DCU Brexit Institute

WORKING PAPER N. 06 - 2024

How the SCA 2022 Shapes the Effectiveness of the TCA: Lessons from EU State Aid and WTO

Elettra Bargellini*

After Brexit, EU State aid no longer applies in the UK to funding and other forms of support measures granted to businesses by public authorities. The EU-UK Trade and Cooperation Agreement (TCA) envisages new subsidy rules under Chapter 3, Title XI. In particular, Chapter 3 sets out some general principles that apply to the EU and UK but allows each side to retain regulatory autonomy on subsidy control. Consequently, the UK was able to introduce its new domestic regime, the Subsidy Control Act 2022 (SCA). The EU, on the other hand, already had its own framework in place under EU State aid. This article offers a comparative analysis between the TCA's enforcement mechanisms, WTO, and EU State aid. In doing so, it examines the tools introduced by the SCA to implement the TCA's requirements. In conclusion, this article suggests that if there is going to be effective control of subsidies between the EU and UK after Brexit, it will be due to the UK domestic subsidy system.

Keywords: subsidy, EU State aid, TCA, Subsidy Control Act, WTO, Brexit, FTAs, dispute settlement, transparency, private enforcement.

[Forthcoming: 59(2) Journal of World Trade (2025)]

I. 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 European Union (EU) and World Trade Organization (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 European Commission (hereinafter the

'Commission') as a formal regulator, these tools are completely absent under the WTO regime.[1] In the case of a lack of voluntary implementation, the only way to enforce WTO subsidy law is for Members to raise complaints.[2] 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.

During the negotiations of the EU-UK Trade and Cooperation Agreement (TCA),[3] 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 Court of Justice of the European Union (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.[4]

Against this backdrop, the parties found an agreement.[5] This agreement is included under Chapter 3, Title XI, of the TCA and incorporates elements from both WTO subsidy law, primarily outlined in the Subsidies and Countervailing Measures Agreement (SCM Agreement), and EU State aid rules.[6]

The aim of this article is to compare and evaluate the enforcement mechanisms under the TCA, WTO and EU State aid. This article argues that the core aspect of the TCA is found in Article 366, which requires the parties to have in place and maintain in their respective jurisdictions 'an effective system of subsidy control'.[7] The UK, in fact, implemented its own regulatory system, namely the Subsidy Control Act 2022 (SCA).[8] As for the EU, the relevant system remains the EU State aid regime. Thus, this article contends that the effectiveness[9] of the UK domestic subsidy system is key to ensuring an effective control of subsidies between the EU and UK after Brexit.

Section II provides a comparative analysis of the transparency obligations under the WTO, EU State aid, and the TCA, also examining its implementation under the SCA. Section III focuses

[1]* PhD Candidate in EU and International Trade Law at Dublin City University, School of Law and Government;
E-mail: elettra.bargellini2@mail.dcu.ie.
See Vincent Verouden, *EU State Aid Control: The Quest for Effectiveness*,14 EStAL (2015).

[2] Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J. Leg. Anal 473, 520 (2010).

[3] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021 ('TCA').

[4] Alan Weiberger, *State Aid Regulations after Brexit: A Good Deal for the UK?*, in *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union* 88 (Jennifer Hillman & Gary Horlick eds, Institute of International Economic Law 2017).

[5] George Peretz, *United Kingdom: The UK Subsidy Control Regime: Where Is It and Where Is It Going?,* 20 EStAL 167, 168 (2021).

[6] Steve Peers, *So Close, yet so Far: The EU/UK Trade and Cooperation Agreement*, 59 Common Mark. Law Rev. 49, 62 (2022).

[7] Art. 366.1 TCA.

[8] Subsidy Control Act 2022 (c.23) ('SCA').

[9] This article embraces Phedon's 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 Nicolaides Phedon, *The Design of Enforcement Institutions,* 20 (3) EStAL 370, 371 (2021).

on the powers of the independent authorities under each system: the Subsidies Committee and the Permanent Group of Experts under the SCM Agreement, the Commission under EU State aid law, and the Subsidy Advice Unit under the SCA. Section IV 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, Section V delves into dispute settlement, comparing the processes under the WTO and the TCA for resolving subsidy disputes.

II. 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.[10]

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',[11] as well as any other subsidy which causes increased exports or decreased imports within the meaning of Article XVI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), must be notified. Initially Members were required to submit a new and full subsidy notification every three years and updating notifications in years two and three.[12] However, in 2005, the Subsidies Committee extended its previous provisional decisions from 2001 and 2003, which required that comprehensive notifications be submitted biennially. Consequently, the new cycle requires subsidy notifications every second year, with no updates.[13] 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.[14] 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'.[15] This principle was underscored in the *Brazil-Aircraft* case, where the Appellate Body (AB) emphasized that 'Article 25 aims to promote transparency by requiring Members to notify their subsidies, without

[10] Andreas Stephan, *Will the New UK Subsidy Control Regime Help Level Up the Economy?,* MLR 172, 182 (2023).
[11] Art. 25.2 SCM Agreement.
[12] WTO, Note by the Secretariat, Timing Aspects for the Notification Requirements in the Agreements in Annex 1A of the WTO Agreement G/NOP/W/5 (21 November 1995) 2.
[13] See Committee on Subsidies and Countervailing Measures - Minutes of the Regular Meeting Held on 14 April 2005, G/SCM/M/53 (2005) paras 31-34; WTO Analytical Index SCM Agreement – Article 25 (Practice) p. 2.
[14] 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 G/SCM/6/Rev.1.
[15] Art. 25.7 SCM Agreement.

prejudging the legal status of those subsidies'.[16] Unfortunately, due to the lack of any substantial penalty for failing to notify subsidies, Members almost never fully comply with this obligation.

Therefore, the effectiveness of Article 25 SCM Agreement hinges on the vigilance of other Members to ensure adherence to subsidy notification requirements.[17] According to Article 25.8-10 of the SCM Agreement, Members possess the authority to either counter-notify or seek details regarding a subsidy that has been issued. Despite retaining this power, Members have rarely taken such actions.[18] 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;[19] but (so far) none of them have been adopted.[20]

In contrast, the EU State aid system is underpinned by a comprehensive system of *ex ante* control, as delineated in Article 108.3 of the Treaty on the Functioning of the European Union (TFEU). This implies that Member States, first, notify the Commission of 'any plans to grant or alter aid'.[21] Second, it requires them to wait for the Commission's approval of the measure's compatibility with the internal market before implementing it (this is known as the 'standstill obligation'). The failure to notify makes the non-notified aid itself unlawful.

The notification obligation applies even when a Member State considers the measure to be compatible with the internal market pursuant to Article 107.2-3 TFEU. Nonetheless, there are some exemptions to Article 108.3 TFEU, for example when a measure falls under the General Block Exemption Regulation (GBER),[22] Regulation No 1370/2007 on public passenger transport services by rail and by road, [23] or it is considered *de minimis* aid.[24] Also the EU State aid schemes already

[16] *Brazil - Export Financing Programme for Aircraft* (2 August 1999) Report of the WTO Appellate Body, AB-1999-1, para. 149.
[17] Petros C Mavroidis, Patrick A Messerlin & Jasper M Wauters, *The Law and Economics of Contingent Protection in the WTO* 399 (Edward Elgar Publishing 2008).
[18] Rare but not totally absent e.g., WTO, Committee on Subsidies and Countervailing Measures, Request from the United States to China Pursuant to Article 25.10 of the Agreement, G/SCM/Q2/CHN/42 (11 October 2011).
[19] See Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements, JOB/GC/204/Rev.2 27 June 2019.
[20] Bernard Hoekman & Douglas Nelson, *Rethinking International Subsidy Rules*, 43 World Econ. 3104, 3123 (2020).
[21] Art. 108.3 TFEU.
[22] Commission Regulation (EU) No 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 (Text with EEA relevance), OJ L 187, 26.6.2014.
[23] Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007.
[24] Commission Regulation (EU) No. 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance, OJ L 15.12.2023 ('GBER').

approved by the Commission (such as the Temporary Frameworks introduced after Covid-19[25] and the Ukraine crises[26]) do not require prior notification.[27]

Further, to ensure transparency within the EU, national authorities are required to disclose details regarding any allocated aid within six months of its granting.[28] According to Article 9.1 and Annex III of the GBER, this information include descriptive details about the exempted state aid measures, the complete text for each individual aid award surpassing 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.[29]

Unlike the EU State aid framework, the TCA does not impose any *ex ante* notification obligation. However, the TCA includes transparency obligations. Article 369.1 of the TCA stipulates 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.[30] 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'.[31] National websites, the Commission's State Aid Transparency website,[32] and the ISEF case search[33] are among the tools that may be used to ensure transparency. 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'.[34] This mechanism is designed to empower interested parties[35] with the necessary details for evaluating the

[25] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, OJ C 91I, 20.3.2020.
[26] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023/C 101/03 C/2023/1711, OJ C 101, 17.3.2023.
[27] Juan Jorge Piernas López, *State Aid,* Rebuild Working Paper Series 1/18, p. 2 (2024) https://zenodo.org/records/10670356.
[28] Art. 9 GBER.
[29] Ibid.
[30] Art. 369.1 TCA.
[31] Art. 369.4 TCA.
[32] Commission's State Aid Transparency website: https://webgate.ec.europa.eu/competition/transparency/ public/search/home/.
[33] Competition case search: https://competition-cases.ec.europa.eu/latest-updates/SA.
[34] Art. 369.5 TCA.
[35] Art. 369.6 TCA states that an interested party is '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'.

subsidy's adherence to the principles outlined in Article 366 of the TCA, enabling them to decide whether to pursue judicial review.[36]

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.[37] 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'.[38] Among the information which must be included 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, its duration, its amount.[39] Interestingly, although the SCA does not outline penalties on the measure itself for non-compliance, the one-month time limit for challenging a subsidy before the Competition Appeal Tribunal (CAT) is not applicable in case of 'inaccurate, absent or incomplete uploads to the subsidy database' (the procedure before the CAT is discussed in section 4).[40]

Ergo, one can observe that WTO subsidy law, EU State aid law and the TCA 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.[41] 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,[42] 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 WTO practice, due to the effect of non-notification on the timing for bringing legal challenges before the CAT.[43] It will also be interesting to see whether UK domestic courts have the

[36] Ben Holles de Peyer & Marija Momic, *State Aid Law Post-Brexit: Subsidy Control under the EU-UK Trade and Cooperation Agreement*, 42 ECLR 365, 368 (2021).
[37] S. 33(2)(c) SCA. The UK database can be accessed at https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government.
[38] S. 33(3)(c) SCA.
[39] S. 34(2) SCA.
[40] Department for Business, Energy and Industrial Strategy, Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022 ('BEIS') 11 November 2022, para. 12.31; Stephan, *supra* n. 10, at 186.
[41] Anna Nowak-Salles, *The Optimal Assessment Rule for EU State Aid Procedure*, 43 (1) World Competition: Law and Economics Review 87, 106 (2020).
[42] See Luca Rubini, *The International Context of EC State Aid Law and Policy: The Regulation of Subsidies in the WTO* in *The Law of State Aid in the European Union* (Andrea Biondi, Piet Eeckhout & James Flynn eds, OUP 2004).
[43] BEIS, *supra* n 40.

power to impose real sanctions when, for example, a granting authority fails to provide the requested information within 28 days.[44]

III. 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.[45]

The SCM Agreement, under Article 24, establishes the Subsidies and Countervailing Measures Committee, also referred to as the Subsidies Committee.[46] 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 SCM Agreement, the Subsidies Committee 'shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member'.[47] 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.[48] It follows that the effectiveness of the Subsidies Committee depends on the suitability of subsidy notifications from Members. As a consequence, the Members' inadequate compliance with the Article 25 SCM Agreement obligation significantly compromises the Subsidies Committee's potential.[49]

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'.[50] 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.'[51] Third, to offer, at the request of a Member, a confidential advisory opinion on the nature of any subsidy that

[44] See Art. 369.5 TCA.
[45] Phedon, *supra* n. 9, at 382.
[46] The Subsidies Committee is composed of representatives from each of the WTO Member.
[47] Art. 24.1 SCM Agreement.
[48] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge 5th ed 2021) Ch. 12, para. 7.2.
[49] See e.g., 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.
[50] Art. 24.3 SCM Agreement.
[51] Ibid.

the Member plans to introduce or is currently maintaining.[52] These advisory opinions are 'confidential and may not be invoked in proceedings under Article 7 of the SCM Agreement'.[53]

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 Member. Various factors have contributed to this outcome. Firstly, despite the confidentiality of the PGE's reports, 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.[54]

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.[55]

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 constitutes state aid according to Article 107.1 TFEU.[56] 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 internal market, and therefore be granted. This assessment falls, instead, within its exclusive power.[57]

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,[58] or through a formal investigation if concerns arise.[59] The preliminary examination process can be initiated by receiving a detailed notification from a Member State, through the Commission's acknowledgment of a credible complaint,[60] or upon the Commission's uncovering of information related to unlawful aid (ex officio).[61] Then, if the Commission decides to proceed with the formal

[52] Art. 24.4 SCM Agreement; Van den Bossche, *supra* n. 48, at para. 7.3.
[53] Ibid.
[54] 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.
[55] Elisabetta Righini & Flavia Tomat, *State Aid Procedures* in *Research Handbook on European State Aid Law* 255 (Leigh Hancher & Juan J Piernas López eds, Edward Elgar Publishing 2021); See generally Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective*, Ch.4 (OUP 2009).
[56] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946, OJ C 262, 19.7.2016.
[57] Case C-385/18 *Arriva Italia* [2019] EU:C:2019:1121, para. 83; Case C-587/18 *CSTP Azienda della Mobilità SpA v Commission* [2020] EU:C:2020:150, paras 90–1.
[58] 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, OJ L 248, 24.9.2015, Art. 4.3 ('Procedural Regulation').
[59] Hans W. Friederiszick, Lars-Hendrik Röller & Vincent Verouden, *European State Aid Control: An Economic Framework* in *Advances in the Economics of Competition Law* 652-54 (P Buccirossi ed., Cambridge, Mass.:MIT press 2006); Andrea Biondi, *The Rationale of State Aid Control: A Return to Orthodoxy*, 12 CYELS 35, 40 (2010).
[60] Art. 24.2 Procedural Regulation.
[61] Art. 12.1 Procedural Regulation.

investigation, as envisaged by Article 108.2 TFEU, it 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. Alternatively, a 'conditional decision' may be issued if the aid is found compatible but subject to certain conditions prior to its implementation. There is also the possibility of a 'negative decision,' where the aid is declared incompatible with the internal market and cannot be implemented.[62] Thus, if the aid was notified before its implementation, a negative decision requires its cessation by the Member State. Conversely, if the aid was not notified, the Member State is mandated to recover it from the beneficiary.[63]

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).[64] The aim of this procedure is to minimize the risk of submitting incomplete notifications, thereby speeding up the handling of such notifications by the Commission.[65]

Article 29.1 of the Procedural Regulation, in addition, 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.[66]

The centralization of state aid compatibility decisions within the Commission has sparked debates on whether this imposes an excessive workload for a single entity. However, while decentralization has proven effective in antitrust enforcement, the unique dynamics of EU State aid, which target measures adopted by public authorities rather than the behaviour of market participants, justify the Commission's role as the sole competent body.[67]

Under Article 371.1 of the TCA, the EU and the UK agreed that 'Each party 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.[68] 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.[69]

Article 371.2 of the TCA also requires cooperation between the parties' respective subsidy authorities. The rationale behind this provision is similar to that of Article 29.1 of the Procedural

[62] Arts 9.3-5 and 15 Procedural Regulation.
[63] Art. 16 Procedural Regulation.
[64] Communication from the Commission, Commission Notice on the enforcement of State aid rules by national courts 2021/C 305/01 C/2021/5372, OJ C 305, 30.7.2021, para. 35; Code of Best Practices for the conduct of State aid control procedures C/2018/4412 OJ C 253, 19.7.2018, p. 16.
[65] Case T-793/14 *Tempus Energy and Tempus Energy Technology v Commission* [2018] EU:T:2018:790, para. 267.
[66] Art. 29.1 Procedural Regulation.
[67] Righini & Tomat, *supra* n. 55, at 254-255.
[68] Art. 371.1 TCA.
[69] Phedon, *supra* n. 9, at 377.

Regulation, as they both promote cooperation between authorities with the objective of ensuring a uniform interpretation of the subsidy regime.

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 Subsidy Advice Unit (SAU) within the Competition and Markets Authority (CMA).[70] 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.[71] As a consequence, even if the SAU raises some concerns about the authority's assessment, the final word on whether to proceed with awarding the subsidy remains with the authority itself. Section 55(2) of the SCA specifies that only a subsidy of particular interest[72] necessitates consultation with the SAU ('mandatory referrals').[73] In addition, the Secretary of State can request a report from the SAU if there is a risk that the proposed subsidy or scheme may not respect the subsidy control requirements set up by the SCA or 'may create negative effect on competition or investment within the United Kingdom'.[74]

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 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.[75]

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.[76] 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.[77]

---

[70] S. 65 SCA.
[71] Stephan, *supra* n. 10, at 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 (2022) paras 2.2-3 ('SAU Guidance') https://www.gov.uk/government/publications/guidance-on-the-operation-of-the-subsidy-control-functions-of-the-subsidy-advice-unit.
[72] Those in excess of GBP 10 million per beneficiary, or GBP 5 million in certain sensitive sectors.
[73] SAU Guidance, *supra* n 71.
[74] S. 55(2) SCA.
[75] See https://www.gov.uk/government/publications/uk-subsidy-control-statutory-guidance
[76] Phedon, supra n. 9, at 383.
[77] SCA, section 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.

Hence, the UK's decision to confer such limited powers to the SAU is a legitimate policy choice.[78] 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 behaviour 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 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.[79] This suggests that the SAU may be able to fulfil the requirements of Article 371 of the TCA.

IV. Private Enforcement

WTO subsidy law, EU State aid law, and the TCA significantly differ in terms of private parties' standing to invoke their rules. Under WTO law, only Member governments can initiate proceedings within the dispute resolution process. Indeed, although private parties can lobby their governments to take action, the final decision to pursue a case rests with national governments. As Professor 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'.[80] Nevertheless, many Members support a more limited role for private actors to participate in the WTO dispute process as amicus curiae.[81] 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).[82]

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.[83]

---

[78] Andrea Biondi, *Subsidies control and enforcement* in *The Law & Politics of Brexit. Volume V: The Trade & Cooperation Agreement* 228 (Federico Fabbrini ed., OUP 2024).

[79] 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.

[80] Alan O Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy*, The Chicago Working Paper Series 1, 39 (2005).

[81] Ibid., 12.

[82] *European Communities – Trade Description of Sardines* (26 September 2002) Report of the Appellate Body, AB-2002-3, para. 315 (b); Joseph Keller, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments*, 33(3) International Journal of Legal Information, 449, 469 (2005).

[83] Case C-199/06 *CELF* [2008] EU:C:2008: 79, para 36; C-536/19 *P (order) EDP España* [2019] EU: C: 2019: 965, paras 37–8.

When national courts assess whether state aid has been granted in accordance with Article 108.3 TFEU, first, they scrutinize the nature of the measure to determine if it constitutes state aid. In the absence of a decision from the Commission regarding a specific aid, national courts depend exclusively on the objective notion of state aid to determine the existence of such aid. When there is not yet a decision but the Commission has initiated its investigation, instead, national courts must consider the Commission's decision, and cannot conclude that a measure does not constitute state aid. Then if the measure meets Article 107.1 TFEU requirements, they are required to determine whether it falls under a block exemption regulation or qualifies as existing aid (which is still exempt from the notification obligation but is subject to a separate review process by the Commission as outlined in Article 108.1 TFEU).[84]

National courts have the authority to implement various remedies to ensure that all breaches of Article 108.3 TFEU are addressed. These encompass the suspension or termination of the measure, orders to recover the sums already disbursed, or the adoption of different provisional measures to otherwise safeguard the interests of the parties concerned. Additionally, national courts may be requested to deliberate on compensating damages incurred by third parties due to the unlawful implementation of the aid.[85]

It is important to note that while adjudicating cases involving state aid, national courts must follow relevant EU regulations and the case law established by the EU Courts. Moreover, 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 notices and guidelines issued by it.[86]

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 Withdrawal Agreement.[87] 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'.[88] 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

[84] Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon* [1991] EU:C:1991: 440, para. 11; Case C-284/12 *Deutsche Lufthansa* [2013] EU: C: 2013: 755, para. 34.
[85] Commission, *supra* n. 64, at 71.
[86] Ibid., 100-130.
[87] See Art. 4 of the WA and Art. 5 TCA. 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*, 25 (1) EJIL, 105-125 (2014).
[88] Art. 372 TCA.

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.[89]

On the EU side, the competent courts are the General Court and the CJEU, although national courts also have the authority to adjudicate certain state aid issues, as explained before in this section. The UK, instead, has established an entirely new jurisdiction where interested parties can bring actions before the Competition Appeal Tribunal (CAT).[90] 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.[91] 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.[92] The SCA provides for a time frame of only one 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.[93]

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.[94] The proceeding was particularly fast as the hearing took place on 3 and 4 July, with the judgement delivered on 27 July. The CAT found the Council's decision did not entail a subsidy scheme. In making the judgement, the CAT did not mention any EU legislation.[95] 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.[96] Some first impressions can be

[89] Andrea Biondi & Anneli Howard, *Levelling up a Level Playing Field: Competition and Subsidies in Post-Brexit Britain* in *Research Handbook on Legal Aspects of Brexit* 383 (Adam Lazowski & Adam Cygan eds, Elgar 2022).
[90] Part. V SCA.
[91] BEIS, *supra* n. 40, at 13.6.
[92] Biondi, *supra* n. 78, at 231.
[93] BEIS, *supra* n. 40, at 13.15.
[94] *Max Recycle v Durham County* Council [2023] CAT 50.
[95] 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.
[96] 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.

drawn from the first judgement. First, the CAT's review in *Duram Council* 'was extensive and on the merits'.[97] 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.[98] 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.[99]

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.[100] 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.[101] The High Court heard two cases regarding TCA subsidy provisions. In *British Sugar*[102] 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.[103] 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 Power and E.ON*.[104] 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.[105] 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.[106]

In sum, the SCA represents a shift towards greater private enforcement compared to the WTO system. As contend by Professor 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

---

[97] Biondi, *supra* n. 78, at 231.
[98] Ibid.
[99] 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.
[100] European Union (Future Relationship) Act 2020 (c. 29); Peretz, *supra* n. 5, at 169.
[101] Biondi, *supra* n. 78, at 232.
[102] *R (British Sugar) v Secretary of State for International Trade* [2022] EWHC 393 (Admin).
[103] Biondi, *supra* n. 78, at 232; Protocol on Ireland/Northern Ireland; HM Government, The Windsor Framework A new way forward CP806, February 2023.
[104] *R (British Gas & Ors) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin).
[105] Ibid, paras 167-169.
[106] 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.

when compared to the more complex dispute settlement process (as discussed in section 5).[107] 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.[108] 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.

V. Dispute Settlement

During the TCA negotiations, the UK firmly rejected any oversight for the EU Courts on the UK (except in relation to Northern Ireland). 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.

The Dispute Settlement Understanding (DSU) establishes a single dispute settlement system for handling disputes under any of the 'covered agreements'.[109] Nonetheless, some of these agreements[110] incorporate rules and procedures which take precedence over the general DSU

[107] Biondi, *supra* n. 78, at 231; JJAM Korving & JC Van Der Have, *Brexit: The Direct and Indirect Effect of the EU-UK Trade and Cooperation Agreement*, 50 Intertax 28 (2022); Totis Kotsonis, *The Squaring of the Circle - Subsidy control under the UK-EU Trade and Cooperation Agreement,* 20 (1) EStAL 15 (2022).

[108] Stephan, *supra* n. 10, at 186-188.

[109] Art. 1.1 DSU; See generally Petros Mavroidis, *Dispute Settlement in the WTO: Mind Over Matter*, EUI, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2016/04 (2016) https://scholarship.law.columbia.edu/faculty_scholarship/2368; David Palmeter, Petros Mavroidis & Niall Meagher, *Dispute Settlement in the World Trade Organization* 153-242 (Cambridge Univ. Press 2022).

[110] 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.

provisions in instances of discrepancy.[111] Under the SCM Agreement these provisions are principally found under Articles 4 and 7.[112]

Article 4 of the SCM Agreement is applicable 'Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member'.[113] One distinction between Article 4 and the general DSU is that while the DSU allocates six months for ordinary panel proceedings, Article 4 reduces this period to three months.[114] The process begins with a formal request for consultations, accompanied by a detailed statement of 'available evidence with regard to the existence and nature of the subsidy in question'.[115] Following this request, the accused Member is expected to engage in consultations 'as quickly as possible', with the objective of clarifying 'the facts of the situation and to arrive at a mutually agreed solution'.[116] 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'.[117] Unlike the usual DSU procedures, the establishment of the panel may occur at the first meeting.[118] The panel has also the authority to request assistance from the PGE to determine whether the measure in question constitutes a prohibited subsidy.[119] If this is the case, the PGE's findings must be accepted by the panel 'without modifications'.[120] The panel's report shall be adopted by the DSB unless,[121] within 30 days of the report being shared with all Members, one of the parties to the dispute decides to appeal the decision.[122] In that case the AB 'shall issue its decision within 30 days from the date when the party notifies its intention to appeal'.[123] '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.'[124]

---

[111] *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* (2 November 1998) Report of the Appellate Body, AB-1998-6.
[112] *Korea - Measures Affecting Trade in Commercial Vessels* (7 March 2005) Report of the Panel, para. 7.2; See Mavroidis, Messerlin & Wauters, *supra* n. 17, at 298; Jan Wouters & Dominic Coppens, *An Overview of the Agreement on Subsidies and Countervailing Measures* in *Law and Economics of Contingent Protection in International Trade* 55 (Kyle W Bagwell, George A Bermann & Petros C Mavroidis eds, Cambridge Univ. Press 2009).
[113] Art. 4.1 SCM Agreement.
[114] In practice that limit is rarely applied as it would be difficult for both Parties and the panels; Mavroidis, Messerlin & Wauters, *supra* n. 17, at 420.
[115] Art. 4.2 SCM Agreement.
[116] Art. 4.3 SCM Agreement; See Gary Horlick, *The Consultations Phase of WTO Dispute Resolution: A Private Practioner's View,* The International Lawyer 685,687 (1998).
[117] Art. 4.4 SCM Agreement.
[118] See Manfred Elsig, Bernard Hoekman & Joost Pauwelyn, *Assessing the World Trade Organization: Fit for Purpose?* 97-200 (Cambridge Univ. Press, 2017).
[119] Art. 4.5 SCM Agreement.
[120] Ibid.
[121] Strictly speaking, the DSB could also decide by consensus not to adopt the report although, of course, that has never happened.
[122] Art. 4.8 SCM Agreement.
[123] Art. 4.9 SCM Agreement.
[124] Ibid.

Article 7 of the SCM Agreement regulates the dispute settlement procedure for actionable subsidies. Compared to the discipline for prohibited subsidies here the timeframes are extended, and there is no involvement of the PGE.[125] Article 7.4 of the SCM Agreement, in fact, allows 60 days from the beginning of consultations for the parties 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'.[126] 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'.[127] For appeals, Article 7.7 specifies that the AB shall issue its decision within 60 days.[128]

Today, when we speak of the AB, we cannot omit that currently it is non-functional. The AB crisis started in 2019 when the US government blocked the appointment of new members. The main objections it raised are two. First, it believed that the AB had repeatedly overstepped its limits 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 (although the AB is required to accept all appeals made by Members and complete them within short time limits- which is clearly an impossible task in many cases). Thus, in April 2020, a group of 19 WTO Members (at the time of writing they are 54) out of 166 notified the WTO of the creation of a mechanism for resolving disputes in the absence of a functioning AB, namely the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).[129]

Shifting the focus to the TCA, the general dispute resolution system is outlined in Part Six, Title I and is applicable across the whole Agreement except for certain specified areas.[130] 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.[131] 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'.[132]

In particular, Article 370 of the TCA establishes a consultations mechanism that either party can resort to if it suspects that a subsidy granted by the other party 'has or could have a negative

[125] Mavroidis, Messerlin & Wauters, *supra* n. 17, at 451.
[126] Art. 7.4 SCM Agreement.
[127] Art. 7.6 SCM Agreement.
[128] Art. 7.7 SCM Agreement.
[129] Joost Pauwelyn, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?*, 22/5 World Trade Review 693 (2023); Another measure available to the EU, which has addressed some gaps following the dismantling of the AB, is the Enforcement Regulation (which expanded the scope of the 2014 Enforcement Regulation); Folkert Graafsma, *The Revised Enforcement Regulation (No 2021/167) and Some Possible Effects on EU Trade Disputes*, 17 Glob. Trade Cust. J 289 (2022).
[130] See Art. 735 TCA.
[131] David Collins, *Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement (TCA),* 12 J.I.D.S. 617, 635 (2021).
[132] Art. 375 TCA.

effect on trade or investment' between them.[133] The procedure starts with a party that request the other to provide within 60 days an explanation on how the TCA subsidy principles apply to the subsidy at issue. If those explanations are insufficient to allay the requesting party's concerns, the latter can request consultations within the Trade Specialised Committee on the Level Playing Field for Open and Fair Competition and Sustainable Development. Then, if a solution is not found, either party can request the establishment of an arbitration panel.[134] The arbitration panel's[135] authority on subsidy issues is significantly limited as it is not competent when the dispute concerns the independent bodies or authorities,[136] judicial review processes,[137] or the examination of individual subsidies (with few exceptions primarily concerning export subsidies).[138]

In addition, 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 can delay or ignore its full implementation. Unlike the CJEU, which can impose fines directly on 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.[139]

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).

The TCA's general dispute settlement mechanism 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'.[140] 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.[141] Here it is crucial to understand the implications of 'substantially equivalent obligation' within the context of the TCA,

[133] Art. 370 TCA.
[134] 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'; Case C-284/16 *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158.
[135] The arbitration tribunal is composed of three arbitrators. The composition of the panel must be agreed upon by the parties within 10 days following the initiation request for an arbitration tribunal. See Federico Fabbrini, *The Law & Politics of Brexit. Volume V: The Trade & Cooperation Agreement* (OUP 2024).
[136] See Art. 371 TCA.
[137] See Art. 372 TCA.
[138] See Art. 375.2 (a) TCA. By implication, 'subsidy schemes' are not excluded; Biondi, *supra* n. 78, at 229.
[139] Barry Rodger & Andreas Stephan, *Brexit and Competition Law* 93 (Routledge & CRC Press 2022).
[140] Art. 736 TCA.
[141] 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.

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 RTAs in recent times given the challenges to multilateral dispute systems.[142] 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 favouring national offshore wind farms.[143] 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. Additionally, 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.[144] Finally, 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.

VI. Conclusion

This article 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

[142] See Giorgio Sacerdoti & Niall Moran, *International Trade and Investment Dispute Settlement. From Rise to Crisis and Reform. A Comparative Introduction* Ch VII (Routledge, forthcoming 2024).
[143] *United Kingdom–Measures Relating to the Allocation of Contracts for Difference in Low Carbon Energy Generation*, Request for Consultations by the European Union, WT/DS612 G/L/1428 30.03.2022.
[144] Biondi, *supra* n. 78, at 232; European Commission, Commission launches infringement proceedings against the UK for breaking international law and provide further details on possible solutions to facilitate the movement of goods between Great Britain and Northern Ireland, Brussles, 15.06.2022 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3676.

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 dispute settlement mechanism. 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 article 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 Labour government could play a significant role in the implementation of the SCA.