proceedings before EU courts.
[645] Case C-403/10 P, *Mediaset SpA v European Commission* ECLI:EU:C:2011:533, para 126.

implementing the recovery order. The second compels member states to complete the recovery process, generally within four months of notification.[646]

Although member states retain procedural autonomy in implementing Commission decisions under their national laws, they must disregard any national provisions that would prevent immediate and effective execution of the Commission's decision.[647] Each member state designates its own implementing authority; however, some have opted to establish a single agency to coordinate recovery processes. This centralization has proven effective in consolidating expertise and ensuring consistent communication with the Commission.[648]

3.4.2 Extension of the deadline for recovery

If a member state encounters difficulties in meeting the recovery deadline, it must promptly inform the Commission to allow for an assessment of the situation and consideration of proposed solutions, which may include extending the deadline.[649] Nevertheless, the Commission grants extensions only in exceptional circumstances and only when the member state provides conclusive evidence that alternative measures would not achieve the timely execution of the decision. Extensions are not granted when delays result from the member state's choice of procedures, particularly where faster alternatives exist. Moreover, requests to extend recovery deadlines cannot be approved retroactively once the original deadline has expired.[650]

3.4.3 Insolvency proceedings

The obligation to recover aid applies regardless of whether the beneficiary is solvent or experiencing financial difficulties. In both cases, the member state must recover the aid. The rationale behind this approach is rooted in the EU internal market principles as a beneficiary that is unable to repay the aid would continue operating solely due to the received aid, thereby distort competition. To restore internal market integrity, such a beneficiary must exit the market. In addition, if the beneficiary ceases operations but transfers advantages to an economic successor, for example through asset sales, the recovery obligation transfers to that successor (principle of economic continuity). Similarly, if

[646] 2019 Recovery Notice, para 72; However the Commission may set different deadlines, depending on the exchanges it has with the member state during the investigation.
[647] Art 16(3) Procedural Regulation; Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others* ECLI:EU:C:2006:644, para 45; Case C-349/17, *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* ECLI:EU:C:2019:172, para 91; 2019 Recovery Notice, paras 74-78; Caroline Buts and Péter Staviczky, 'Eesti Pagar: A Formalistic Approach to Incentive Effect and Recovery Procedures' (2021) 20 European State Aid Law Quarterly 546.
[648] Ibid.
[649] Case C-481/16, *European Commission v Grece (Larco)* ECLI:EU:C:2017:845, para 29.
[650] Case C-63/14, *European Commission v French Republic* ECLI:EU:C:2015:458, para 45.

the original beneficiary becomes part of a different undertaking while retaining the advantage, it remains obligated to repay the aid.[651]

When insolvency proceedings begin against the beneficiary, restoring the pre-aid situation and correcting competitive distortions depend on registering the recovery order in the liabilities schedule before the recovery deadline. This registration must result in either full recovery of the aid or, if full recovery is impossible, the dissolution and permanent closure of the beneficiary's operations.[652] For the first requirement, the state must register the recoverable amount, which includes both the incompatible aid and accrued interest until repayment. For the second, although national laws may permit the temporary continuation of insolvent entities, such provisions cannot be applied if they prevent prompt aid recovery and termination of the recipient's activities. Thus, compliance with the recovery decision requires liquidation, ensuring the ceasing the beneficiary's operations and that its assets are sold at market value through a transparent process overseen by an independent authority. To exempt asset purchasers from aid-related liability, the state must ensure definitive termination of the original beneficiary's economic activities.[653]

3.5 Infringement proceedings

If a member state fails to execute a recovery decision and cannot prove that compliance was absolutely impossible, the Commission is entitled to start infringement proceedings.[654] Article 108(2) TFEU, reflecting the importance of state aid rules for protecting competition and ensuring the effective functioning of the EU internal market, allows the Commission to refer non-compliant member states directly to the CJEU without a pre-litigation phase (unlike the procedure established under Article 258 of the TFEU).[655] To bring a case before the CJEU under Article 108(2) TFEU, the Commission must identify the specific obligation the member state has failed to fulfill under the recovery decision. This may involves determining whether the member state has failed to submit the required compliance report; or has failed to provide updates on recovery progress after the deadline; or has failed to complete aid recovery within the prescribed timeframe.[656] Consequently, the infringement of any of these obligations, as well as of any other obligation established in the recovery decision, may lead to an action pursuant to Article 108(2) TFEU. While infringement is established

[651] Case C-42/93, *Kingdom of Spain v Commission of the European Communities* ECLI:EU:C:1994:326
[652] Recovery Notice, para 129; Case C-610/10, *European Commission v Kingdom of Spain (Magefesa II)* ECLI:EU:C:2012:781, paras 72, 104.
[653] 2019 Recovery Notice, paras 127-135.
[654] Following the case law of the EU courts and Article 16(1) of the Procedural Regulation, the Commission shall not require recovery of the aid if this would be contrary to a general principle of EU law.
[655] Damian Chalmer, Gareth Davies and Giorgio Monti, European Union Law: Text and Materials (4th edn, Cambridge University Press 2019) 346-349.
[656] 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.

when an obligation remains unfulfilled by the recovery deadline, member states must continue efforts to recover the aid even after the deadline expires.

The recovery obligation is an obligation of results. Article 260(2) TFEU allows the Commission to refer a case to the CJEU if a member state has failed to comply with obligations established in a judgment issued under Article 108(2) TFEU, after first providing that state an opportunity to submit observations. The assessment of infringement under Article 260(2) TFEU is based on the deadline set in the formal notice issued pursuant to that article. This procedure aims to compel non-compliant member states to fulfill their obligations under previous judgments, ensuring effective application of EU law.[657] To this end the CJEU may impose two types of sanctions: a lump sum payment and a penalty payment.[658] The sanctions are then decided by the CJEU on the basis of a proposal from the Commission (which is not binding). The Commission's proposal for sanctions under an Article 260(2) TFEU action follows criteria set out in a regularly updated communication,[659] which requires three fundamental criteria when imposing financial sanctions on member states: the infringement's seriousness, its duration, and the sanction's deterrent effect against future violations.[660]

Additionally, the Commission may condition the approval of new compatible aid on the recovery of previous declared unlawful and incompatible aid.[661] In *Deggendorf*, the CJEU confirmed that the Commission may approve state aid as compatible with the internal market only if the beneficiary has repaid any previously granted unlawful aid.[662]

3.6 Indirect challenges against a Commission decision

Member states, as the addressees of recovery decisions, may directly challenge the Commission's decisions under Article 263(4) TFEU.[663] Aid beneficiaries may also contest the decisions under the same article if they are individually concerned 'by reason of certain attributes which are peculiar to

[657] Damian Chalmer, Gareth Davies and Giorgio Monti, European Union Law: Text and Materials (4th edn, Cambridge University Press 2019) 359; David Edward and Robert Lane, *Edward and Lane on European Union Law* (Edward Elgar Publishing 2013).
[658] Jacques Derenne, 'Recovery of Unlawful State Aid and Determination of Beneficiaries: Guidance for National Courts' (2012) 3 Journal of European Competition Law & Practice 469.
[659] Commission, Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings [2020] OJ C 301/1.
[660] 2019 Recovery Notice, para 157.
[661] Blockx (n 625) 540.
[662] Case C-355/95 P, *Textilwerke Deggendorf GmbH (TWD) v Commission of the European Communities and Federal Republic of Germany* ECLI:EU:C:1997:241, paras 25–26.
[663] See Koen Lenaerts, Kathleen Gutman and Janek Tomasz Nowak, *EU Procedural Law* (2nd edn, Oxford University Press 2023) ch 7.

them or by reason of circumstance in which they are differentiated from all other persons', as established by the *Plaumann* test.[664]

While competitors of aid beneficiaries rarely meet the Article 263 TFEU standing requirements, the CJEU has recently expanded the conditions they need to fulfill to challenge state aid decisions, strengthening their legal position. In interpreting Article 263(4) TFEU, the CJEU held that Commission state aid decisions may qualify as 'regulatory acts' that directly affect competitors, granting them standing to challenge these decisions before the General Court. Given the restrictive nature of the *Plaumann* test, the CJEU in *Atzeni* established that plaintiffs who lack standing under Article 263(4) TFEU may indirectly contest Commission's decisions through national courts.[665] In line with *Atlanta* and *Zuckerfabrik*, the national court would then refer questions on the recovery decision's legality to the CJEU through a preliminary ruling.[666] However, after *Montessori*, the *Atzeni* precedent may become less significant, as competitors can now rely on *Montessori* to establish standing before the General Court.[667]

[664] Case C-25/62, *Plaumann & Co v Commission of the European Economic Community* ECLI:EU:C:1963:17; Damian Chalmer, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (4th edn, Cambridge University Press 2019) 166-170.
[665] Joined Cases C-346/03 and C-529/03, *Giuseppe Atzeni and Others v Regione Autonoma della Sardegna* ECLI:EU:C:2006:130, paras 30–34.
[666] Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1995:369; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* ECLI:EU:C:1991:65.
[667] Case C-622/16 P, *Scuola Elementare Maria Montessori Srl v European Commission* ECLI:EU:C:2018:873; see Karen Davies, *Understanding European Union Law* (7th edn, Routledge 2019) ch 5.

4. TCA

4.1 Introduction

Within Chapter 3 of Title XI, the TCA introduces a state-to-state remedy in the form of remedial measures. These measures apply when a subsidy causes, or is at risk of causing, a significant negative effect on trade or investment between the EU and the UK. Beyond these specific Chapter 3 remedies, the TCA provides for the possibility to implement rebalancing measures under Article 411. This remedy applies to the entire Level Playing Field Title of the TCA, encompassing labor and social standards, environmental or climate protection, in addition to subsidy control. Article 411 TCA establishes that in cases of significant divergence between the parties in one of the abovementioned regulatory areas, a party may implement appropriate rebalancing measures to address the situation. However, such measures are not designed to counteract the effect of an individual subsidy but are applicable only if the overall system is deemed ineffective.

This section begins by examining the remedial measures regulated by Article 374 TCA. It then shifts the focus to the rebalancing measures established under Article 411 TCA. The analysis points out that the implementation of either remedial or rebalancing measures is contingent upon the parties' commitment to aligning their regulatory policies on subsidy control with the TCA's level playing field commitments. It also highlights that significant divergences in subsidy control policies could reflect a fundamental and systematic shift in the parties' approach to subsidy control, potentially causing more substantial and enduring disruptions to the level playing field than isolated subsidies. In this context, the section emphasizes that the use of rebalancing measures may result in more stringent trade restrictive actions compared to the remedial measures.

4.2 Remedial measures

Article 374 of the TCA provides for the possibility to adopt remedial measures. Under this provision, a party may initiate consultations about a subsidy that 'it considers causes, or there is a serious risk that it will cause, a significant negative effect on trade or investment between the Parties.'[668] If no agreed solution is reached within 60 days, the party may unilaterally implement appropriate remedial measures, which are required to be necessary and proportionate to address the significant negative effect. The party providing the subsidy has the right to contest the determination of significant negative effect, as well as the necessity and proportionality of the remedial measures, before an

[668] Art 374(1) TCA.

arbitration tribunal. Thus, if the remedial measures are deemed inconsistent with the TCA and are not withdrawn, the affected party has the option to suspend concessions in response.[669]

4.2.1 Consultation phase

In the presence of a subsidy that may causes, or there is a serious risk that it will cause, a significant negative effect on trade or investment, the requesting party may submit a written request for information regarding the subsidy in question, aiming to reach a mutually agreeable solution. The responding party is then allotted a period of 30 days from the receipt of this request to provide a written response addressing the concerns highlighted.[670] At the same time, the TCA mandates the parties to enter into consultations over the issue. These consultations are considered concluded 60 days after the receipt of the written request unless the parties mutually agree on a different timeframe.[671]

4.2.2 Implementation of remedial measures

The requesting party has the right, after 60 days from the submission of the written request, to take appropriate remedial measures if there is evidence that the subsidy of the requested party causes, or there is a serious risk that it will cause, a significant negative effect on trade or investment between the parties.[672] These measure may encompass a variety of potential actions tailored to mitigate the distortion, including the imposition of new tariffs or the introduction of quotas to counteract the free access to the market being distorted.[673]

As to the evidentiary burden in this context, the TCA provides that a party's assessment of the existence of a subsidy, its significant negative effect, or the serious risk of this arising, must be based on facts 'and not merely on allegation, conjecture or remote possibility'.[674] In addition, the realization of the alleged risk must be 'clearly predictable.'[675]

The requesting party must notify the other party of the intended remedial measures at least 45 days after delivering the written request, providing all relevant information concerning these measures to facilitate a mutually acceptable solution between the parties. If reaching such a solution proves unattainable, the requesting party may proceed with the remedial measures no sooner than 15 days after delivering the notification of these measures to the other party.[676]

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[669] Biondi (n 2) 229.
[670] Art 374(1) TCA.
[671] Art 374(2) TCA.
[672] Art 374(3) TCA.
[673] Biondi (n 181) 177.
[674] Art 374(6) TCA.
[675] Art 374(5) TCA.
[676] Art 374(4) TCA.

4.2.3 Arbitration tribunal

Within five days of the imposition of remedial measures, the other party may request the establishment of a tribunal.[677] However, this request does not have a suspensory effect on the remedial measures. The powers of the tribunal in this context are limited as it does not have the authority to assess the compliance of the subsidy with the TCA's subsidy principles.[678] Instead, its role is specifically limited to resolving issues like whether the party, in implementing remedial measures, satisfied the procedural requirements and evidentiary standards required. This includes assessing the existence of a subsidy, its significant negative effect, as well as evaluating the proportionality of the remedial measures taken. The tribunal must deliver its decision within 30 days of its establishment.[679]

4.2.4 Countermeasures

If the tribunal concludes that a party's remedial measures do not comply with the TCA requirements, the party must communicate the other party of the measures it has undertaken to conform to the tribunal's decision within 30 days of receiving the ruling. During this 30-day window, if the tribunal has deemed the remedial measures significantly non-compliant with the TCA requirements, the party that raised the complaint has the right to request the tribunal to set a suitable level of obligation suspension under the TCA. This mechanism is intended to mitigate the adverse effects caused by the remedial measures. The complaining party may then proceed to suspend obligations in line with the tribunal's ruling, provided a minimum of 15 days has passed since the issuance of the tribunal's ruling.[680] It is important to note that while the decisions and rulings of the arbitration tribunal are

[677] Such a request is also possible outside this five-day period but in such a case, a different and longer dispute resolution procedure applies. Article 374(16) TCA states that 'If the Party against which remedial measures were taken does not submit a request pursuant to paragraph 9 of this Article within the time period laid down in that paragraph, that Party may initiate the arbitration procedure referred to in Article 739 to challenge a remedial measure on the grounds set out in paragraph 9 of this Article without having prior recourse to consultations in accordance with Article 738. An arbitration tribunal shall treat the issue as a case of urgency for the purpose of Article 744.

[678] See Article 366 TCA which spells out the criteria that the Parties must apply under their respective domestic laws in order to be able to demonstrate compliance with the TCA.

[679] Art 374(9)TCA: Within five days from the date on which the remedial measures referred to in paragraph 3 enter into effect and without having prior recourse to consultations in accordance with Article 738, the notified Party may request, in accordance with Article 739(2), the establishment of an arbitration tribunal by means of a written request delivered to the requesting Party in order for the arbitration tribunal to decide whether: (a) a remedial measure taken by the requesting Party is inconsistent with paragraph 3 or 8; (b) the requesting Party did not participate in the consultations after the requested Party delivered the requested information and agreed to the holding of such consultations; or (c) there was a failure to take or notify a remedial measure in accordance with the time periods referred to in paragraph 3 or 4 respectively.
That request shall not have a suspensive effect on the remedial measures. Furthermore, the arbitration tribunal shall not assess the application by the Parties of Articles 366 and 367.

[680] Art 374(12) TCA.

binding on the parties, they do not create any rights or obligations with respect to natural or legal persons.[681]

Table 5: Remedial Measures (Article 374 TCA)

Written request	The requesting party may issue a written request for information; simultaneously, the parties enter into two months of consultations (Art 374.2).
Consultations	Consultations are deemed to be concluded 60 days after receiving the written request (Art. 374.2).
Implementation remedial measure	If no solution is found, and there is evidence that a subsidy causes, or there is a risk it will cause, a significant negative effect on trade or investment between the parties, remedial measures may be unilaterally applied (Art. 374.3).
Arbitration tribunal	The other party can challenge the remedial measures within five days. This request does not have a suspensory effect on the measures adopted (Art 374.9). If the AT finds that the measure is consistent with Article 374 TCA, the remedial measures remain in place.
Countermeasures	If the AT determines that the remedial measures cause further distortion the other party may enact countermeasures to offset the negative effects of the remedial measure (Art 374.12).

4.3 Rebalancing measures

The rebalancing measures represent an unprecedented international trade remedy.[682] The scope of this mechanism is not limited to subsidy control but extends across the entirety of the Level Playing Field Title, encompassing areas such as labor and social standards, environmental and climate protection.[683] Thus, when one party significantly diverges regarding its policies and priorities in these areas, causing a material impact on trade or investment, the other party may take appropriate and proportionate rebalancing measures. In particular, Article 411(1) TCA provides that:

> The Parties recognise the right of each Party to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control, in a manner consistent with each Party's international commitments, including those under this Agreement. At the same time, the Parties acknowledge that

[681] Biondi (n 2) 233.
[682] Biondi (n 181) 177.
[683] Title XI, Heading One, Part Two, TCA.

> significant divergences in these areas can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement.[684]

While the TCA recognizes each party's right to legislate in areas covered by Title XI, it acknowledges that significant divergences can affect trade and investment. Article 411(2) of the TCA goes on to say that 'If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation.'[685] These measures apply only to systemic divergences, not to individual subsidies (unlike remedial measures). Such divergences may occur, for example, when one party raises its standards while the other remains static by maintaining the existing ones.[686] Article 411(2) of the TCA further clarifies that 'Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation.'[687] It also adds that 'Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility.'[688]

4.3.1 Consultation phase

Article 411(3) TCA sets out an *ad hoc* procedure to follow for the application of rebalancing measures. According to that, before rebalancing measures may be implemented, the concerned party must notify the other of its intention to adopt these measures via the Partnership Council, providing all relevant information. The parties must then immediately enter into consultations with a view to finding a mutually acceptable solution within 14 days from the date of the notification. If no solution is found, the rebalancing measures can be adopted five days from the end of the consultation, provided that the other party has not requested the establishment of an arbitration tribunal, via written request, to the concerned party within the same five days.[689]

4.3.2 Arbitration tribunal

The tribunal has to decide on the legitimacy of the rebalancing measures. Specifically, it will verify whether they are proportionate and appropriate to what is strictly necessary to remedy the situation, as required by Article 411(2) of the TCA. The arbitration tribunal must deliver its final ruling within

[684] Art 411(1) TCA.
[685] Art 411(2) TCA.
[686] Clair Gammage and Philip Syrpis, 'Sovereignty Fictions in the United Kingdom's Trade Agenda' (2022) 71 International & Comparative Law Quarterly 563, 585-586.
[687] Art 411(2) TCA.
[688] Art 411(2) TCA.
[689] Art 411(3)(a) and (b) TCA.

30 days from its establishment, during which time the measures may not be applied. Additionally, in case it does not deliver a ruling within that period, the concerned party may adopt its rebalancing measures three days after the end of the 30-day period. In return, the other party may also take proportionate countermeasures until the tribunal delivers its ruling. When implementing these measures, the aim is to minimize disruptions to the parties' trading relationship as much as possible.[690]

Additionally, if the concerned party fails to submit the written request for the establishment of an arbitration tribunal within five days, as stated in Article 411(3)(b), it may still initiate the arbitration procedure using the general dispute settlement procedure without recourse to consultation and as an urgent case. The tribunal in this procedure only decides if the rebalancing measure are consistent with the requirements listed above.[691]

4.3.3 Implementation of rebalancing measures

If the tribunal finds the rebalancing measures to be consistent with the requirements described above, the concerned party may adopt them (or confirm them where it has already implemented them provisionally).[692] If countermeasures were adopted by the responding party, they must be withdrawn within five days of the ruling. Conversely, if the tribunal finds the rebalancing measures to be inconsistent with such requirements, the concerned party must, within three days from the ruling, notify the responding party of the measure it intends to adopt to comply, including withdrawal or adjustment of the rebalancing measures. Failure to do so allows the responding party to adopt countermeasures.[693]

4.3.4 Review procedure

Frequent recourse to rebalancing measures can be symptomatic of a deeper, structural, issue within the TCA subsidy regime. If a party consistently observes significant regulatory divergences, it then raises legitimate concerns about the effectiveness of the Level Playing Field Title as originally stipulated.[694] Under such circumstances, the TCA allows each party to request for a review of the trade provisions outlined in Heading One of Part Two. The scope of this review may be expanded to include additional headings of the TCA, subject to the mutual consent of both parties.[695]

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[690] Art 411(2) TCA; Ann-Evelyn Luyten, 'The EU-UK TCA: A Front-Runner in Trade and Sustainable Development' (TradeExperettes, 16 March 2021) https://www.tradeexperettes.org/blog/articles/the-eu-uk-tca-a-front-runner-in-trade-and-sustainable-development.
[691] Art 411(3) (h) TCA.
[692] Art 411.3 (c) TCA.
[693] Art 411(3) (f) TCA. Sara Moran 'UK-EU Series: Trade & Cooperation Agreement Level Playing Field' (Welsh Parliament, Senedd Research March 2022) 21 < https://research.senedd.wales/media/f4xdzbrp/22-35-tca-level-playing-field-en.pdf>.
[694] Rodger and Stephan (n 127) 96.
[695] Lydgate and others (n 302).

Specifically, under Article 411(4) of the TCA, any party may, no earlier than four years following the agreement's entry into force, request a review of Heading One on Trade and, if both parties agree, other sections of the agreement as well. This review may also start earlier than four years if rebalancing measures have been taken frequently or if a measure that has a material impact on trade or investment between the parties has been applied for a period of 12 months.[696]

The purpose of such review is for the parties to consider whether there is a need to amend the TCA in the light of significant regulatory divergences that have emerged and rebalancing measures that may have been taken, so as to ensure an appropriate balance between the commitments in the agreement on a durable basis. There are specific rules as to how often a party may request the review of the agreement in this context but, in general, a review may be repeated at least every four years following the conclusion of the previous review. If, following the review, a party considers that there is indeed a need to amend Heading One on Trade or other parts of the agreement, the parties will commence negotiations with a view to agreeing on the necessary amendments. If, following a year of negotiations, the parties are still unable to agree on an amending agreement, either party may give a three-month notice of its intention to terminate the Heading One of Part Two of the agreement or any other part of the agreement that was added to the review.[697]

[696] Art 411(5) TCA.
[697] Art 411(10) TCA; Catherine Barnard, 'Level Playing Field Provision in the TCA: An Introductory Guide' (Welsh Parliament 2021) p.17 https://business.senedd.wales/documents/s124507/LJC6-13-22%20-%20Paper%2027%20%20Paper%20by%20Professor%20Catherine%20Barnard%20University%20of%20Cambridge%20Level%20Playi.pdf.

Table 6: Rebalancing Measures (Article 411 TCA)

Notification	The concerned party must notify the other of its intention to adopt these measures via the Partnership Council and provide justification (Art. 411.3(a)).
Consultation	Consultations aim to find a mutually acceptable solution within 14 days from the date of the notification (Art. 411.3(a)).
Rebalancing Measures	If no solution is found, rebalancing can apply in five days (Art. 411.3(b) TCA). The rebalancing measures must be proportionate and strictly necessary to address the material impact on trade or investment caused by significant divergence (Art 411.2).
Arbitration tribunal	The other party can challenge the rebalancing measure within five days. Arbitrators must rule within 30 days from the establishment of the tribunal, during which time the measures may not be applied. If the AT does not issue a ruling within the 30-day period, the concerned party may adopt its rebalancing measures three days after the end of the 30 days period. The other party can also take countermeasures until the tribunal gives its ruling (Art 411.3(c)). If the AT upholds the rebalancing measures, the concerned party may implement them permanently (or confirm them where they were provisionally applied). If the AT finds them inconsistent with Article 411(2) TCA, the concerned party must rectify them within 3 days (Art. 411.3(d)-(e)).
Countermeasures	Failure to rectify the measures can lead to 'return retaliation', where the other party takes countermeasures (Art. 411.3(d)-(e)).
Review	No earlier than four years after the TCA entered into force (or sooner if rebalancing measures have been applied frequently or for more than 12 months) either party may request a review of Heading One, Part Two on Trade. If, after one year of negotiations, no agreement is reached, either party may give three months' notice to terminate this Heading or any other Heading of the TCA that was added to the review (Art. 411.4-11).

5. A comparative analysis between remedial and rebalancing measures under the TCA, countermeasures under WTO law, and the recovery of state aid

5.1 Introduction

This section provides a comparative analysis of the TCA's remedial and rebalancing mechanisms, CVDs and countermeasures that may be adopted when the recommendation of a WTO dispute settlement panel concerning actionable or prohibited subsidies are not fulfilled, and the recovery of state aid. Its main objective is to offer insights into how the potential future implementation of remedial and rebalancing mechanisms may affect the level playing field between the EU and the UK after Brexit.

This section starts by providing an overview of the remedies available under WTO, EU state aid, and the TCA, offering a framework to determine which elements of WTO and EU law should be compared with the TCA's remedial and rebalancing measures. It highlights that the WTO provides two distinct options: a remedy addressing the specific subsidy or its effects through CVDs, and a systemic response using appropriate countermeasures when the respondent fails to comply with dispute settlement rulings.[698] The EU state aid regime, on the other hand, adopts a different approach, where recovery is the only remedy available against unlawful or incompatible aid. Then, this section conducts a comparison of the substantive elements governing the adoption of CVDs and the implementation of countermeasures in cases of non-compliance with WTO dispute settlement decisions, the recovery mechanism under EU state aid law, and the remedial and rebalancing measures in the TCA. Finally, it proceeds with this comparative analysis by focusing on the procedural aspects of these WTO, EU, and TCA remedies. This section reveals that, although the primary purpose of rebalancing measures is to restore the level playing field by permitting the adoption of trade restrictive measures, extensive use of this instrument by the parties could ultimately result in the termination of the TCA's trade provisions, thereby jeopardizing the very objective this tool is meant to serve.

5.2 Prospective v retroactive approach

The WTO framework identifies two distinct options for addressing remedies for harmful subsidies.[699] One operates on a multilateral basis, and the other on a unilateral basis. The general principle dictates that both types of remedies are only prospective. The multilateral mechanism allows affected members to initiate a case before the WTO's DSM, claiming that the subsidies in question are

[698] Clarke and Horlick (n 581) 708.
[699] Rubini (n 13) 126-127.

prohibited or are causing adverse effects to the interests of another member.[700] Within the WTO system, compliance with dispute settlement rulings typically involves bringing the measure into conformity with WTO obligations.[701] In the context SCM Agreement, this can be achieved either by withdrawing the subsidy or by removing its adverse effects.[702] Article 21(5) of the DSU provides a mechanism to verify whether the parties have complied with the rulings. If compliance is not achieved, the primary recourse is trade retaliation.[703] This mechanism allows the affected party to suspend (temporarily) treaty obligations as a countermeasure to induce compliance with the rules. Under Article 22(6) DSU, there is a process to review whether the suspension of concessions imposed as retaliation are proportionate to the harm caused.[704] As an alternative to the multilateral mechanism, the unilateral mechanism provides for the possibility that the subsidy will be maintained and CVDs are imposed. CVDs are additional duties that an importing country can apply to future imports of subsidized goods to neutralize the negative impact of the subsidy.[705]

Under EU state aid, member states may under no circumstances implement unilateral measures to protect themselves against aid granted by other member states. The only remedy available against an unlawful or incompatible aid is the retroactive recovery of the aid from the beneficiary. Compliance with a recovery order requires the aid recipient to relinquish any advantage gained through the aid compared to its competitors, with the effect of restoring the internal market to its status quo before the aid was granted. Due to the lack of an explicit provision for the recovery of unlawful aid, the CJEU has explicitly stated that 'recovery […] is the logical consequence of the finding that [the aid] is unlawful. Consequently, the recovery is a pivotal mechanism to uphold the integrity of the general prohibition on State aid delineated in Article 107.1, as well as the standstill obligation as per Article 108.3 TFEU'.[706]

The TCA includes four mechanisms to address subsidies that affect trade and investment between the parties: private enforcement before national courts, a general DSM, unilateral state-to-

[700] There are three types of adverse effects: serious prejudice, injury and nullification or impairment.
[701] Van den Bossche and Zdouc (n 32) 178.
[702] Art 4(7) and 7(8) SCM Agreement.
[703] Articles 4(10) and 7(9) SCM Agreement; See eg Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones) (*adopted 13 February 1998) WT/DS26/AB/R, WT/DS48/AB/R; In the *Hormones* case, the DS panel concluded that the EU lacked proper justification for its ban on the importation of hormone-treated beef. As a result, the EU was obligated to comply by bringing its measure into conformity under Article 19 of the DSU. This requirement could be fulfilled either by removing the measure entirely or by addressing its inconsistency with WTO rules. However, the EU was either unable or unwilling to comply. Consequently, the US was entitled to adopt countermeasures, which took the form of the suspension of equivalent concessions. Notably, the US's response did not directly relate to beef but instead manifested as trade retaliation targeting unrelated sectors; David Palmeter, Niall Meagher and Petros C Mavroidis, 'Remedies' in Dispute Settlement in the World Trade Organization (3rd edn, Cambridge University Press 2022) 468.
[704] Andrew Mitchell, 'Proportionality and Remedies in WTO Disputes' (2006) 17 European Journal of International Law 985, 995; Mavroidis, Messerlin and Wauters (n 189) 298; Chad P Bown, 'Trump Ended WTO Dispute Settlement. Trade Remedies Are Needed to Fix It' (2022) 21 World Trade Review 312.
[705] Coppens (n 18) 202; see Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of Their Violation' (2006) 17 European Journal of International Law 723.
[706]Case C-142/87, *Kingdom of Belgium v Commission of the European Communities (Tubemeuse)* ECLI:EU:C:1990:125, para 66; See Simone Donzelli, *The Commission's New Recovery Notice*, 18 European State Aid Law Quarterly 528 (2019).

state remedies in the form of remedial measures, and rebalancing measures when one party systematically fails to comply with the TCA's principles. First, Article 372 of the TCA requires the parties to introduce a judicial mechanism to oversee their respective subsidy decisions. Among the domestic remedies available there is the recovery of unlawful subsidies from beneficiaries (which aligns with EU state aid regime).[707]

The second tool is the DSM under the TCA. If one party believes that a subsidy has or may have a negative impact on trade or investment between the EU and the UK, it may start a process of consultations. If consultations do not solve the matter, the injured party may request the formation of an arbitration tribunal.[708] However, the tribunal's power does not extend to issues concerning independent bodies or authorities, judicial review processes, or the examination of individual subsidies.[709] It is also worth noting that, in the event of a delay or outright disregard for the outcome of arbitration, no penalties can be imposed beyond the application of remedial actions. As emphasized by Biondi, the TCA's general DSM seems to be designed for the oversight of systemic adherence to subsidy control norms, rather than for assessing the legitimacy of individual subsidies.[710]

The third tool is remedial measures. This mechanism is included under Article 374 TCA and allows the injured party to adopt unilateral remedial measures (e.g. tariffs, quotas), without prior approval from an arbitration tribunal, when a subsidy causes, or poses a significant risk of causing, a significant negative effect on EU-UK trade or investment.[711]

In addition, the TCA permits the adoption of rebalancing measures (fourth tool) when one party systematically fails to comply with the TCA's principles.[712] These measures apply broadly, encompassing labor, social, environmental or climate protection, other than subsidy control. With particular reference to subsidies, rebalancing measures are not designed to counteract the effect of an individual subsidy but are applicable only if the overall system is deemed ineffective. For instance, the EU could impose a unilateral rebalancing measure if the UK implemented a subsidy control system that systematically fails to prevent the adoption of trade-distorting subsidies, resulting in the UK getting a competitive advantage.[713]

Finally, the TCA explicitly does not exclude the rights relating to CVDs (or other trade remedies) available under the WTO Agreement. Article 374(14) TCA expressly grants the parties

[707] Art 5 TCA; Article 372 TCA appears to have de facto direct effect, even though the TCA emphasises that it is an international agreement between the EU and the UK and lacks the direct effect and supremacy that characterise EU law; See Nollkaemper (n 519) 105-125.
[708] Disputes are to be resolved by arbitration tribunals whose members are chosen by the two Parties and which must strive to decide by unanimity. If unanimity proves impossible, they may decide by majority vote. See Nicolas Levrat, 'Governance: Managing Bilateral Relations' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume III: The Framework of New EU-UK Relations* (Oxford University Press 2021) 233-236.
[709] There are limited exceptions mostly related to the kind of subsidies traditionally prohibited by any other international agreement such as export subsidies and unlimited state guarantees.
[710] Biondi (n 2) 229.
[711] Art 374 TCA.
[712] Art 411 TCA.
[713] Biondi (n 181) 177.

the authority to adopt unilateral measures in accordance with the WTO Agreement, including the implementation of CVDs. The only constraint is a prohibition on dual remedies. This implies that when determining the scope of a remedial measure for a product, a party must take into account any countermeasure previously imposed or maintained for the same product.[714]

5.3 Substantive rules

The following paragraphs reveal that when designing remedial measures, the TCA negotiators drew inspiration from the substantive elements and principles required to adopt CVDs. Indeed, members may impose CVDs only if three cumulative conditions are met: the presence of subsidized imports; injury, or at least the threat thereof, to the domestic industry producing the like product, and; a causal link between the subsidized imports and the alleged injury.[715] In a related manner, Article 374 of the TCA requires the presence of a subsidy and a significant negative effect or a serious risk of a significant negative effect on trade or investment between the parties, along with demonstrated causality between these two factors. While pointing out similarities and differences between the TCA and the WTO regime, this section highlights that rebalancing mechanisms diverge from CVDs as they are not intended to address individual subsidies but rather to tackle significant divergences in subsidy control policies between the parties.[716]

a. Existence of a subsidy and significant divergence in policy areas

The first condition to adopt CVDs is the presence of imports which are subsidized within the meaning of Article 1, and specific within the meaning of Article 2, of the SCM Agreement. Similarly, Article 374(1) of the TCA stipulates that the existence of a subsidy is an essential element for imposing remedial measures. Since the TCA does not specify further requirements, it can be inferred that any type of subsidy, as defined by Article 363 TCA, may be counteracted through the remedial measures. In turn, Article 411(1) of the TCA focuses on significant divergences that 'can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of the Agreement'.[717] This conveys that rebalancing

[714] Jesse Kreier, 'Enforcement of Subsidy Provisions in the EU-UK TCA' (International Economic Law and Policy Blog, 30 December 2020) https://ielp.worldtradelaw.net/2020/12/enforcement-of-subsidy-provisions-in-the-eu-uk-tca.html.
[715] Articles 10, 11(2), and 19(1) of the SCM Agreement and Article VI of the GATT; Van den Bossche and Zdouc (n 32) 929.
[716] Biondi and Howard (n 5) 383.
[717] Art 411(1) TCA.

mechanisms may be invoked when there is a systematic failure to comply with the TCA principles, leading to divergence that undermines the TCA's core balance.[718]

While the distinction between the rebalancing measures and the WTO's CVDs is evident as the former are not designed to address instances caused by an individual subsidy or a subsidy scheme, rebalancing can resemble the functionality of the suspension of equivalent concessions authorized under the WTO where a member fails to comply with a DSB recommendation to withdraw or remove the adverse effects caused by a subsidy.[719] The element that links these two mechanisms is not only their effect but also their rationale. On the one hand, Palmeter and Alexandrov argue that countermeasures aim at maintaining the balance of reciprocal trade concessions negotiated in the WTO agreement.[720] Similarly, the TCA rebalancing measures appears to be designed to preserve the overall balance in trade relations between the EU and the UK.

b. Significant negative effect and material impact

The second requirement for enforcing CVDs is a demonstration of material injury, or at least the threat thereof, or material retardation to the domestic industry producing the like product to the subsidized imported products, in accordance with Articles 15 and 16 of the SCM Agreement. Article 15(1) of the SCM Agreement provides that determining injury involves 'an objective examination of both (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products'.[721] Article 15(4) specifies that 'the examination of the impact of the subsidized imports on the domestic industry shall include (…) actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments'.[722] Alongside that, 'in making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, inter alia, such factors as: (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom; (ii) a significant rate of increase of subsidized imports into the domestic market (…); (iii) (…) substantial increase in, capacity of the exporter (…); (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic

[718] Clair Gammage and Philip Syrpis, 'Sovereignty Fictions in the United Kingdom's Trade Agenda' (2022) 71 International & Comparative Law Quarterly 563, 585-586.
[719] Art 22(2) DSU.
[720] David Palmeter and Stanimir A. Alexandrov, 'Inducing Compliance in WTO dispute settlement' *in* Daniel Kennedy and James Southwick (eds) *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press 2002) 646; See also Gary N. Horlick, 'Problems with the Compliance Structure of the WTO Dispute Resolution Process' in D. Kennedy and J. Southwick (eds) *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge University Press 2002) 636.
[721] Art 15(1) SCM Agreement.
[722] Art 15(4) SCM Agreement.

prices, and would likely increase demand for further imports; and (v) inventories of the product being investigated'.[723]

The adoption of remedial measures is contingent upon demonstrating the existence of a significant negative effect on trade or investment between the parties.[724] Article 411(1) of the TCA, for its part, requires proof of material impacts on trade or investment between the parties for the implementation of rebalancing measures. The elements of significant negative effect (regarding remedial measures) and that of material impacts (concerning rebalancing measures) echo the WTO's concept of material injury required for imposing CVDs. Article 374(1) of the TCA also accounts for situations involving a serious risk of a significant negative effect, which is reminiscent of the WTO's concept of a threat of material injury under Article 15 SCM Agreement. There is ambiguity regarding whether the requirement to demonstrate significant negative effect on trade or investment to activate remedial measures is distinct from the need to show material impacts when justifying the adoption of rebalancing measures. The fact that significant divergences in the parties' approaches to subsidy control are likely to cause more persistent and widespread disruptions to the level playing field than those caused by an individual subsidy suggest that material impacts might involve a lower threshold of harm compared to a significant negative effect.

Additionally, both criteria of significant negative effect and material impacts are considerably higher threshold than the effect on trade requirement under EU state aid.[725] The Commission's compatibility assessment does not need to establish that there is a serious risk that any negative effect is significant. State aid is deemed incompatible with the internal market if it affects trade to an extent that conflicts with the common interest, but there is no requirement that the extent is significant for a finding of incompatibility.[726]

In any case, it can be said that remedial measures focus on the harm caused to the import-competing sector, or in WTO terms, the domestic industry producing the like product. Rebalancing is more systemic and looks at the broader impact of divergences on trade and investment. So, the difference is more about the object of, or breadth of, the harm, rather than its threshold.

c. Causation between the two

Third, Article 15 of the SCM Agreement requires a causal link between the subsidized imports and the injury sustained by the domestic industry to introduce CVDs. Article 15(5) of the SCM

[723] Art 15(7) SCM Agreement.
[724] Art 374(1) TCA.
[725] Art 107(1) TFEU.
[726] Phedon Nicolaides, The UK is not bound by EU State aid rules: Subsidies in the Trade and Cooperation Agreement between the EU and the UK, EU Law Live (2020) https://eulawlive.com/op-ed-the-uk-is-not-bound-by-eu-state-aid-rules-subsidies-in-the-trade-and-cooperation-agreement-between-the-eu-and-the-uk.

Agreement specifies that 'it must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement'.[727]

Comparably, Article 374(5) of the TCA states that 'the change in circumstances that would create a situation in which the subsidy would cause such a significant negative effect must be clearly predictable'.[728] Thus, while the WTO requires the demonstration of a causal link between the subsidized import and its market impact, Article 374(5) of the TCA adds a predictive component.

Article 411(1) of the TCA requires to show that 'material impacts on trade or investment between the Parties are arising from significant divergences between the Parties' subsidy regimes.[729] It is still not clear whether demonstrating material impacts requires distinct evidence linking these impacts to significant divergences, or if showing divergences between the parties' subsidy policies will automatically be considered significant. Despite that, the element of causation between the subsidy and the harm caused is required under both the WTO and the TCA. This is absent in the EU state aid regime, where proving causality between the granting of state aid and its negative effects is not necessary.

d. Proportionality

Article 19(4) of the SCM Agreement states that members must not impose CVDs that exceed the amount of the subsidy itself. Beyond that, '[i]t is desirable' that the amount of duties imposed be less than the amount of the subsidy 'if such lesser duty would be adequate to remove the injury to the domestic industry'.[730] Moreover, in the context of retaliatory actions taken for failure to bring actionable subsidies into conformity with WTO agreements, the DSB authorizes the complaining member to 'take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist'. For prohibited subsidies, the DSB authorizes the complaining member to 'take appropriate countermeasures'. Footnotes 9 and 10 of the SCM Agreement clarify that appropriate countermeasures must not be disproportionate.[731]

The proportionality requirement is also found under Article 374(8) TCA, which states that the remedial measures 'shall be restricted to what is strictly necessary and proportionate'.[732] And Article 411(2) of the TCA makes it clear that rebalancing measures 'shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the

[727] Art 15(5) SCM Agreement.
[728] Art 374(5) TCA.
[729] Art 411(2) TCA.
[730] Art 19(2) SCM Agreement.
[731] Appellate Body Report, *United States—Tax Treatment for 'Foreign Sales Corporations' ('US – FSC')* (adopted 20 March 2000), para 5.27; Mitchell (704) 996; Arbitrators under Article 22(6) DSU may assess whether the proposed countermeasures meet the proportionality standard.
[732] Art 374(8) TCA

situation'.[733] Both Article 374(8) and 411(2) states that 'priority shall be given to measures that will least disturb the functioning of the Agreement'.[734]

Moving the focus to EU state aid, the recovery of the aid cannot be deemed disproportionate to the TFEU's aims concerning state aid, nor can it be construed as resulting in unjust enrichment for the member state, as it involves only the return of the amount that was allocated to the beneficiary. Specifically, to neutralize any secondary benefits derived from the unlawful aid, the beneficiary is required to repay not just the aid but also any interest accrued from the time the aid was at their disposal until it is fully repaid. This ensures that the beneficiary does not financially benefit from the duration for which the funds were available.

There is an intersection of principles across the WTO, EU and the TCA legal frameworks in ensuring that the remedies available need to be proportionate to the trade disruptions they aim to address. Arguably, while the WTO caps CVDS at the amount of the subsidy,[735] TCA remedies are capped by the effects caused, which looks more like an application of the (non-mandatory) lesser duty rule under Article 19(2) SCM Agreement.[736]

5.4 Procedural rules

The TCA establishes brief procedures for adopting its remedial and rebalancing measures. This is particularly evident in the rebalancing process according to which, within less than three weeks, if no arbitration is required, rebalancing measures can be adopted. This timeline is markedly shorter than the one stipulated in the WTO subsidy framework, which mandates a long and expensive process of consultation and investigations prior to the adoption of CVDs. In addition, the TCA mandates that the arbitral tribunal must deliver a decision on the remedial and rebalancing measures within just 30 days of its establishment, which is, as well, a much faster process compared to the dispute resolution process available under the WTO.[737]

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[733] Art 411(2) TCA.
[734] Ibid.
[735] Appellate Body Report, *Brazil—Export Financing Programme for Aircraft* (adopted 20 August 1999) WT/DS46/AB/R; The level of (provisional or definitive) CVDs imposed by the importing member may not exceed the amount of the subsidy, calculated in terms of subsidization per unit of the subsidized and exported product (Article 19(4) SCM Agreement); Dominic Coppens, 'Remedies' in *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014) 196, 246.
[736] Art 17(5) and 19(2) SCM Agreement; Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China ('US – AD/CVD')* (adopted 25 March 2011) WT/DS379/AB/R, para. 557.
[737] Art 13 SCM Agreement.

a. Consultations

Under the SCM Agreement, before an investigation is initiated, the injured domestic industry must submit a written complaint indicating that injurious subsidization is taking place.[738] Article 11(3) places a duty on the investigating authority to decide whether the evidence presented is sufficient to justify the commencement of an investigation.[739]Article 11(6) establishes that investigating authorities, when they have sufficient evidence of the existence of a subsidy, injury, and causal link, may also decide to initiate CVD investigations *ex officio*, as happened, for example, in the investigation on EVs from China.[740] Moreover, Article 13 of the SCM Agreement also mandates that the importing member must enter into consultations with the exporting member. These pre-initiation consultations can help to filter out subsidy programs that clearly do not meet the criteria for countervailability, such as those that are not specific or not actually utilized by the exporters in question. Investigations must normally be concluded within one year and should not exceed eighteen months, although, in practice, this does always happen.[741]

The TCA states that, in the presence of a subsidy that may cause, or there is a serious risk that it will cause, a significant negative effect on trade or investment, the requesting party may submit a written request for information regarding the subsidy in question, aiming to reach a mutually agreeable solution. The responding party is then allotted 30 days from the receipt of this request to provide a written response addressing the concerns highlighted.[742] In parallel the parties shall enter into consultations which are considered concluded 60 days after the receipt of the written request.[743] The requesting party is obliged to notify the other party of the remedial measures it wants to adopt at least 45 days after delivering the written request, providing all relevant information. Thus, if reaching such a solution proves unattainable, the requesting party may proceed with the remedial measures no sooner than 15 days after the notification of these measures has been delivered to the other party (which means 60 days after the submission of the written request).[744] The right to take remedial measures is not subject to a limitation period. This is relevant because the effects of a

[738] Article 11(4) SCM Agreement.
[739] This decision-making process includes evaluating the accuracy and adequacy of the evidence provided. In assessing the adequacy of evidence for initiating a CVD investigation, the Panel in *China – GOES* highlighted the investigating authority's role in weighing two competing interests: the domestic industry's interest in initiating an investigation against the respondents' interest in preventing investigations based on unjustified or groundless claims. However, as Article 11(3) SCM Agreement does not provide any details on the nature of this review, it is difficult for panels to judge whether importing country authorities have complied with Article 11(3); Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (adopted 16 November 2012) WT/DS414/R.
[740] Commission, 'Commission Investigation Provisionally Concludes That Electric Vehicle Value Chains in China Benefit from Unfair Subsidies' (Press Release, 13/06/2024) https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_24_3231/IP_24_3231_EN.pdf
[741] Art 11(11) SCM Agreement.
[742] Art 374(2) TCA.
[743] Ibid; Unless the Parties mutually agree on a different timeframe.
[744] Art 374(3)-(4) TCA.

subsidy may not become sufficiently evident, and thus capable of providing evidence to justify the adoption of remedial measures, until long after the subsidy has been granted.[745]

Article 411(3) of the TCA significantly accelerates the process for implementing rebalancing measures. According to that article, the concerned party must notify the other of its intention to adopt rebalancing measures via the Partnership Council, providing all relevant information. The parties must then immediately enter into consultations with a view to finding a mutually acceptable solution within 14 days from the date of the notification. If no solution is found, rebalancing measures can be adopted five days from the end of the consultation, providing that the other party has not requested the establishment of an arbitration tribunal, via written request, to the concerned party within the same five days.[746]

To recapitulate, the TCA's process for adopting remedial measures, and even more so the one for rebalancing measures, is notably shorter than the process outlined in Articles 11-13 of the SCM Agreement.[747]

b. Arbitration tribunal and countermeasures

The WTO framework confers the right to members to challenge CVDs through the DSM. And if the panel finds the adopted CVD not appropriate or proportionate, the implementing member will have to bring the measure into conformity under Article 19 DSU. Moreover, in case the implementing member doesn't satisfy the dispute settlement decision, the other member may adopt appropriate countermeasures.[748]

As concerns the TCA, Article 374(9) TCA states that the party providing the subsidy has the right to contest adoption of the remedial measures, before an arbitral tribunal. The tribunal can be established within 5 days following the implementation of the remedial measures, and the initiation of the review does not suspend those measures.[749] The powers of the tribunal are very limited: it cannot assess the compliance of the subsidy with the TCA's subsidy principles,[750] but it can only solve issues such as whether the party, in implementing the remedial measures, satisfied the necessary evidentiary standards (including the existence of a subsidy, the significant negative effect, the causation between the two, as well as the proportionality of the measure). The tribunal must deliver its decision within 30 days of its establishment.[751] According to Article 374(11) TCA, if the tribunal finds the party's remedial measures inconsistent with the TCA, that party must, within 30 days of

[745] Art 374(3) TCA; George Peretz, 'United Kingdom: To Have One Subsidy Control Regime Is a Misfortune: To Have Two Looks like Carelessness' (2021) 20 European State Aid Law Quarterly 455.
[746] Art 411(3) (a)-(b) TCA.
[747] Art 11(11) SCM Agreement.
[748] Art 22(2) DSU.
[749] Art 374(9) TCA.
[750] See Article 366 TCA which spells out the criteria that the Parties must apply under their respective domestic laws in order to be able to demonstrate compliance with the TCA.
[751] Art 374(10) TCA.

receiving the ruling, inform the other party of 'any measure it has taken to comply with that ruling'.[752] During this 30 day, the complaining party may also ask the tribunal to determine a level of suspension of obligations under the TCA or a supplementing agreement to offset the adverse effects. The complaining party may then proceed to suspend obligations in line with the tribunal's ruling, provided a minimum of 15 days has passed since the issuance of the tribunal's ruling.[753]

For the rebalancing measures Article 411(3) of the TCA states that the tribunal should verify if the measure is proportionate and appropriate to what is strictly necessary to remedy the situation. This has a lot in common with Article 22(6) DSU (which verifies whether the suspension of equivalent concessions is equivalent to the level of the nullification or impairment caused by the non-compliant measures).[754] The TCA arbitration tribunal must deliver its final ruling within 30 days from its establishment.[755] As opposed to the review of the remedial measures which occurs after their implementation, rebalancing measures are not implemented until the tribunal has decided on their respect of the terms of the TCA. It follows that the aim of this procedure is to delay the effect of the rebalancing measure until the tribunal has ensured that it aligns with the terms of the TCA.[756] Thus, if the tribunal finds the rebalancing measure to be consistent with the requirements described above, the concerned party can adopt it (or confirm it where it implemented it provisionally).[757] If not, the concerned party must, within three days from the ruling, notify the responding party of the measure it intends to adopt to comply with the ruling, including withdrawal or adjustment of the rebalancing measure. Failure to stop allows the responding party to adopt countermeasures.[758]

Interestingly, the TCA prohibits the parties from invoking the WTO Agreement or other agreements to challenge remedial and rebalancing measures, including the suspension of obligations under the TCA. This raises not only concerns about the potential impact of such measures, but also the possibility of a conflict between remedial and rebalancing measures with WTO law.[759]

Here emerges that the TCA features a quicker review process for assessing the legitimacy of the remedial and rebalancing measures if compared to the dispute settlement procedure under the WTO. By establishing a streamlined procedure before the tribunal, the TCA limits the scope for arbitrators to conduct a thorough analysis of the measures at issue, and limits the scope for the parties to have sufficient time to pursue mediation efforts in an attempt to avoid their adoption.

[752] Art 374(11) TCA.
[753] Art 374(12) TCA.
[754] Mitchell (704) 996.
[755] Art 411(3) (c) TCA.
[756] Art 411(2) TCA; Collins (186).
[757] TCA art 411(3) (c).
[758] TCA art 411(3) (e).
[759] Art 411(3)(g); Hestermeyer (n 159).

c. Rebalancing as a political tool

The frequent recourse to rebalancing measures can be symptomatic of a deeper, structural issue.[760] Under such circumstances, the TCA allows each party 'no sooner than four years after the entry into force of the Agreement' to request for a review of the operation of Heading One on trade of Part Two of the TCA.[761] The scope of this review, which is additional to the five-yearly reviews of the whole agreement under Article 776 of the TCA, can be expanded to include additional Headings, subject to the mutual consent of both parties, and it may also start earlier than four years after the entry into force of the TCA if rebalancing measures have been taken frequently, or if a rebalancing measure has been applied for a period of 12 months.[762] If, following the review, a party considers that there is indeed a need to amend Heading One on Trade or other parts of the agreement, the parties will commence negotiations with a view to agreeing on the necessary amendments.[763] After one year of negotiations, if the parties are still unable to find an amending agreement, either party may give a three-month notice of its intention to terminate the Heading One on Trade or any other part of the TCA that was added to the review.[764] In essence, the purpose of this review is for the parties to consider whether there is a need to amend the TCA in the light of the significant regulatory divergences that have emerged, so as to ensure an appropriate balance between the commitments in the Agreement on a durable basis.[765] The pertinent question here is why the TCA in the intent to pursue and maintain a level playing field between the EU and the UK delineates a procedure which could potentially lead to the termination of its entire provisions on trade? To answer this question, it is crucial to highlight the political dimension of the rebalancing mechanism.[766] Consider a situation where the EU elevates specific standards, potentially impacting trade dynamics with the UK. In such a scenario, should the UK decide not to conform to these higher standards, the EU may contemplate imposing restrictions on UK exports to remedy the situation. Although compliance with these heightened standards could benefit the UK's wider trade interests, the UK might choose not to comply, perceiving this as an affront to its sovereignty.[767] This perspective is substantiated by the prevailing narrative in UK political rhetoric, which has portrayed diverging from EU rules as a major benefit of Brexit.

Hence, whereas the EU viewed this instrument as a safeguard against regulatory divergence that could distort the level playing field (particularly given the climate of political uncertainty and

[760] Rodger and Stephan (n 127) 96.
[761] Art 411(4) TCA.
[762] Art 411(5) TCA.
[763] Art 411(9) TCA.
[764] Art 411(10) TCA.
[765] Art 411(8) TCA.
[766] See Paul P. Craig, 'Brexit a Drama the Endgame – Part II: Trade, Sovereignty and Control' (2021) 46 European Law Review 129, 145.
[767] Laffan (n 117).

deep mistrust in which the TCA was concluded), the UK interpreted it as a way to assert its regulatory autonomy, even if doing so might expose it to retaliatory measures from the EU.[768]

It follows that, if used with political savvy, the rebalancing mechanism can serve as a political tool that discourages divergence and is rarely applied in practice. Conversely, if used without such restraint, it risks becoming a source of ongoing tensions, potentially destabilizing the parties' entire trade relationship.[769]

[768] Filippo Fontanelli, 'The Law of UK Trade with the EU and the World After Brexit' (2023) 34 King's Law Journal 3, 18-19.

[769] Hestermeyer (n 159); Within the EU, responsibility for exercising this political discretion lies with the Commission. Under Article 3(1)(c) of Council Decision (EU) 2020/2252 of 29 December 2020, the Commission is charged with implementing the rebalancing measures and countermeasures outlined in Article 411 of the TCA's level playing field provisions, at least until a dedicated legislative framework is adopted to regulate their use; Complying with the UK's International Obligations on Subsidy Control: Guidance for Public Authorities' (GOV.UK, 9 June 2023) https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities.

6. Conclusion

The TCA's approach to addressing the harmful effects of a subsidy through retaliatory actions aligns with the logic of countermeasures under the WTO but contrasts with the EU's state aid regime, where the recovery of unlawful aid eliminates both the advantage conferred and the distortion caused without introducing additional disruptions.

The similarities between CVD rules and the TCA are evident in the comparison of the TCA's remedial measures under Article 374 with the CVDs as regulated by Part V of the SCM Agreement. Article 374(1) of the TCA sets out that, in the presence of a subsidy, which either causes, or poses a serious risk of causing, a significant negative effect on trade or investment, each party can implement remedial measures. It establishes three cumulative criteria – the existence of a subsidy, a significant negative effect or a serious risk of such effect, and a causal link between the two – which are reminiscent of the legal requirements under WTO law for imposing CVDs, namely the existence of a subsidy, material injury or a threat of material injury, and a causal relationship between them. On the other hand, Article 411 of the TCA specifies that rebalancing measures may be enacted in response to significant divergences in subsidy control between the parties that lead to material impacts on trade. This concept of material impact is akin to the notion of material injury found in Article 15 of the SCM Agreement. However, this chapter shows that Article 411 sets itself apart from WTO CVD law by stipulating that these material impacts must result from significant divergences. The rebalancing measures in the TCA are not designed to address instances caused by an individual subsidy (such as the CVDs under WTO law) but they aim to resolve systemic variances in subsidy control policies between the EU and the UK. In such cases, rebalancing measures appear functionally similar to the suspension of equivalent concessions under the WTO system. While the latter are designed to preserve the balance of reciprocal trade concessions within the WTO framework, the former serve the same purpose within the context of the TCA, trying to safeguard the EU-UK level playing field.

From a procedural point of view, the TCA incorporates much more expedited mechanisms for implementing both its remedial and rebalancing measures, compared to the procedures to adopt CVDs and countermeasures under the WTO framework. Article 411(3) of the TCA delineates a process for activating rebalancing measures which involves a consultation period limited to 14 days, after which rebalancing measures can be enacted, unless the party involved requests arbitration. Under the WTO, the adoption of CVDs involves a process of consultation and investigation that is intended to conclude within 18 months but always exceeds this timeframe. Further emphasizing the TCA's focus on speed – compared with the dispute resolution process under the WTO – is the requirement for the arbitration tribunal to issue a decision within a mere 30 days of its formation (this time period is valid both for remedial and rebalancing measures).

This chapter reveals that the TCA, with its multiple mechanisms allowing for retaliation (Article 374 and 411 of the TCA), suspension, and termination (Article 411 of the TCA), coupled

with the very fast procedures for implementing these measures, indicates both a fundamental lack of trust between the EU and the UK and the high stakes involved. The inclusion of these clauses suggests that both parties recognised the possible need for swift trade defense mechanisms to maintain a level playing field.

It also recognizes that the future application of the TCA's remedial and rebalancing mechanisms will hinge significantly on the legal interpretation of key criteria such as 'significant negative effect'; 'significant divergences' and 'material impacts', which appears quite ambiguous due to the lack of guidance. In any case, threshold level to adopt these measures is quite high (when compared with WTO and EU thresholds). It is also important to recognize that the TCA may be subject to amendments, as established by Articles 411 and 776 of the TCA. Consequently, while the remedies designed to ensure a level playing field between the EU and the UK constitute the current legal framework, they may be subject to revisions in the developing EU-UK relationship.

To date, the TCA's remedial and rebalancing measures have not yet been put into practice. The likelihood of either party resorting to these measures hinges significantly on their dedication to ensuring broad alignment in the evolution of their regulatory policies under the TCA's commitments.

Conclusion

This thesis has analyzed the subsidy control discipline established under Chapter 3, Title XI of the Trade and Cooperation Agreement (TCA) concluded between the European Union the United Kingdom after Brexit. The issue of subsidies emerged as one of the three pivotal elements of contention during the post-Brexit negotiations on the framework of new relationship, alongside fisheries and governance. Indeed, the lack of consensus on this matter would have made the conclusion of a trade agreement regulating the future EU-UK relations unachievable. On the one hand, the EU's priority was to safeguard the integrity of its internal market, which it sought to achieve by maintaining the EU state aid regime in the UK after Brexit. Conversely, the UK entered the negotiations with two main aims: to establish its own rules on state aid and to escape the jurisdiction of the CJEU. The compromise reached under the TCA allowed the parties to retain regulatory autonomy over subsidy control, while still committing to specific obligations to maintain a level playing field between them. This autonomy was formalized in the UK through the implementation of the Subsidy Control Act 2022, which came into force on 4 January 2023.

This thesis has sought to answer the following RQ: whether the TCA subsidy control framework suffice to ensure an EU-UK level playing field after Brexit. The thesis defined the level playing field as the objective to ensure that a party does not gain a competitive advantage by using public resources or regulatory powers to favor its domestic businesses at the expense of its foreign competitors. It needs to be specified that this thesis has not aimed to determine whether the UK's new regulatory system grants public authorities greater flexibility in spending decisions compared to the EU state aid framework. While this is an important question in its own right, the purpose of this thesis has been to explain the TCA's capacity to ensure that public spending decisions made by the EU and the UK do not distort competition and trade between them. The focus has therefore been on their bilateral trade relationship rather than the domestic impact of UK subsidies on the UK internal market.

To evaluate the efficiency of Chapter 3 in maintaining a level playing field, this thesis has embraced a comparative perspective examining the TCA subsidy system in light of the WTO and the EU state law frameworks. As detailed in chapter I, the WTO regime has been selected as a benchmark for comparison as it represents the international subsidy framework that the UK has aimed to align

with, and that would have applied to the UK by virtue of its autonomous membership in the WTO in case of a no-deal post-Brexit. Furthermore, EU state aid law has been selected as it is the system that operated in the UK for nearly 50 years, and that the EU was very determined for the UK to adhered to, despite its status as a third country. To substantiate the analytical framework it has developed, the thesis has adopted a law-in-context approach, examining the influence of EU-UK political and economic dynamics on the enforcement of the TCA's subsidy provisions.

The analysis of the TCA subsidy regime has been structured into three distinct chapters: chapter II focused on the substance of the notion of subsidy, chapter III on monitoring and enforcement, and chapter IV on remedies. Throughout the exploration of these dimensions, the guiding thread of the analysis has been the ability of these provisions to maintain an EU-UK level playing field. As such, chapters II, III and IV of the thesis have been structured in the same way. Specifically, each chapter has examined in turn the law of the WTO, EU, and the TCA, providing a foundational understanding of each subsidy regime. Subsequently, each chapter has compared the three regimes, and consequently evaluated the strengths and weaknesses of the TCA's provisions in safeguarding the EU-UK level playing field.

In particular, chapter II of this thesis has highlighted that, by omitting any reference to EU treaty articles, regulations, or state aid guidelines, the TCA consistently adopts international trade terminology. The most notable example is the absence of the term state aid, which is replaced by the term subsidy throughout the TCA. Yet, this thesis has pointed out that the substantive provisions of Chapter 3 rely heavily on the principles enshrined in Article 107 TFEU. In this regard, the thesis has also clarified that certain adjustments were necessary because some EU rules, which function effectively in the context of the internal market, required reassessment within the framework of a bilateral trade relationship. For instance, under the EU system, all state aid measures that fall outside the exemptions provided under the TFEU are prohibited, regardless of their effect on trade. By contrast, under the TCA, subsidies are only prohibited if they have a material effect on trade or investment between the parties. Even subsidies that are prohibited or made subject to conditions under the TCA may still be granted if they lack such a material effect. In any case, chapter II has underscored that certain EU principles continue to have an impact in the UK, even after its withdrawal.

Chapter III, focusing on monitoring and enforcement, on the other hand, has arrived at different conclusions from those of chapter II. In particular, it has identified a substantial departure from some of the fundamental features of the EU state aid system. First, the TCA does not require prior notification of subsidy measures to a competent authority before their implementation. Second, the TCA lacks a supranational institution tasked with enforcing compliance. Even so, the TCA requires both parties to establish an independent authority to play an appropriate role in their respective subsidy control regimes – a clear influence of the state aid regime in EU law. Regarding the UK government's decision to appoint the Subsidy Advice Unit as the independent authority, this thesis has argued that, while it was a legitimate choice for the UK to confer very limited powers on

that institution (i.e., it lacks investigative powers, the authority to assess whether a measure complies with subsidy principles, and blocking or recovery powers), concerns remain about its ability to fulfil the TCA's requirement to act impartially.

Finally, in chapter IV on remedies, this thesis has explained that the TCA includes four mechanisms that can be enforced against illegal subsidies: private enforcement before national courts, a general dispute settlement mechanism, unilateral state-to-state remedies in the form of remedial measures, and rebalancing measures when one party systematically fails to comply with the TCA's principles. However, chapter IV has contended that, in practice, only one, out of the four listed options, entails an effective international mechanism for addressing the harmful effects when it comes to a single subsidy In fact, private enforcement mechanisms, while they potentially provide a fast and effective way to resolve disputes, are inherently domestic in nature. In addition, the TCA's general dispute settlement mechanism is highly limited in scope, as it does not cover issues related to the decisions of independent bodies or authorities, judicial review processes, or the examination of individual subsidies. Furthermore, even where it applies, it lacks the authority to impose fines or other sanctions for non-compliance, with the only recourse being the possibility to adopt retaliatory measures. It follows that, since rebalancing measures cannot be applied to counteract the effects of an individual subsidy but only in cases of systemic divergences in subsidy control policy between the parties, the only remaining available tool to address the effect of a subsidy is remedial measures. Thus, chapter IV has explained that the TCA's approach to incentivizing compliance through the threat of retaliation, while consistent with the logic of countermeasures under the WTO, contrasts with the EU state aid regime, where the recovery of unlawful aid eliminates both the advantage conferred and the distortion caused, without introducing further disruptions. The thesis has argued that such an approach may prove inefficient in safeguarding the level playing field between the EU and the UK, as unilateral retaliatory mechanisms may create additional barriers between the parties. Also, even if an arbitration tribunal later rules against them, damage to bilateral trade or investment will already have been inflicted.

This thesis has demonstrated that, although the substantive rules of the TCA are largely aligned with EU state aid principles and do not exhibit gaps significant enough to undermine a level playing field between the parties, the main concerns arise when looking at the tools available for monitoring and enforcement. In particular, two elements stand out as mechanisms that, in my view, could have been addressed differently. First, the absence of a supranational authority tasked with overseeing the implementation of the TCA. Even without reinstating the Commission in this role, the parties could have established a new supranational independent body to perform this function. Second, the extremely limited powers of the TCA arbitration tribunals on subsidy issues. The decision to create tribunals whose use (at least so far) has been almost negligible appears questionable. Indeed, tribunals with the authority to rule on the legality of subsidies and impose penalties for non-compliance with their decisions would have ensured greater certainty and objectivity in the enforcement of the TCA. This thesis has concluded that it is precisely due to these

weak monitoring and enforcement mechanisms that the TCA risks seeing its provisions enforced primarily through trade-restrictive measures, which could jeopardize competition and trade between the parties. Nonetheless, it has further argued that the decision of the parties to adopt such measures will ultimately depend not on the principles enshrined in the TCA but rather on the political and economic considerations of the moment.

In this regard, this thesis has outlined that, despite earlier rhetoric promoting regulatory divergence on subsidy control as a post-Brexit advantage, the UK has delivered little in practice. On the contrary, over the past few years (which coincide, purely by chance, with the period following Brexit) the EU's approach to state aid has undergone significant transformations to address global crises. This trend became evident when the Commission introduced the Temporary Crisis Frameworks to enable member states to support their economies during the COVID-19 pandemic and the war in Ukraine. It was further solidified in 2023 when, in response to the US Inflation Reduction Act and concerns about hidden subsidies in China, the Commission unveiled a plan to enhance the competitiveness of the EU's net-zero industry and accelerate the transition to climate neutrality. Then, again, on 9 March 2023, the GBER Regulation was amended to further increase member states' flexibility in designing support measures, enabling a more robust response to evolving global challenges. Among the factors that have contributed to the relaxation of EU state aid rules are the growing focus on addressing the EU's competitiveness crisis as recently highlighted in the Draghi Report, and the broader crisis of the multilateral trading system (exemplified by the deadlock in large multilateral negotiations and the dysfunctional dispute settlement mechanism due to the AB crisis, which has weakened the effectiveness of global subsidy disciplines). Nevertheless, despite having the possibility to initiate disputes or adopt countermeasures to mitigate the impact of this wave of EU subsidies granted due to the relaxation of state aid rules, the UK neither acted on these concerns nor pursued a similar approach.

Ultimately, this thesis has pointed out that even if divergence exists, it may be overlooked for various economic and political reasons, such as the need to avoid undermining positive cooperation in other areas of international relations.[770] The economic reality remains clear: the EU is the UK's largest trading partner, accounting for over half of its trade, and the case for minimizing frictions is compelling.

Thus, as the EU-UK relationship settles into its post-Brexit status quo, both sides must continue to reflect on how best to strengthen their trade relationship. While deeper trade facilitation

[770] Until now, there has been only one dispute (the Sandeel Case) between the UK and the EU under the TCA that has reached the arbitration stage. The dispute was launched by the EU in April 2024 in relation to the UK's decision to impose a ban on EU fishing vessels operating in the English waters of the North Sea and in all Scottish waters, preventing those vessels from fishing sandeel in these areas. The EU raised concerns regarding the compatibility of the UK's ban with the TCA. Here it should be noted that fishing is a sector in which the TCA's legal framework is relatively clear, leaving less room for interpretation. Subsidies, by contrast, fall within a much more complex system. Therefore, the lack of formal disputes in this area may not only reflect political caution, but also the difficulty of establishing a clear breach, possibly discouraging parties from initiating formal proceedings; *European Union v United Kingdom of Great Britain and Northern Ireland*, PCA Case No 2024-45 (28 April 2025).

could be explored in the future, the immediate priority should be to strike the right balance between cooperation and regulatory autonomy. In an increasingly unstable geopolitical environment, marked by the US retreat from multilateral leadership and the growing economic influence of emerging regions, particularly in Asia, it is in the UK's strategic interest to prioritize its relationship with the EU. The UK and the EU may have taken different institutional paths, but they continue to share fundamental values and interests. The UK will always remain a part of Europe, and working together with the EU as its closest and most natural partner is not only desirable, but necessary. A fragmented Europe helps no one.

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