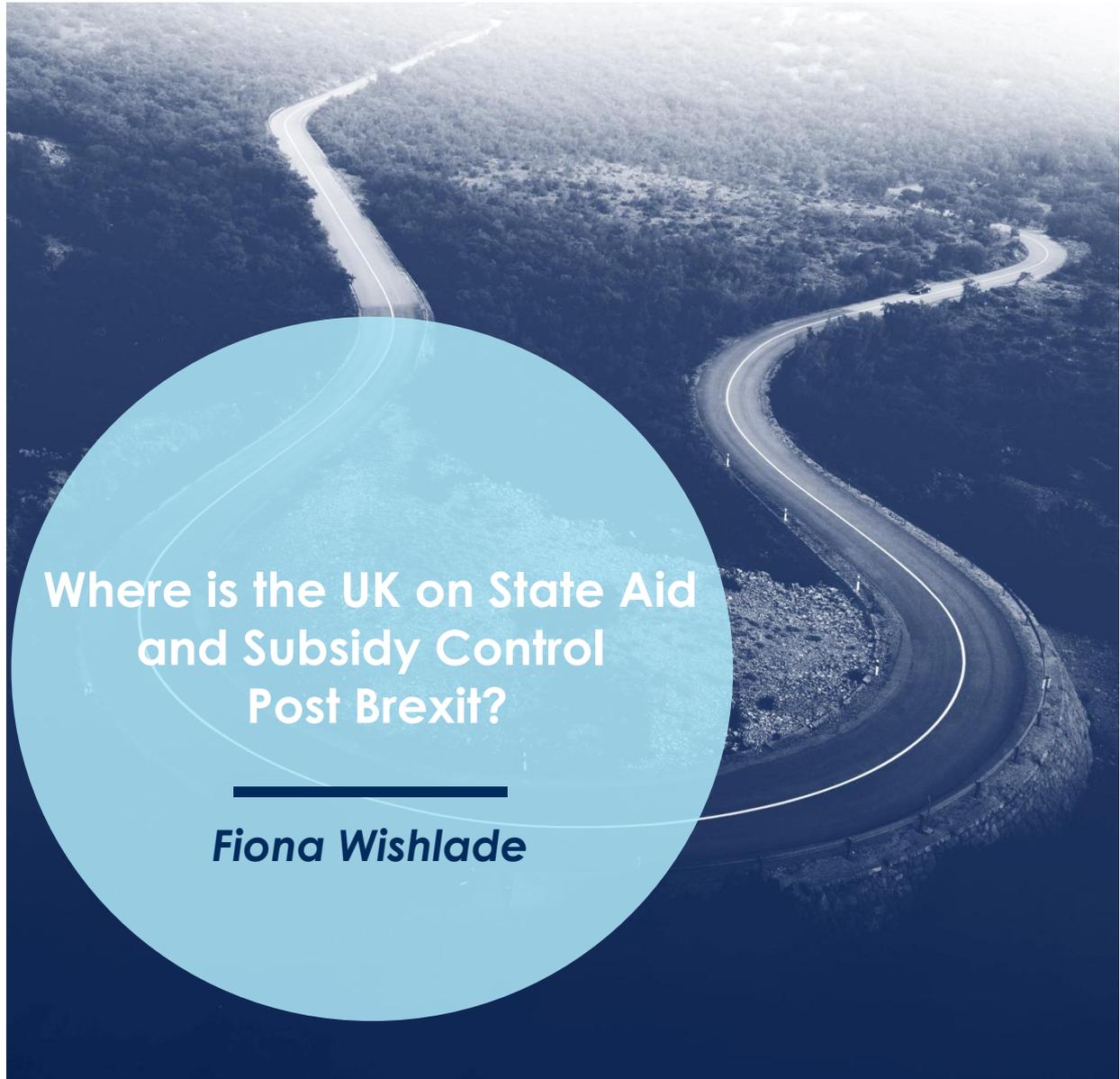




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Where is the UK on State Aid and Subsidy Control Post Brexit?

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WHERE IS THE UK ON STATE AID AND SUBSIDY CONTROL POST BREXIT?

Rather surprisingly, State aid control became one of several seemingly intractable issues in the EU-UK trade negotiations. Surprising, partly because successive UK governments have not shown much appetite for using State aid in economic development policy, but also because it had initially seemed that State aid control post-Brexit would be uncontroversial. So how did State aid control become so troublesome, and where is the UK now on subsidy discipline?

1 THE STARTING POINT

Back in 2018, the May government had proposed:¹

"...committing to a common rulebook on State aid, to be enforced and supervised in the UK by the Competition and Markets Authority"

This commitment reflected the 2018 Withdrawal Agreement,² which broadly provided that EU State aid law would apply to the United Kingdom for measures that affected trade between the UK and the EU, and that the UK would set up an independent State aid authority with functions and powers equivalent to those of the European Commission. Accordingly, a draft Statutory Instrument (SI)³ was tabled to transpose EU State aid rules into UK law on EU exit, incorporating the changes required to make the rules workable in a domestic context;⁴ and in March 2019 the Competition and Markets Authority (CMA), the proposed UK independent State aid authority, consulted on guidance for State aid notification and reporting.⁵ In terms of EU-UK relations, preparations for State aid control thus seemed set to be uncontentious; domestically, however, aspects of the May government proposals *were* controversial, with both the Scottish and Welsh governments contesting the UK government view that State control was simply a reserved matter following the repatriation of competences implicit in Brexit.⁶ The objections of the devolved governments remain, but at the time were overshadowed by successive failures in reaching Parliamentary agreement on the Withdrawal Agreement, culminating in the resignation of Theresa May as Conservative Party leader and Prime Minister.

2 THE JOURNEY

The replacement of Theresa May with Boris Johnson as Prime Minister in summer 2019, followed by the renegotiation of the Withdrawal Agreement with the European Union resulted in a significant shift on State aid issues. This had two dimensions. First, the provisions on State aid in the Withdrawal Agreement itself were dropped. Second, a new Protocol on Ireland/Northern Ireland provided that EU State aid rules *would* continue to apply to measures that affect trade



in goods between Northern Ireland and the EU.⁷ Although ostensibly Great Britain would then fall *outside* the scope of the EU State aid rules, several commentators were quick to observe that the rules could have a 'long reach' and potentially apply in Great Britain – for instance, if a subsidised car manufacturer in England were to place vehicles on sale in Northern Ireland.⁸

In parallel, Northern Ireland aside, the negotiations relegated most of the commitments on distortions of trade and unfair competitive advantages from the (binding) 2019 Withdrawal Agreement to the Political Declaration. This stated, that:

“ the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid...The Parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition...”⁹

The 2019 Withdrawal Agreement Bill was not immediately approved by the UK Parliament. Instead, against the backdrop of another looming Article 50 deadline and considerable political turmoil, a general election was called for mid-December 2019. The first concrete indications of how much the UK position on State aid would change emerged during the election campaign in which Boris Johnson undertook to:

“back British business by introducing a new state aid regime which makes it faster and easier for the Government to intervene to protect jobs when an industry is in trouble”¹⁰

Crucially, this would involve “a whole new approach, based on World Trade Organisation commitments on restricting harmful subsidies”. The speech also promised “immediate steps to ensure that a new state aid regime is designed and ready to be in place by 1 January 2021.”

Following the re-election of a Conservative government in December 2019, this time with a substantial majority, the European Union (Withdrawal Agreement) Act 2020¹¹ and the UK formally left the EU on 31 January 2020. Subsequently, pivot towards WTO based rules was confirmed: communications¹² increasingly eschewed the term 'State aid' in favour of 'subsidy';¹³ and the UK's negotiating position¹⁴ published in February 2020 made no mention of State aid, but comprised a short chapter on 'Subsidies'. This reads (in full) as follows:

“64. The UK will have its own regime of subsidy control. The Agreement should include reciprocal commitments to transparency about the award of subsidies which go beyond the notification requirements set out in the WTO Agreement on Subsidies and Countervailing Measures. This should include an obligation on both parties to notify the other every two years on any subsidy granted within its territory, applying to goods or services, in line with EU-Japan EPA. The Agreement should also include the right to request consultations on any subsidy that might be considered to harm the interests of the parties.

65. In line with precedent such as CETA and the EU-Japan EPA, the consultation commitment should not be subject to the Agreement's dispute resolution mechanism outlined in Chapter 32.”



The renunciation of the May government position on State aid was complete.¹⁵ The marked shift in position on State aid between the May and Johnson governments is widely attributed to the views of Dominic Cummings, then senior adviser to Boris Johnson¹⁶ and the assertion that essentially retaining the EU rules would constrain investment in key areas of technology.¹⁷

For its part, the Commission negotiating mandate¹⁸ published around the same time, specified that:

“The envisaged partnership should ensure the application of Union State aid rules to and in the United Kingdom. For aid granted by the United Kingdom affecting trade between Great Britain and the Union, the United Kingdom should set up an independent and adequately resourced enforcement authority with effective powers to enforce the applicable rules, which should work in close cooperation with the Commission. Disputes about the application of State aid rules in the United Kingdom should be subject to dispute settlement.”

A few days after these opening salvos were published, the House of Lords EU Committee not unreasonably concluded that:

“the UK and EU positions on State aid are essentially incompatible, and have recently hardened.”¹⁹

3 THE BATTLEGROUND

State aid thus emerged as one of the key sources of contention in the negotiation of future trading relations, with the EU starting point being its own **State aid regime**, and the UK position based on **WTO mechanisms for subsidy discipline**. These are fundamentally different in approach (see Figure 1).

Figure 1: Key features of EU State aid control and WTO Subsidy discipline

EU State aid rules	WTO Agreement on SCM
Generally prohibits State aid	Generally allows subsidies
Covers 'economic activities'	Covers goods only
Rules apply <i>ex ante</i> – i.e. before aid is offered	Rules apply <i>ex post</i> – if complaints made
European Commission enforces and claims can be made in national courts	WTO dispute settlement or national investigation
Individuals, firms & governments can complain	Only States can initiate complaints
Proof of harm not required for aid to be incompatible with Treaty	Bar for complaints high – eg. proof of serious threat to interests
Recovery of illegal aid from recipient	Trade defence measures only eg countervailing duties

Note: Although the WTO Agreement on Subsidies and Countervailing Measures only covers goods, the UK's approach to future EU relations extends this to services.

In the absence of formal briefings, information on the turns of the negotiations is difficult to access in real time. Nevertheless, it seems that by the end of July 2020 the EU had softened its stance, apparently dropping demands for European Court of Justice oversight and UK



adoption of future EU State aid rules, but in it exchange sought agreement on a 'shared philosophy' for subsidies.²⁰

The UK did not publicly outline its plan for subsidy control until 9 September 2020.²¹ This left the UK position substantially unchanged, but comprised following elements:

- confirmation of the intention to replace EU State rules with WTO subsidy rules from 1 January 2021
- a commitment to publish clear guidance on the WTO rules for public authorities and the devolved administrations before end 2020
- consultation (in 2021) on the need for further domestic legislation on subsidies.

That same day saw the first reading of the **Internal Market Bill (IMB)**,²² wide-ranging and highly controversial legislative proposals partly designed to backfill the regulatory vacuum created by Brexit. The most contentious element (among many) was the provision that Ministers might make regulations to 'disapply' aspects of the Withdrawal Agreement in relation to the Northern Ireland Protocol, including the provisions on State aid; as the Northern Ireland Secretary framed it, the IMB would "break international law in a very limited and specific way".²³ The proposals to renege on international legal obligations attracted widespread condemnation both domestically and from abroad.²⁴ For its part, the European Commission initiated infringement proceedings²⁵ and the European Parliament said it would not ratify a trade deal with the UK if it maintained its threat to breach the Withdrawal Agreement.²⁶ In early December 2020, political agreement was reached between Michael Gove and Maroš Šefčovič, co-chairs of the EU-UK Joint Committee on aspects of the Withdrawal Agreement; on this basis the UK government undertook to remove the offending clauses of the IMB.²⁷ As will be seen, however, the issue of potential 'reach back' of EU State aid rules from the Northern Ireland Protocol into Great Britain, which was central to the motivation to 'disapply' aspects of the Withdrawal Agreement, was not resolved in the Joint Committee and remains a matter of contention.

The IMB was eventually passed on 17 December 2020. The Internal Market Act is a **significant piece of the domestic legislative 'jigsaw' on subsidies** insofar as it amended the various 'devolution' Acts²⁸ and explicitly made subsidy control a matter 'reserved' to Westminster.²⁹ However, it provided for 'engagement' with the devolved administrations on the subsidy control consultation announced on 9 September 2020; it also required the government to produce guidance on the application of Article 10 of the Northern Ireland protocol on State aid within a month of the Act coming into force.

4 THE LANDING ZONE

The UK and EU negotiating teams **agreed the Trade and Cooperation Agreement (TCA)** on Christmas Eve,³⁰ with 'subsidies' among the last issues to be settled (the term 'State aid' is absent from the TCA).

The core provisions are in Chapter 3 'Subsidy control' of the TCA. This chapter is longer and more substantial than the 'Subsidies' chapters of the EU-Japan partnership agreement³¹ and

the EU-Canada CETA which are more closely aligned to the WTO rules.³² The Subsidy Control chapter is complemented by a 'Joint declaration on subsidy control policies'³³ giving non-binding 'guidance' on subsidies for regional development, transport and research and development.

There are two immediately striking features of the TCA Subsidy Control chapter. First, is the extent to which the substance of the definitions, scope and exceptions **echo the EU State aid provisions** and case law. Second, is the **'conscious uncoupling' of the text from EU vocabulary** – hence 'State aid' becomes 'subsidy', 'undertaking' becomes 'economic actor' a firm 'in difficulty' becomes 'ailing or insolvent' and 'services of general economic interest' become 'services of public economic interest'. The outcome is thus rather contradictory. On the one hand there are familiar concepts and principles; on the other hand, the use of different terminology impedes recourse to European Court judgments as definitional reference points.

Before looking more closely at the TCA Subsidy control chapter, it is important to note that these are not the only 'subsidy rules' to which the UK is subject since 31 December 2020:

- By dint of the 2019 Withdrawal Agreement, EU State aid rules continue to apply to any remaining expenditure under the EU programmes in which the UK participates (ERDF, ESF, etc) until the closure of those programmes;³⁴ and,
- By dint of the Northern Ireland protocol, EU State aid rules apply to the UK in respect of measures that could affect trade in goods between the Northern Ireland and the EU.

Neither of these is mentioned in the TCA.

5 THE SUBSIDY CONTROL CHAPTER

The Subsidy control chapter determines how both the EU and the UK can deploy subsidies in their respective jurisdictions. It sets out: what a subsidy is; what is excluded from the scope of the chapter or prohibited under it; special conditions for some types of subsidy; and general principles to be applied to all other types. It requires an independent body in the EU and the UK with an appropriate role in subsidy control and provides for transparency and consultation between the parties. There are also provisions for remedies and sanctions. Within the parties these include a requirement for beneficiaries to repay subsidies, but there is also scope for 'remedial' and 'rebalancing' measures that could involve the imposition of tariffs or quotas. More specifically, Chapter 3 does the following:

- 1) **defines** the term 'subsidy' (Article 3.1)
- 2) **allows for subsidies of a social character**, targeted at individual consumers (Article 3.2.2)
- 3) **conditionally exempts:**
 - a) subsidies to compensate for damage caused by natural disasters, exceptional non-economic occurrences (article 3.2.1) and
 - b) temporary aid in response to a national or global emergency (Article 3.2.3);
- 4) identifies **exclusions from the subsidy rules**, namely:
 - a) agriculture, fisheries and the audio-visual sector (article 3.2.5); and



- b) subsidies below 325,000 SDR (c €385,000) in any three-year period (Article 3.2.4)
- 5) introduces **specific rules** for services of public economic interest; (Article 3.3) international cooperation projects (Article 3.5.13); sustainable energy and environmental subsidies (Article 3.5.14); and subsidies to air carriers (Article 3.5.15)
- 6) **prohibits certain types of subsidy** where they have or could have a *material* effect on trade and investment between the parties (Article 3.4.2), namely:
 - a) unlimited State guarantees (Article 3.5.2),
 - b) rescue and restructuring subsidies in the absence of a credible plan (Article 3.5.3-5);
 - c) support for banks and insurance companies beyond what is needed to ensure orderly exit in the absence of a credible restructuring plan (Article 3.5.6-7);
 - d) export subsidies other than export credit insurance and guarantees for non-marketable risks (Article 3.5.8-11);
 - e) and subsidies contingent on the use of domestic content (Article 3.5.13)
- 7) commits the EU and the UK to maintaining an effective system of subsidy control that respects **six 'principles' to ensure that subsidies are not granted where they have or could have a material effect on trade or investment** between the EU and the UK (Article 3.4)
- 8) requires an operationally **independent authority with an 'appropriate' role in subsidy control** (Article 3.9)
- 9) specifies **transparency requirements**, notably that details of subsidy measures and recipients be made publicly available (Article 3.7)
- 10) provides for **consultation** between the UK and the EU where disagreements emerge (Article 3.8)
- 11) sets out the competences of **courts and tribunals** in each jurisdiction and gives the UK and the EU the right to intervene in one another's courts and tribunals (Article 3.10)
- 12) requires an effective mechanism for the **recovery of subsidies** from the beneficiary in specific circumstances (Article 3.11)
- 13) provides for **sanctions** (eg tariffs or quotas):
 - a) under *remedial measures* for subsidies that have or could have a significant negative effect on trade or investment between the UK and the EU (Article 3.12); and
 - b) the application of general dispute settlement provisions leading to *rebalancing* under some conditions (Article 3.13).

Much of the substance these provisions – notably the definition of subsidies, the exclusions, conditional exemptions, prohibitions and the 'six principles', and even the transparency requirement, will be familiar to State aid practitioners, though of course the dispute resolution mechanisms reflect that the TCA is an **international trade agreement**, rather than **internal market legislation**.

6 THE CONCEPT OF SUBSIDY

The concept of a subsidy essentially parallels the definition of 'State aid' in EU law (see Figure 2).³⁵ The TCA also makes clear that tax measures may be classed as subsidies if they are 'specific' and the circumstances in which this is so broadly mirror existing European Court of Justice case law.³⁶ For example, the concepts of institutional, procedural, financial and

economic autonomy used to determine whether tax regimes that vary across a national territory involve State aid or are general measures are lifted from the *Azores* case.³⁷

Figure 2: 'State aid' and 'subsidy'

TFEU: Article 107(1)	TCA: Article 3.1(1)(b)
aid granted by a Member State or through State resources	'subsidy' means financial assistance which arises from the resources of the Parties
in any form whatsoever	including: direct or contingent transfer of funds such as direct grants, loans or loan guarantees; the foregoing of revenue that is otherwise due; or the provision of goods or services, or the purchase of goods or services;
favouring certain undertakings or the production of certain goods	confers an economic advantage on one or more economic actors; 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
distorts or threatens to distort competition; affects trade between Member States,	has or could have , an effect on trade or investment between the parties

Within the EU the bar for determining an **impact on competition** or trade has been notoriously low, with seemingly innocuous measures often caught (though in practice exempted). It remains to be seen how the possible 'effect on trade or investment between the parties' is interpreted but given that the effect of the TCA is to reduce the degree of market integration between the EU and the UK, it can be assumed that the bar is higher.

A notable difference between the WTO subsidy rules on which the EU-Japan partnership and the EU-Canada CETA rely, and the TCA is that **infrastructure** is within the scope of the subsidies chapter. Infrastructure has been firmly within the remit of the EU State aid rules since the *Leipzig-Halle* judgment,³⁸ but has often been viewed as problematic by domestic policymakers. Partly for this reason,³⁹ some commentators argued that a post-Brexit subsidy regime should exclude infrastructure.³⁹

7 SCOPE, PROHIBITIONS AND CONDITIONS

The TCA also mirrors significant elements of EU State aid law and practice in determining the **scope** of what falls outside the agreement (see Figure 3). For example, under Article 107(2) **social aid** paid to individuals and aid to make good damage caused by **natural disasters** and exceptional occurrences, are *de jure* compatible with the TFEU, as opposed to relying on Commission discretion. Parallel provisions are in Article 3.2.1 and Article 3.2.2 TCA – though the TCA specifies that the exceptional occurrences are 'non economic'.





Figure 3: Scope and exceptions

TCA	Subsidy type	Status	TFEU 'equivalent'
Art 3.2.1	Compensation for damage caused by natural disasters or exceptional non-economic occurrences	The following constraints do not apply : Art 3.4 (Principles), Art 3.5 (prohibited and conditional subsidies) Art 3.12 (remedial measures)	Art 107(2)(b)
Art 3.2.2	Social character targeted at final consumers	Not prevented by Subsidy Chapter	Art 107(2)(c)
Art 3.2.3	Response to national or global economic emergency (must be targeted proportionate, effective)	The following constraints do not apply : Art 3.4 (Principles), Art 3.5 (prohibited and conditional subsidies) Art 3.12 (remedial measures)	Art 107(3)(b)
Art 3.2.4	Below 325,000 SDR in any three fiscal years	Subsidy chapter does not apply	<i>De minimis</i> Regulation ⁴⁰
Art 3.2.5	Agriculture, trade in fish or fish products	Subsidy chapter does not apply	Art 107(1) "Save as otherwise..." excludes, agriculture and fish,
Art 3.2.6	Audio-visual sector	Subsidy chapter does not apply	

Similarly, Article 107(3)(b) TFEU gives the Commission discretion to allow "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". This has provided the legal basis for most State aid in the **COVID crisis**, notably the Temporary Framework and is also reflected in the TCA, but in somewhat more specific terms. Article 3.2.3 TCA states "Subsidies that are granted on a temporary basis to respond to a national or global economic emergency shall be targeted, proportionate and effective in order to remedy that emergency". In different times, this provision might have been less important – Article 107(3)(b) TFEU was also used to address the aftermath of the economic and financial crisis, but has otherwise been used very rarely in respect of 'serious disturbances'.

The TCA includes a **de minimis provision** – that subsidies below 325,000 SDR (about €385,000 or £335,000) in any three-year period are out of scope. This is a higher threshold than the (general) *de minimis* amount applied within the EU (€200,000), but lower than in the EU-Japan agreement (450,000 SDR).

Conversely, where subsidies fall within the scope of the subsidy chapter, they are subject to conditions or may be **prohibited** if they "have or could have a material effect on trade or investment between the parties". This is different from the approach under the State aid rules which starts from the presumption that State aid is prohibited, then defines the circumstances in which it is or may be allowed. Nevertheless, superficially at least, the outcome is not radically different; aid for **undertakings in difficulty** and for **exports** are tightly proscribed through Commission Regulations, guidelines and decisional practice and ECJ case law; these forms of support are regarded as the most harmful to the internal market and are also in principle prohibited under the TCA.

Figure 4: Prohibited subsidies

	Subsidy type	Exceptions to prohibition
Art 3.5.2	Unlimited state guarantees	None
Art 3.5.3-5	Rescue and restructuring	Credible plan to ensure long-term viability and significant contribution from owner, investors etc
Art 3.5.6	Restructuring banks, credit institutions and insurance companies	Credible plan to ensure long-term viability or orderly liquidation.
Art 3.5.8	Export subsidies	Short-term credit insurance for non-marketable risks Export credit, guarantees and insurance compatible with WTO ASCM
Art 3.5.12	Subsidies contingent on use of domestic content	None
Art 3.5.15	Operation of air routes	Public service obligation in accordance with Art 3.3 Special cases of wider societal benefit Start-up subsidies for regional airport that increase citizen mobility and stimulate regional development

Subsidies to **air carriers**⁴¹ for the operation of routes are generally prohibited under Article 3.5.15 TCA but can be allowed where there is a public service obligation, in special cases where there are wider benefits to society and as start-up subsidies for opening new routes to regional airports providing that it increases the mobility of citizens and stimulates regional development. These are similar to the 'carve outs' provided for in the GBER for regional airports and operating aid in remote regions and in line with the Commission guidelines on aid to airports and airlines.⁴²

Some categories of subsidy are subject to **conditions** of their own, *in addition to the six principles* of Article 3.4.

Mirroring EU State aid law and practice on Services of General Economic Interest, provision is made for **Services of public economic interest** (Article 3.7). This covers specific tasks, including but not limited to public service obligations, which are assigned in advance. A *de minimis* threshold (750,000 SDR) applies to subsidies for such services.

Subsidies for **large cross border or international cooperation** projects are provided for in Article 3.5.13 TCA. Examples given are transport, energy, the environment, research and development and 'first deployment' projects to incentivise the emergence of new technologies. Subsidised projects must offer benefits extending beyond the participating States, relevant sector and beneficiary. Again, this echoes EU State aid rules relating to projects of common European interest (legal basis Article 107(3)(b)); this is of increasing importance in the EU, having recently been used for aid of over €6 billion in battery technology.⁴³ It also addresses the potential issue of the EU-funded projects in the scope of the TCA.

Article 3.5.14 TCA provides that subsidies for **energy and environment** must, in addition to the six principles, aim at and incentivise the beneficiary in:

"delivering a secure, affordable, and sustainable energy system and a well-functioning and competitive energy market or increasing the level of environmental protection compared to the level that would be achieved in the absence of the subsidy".





Environmental subsidies should also not relieve beneficiaries from their liabilities as a polluter under the relevant law. Again, the ‘polluter pays’ principle will be familiar to State aid practitioners.

Figure 5: Subsidies with specific conditions

	Subsidy type	Additional conditions (to Art 3.4)	TFEU ‘equivalent’
Art 3.3	Services of public economic interest	<ul style="list-style-type: none"> • Task assigned in advanced in a transparent manner • Limited to minimum necessary, including ‘reasonable’ profit • No cross-subsidisation of other activities 	Commission ‘package’ on SGEI ⁴⁴
Art 3.5.13	Large cross-border cooperation	<ul style="list-style-type: none"> • Benefits must not be limited to participating states, sectors or beneficiaries 	Communication on aid to projects of common European Interest ⁴⁵
Art 3.5.14	Energy and environment	<ul style="list-style-type: none"> • Aim at delivering secure, affordable and sustainable energy system and well-functioning competitive energy market or increasing level of environmental protection beyond that attainable without subsidies. • Polluter pays principle. 	Guidelines on State aid for environmental protection and energy ⁴⁶

8 THE SIX PRINCIPLES OF SUBSIDY DESIGN

the EU and the UK as parties to the TCA must have in place an effective system of subsidy control which ensures that the granting of a subsidy respects **six key principles** (Article 3.4). In practice, these clearly echo the European Commission ‘common principles’ on which basis it assesses aid proposals under, for example, the regional aid or the R&D aid guidelines (ie. those that fall outside the General Block Exemption Regulation and therefore require notification).⁴⁷

The **six principles in the TCA** are that subsidies:

- a) should pursue a specific public policy **objective** to remedy a market failure or address an equity rationale
- b) should be **proportionate** and limited to what is necessary
- c) should be designed to **change the economic behaviour** of the beneficiary to achieve the policy objective in ways that could not be achieved without subsidies
- d) should not compensate for costs which the beneficiary would have borne anyway – ie should not result in **windfall gains**
- e) should be **appropriate** and used where the objective cannot be achieved by other means; and
- f) that the **positive contributions** of subsidies should **outweigh any negative effects**, especially on trade or investment between the UK and the EU.

The EU and the UK each determine how to implement these principles in their own subsidy control systems in domestic law and must do so in such a way as to ensure **that the lawfulness of an individual subsidy is determined by the principles**. The key difference is that the EU has a substantial body of case law, Regulations, guidelines and Decisions that give practical effect



to these principles across a range of policy areas – including eligibility criteria, rates of award, assisted area coverage; by contrast, as discussed below, the UK has actively repudiated this framework and context.

9 INSTITUTIONAL MECHANISMS

The TCA is to date unique among trade agreements in requiring the parties to have structures in place to police subsidies. Article 3.9 specifies that each party must 'establish or maintain an operationally **independent authority** or body with an appropriate role in its subsidy control regime'. The UK has not so far designated such a body, though it seems likely that the CMA will fulfil this role; DG Competition will presumably be the relevant authority in the EU. An "appropriate role" is not defined; however, the TCA **does not impose ex ante approvals of subsidies** so there is no obligation to notify measures *in advance* of implementation which in principle is required in the EU. That said, within the EU, prior notification has become increasingly rare anyway as the vast majority of awards and schemes are designed fall within the General Block Exemption Regulation which provides a framework for compliance.

The **transparency** requirements of the TCA also go beyond what is usual in a trade agreement. Echoing the EU State aid approach, each party must make publicly available on an official website or a public database the following information:

- the legal basis and policy objective of the subsidy
- the name of the recipient of the subsidy
- the date of granting, duration and other time limits
- the amount of the subsidy or the amount budgeted.

This information must be provided within six months (12 months in the case of tax measures) of an award decision. In the EU, awarding bodies are generally required to report awards exceeding €500,000. The TCA does not have a lower limit for reporting, but it also does not apply to subsidies below 325,000 SDR (c €385,000) in any three-year period. This suggests that an adjustment to the EU State aid reporting requirements will be required, to capture subsidies below the €500,000 that are caught by the TCA.

Each party must also ensure the possibility of **judicial review** of the decisions of the independent authority and of awarding bodies (Article 3.10). Relevant courts or tribunals should have the scope to review whether subsidy decisions comply with the six principles, impose effective remedies and hear claims from interested parties. Interested parties include 'any legal or natural person' whose interest might be affected by the subsidy – including the beneficiary, competitors and trade associations.

Recovery of subsidies paid must be among the domestic remedies provided for by each party. Recovery may be ordered if a court or tribunal finds that:

- a measure constituting a subsidy was not treated as such by the awarding body



- the awarding body has failed to apply the six principles as provided for in the law of that party
- the awarding body has exceeded or misused its powers in granting the subsidy.

Note, however, that **recovery is not required in all cases** (Article 3.11.5). Specifically, is it not required where a subsidy is granted on the basis of a UK Act of Parliament, an act of the European Parliament and of the Council of the EU, or of an act of the Council of the EU. It is not immediately clear what “on the basis of” means in this context. Would it take European Structural and Investment Fund subsidies outside the scope of recovery, even though they fall within the State aid rules, or would the exclusion only apply to centrally-managed EU measures? Recovery would certainly appear potentially to apply to all purely domestic legal bases within EU Member States, even the national level, and the acts of devolved governments and local authorities in the UK.

10 THE NEW UK DOMESTIC SUBSIDY REGIME

Before the TCA negotiations were complete, the UK government had introduced measures⁴⁸ to revoke direct EU legislation and Treaty provisions relating to State aid with effect from the end of the Transition Period.⁴⁹ The European Union (Future Relationship) Act 2020,⁵⁰ which implements the TCA in UK law, contains wide-ranging so-called ‘Henry VIII powers’ (Section 31).⁵¹ This clause could have enabled ministers to introduce a framework to regulate subsidies effective from 1 January 2021,⁵² and the government was not short of expert advice in this regard,⁵³ but neither were used in practice. Instead, on 31 December 2020, the Department for Business, Energy and Industrial Strategy (BEIS) issued ‘Guidance’⁵⁴ on the UK’s international subsidy control commitments, to be applied from the start of 2021. This Guidance is discussed further below.

Since then, a **public consultation on the future UK subsidy regime** has been launched (3 February 2021);⁵⁵ it closes end March 2021. The consultation document indicates that the government will bring forward primary legislation – as mentioned, under the Internal Market Act 2020 the UK subsidy control regime is reserved to the UK government; however, it also has a duty under the Act to consult with the devolved administrations before publishing its response to the public consultation.

The consultation seeks **views on a range of issues**, including, but not limited to:

- What **type of subsidies** are *beneficial* to the UK economy and which are most *harmful or distortive*
- The appropriateness of government **objectives** for the subsidy control regime, namely:
 - facilitating interventions to deliver on the UK’s strategic interests;
 - maintaining a competitive and dynamic market economy;
 - protecting the UK internal market;
 - acting as a responsible trading partner.

Here it is noteworthy that the aims *go beyond subsidy discipline* to meet international obligations, but also frame subsidies as instruments of economic and industrial development.



- Whether the domestic subsidy rules should cover **agriculture, fisheries**, and the **audio-visual** sectors (which are outside the TCA Subsidy chapter).
- The relevance of adding a seventh **principle focussed on protecting the (UK) internal market**, and whether any further principles are appropriate.
- The **level of guidance or information required for awarding bodies** to comply with the principles. In the EU, the common assessment criteria (which the six principle reflect) are effectively operationalised through the various guidelines and the GBER which, among other things, define 'incentive effect', set eligibility criteria, calibrate maximum rates of award, regional aid maps and otherwise shape the scale and scope of State aid. To what extent do UK stakeholders want detailed guidance.
- Thresholds for **small amounts of subsidy** –and whether the UK should have a domestic *de minimis* principle and if so at what level.
- What steps should be taken to **protect the UK internal market** and prevent competitive outbidding or migration of jobs and investment between the four nations.
- How prescriptive the rules should be on subsidies in determining when the TCA and other international obligations are met – should the UK set out '**categories of subsidy that are considered in compliance**' with international legal obligations, a 'safe harbour' approach for low-risk subsidies (akin to the EU GBER)
- Whether there should be **sector and category specific provisions or guidance** in areas such as disadvantaged areas, R&D, transport, skills or others.
- What thresholds would be appropriate for **reporting under the transparency requirement**.
- What **functions the independent body should have** and to what extent it should have a role in: information and enquiries, reviews and evaluations, advice on designing subsidies, post-award review and enforcement.

It is unclear what the timescale is for new legislation. In the meantime, awarding bodies in the UK are invited to use the **BEIS Guidance** published on New Year's Eve; the election campaign promise of "a new state aid regime... designed and ready to be in place by 1 January 2021" was not to be. Several commentators have been critical of the uncertainty caused by this *interregnum*.⁵⁶

A striking feature of the BEIS Guidance is that it makes clear that **the TCA is but one of several international agreements under which the UK has obligations in respect of subsidies**. UK practitioners have rarely had to consider the non-EU implications of using subsidies or State aid. This is because of the relatively comprehensive nature of the EU State aid rules, the direct applicability of the GBER, the role of the EU in external relations (ie. negotiating FTAs) and the high bar set for harm under the WTO rules. In short, it has *generally* been the case that financial support which does not contravene EU State aid rules will not fall foul of international agreements either. However, this is not always so: US action against EU and European (including UK) support for Airbus⁵⁷ resulted in a WTO Dispute Settlement Panel authorising levies of up to 100 percent on \$7.5 billion worth of EU goods; close to home, this translated into tariffs of 25 percent on UK exports of single malt whisky to the United States.⁵⁸





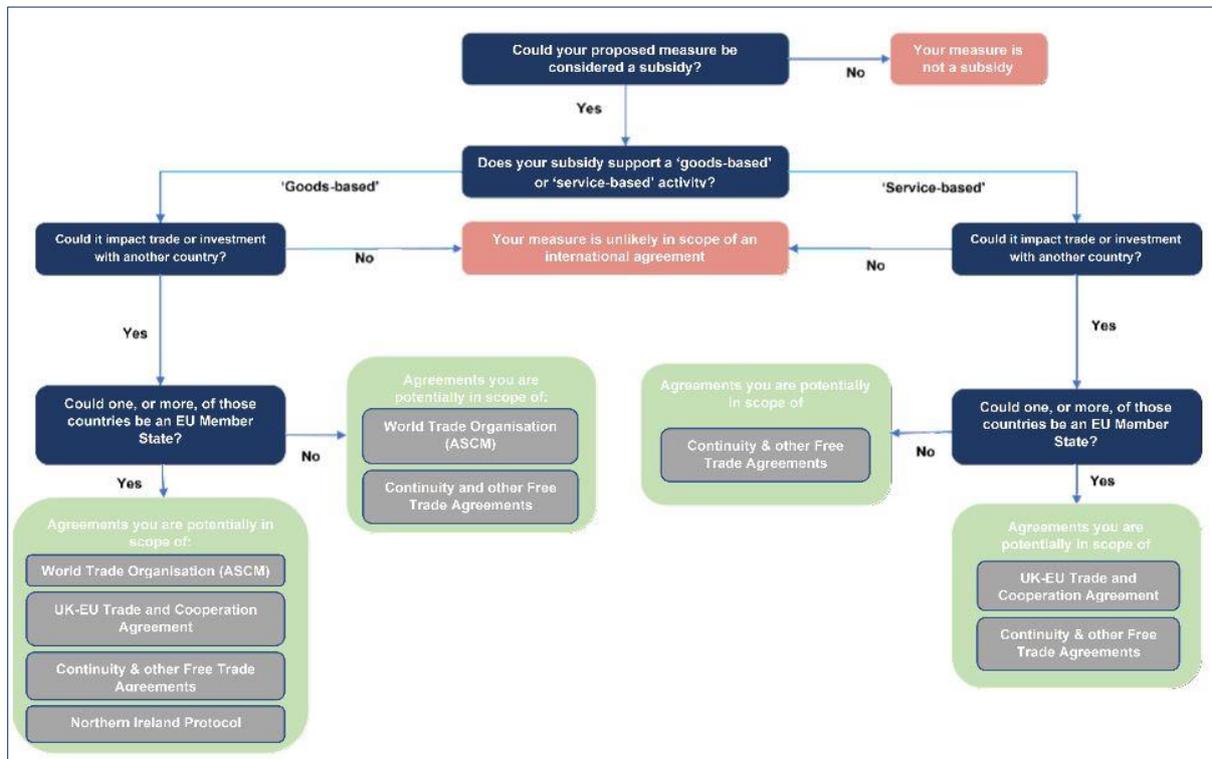
Although the TCA is the most likely of various trade agreements to bite in UK use of subsidies, the BEIS guidance notes that from 1 January 2021 awarding bodies will have to take account of several international obligations:

“...public authorities will need to determine whether their subsidy carries any appreciable risk of triggering a dispute with a trade partner under the terms of the WTO ASCM rules or the UK’s FTAs. This is in addition to considering whether the proposed subsidy falls within scope of domestic law obligations relevant to subsidy control.”

Thus, following Brexit, UK practitioners (and beneficiaries) should consider:

- whether a proposed measure is a subsidy, and if so, what international obligations apply (Article 10 of the Northern Ireland protocol, TCA, other trade agreements concluded by the UK and the WTO ASCM)
- whether the measure is a prohibited subsidy under any of those arrangements
- whether the six principles of Article 3.4 TCA are met if the subsidy is within scope of that agreement (public authorities are asked to record how they have considered these principles lest evidence should be required in consultation, remedial procedures or judicial review)
- whether there is any likelihood of triggering a dispute or unilateral remedies under WTO(ASCM) or other FTA.

Figure 6: Which international agreements are relevant to subsidy control in the UK?



Source: BEIS technical guidance on subsidy control (see note 54).



Where subsidies *are* awarded, they must be recorded – ultimately in a database which is being developed by BEIS - to meet the TCA transparency requirements, and potentially for other ends.

In reality, except for the Northern Ireland Protocol, the BEIS Guidance does little more than restate the obligations under the various agreements; this is unlikely to be sufficient for many practitioners – particularly those who had relied exclusively on the ‘safe harbour’ provided by the GBER and its direct applicability in UK law; the application of the Article 3.4 principles is similar to the assessment required for a Commission State aid notification – of which very few awarding bodies have experience (and all are keen to avoid); the BEIS Guidance contains no interpretative information, only a template for awarding bodies to record their analysis (see Figure 7). This information could be requested by the EU or by interested parties considering a domestic legal challenge; under the TCA (Art 3.4.3) “the legality of an individual subsidy will be determined by the principles”. The analysis is therefore not a trivial task.

Figure 7: Compliance with the six principles of the TCA

Principles	How does the subsidy comply with the principle?
The subsidy pursues 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”).	
The subsidy is proportionate and limited to what is necessary to achieve the objective.	
The subsidy is designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of the subsidy being provided.	
The subsidy should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.	
The subsidy is an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means.	
The subsidies’ positive contributions to achieving the objective outweigh any negative effects , in particular the material effect on trade or investment between the Parties.	
Where relevant, record consideration against Article 3.5 [Prohibited subsidies and subsidies subject to conditions], including consideration of whether that subsidy has or could have a material effect on trade or investment between the Parties.	

Source: BEIS technical guidance on subsidy control (see note 54).

The Guidance does strike a note of continuity in observing that:

“public authorities can still pay out subsidies under previously approved schemes as these will be in line with the principles [of the Article 3.4 TCA]. This includes subsidies related to COVID-19 that have previously been under the State aid Temporary Framework. Public authorities should keep these schemes under review and apply the principles to any changes made to these schemes”

However, this reassurance underplays some of the practicalities of ensuring the legality of subsidies since 1 January 2021 – “will be in line with” does not provide the legal certainty that





many awarding bodies and beneficiaries will seek. Some 'action points' suggested for local government (in Great Britain) at least partially to address this include:⁵⁹

- updating grant funding agreements to reference the new rules mentioned in the BEIS guidance rather than EU State aid rules, noting that the UK courts rather than the Commission (or ECJ) will be the arbiter
- updating guidance in parallel, taking account of the fact that the TCA *de minimis* is likely to be cumulated with past awards under the EU *de minimis* rules
- asking applicants to justify how an award is lawful in relation to the six principles of Article 3.4 TCA
- asking applicants for details of any Northern Ireland operations and activities
- preparing guidance notes for each of the six principles which awarding bodies can use in award decisions.

The same author suggests that the EU State aid rules can help local government to interpret these principles and offer a “tried and tested rationale of why certain measures are permissible and proportionate”; he also notes that a number of local authorities are already adopting this approach - in other words, staying close to the definitions and practices of the EU rules, even though no longer in force, at least partly to be sure of remaining compliant with international obligations and lessening the risk of challenges to decisions from interested parties such as competitors.

The combined effect of implementing the TCA and revoking the EU State aid rules is to create a broadly familiar structure for UK subsidy control – similar definitions (State aid and subsidy), and basic exemptions and prohibitions (social aid, export aid...), but one devoid of content of its own. In the absence of concrete guidance about *how* the key principles of the TCA should be interpreted, it is not surprising that some awarding bodies have opted to apply familiar EU constraints.

11 NORTHERN IRELAND PROTOCOL

The BEIS Guidance explicitly fulfils the requirement of the Internal Market Act (section 48) to provide guidance on the Northern Ireland Protocol Article 10 and is more substantial than the rest of the text.

The implications of the NI Protocol merit a discussion in their own right and cannot be done justice in this short general paper. Moreover, it is difficult to overestimate the complexity of the outcome of the Withdrawal Agreement and TCA negotiations, both for Northern Ireland and for the rest of the UK (and, potentially for the EU). In essence:

- the EU State aid rules continue to apply to Northern Ireland in respect of measures which affect trade in goods and electricity between NI and the EU;
- support for agriculture and fisheries in Northern Ireland is exempt from the EU State aid rules, up to certain (annual and multiannual) spending limits, beyond which Article 10 of the protocol applies;

- the UK subsidy rules apply to services in Northern Ireland, though awarding bodies will need to be mindful of the EU State aid rules for firms that produce services *and* goods, and with respect to the 'servitisation' of goods;
- in some circumstances, subsidies awarded to firms in Great Britain could fall within the scope of the NI protocol and become subject to the EU State aid rules – most obviously a GB firm with an NI operation but without the two being separate entities.

As mentioned earlier, the possibility of 'reach back' of the EU State aid rules into Great Britain from the Northern Ireland Protocol was among the issues discussed in the Joint Committee; however, analysis of the BEIS guidance described above and a subsequent Commission notice to stakeholders⁶⁰ suggests that those issues are not yet resolved.⁶¹

12 CONCLUSIONS

Perceptions of the TCA subsidies chapter and its implications for the UK vary. Some view the TCA as a 'deregulation of subsidy control in Great Britain on a massive scale'⁶² and that 'the UK will not be constrained in any significant way in laying down its own rules'.⁶³ An alternative view is that it is:

“combines a substantial continuation of the EU State aid rules (Article 10) with a regime that as it now stands could hardly be better designed to deter public subsidy by making it commercially uncertain.”⁶⁴

It remains to be seen how the TCA Subsidies chapter is implemented in the UK; there is a **spectrum of views on future UK subsidy control policy**. On the one hand is a *tabula rasa* vision in which subsidies below a given threshold (much higher than the current *de minimis*) are considered not to cause harm, awarding bodies themselves interpret the key principles and enforcement is through the courts, not by a subsidy authority. Under this view, the concepts developed in the GBER would no longer be relevant, so:

“no aid ceilings, no eligible costs, no SME or large company distinctions, no regional aid map, no single investment project issues, no distinction between types of research and development spend or training...”⁶⁵

An alternative view is that the UK can usefully retain aspects of EU State aid policy. This could use an adapted GBER and an approval system for subsidies above a 'safe harbour' threshold where the subsidy authority would assess awards based on the six principles.⁶⁶

While this plays out, it is interesting to situate these views in a wider perspective - how troublesome have the State aid rules *really* been for UK policymakers, whether the pull of rules and guidance is inexorable and, as the UK seeks to regulate its own 'internal market', what are the territorial implications of subsidy discipline.



Until recently, **EU State aid control has rarely been controversial in the United Kingdom**. Indeed, the UK has tended to be in vanguard of tighter State aid controls and, in the 1980s, as:

“the staunchest supporter of tighter state aid rules in the Community, Britain helped ensure a succession of relatively liberal Commissioners of Competition”⁶⁷

Among these Commissioners was Sir Leon Brittan (1989-99) whose “bonfire of subsidies”⁶⁸ resulted in a far more proactive approach to controlling State aid at European level, including reviews of *existing* State aid measures and attempts to capture the scale of spend by Member States. The origins of this activist approach to State aid discipline can be traced back to another UK Commissioner, Lord Cockfield, (Internal Market and Services 1984-89) whose Single Market White Paper famously detailed some 300 barriers to completing the internal market,⁶⁹ and emphasised the need for State aid control to be ‘rigorously enforced’.

Internally, the UK has long been active in preventing inadvertent breaches of the State aid rules, which have tended to be regarded as a source of political embarrassment. In 1993 Commission recovery of £58 million in illegal aid to British Aerospace for the purchase of Rover⁷⁰ triggered a major review to avoid a recurrence. This led to the establishment of the European State Aid Policy Section (ESAPS) within the then Department of Trade and Industry. This developed quite robust mechanisms for *ex ante* checks on government action that might constitute State aid,⁷¹ and detailed guidance for practitioners; the Treasury authored pragmatic advice on assessing the presence of State aid in policy decisions.⁷² Subsequent devolution saw the establishment of State aid units in the devolved administrations.

Partly reflecting this stance, the UK has had few recovery orders (repayment of unlawful aid by beneficiaries) imposed by the Commission – just five since 1999, compared with 37 for France, 53 for Italy and 67 for Germany.⁷³ At the same time, the UK spent less on State aid than other large EU countries – on average 0.25 percent of GDP in 2000-2018, compared to 0.57 percent in France, 0.34 percent in Italy and 0.85 percent in Germany.⁷⁴

Against this background, it is fair to argue that the EU State aid rules were not a *significant* constraint on the UK; and commentators have countered the claim that State aid rules would have stunted the technology policy ambitions of Dominic Cummings,⁷⁵ rumoured to have underpinned the about-turn on State aids in the Brexit negotiations. This is not to say that aspects of the rules were not at times extremely *irksome*, but it is questionable whether they were a major impediment to policy design in the UK.

Finding the **balance between flexibility and certainty in subsidy discipline** may not be easy. Some commentators have already noted that the interim ‘bare bones’ regime has not worked and that the new rules lack certainty;⁷⁶ others consider that it would be ‘wrong and unfair not to use the new freedoms to fullest extent possible’ given the high price paid for this freedom in terms of increased trade friction.⁷⁷



It is worth recalling that the EU State provisions too were once just 'bare bones' – Article 107-109 TFEU run to less than 800 *words*. In the early years, successive Commission decisions interpreted the original Treaty provisions case-by-case, sometimes challenged in the courts, but increasingly requiring the principles underpinning its decisions to be enunciated. Since the 1980s, in particular, EU State aid policy has been progressively codified in Regulations and guidelines. This partly reflects the fact that the basic Treaty provisions require interpretation to operationalise them, but also that all parties have an interest in the transparency and predictability of that interpretation. Thus, the principle that aid for the development of certain activities or areas may be allowed if it does not affect trade to an extent contrary to the common interest is translated into guidelines that are *proxies* for balancing the positive and potential negative effects of aid. So, for example, aid to firms in disadvantaged regions can be aided up to levels calibrated to reflect the severity of the regional problem; similarly, aid to small firms can be allowed at higher rates than for large ones because their need is greater and the risk to competition is less.

By 2014, the consolidated version of the EU State aid rules and guidance ran to 1000 *pages*; ⁷⁸ it would now be much more. This output is not just the result of bureaucratic productivity and 'mission creep'; rules and guidance are apt to grow like barnacles on a boat in response to demands for predictability in policy implementation and shelter from litigation, often obscuring the original principle to the casual observer. Most State aid in the EU is now awarded under the GBER, essentially a self-policing mechanism that should enable measures which comply with its terms to proceed with confidence and without delay. The GBER itself runs to 100 pages, but such is the appetite for certainty and clarity of interpretation from those implementing it, that it is complemented by some 75 pages of answers to FAQs. While few would argue that the EU State aid regime is perfect, the UK may yet end up closer to it than might be assumed as the balance between flexibility and certainty plays out.

The main focus of the State aid debate has been on UK-EU relations, but there are **important internal territorial and spatial aspects to subsidy discipline** which risk being the source of considerable tension. There are several dimensions to this. These include, but are not limited to, the following.

First, and most obviously, **there is no single UK-wide regime**. The NI Protocol ties Northern Ireland to the EU State aid rules in respect of goods and electricity. Related, subsidies in Great Britain may also be implicated if there is an 'effect on trade'; however, emerging divergent interpretations of the 'the effect on trade' mean that the extent of this reach seems bound to be the subject of litigation. ⁷⁹

Second, and notwithstanding the objections of the Scottish and Welsh governments, the **Internal Market Act designates subsidy control a 'reserved' matter**. The IMB provides for consultation with the devolved administrations in advance of publishing its response to the public consultation on subsidies, but the extent of cooperation provided for is otherwise rather limited. Here it is important to note that while BEIS or its predecessors have been the main interlocutors with the European Commission on State aids, specialised units in the devolved





administrations have played an important role within their jurisdictions. However, none, including BEIS, had formal jurisdiction over State aid (this being the preserve of the European Commission). It remains to be seen whether and how the devolved administrations can influence the *policy* focus of subsidy control now centralised in Westminster and what their relations with the new subsidy authority will be, whatever its role turns out to be. A further asymmetry under the new regime is that subsidies offered “on the basis of an Act of the Parliament of the United Kingdom” are not subject to recovery under the TCA. Whilst the scope of this is not clear, this shelter is not afforded to measures of the devolved administrations.

Third, the implementation of UK subsidy discipline has ***implications for regional policy***. This is important not only because economic development is devolved (albeit apparently less so since the Internal Market Act), but also for the relationship between the wider ‘levelling up’ agenda and the new subsidy regime. Support for disadvantaged areas is mentioned in the Political Declaration accompanying the TCA, which contains ‘guidance’ albeit in rather loose terms. Under the EU State aid rules the Regional Aid Guidelines⁸⁰ have provided a basis for regional aid maps and aid subject to limits designed to reflect the seriousness of the regional problem, while preventing competitive-outbidding. The government consultation on subsidy discipline strikes a rather agnostic note on whether assisted area maps would be useful now that they are no longer required by the European Commission. It also considers whether measures should be included to prevent the ‘uneconomic’ relocation of activity between the four nations. Long-standing observers of EU State aid control will know that reconciling the tensions between the internal market and addressing regional disparities taxed the Commission as far back as the 1960s. It remains to be seen whether and what the UK can learn from this.

So, to conclude, where is the UK now on State aid and subsidy control? The short answer is that it has yet to reach its final destination. This will doubtless be shaped by the consultation process and resulting legislation; however, it seems likely that the UK will be on its subsidy control journey for some time to come, and certain that elements of the EU State aid rules will remain in the luggage compartment.



Notes

¹ HM Government (2018) The Future Relationship between the United Kingdom and the European Union, Cm 9593, July:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

² See Part Four, Council agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJEU C66/1 of 19 February 2019: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2019:066:FULL>

³ The State Aid (EU Exit) Regulations 2019: <http://www.legislation.gov.uk/ukdsi/2019/9780111178768> (accessed January 2021) laid before Parliament in February 2019.

⁴ For instance, generally replacing "the European Commission" with "the Competition and Market Authority" (CMA).

⁵ CMA (2019) Draft procedural guidance on state aid notification and reporting – consultation document:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890534/State_aid_guidance_consultation_document_V2_pdf_a.pdf (accessed January 2021).

⁶ House of Lords European Union Committee (2018) Brexit: competition and State aid, 12th Report of Session 2017-19, HL Paper 67, para 190.

⁷ See Ireland/Northern Ireland Protocol Article 10, Council agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJEU C384/1 of 12 November 2019: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN)

⁸ Holehouse, M (2019) Brexit deal's state aid rules might have long reach: <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/brexit/brexit-deals-state-aid-rules-might-have-long-reach> (accessed January 2021); Peretz, G and Artley, A. (2020) State aid under the Northern Ireland Protocol: https://www.monckton.com/wp-content/uploads/2020/05/GP-AAR-TJ_2020_Issue1487_May_Peretz.pdf

⁹ See para 77 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJEU C384/1 of 12 November 2019: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=EN)

¹⁰ The speech does not appear to be published in full, but was widely reported (and criticised), eg: Financial Times, 'Johnson backs looser state aid rules after Brexit' 29 November 2019: <https://www.ft.com/content/e46f977e-12b5-11ea-a7e6-62bf4f9e548a>; Peretz, G (2019) The Conservative's new state aid proposals are the worst of all worlds, Prospect, 3 December: <https://www.prospectmagazine.co.uk/economics-and-finance/the-conservatives-new-state-aid-proposals-are-the-worst-of-all-worlds>

¹¹ European Union (Withdrawal Agreement) Act 2020:
<https://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>

¹² PM speech in Greenwich: 3 February 2020: <https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020>

¹³ As in the WTO Agreement on Subsidies and Countervailing Measures:
<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/UR/FA/24-scm.pdf&Open=True>

¹⁴ HM Government (2020) The Future Relationship with the EU: The UK's Approach to Negotiations, CP211, February 2020:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf

¹⁵ See note 1 above.

¹⁶ Financial Times, 27 July 2020, Cummings leads push for light-touch UK state-aid regime after Brexit: <https://www.ft.com/content/e29430c7-9dae-440e-8093-74f705ce62c3>





- ¹⁷ The Spectator, 7 September 2020, Why Boris thinks no deal might be worth the pain, <https://www.spectator.co.uk/article/why-boris-thinks-no-deal-might-be-worth-the-pain>
- ¹⁸ Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 5870/20; ADD 1 REV ;, UK 3: <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf>
- ¹⁹ House of Lords European Union Committee (2020) Report pursuant to section 29 of the European Union (Withdrawal Agreement) Act 2020: Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement, 8th Report of Session 2019-20, HL Paper 32, para 120: <https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/32/32.pdf>
- ²⁰ Financial Times, 27 July 2020, 'The hard Brexit choices that could yet deliver a deal': <https://www.ft.com/content/ae1805a0-b15d-4c2a-8b86-c5b63a4731a2> ; Reuters, 3 August 2020, 'EU eyes softening key state aid demand in Brexit talks – sources: <https://uk.reuters.com/article/uk-britain-eu-stateaid/eu-eyes-softening-key-state-aid-demand-in-brexit-talks-sources-idUKKBN24Z1MF>
- ²¹ Government sets out plans for new approach to subsidy control, 9 September 2020: <https://www.gov.uk/government/news/government-sets-out-plans-for-new-approach-to-subsidy-control>
- ²² United Kingdom Internal Market Act 2020: <https://services.parliament.uk/Bills/2019-21/unitedkingdominternalmarket/stages.html>
- ²³ Northern Ireland Secretary admits new bill will 'break international law' (8 September 2020) <https://www.bbc.co.uk/news/uk-politics-54073836>
- ²⁴ Financial Times, 11 November 2020, Joe Biden warns Boris Johnson not to let Brexit upend Northern Ireland peace process: <https://www.ft.com/content/8c533029-5e5e-418b-9d1a-03ef38a4de07>
- ²⁵ Press Statement by President von der Leyen on the implementation of the Withdrawal Agreement between the EU and the UK, 1 October 2020: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1800
- ²⁶ Statement of the UK Coordination Group and the leaders of the political groups of the EP, 11 September 2020: <https://www.europarl.europa.eu/news/en/press-room/20200907IPR86513/statement-of-the-uk-coordination-group-and-ep-political-group-leaders>
- ²⁷ Joint statement by the co-chairs of the EU-UK Joint Committee: <https://www.gov.uk/government/publications/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement>
- ²⁸ Scotland Act 1998; Northern Ireland Act 1998; and Government of Wales Act 2006.
- ²⁹ United Kingdom Internal Market Act 2020, Section 52.
- ³⁰ 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, OJEU L444/14 of 31 December 2020: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN)
- ³¹ Agreement between the European Union and Japan for an Economic Partnership: http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=338
- ³² Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>
- ³³ Annex to the Proposal for a Council Decision on the signing, on behalf of the Union, and on 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, COM(2020)855 final, Brussels 25 December 2020: https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/com_2020_855_final_annexe3_v1.pdf
- ³⁴ See Article 138, Council agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJEU C384/1

of 12 November 2019: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN)

³⁵ For an overview 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, OJEU C262/1 of 19 July 2016: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN)

³⁶ Peretz G (2020) The subsidy control provisions of the UK-EU trade and cooperation agreement: a framework for a new UK domestic subsidy regime: <https://uksala.org/the-subsidy-control-provisions-of-the-uk-eu-trade-and-cooperation-agreement-a-framework-for-a-new-uk-domestic-subsidy-regime-by-george-peretz-qc/>

³⁷ C-88/03 *Portugal v Commission* [2006] ECR I-07115: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-88/03>

³⁸ C-288/11 P *Mitteldeutsche Flughafen Leipzig-Halle v Commission* [2012]: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=131967&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4158373>

³⁹ Webber, J (2020) All change? UK State aid after Brexit. What law? Whose courts? Politeia: <https://www.politeia.co.uk/wp-content/uploads/2020/12/02%20James%20Webber%20All%20Change%3F%20State%20Aid%27All%20Change%20UK%20State%20Aid%20after%20Brexit%20-%20What%20Law%20What%20Courts%27%2C%20James%20Webber.pdf>

⁴⁰ COMMISSION REGULATION (EU) No 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, OJEU L352/1 of 24 December 2013: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1407&from=EN>

⁴¹ Note that under Article 3.2.8 any reference to “effect on trade or investment between the parties” is replaced by “effect on competition between air carriers of the Parties in the provision of air transport services”.

⁴² Guidelines on State aid to airports and airlines, OJEU C99/3 of 4 April 2014: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:099:FULL&from=EN>

⁴³ European Commission (2019) State aid: Commission approves €3.2 billion public support by seven Member States for a pan-European research and innovation project in all segments of the battery value chain: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705 European Commission (2021) State aid: Commission approves €2.9 billion public support by twelve Member States for a second pan-European research and innovation project along the entire battery value chain: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_226

⁴⁴ Comprising two Communications, a Decision and a SGEI-specific *de minimis* Regulation: https://ec.europa.eu/competition/state_aid/legislation/sgei.html

⁴⁵ European Commission (2014) 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, OJEU C188/4 of 20 June 2014 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0620\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0620(01)&from=EN)

⁴⁶ European Commission (2014) Guidelines on State aid for environmental protection and energy 2014-2020, OJEU C200/1 of 28 June 2014: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN)

⁴⁷ See, for example, Section 3, Guidelines on regional State aid for 2014-20. OJEU C 209/1 of 23 July 2013: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:209:0001:0045:EN:PDF>

⁴⁸ The main one being The State Aid (Revocation and Amendments) (EU Exit) Regulations 2020, No 1470: <https://www.legislation.gov.uk/ukdsi/2020/9780348212570/contents>, but see also The Taxes (State Aid) (Amendments) (EU Exit) Regulations 2020, No 1499.

⁴⁹ This is controversial. The Good Law Project has challenged the government's decision to use secondary legislation under the EU Withdrawal Act 2018 to remove a whole area of EU regulation from retained EU law. See: Peretz, G (2021) Good Law Project to challenge regulations purporting to remove State aid rules: <https://uksala.org/good-law-project-challenge-to-regulations-purporting-to-remove-state-aid->



[rules/#:~:text=The%20Good%20Law%20Project%20%E2%80%93%20a,to%20remove%20EU%20State%20aid](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0620(01)&from=EN) [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0620\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0620(01)&from=EN)

⁵⁰ European Union (Future Relationship) Act: 2020:

<https://www.legislation.gov.uk/ukpga/2020/29/enacted>

⁵¹ Clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of Parliamentary scrutiny:

<https://www.parliament.uk/site-information/glossary/henry-viii-clauses/>

⁵² Peretz, G (2021) The UK's new subsidy regime: a marsh of uncertainty:

<https://eurelationslaw.com/blog/the-uks-new-subsidy-regime-a-marsh-of-uncertainty>

⁵³ Financial Times, 21 September 2020, Lawyers offer Johnson help to break state aid impasse:

<https://www.ft.com/content/fb1a645e-0865-4780-8448-857fac15b2da>; see also open letter to the Prime Minister: <https://uksala.org/wp-content/uploads/2020/09/UK-Domestic-Subsidy-Control-letter-18-September-2020-002.pdf>; and Institute for Government (2020) Beyond State aid: the future of subsidy control in the UK: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/beyond-state-aid.pdf>

⁵⁴ Department for Business, Energy & Industrial Strategy (2020) Summary and Technical guidance on the UK's international subsidy control commitments from 1 January 2021:

<https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities>

⁵⁵ Department for Business, Energy & Industrial Strategy (2021) Subsidy control: Designing a new

approach for the UK: <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>

⁵⁶ Owens, D *et al* (2021) State aid to subsidy control, 22 January:

<https://www.localgovernmentlawyer.co.uk/projects-and-regeneration/317-projects-features/45925-state-aid-to-subsidy-control>; Branton, J and Rose A (2020) UK Subsidy Control: how will public funding change now the UK has taken back control of State aid regulation? <https://uksala.org/uk-subsidy-control-how-will-public-funding-change-now-the-uk-has-taken-back-control-of-state-aid-regulation-by-jonathan-branton-and-alexander-rose-dwf-law/>

⁵⁷ DS316: European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm

⁵⁸ Office of the United States Trade Representative [Docket No. USTR-2019-0003] Notice of Modification of Section 301 Action: Enforcement of U.S. World Trade Organization (WTO) Rights in Large Civil Aircraft Dispute, Federal Register / Vol. 85, No. 160 / Tuesday, August 18, 2020 / Notices

<https://ustr.gov/sites/default/files/files/Press/Releases/85FR50866.pdf>

⁵⁹ McGaughey (2021) A bold new world? 29 January:

<https://www.localgovernmentlawyer.co.uk/projects-and-regeneration/317-projects-features/46000-a-bold-new-world>

⁶⁰ European Commission (2021) Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of State aid, 18 January:

https://ec.europa.eu/info/sites/info/files/notice-stakeholders-brexit-state-aid_en.pdf

⁶¹ Peretz, G (2021) EU Commission issues "Notice to Stakeholders" on Brexit and State aid, 21 January:

<https://uksala.org/eu-commission-issues-notice-to-stakeholders-on-brexit-and-state-aid/>

⁶² Webber, J (2021) Taking advantage of the opportunity presented by the UK's new subsidy control

regime, 27 January: <https://uksala.org/taking-advantage-of-the-opportunity-presented-by-the-uks-new-subsidy-control-regime-by-james-webber-partner-shearman-sterling/>

⁶³ Nicolaides, P (2021) One Agreement, Two Parallel Systems: Subsidies in the Trade and Cooperation

Agreement between the EU and the UK, 5 January: <https://www.lexion.eu/en/stateaidpost/one-agreement-two-parallel-systems-subsidies-in-the-trade-and-cooperation-agreement-between-the-eu-and-the-uk/>

⁶⁴ Peretz, G (2021) The UK's new subsidy regime: a marsh of uncertainty:

<https://eurelationslaw.com/blog/the-uks-new-subsidy-regime-a-marsh-of-uncertainty>

- ⁶⁵ Webber, J (2021) Taking advantage of the opportunity presented by the UK's new subsidy control regime, 27 January: <https://uksala.org/taking-advantage-of-the-opportunity-presented-by-the-uks-new-subsidy-control-regime-by-james-webber-partner-shearman-sterling/>
- ⁶⁶ Branton, J and Rose A (2020) UK Subsidy Control: how will public funding change now the UK has taken back control of State aid regulation? <https://uksala.org/uk-subsidy-control-how-will-public-funding-change-now-the-uk-has-taken-back-control-of-state-aid-regulation-by-jonathan-branton-and-alexander-rose-dwf-law/>
- ⁶⁷ Aydin, U (2014) Issue framing in the European Commission: State aid policy and the single market, *Comparative European Politics* Vol. 12, 2, 141–159 www.palgrave-journals.com/cep/
- ⁶⁸ Brittan, L (1989) A bonfire of subsidies? A review of State aids in the European Community, address to the London seminar on competition policy, 10 March.
- ⁶⁹ Commission of the European Communities (1985) Completing the Internal Market, COM(85)310 final of 14 June 1985: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51985DC0310&from=EN>
- ⁷⁰ https://ec.europa.eu/commission/presscorner/detail/en/IP_93_405
- ⁷¹ Wislade, F. and Olsen, A. (1997) 'The Notification of State Aids under Article 93 of the Treaty on European Union: A Comparative Study', *Vestlandsforskning*, VF-notat 24/97, Sogndal, Norway.
- ⁷² HM Treasury (2004) Taking Account of State Aid Issues in Policy Making – A risk based approach: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/949166/withdrawn-taking-account-of-state-aid-issues-in-policy-making.pdf
- ⁷³ See: https://ec.europa.eu/competition/state_aid/studies_reports/recovery.html
- ⁷⁴ Calculated from data in: https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html
- ⁷⁵ Politico, 10 September 2020, Britain grapples with post-Brexit state aid riddle: <https://www.politico.eu/article/britain-grapples-with-post-brexit-state-aid-riddle/>
- ⁷⁶ <https://twitter.com/AlexanderPHRose/status/1357062731095019520?s=20>
- ⁷⁷ Webber, J (2021) Taking advantage of the opportunity presented by the UK's new subsidy control regime, 27 January: <https://uksala.org/taking-advantage-of-the-opportunity-presented-by-the-uks-new-subsidy-control-regime-by-james-webber-partner-shearman-sterling/>
- ⁷⁸ European Commission (2014) EU competition law rules applicable to State aid – situation as at 15 April 2014: https://ec.europa.eu/competition/state_aid/legislation/compilation/state_aid_15_04_14_en.pdf
- ⁷⁹ House of Lords Select Committee on the European Union, uncorrected oral evidence: Future UK-EU relations: governance, 2 February 2021 at p17: <https://committees.parliament.uk/oralevidence/1656/pdf/>
- ⁸⁰ Guidelines on State aid for 2014-20, OJEU C209/1 of 23 July 2013: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:209:0001:0045:EN:PDF>

