**A Case of Smoke and Mirrors and a Protocol?: Analysing how far the United Kingdom has regained exclusive control over state aid post Brexit**

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Competition policy has been a core aspect of the European integration project from its inception. The United Kingdom’s contributions to EU competition policy design and development are indisputable. British competition legislation through both the 1998 Competition Act in the 2002 Enterprise Act reflected and voluntarily copied (á la Europeanisation) many aspects of the EU rules. With hindsight the vote for Brexit was a potential game changer and one that necessitated changes to the competition landscape amidst demands to ‘take back control’ and regain sovereignty. The UK government found itself facing a policy dilemma: Did it continue aligning with the EU regime or did it carve itself a new and British competition order? The Johnson pro Brexit government in its determination to deliver a clean Brexit and chose the second option. It has recently hailed the publication of its new Subsidy Control Act Bill in June 2021 as a ‘clear departure from the EU state aid regime’ and a means to empower central and devolved governments to design subsidies that benefit the UK taxpayer (UK Parliament 2021). The central question at the heart of this paper is to what extent the UK now has a genuinely British wide independent competition regime. It argues that the situation is actually more complex and that we are witnessing a game of smoke and mirrors where the UK remains in part attached to the EU system? State aid, the focus of this paper, represented one of the most contentious issues of the Brexit negotiations between the EU and the UK. Despite the rhetoric of taking back control and repatriating state aid law the government’s acceptance of both the Withdrawal Agreement of 2019 (including Ireland/Northern Ireland Protocol) and the EU/UK Trade and Cooperation Agreement (TCA) of 2020 have curtailed in practice the ability of the UK to break free completely from the EU’s state aid orbit and with the addition of the Subsidy Control Act (2022) left the UK confronting two subsidy control regimes. This was never the intention. Ultimately the UK is still subject to the EU regime, both directly (in Northern Ireland through the Protocol) and indirectly (Northern Ireland within the UK), claims that the UK has escaped the confines of the EU that necessitates closer examination and scrutiny.

Key words

Competition Policy, State Aid, United Kingdom, Northern Ireland

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The United Kingdom (UK) formally left the European Union (EU) on 31st January 2020 after some 47 years of membership. Its departure under the terms of the Withdrawal Agreement (2019) left many unanswered questions about the longer term nature of the UK/EU trading relationship and both parties almost immediately launched another round of intense negotiations that culminated in the Trade and Cooperation Agreement (TCA) on 24th December 2020.[[1]](#footnote-1) If the process of securing Brexit with agreement on the divorce bill, the Irish question and citizens’ rights had been difficult, the process of delivering a truly successful Brexit entailed exploring every aspect of policy interaction constructed over nearly five decades of the UK’s EU membership. The idea of decoupling the UK from the EU policy base and simply repatriating EU policy competences may have appealed to the Brexit voting public, but it was going to be complicated and fraught with difficulties about what could be achieved given firstly, the EU’s insistence on maintaining a level playing field to protect the single market and secondly, its determination to prevent a hard border on the island of Ireland.

Boris Johnson’s government always lauds Brexit as a positive moment for the country and talks repeatedly of ‘the opportunities of the UK’s departure from the European Union’ (Queen’s Speech, May 2022). It is under pressure. however, to deliver results, both tangible and psychological, and this has taken the form of a new ministerial post for Brexit Opportunities and Government Efficiencies (under the staunch Brexiteer, Jacob Rees-Mogg) within the Cabinet Office in February 2022.[[2]](#footnote-2) Some 6 years after the Brexit vote questions remain, however, over just how far Brexit has made a meaningful and positive difference. Was it a pyrrhic victory or a major turning point in UK politics? While it may be still too early to assess the full costs/benefits of Brexit and especially in the wake of Covid pandemic and the impact of the war in Ukraine, we can already identify challenges, issues and developments that cast some doubt on some of the core promises made by the Brexiteers during the 2016 referendum campaign.

Competition policy is one such policy area. Competition policy represents one of the greatest triumphs of the European integration process. Given the subject specific technicalities of this area it has remained the preserve of mostly legal scholars given the substantive EU case law and legal interpretations (Ibanez Colomo, 2020; Ezirachi, 2021; Marco Colino, 2019 and Sufrin and Jones, 2019) and economists who focus on the theories of competition (Hunt, 1999 and Motta, 2004). The policy is now drawing the attention of historians (Warzoulet, 2018) and mainstream political science (Cini and McGowan, 2008; Buch Hansen and Wigger 2011, Wilks, 1999). Both of these disciplines have provided less research on state aid (Cini 2011; Schito 2021), the focus area of this paper. The absence of interest and especially in relation to state aid is particularly curious as this area revolves around fundamental questions about the role of the state in the economy such as on taxation, regional regeneration and the support/bailing out of companies.

This paper does not concern itself with an analysis of individual state aid decisions or legal definitions, but rather on the politics at play in the design and roll-out of a new UK subsidy policy in a post Brexit world. The paper’s starting point holds the vote for Brexit on 23rd June 2016 as a surprise result and one where beyond the political dogma of the leave campaign, very little consideration had been given and practically no contingency planning had been done by the David Cameron governments (2010-16).

The road to Brexit was going to cast long shadows over many areas of UK public policy. The issue of competition policy and state aid had attracted minimal attention in the wider political arena both immediately prior to, and after the vote for Brexit. However, this theme rapidly emerged as one of the most contentious aspects of the entire four and a half years of EU/UK negotiations.[[3]](#footnote-3) The sudden salience of state aid might be regarded at first as somewhat puzzling as the EU state aid rules had caused successive British governments few concerns and all had been ‘generally supportive of the EU’s overall approach’ (UKSALA, 2018).[[4]](#footnote-4)

**Brexit demanded change and t**he push for a harder form of Brexit meant leaving the EU and by logical extension, policy divergence away from EU norms and the development of a new and solely British state aid policy. The UK’s Subsidy Control regime (April 2022) looks like the logical corollary of this trajectory and will appeal to the Brexiteers as a prime example of regained sovereignty and breaking free from the European Commission and the European Courts. A closer inspection of developments reveals that the situation cannot be portrayed in such black and white terms and that there is now an emerging ‘revisionist’ narrative of events from 10 Downing Street. It is argued here that the government’s handling of state aid policy is open to criticism as it did not grasp the significance of state aid when it agreed signed off on the Ireland/Northern Ireland Protocol. The real narrative is one of developments akin to smoke and mirrors which this paper aims to disperse to enable a more accurate depiction of events and developments.

From the outset of the EU/UK negotiations there were two major hurdles for the Johnson administration (2019-). Firstly, securing access to the EU market always depended on reaching an agreement with the European Commission which was always going to insist on a level playing field and common competition rules. Secondly, Northern Ireland, or more accurately the necessity of preserving the 1998 peace settlement proved an added complication to many of the discussions surrounding Brexit. With hindsight, the UK was never able to fully dictate and steer developments in the arena of state aid as it sought to portray.

This paper challenge assumptions over how much control has been taken back in the area of state aid. This paper will show how that in spite of all the rhetoric on taking back control and long awaited new UK Subsidy Control Law (received royal assent on 28 April 2022 and to be in place by the autumn), heralded as escaping the decisions of ‘unelected EU bureaucrats’ and providing a new system for subsides guaranteeing British independence in the field of state aid (UK Government, June 2021), the UK still remains tied in varying degrees to the EU regime. The SCA has been constructed to a large extent from the EU system. This Act serves as the backbone of state aid in the UK and is intended to build upon and develop the subsidy control regime relating to the government’s acceptance of the Withdrawal Agreement (WA) of 2019 and the subsequent Trade and Cooperation Agreement (TCA) from December 2020.[[5]](#footnote-5) P**rovisions on state aid are covered in two parts of the WA, namely the separation provisions (part 3) and the Protocol on Ireland/Northern Ireland. The Northern Irish dimension is crucial here as this region of the UK remains subject to EU state aid rules.**  Both systems are mutually exclusive and the latter may even influence how the UK regime itself develops.

**Moreover, the UK is still bound by EU rules and the interactions and decisions from both the Commission and the Court of Justice until the end of December 2024 for any cases of illegal state aid or misused state aid that was approved up to the end of December 2020. The Protocol may keep the UK tied to the EU regime for as long as the Protocol survives.** This paper explores the current state of play with regard to state aid in the UK. Much is still unclear with how the new Act will operate and the guidelines for doing so and questions have been asked over the levels of transparency and efficacy. It is divided into three subsequent sections; the first sets the context and provides a brief overview of the EU competition policy regime; the second looks at UK analyses the outcome of the WA and the TCA for state aid in the UK and the significance of the Subsidy Control Act; the third discusses the meaning and impact of the Northern Ireland Protocol on state aid across the entire UK before presenting final conclusions.

**The EU State Aid Rules: Setting the Context**

Competition policy has long provided the best example of a genuine ‘supranational’ (McGowan and Wilks, 1995) policy and constitutes one of only five exclusive EU policy competences. The competition provisions including state aid (alongside objectives to tackle cartels and restrictive practices and abusive monopolies) were first laid down in the Treaty establishing the European Coal and Steel Community (1951) **and were subsequently built into the European Economic Community Treaty (19**57) under Articles 85-94.[[6]](#footnote-6) Competition policy came of age in the late 1980s fuelled by the advance of neoliberal economics and a succession of pro-market driven European Competition Commissioners and particularly Sir Leon Brittan (1988-93). The arrival of a European merger control regulation in 1990 and a successful drive to open up the energy, airlines and telecommunications sectors to greater competition was accompanied by a determination to rigorously enforce and apply state aid.

The ascendancy of competition policy was reflected in the alignment and Europeanisation of the domestic competition regimes in line with the EU rules across all member states. The UK was at a proactive player at the heart of these developments and helped to put in place a quasi ‘federal’ system where responsibility for case decision making rested with the European Commission and if, decisions were appealed to the EU Courts. The majoritarian institutions in the form of the European Parliament and the Council of the European Union had no formal role to play in making decisions on competition cases. This architectural structure seemingly epitomised for many Brexiteers all the worst traits of the European project. However, dogma, economic and political realities and both experience of, and familiarity with the EU rules was almost certain to make discussions of a post Brexit competition policy particularly complex and complicated.

The competing formats of any new UK/EU relationship narrowed almost immediately after the Brexit vote in June 2016 and demands for a harder format of Brexit took centre stage. Escaping CoJ rulings became a rallying call not just for the victorious Brexiteer movement but also a red line for the Theresa May government. The logical roll-out of this position also meant abandoning the EU competition regime that the UK had been influential in shaping and one that had caused it few concerns even in relation to the institutional machinery of EU competition policy. On the contrary, the UK had been a competition vanguard, and especially in his hostility towards state aid and the granting of subsidies within other member state governments.

**The EU state aid rules (Cini and McGowan 2008) are laid out in Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU). EU state aid is designed to prohibit (under paragraph 1 of Article 107) national governments from lending financial support to industries or government owned companies (usually in the form of subsidies, tax breaks and other incentives) that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods’.**[[7]](#footnote-7) **Such subsides are deemed to be ‘incompatible with the internal market’.** Subsidies do have a clear potential to distort markets and restrict competition as occurred when the French government decided to provide financial aid (some €579 million euros) to the PSA Peugeot/Citroen group in 2013.[[8]](#footnote-8) European Commission decisions can also generate real tensions between Brussels and a member state government as in the judgement on Apple Inc in Ireland.[[9]](#footnote-9) **However, the concept of aid itself is fairly broad and exemptions are provided for (A**rticle 107, paragraph 2b) **where subsidies can be judged to have positive consequences, for example, making good damage caused by natural disasters and promoting economic development.**

**Many forms of direct aid are also exempt, most notably in relation to agriculture and fisheries, industrial support, aid having a social character and measures to promote culture and heritage conservation.** Article 107’s third paragraph allows state aid to ‘remedy a serious disturbance in the economy of a Member State’ while **Article 106 explicitly allows member states to support undertakings in the provision of services of ‘general economic interest’ (e.g. postal sector). The Commission is also cognisant of the benefits that state aid can bring rewards as in the cases of research and development (Commission, 2009) and in reducing regional equalities (i.e. employment and income) by getting firms for example, to establish premises in less sought after. and peripheral, areas within the EU.**

**The European Commission’s pursuit of illegal state aid intensified from the late 1990s onwards and in the last decade, has been particularly pronounced under Margrethe Vestager, the current EU competition policy commissioner (in post since 2014 and re-appointed in 2019). Responsibility for the day to day handling of competition investigations rests with DG Competition (DG COMP). This DG is headed by Olivier Guersent, the current Director General. Within DG COMP state aid is the preserve of Directorate H which is in turn headed by the Deputy Director General, Carlos Esteva Mosso. This directorate is sub-divided into 6 units responsible for 1) Infrastructure and Regional Aid; 2) R+D+Is and IPCEI and Environment; 3) Fiscal Aid; 4) Enforcement and Monitoring; Tax Planning Practices and 6) Agriculture and Fisheries. Directorate H oversees the rules and handled all potential aid requests for subsidies under Article 108 (unless they fall within the General Block Exemption Regulation (GBER) first adopted in 2008) as well as conducting investigations including those arising from third party complaints on the legality of types of aid.**[[10]](#footnote-10) **The GBER automatically allowed for state aid in areas of regional distress and need under certain conditions which were known to local and regional authorities. Outside these conditions authorities from the Commission. It was an effective system.**

**Vestager and her team in DG COMP have repeatedly made the media headlines by taking on leading companies such as Apple, Google and Facebook and garnered a reputation as a defender of consumer interests. Her determination certainly angered former US President, Donald Trump, who accused her of hating the US and labelled her as the EU’s ‘tax lady’ and ‘the worst woman I’ve ever met’ (Politico, 27 November 2019). Vestager has shown flexibility when needed and has pushed to loosen the state aid rules for companies impacted by Covid (Foo Yung Chee, 30 September 2021) and approved the decision not to hold the new Italian air carrier liable for illegal subsidies awarded to its predecessor, Alitalia (Leali and Eccles, 2021).**

**Ultimately, the Commission (on DG COMP’s recommendation via the Commissioner) can prevent member state governments from granting state aid, but these instances are rare and there were only 11 such cases in almost twenty years (2000-2019) in relation to the UK.**[[11]](#footnote-11) **The Commission’s own analysis reveals that some 90% of the forms of aid are granted are covered by block exemptions.**

**It is important here to highlight three points in relation to some of the criticisms amongst Brexiteers. Firstly, EU state aid rules have never prevented the roll-out of an industrial strategy where it is directed towards a set of progressive priorities that include regional development (especially facilitating the growth of small and medium sized enterprises) and environmental protection. Secondly, not only does the policy allow nationalisation but it encourages public ownership when it works to the benefit of the greater good (e.g. rail transport).** Thirdly, the EU state aid regime has shown ability to respond to major events such as in the aftermath of the financial crisis when it agreed to aid in over 40 instances.

The Covid pandemic illustrated how the Commission demonstrated flexibility in relation to approving state aid under Article 107 (3) when companies are facing acute liquidity needs. A pertinent example found expression in the Commission’s approval (in 2020) of two British schemes to support small and medium sized enterprises; namely the Coronavirus Business Interruption Loan Scheme and Direct Grants to Support SME Scheme on the grounds that Covid had seriously disturbed the economy of a Member State. These cases show hoe the EU regime fitted UK government policy and raised questions about how far Brexit offered the UK government a better means to handle its own cases in relation to state aid, and to ponder just how problematic Brussels interference had been?

**Delivering A Pure Brexit: State Aid Policy in the UK.**

Brexit’s proponents, of course, argued that leaving the EU enabled the UK to escape the confines of EU rules on state aid and with that the adjudication from the Court of Justice of the European Union. Proponents of a purely British approach maintain decisions could be made better and faster without the long delays experienced with the EU regime (Branton, Rose and Eaton, 2022). **In truth, the EU state aid regime had always been an easy target and served as useful camouflage for** British ministers who had on occasions hidden behind the rules (Berwin Leighton Paisner, 2018) as a reason for their reasons not to intervene in certain economic areas as **Boris Johnson did in 2015, laying the responsibility for the difficulties in the British steel industry.**

Brexit’s opponents within the UK countered that the EU rules had never really ‘curtailed successive governments’ ability to grant state aid’ (House of Lords, 2018). Whatever view taken it was clear from the start of the negotiations that the European Union was insistent that the maintenance of a level playing field and continued barrier free goods between Northern Ireland and the EU as well as British access to the EU market and that these were only possible so long as the UK government respected and followed the EU competition rules. This European Commission red line was driven by concerns that any UK deviation from the rules on state aid placed its member states at a real competitive disadvantage.

For the Johnson government only an undiluted and pure Brexit could liberate the UK from ‘Brussels rule’ and allow the government to pursue an expansive and more selective industrial policy and the levelling up agenda that in turn would secure more jobs and nurture the growth businesses for tomorrow. Just how more effective the new Subsidy Control Act will be in dealing with regional development subsidies than the EU regime is open to question. Johnson was under pressure from the start of his premiership to secure an agreement with the EU. What form it would take, how much he could give, how much he could ignore are all part of the process of the UK’s withdrawal from the EU.

The UK’s exit from the EU really marks a pivotal moment in the evolution of British competition policy.[[12]](#footnote-12) How much change and how much stability endures is still unfolding, but the proposed basis for the future EU/UK relationship was set out in **Paragraphs 77-79 of the Political Declaration attached to the 2019 Withdrawal Agreement:**

‘*Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, 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, competition, social and employment standards……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*.’

The idea of a level playing field is the crucial underpinning element of the new EU/UK relationship and while this implied a degree of symmetrical co-existence on the issue of state aid, it nevertheless faced the challenge of a UK set on divergence from the EU model. Otherwise, was there any point to Brexit? State aid certainly dogged UK/EU negotiations from practically the moment the UK left the EU on 31st January 2020. While the Commission robustly defended its position of **maintaining the integrity of the single market, the Johnson administration (came into office in July 2019 much preferred a solution where the UK was not bound to continuing align with EU rules.**

**By the start of 2020** Johnson’s direction of travel had become even clearer, declaring; ‘there is no need for a free trade agreement to involve accepting EU rules on competition policy, subsidies, social protection, the environment, or anything similar, any more than the EU would be obliged to accept UK rules’ (Boris Johnson, 3rd February 2020 at <https://www.politico.eu/article/boris-johnson-uk-undercut-eu-competition-rules-trade-brexit/>). The UK’s chief negotiator with the EU, David Frost, reiterated this position and stated ‘it is central to our vision that we must have the ability to set laws that suit us ….so to think that we might accept EU supervision on so-called level playing field issues simply fails to see the point of what we are doing’.[[13]](#footnote-13) Could dogma trump economic and political positions and agreements and could the UK escape the *ancien regime* of EU rules?

Tensions over the issue of subsidies and their role in the UK’s economic policy continued to simmer within the British cabinet as revealed by Dominic Raab, the British Foreign Secretary (Times, 7 September 2020 at <https://www.thetimes.co.uk/article/dominic-raab-blames-eu-state-aid-row-for-brexit-deal-delay-cr38bf835>), where the majority supported a position where the UK reject all interfaces with EU rules over state aid. Conflict seemed inevitable.

The negotiations between the EU and the UK were difficult and painfully slow with the EU teams constantly critical of the UK’s readiness to engage fully with the process and concerns over trusting the Johnson government. On occasions it looked in the second half of 2020 as if both sides were heading towards a no deal scenario. However, renewed momentum enabled an eleventh hour agreement on Christmas Eve 2020. On reflection the result of this time-pressured negotiation was regarded by many as an uninspiring bare-bones Trade and Cooperation Agreement (TCA) that did little more than ensure the continuation of tariff and quota-free trade between the UK and the EU.

In relation to state aid the TCA included a range of general principles that effectively mirrored existing EU rules and case law (Morris 2020). To ensure enforcement Article 363 contained an obligation for the UK to establish an independent body to control the awarding of state aid as well as a formal dispute settlement mechanism through an effective subsidy control system. The TCA may have been a compromise, but in a slightly awkward development the new subsidy regime commitments within it were enacted into UK law from the start of January 2021. In short, and prior to a new UK state aid law whenever a public body sought to grant financial aid to an economic entity, it was compelled to adhere to the definitions of a subsidy under the TCA and the six principles of allowed aid (the EU guidelines), as established under Article 366. This was far removed from a complete break from Brussels. In reality, **any new British state aid law was always likely to encapsulate a more symbolic piece of legislation (Soltesz, 2021) and one arguably driven more by political objectives than the necessities of competition law.**

From the EU’s perspective there was always a question of trust or rather lack of trust with the UK during these negotiations and whether Boris Johnson would be confined by EU principles and accompanying agreements in the medium term. For Johnson’s government the imperative had always been to bring state aid control back home (Pimlott, 2021) and in doing so help to sustain and protect domestic British businesses. The government’s focus on deploying state aid as a new strategic approach suggests a significant departure from its more belligerent anti-subsidy approach of the very recent past, but is it?[[14]](#footnote-14) Levels of state aid in the UK are relatively low in comparison with other European states and amounts to less than 0.4 per cent of GDP. Spending across the EU is practically double the British level. This point was reiterated by several witnesses before the House of Lords European Union Committee. According to Oxera (Oxera, 2018) the UK ‘spent on average €100 per capita on state aid between 2009 and 2015, compared to €181 per capita in Belgium, €224 per capita in France, and €226 per capita in Germany over the same period’. Overall, **the UK had also fared well under the EU regime in practice and had been subject to considerably fewer infraction proceedings than was the case for either France or Germany. Could Brexit better this record?**

The government’s Brexit narrative runs that the UK has taken back control for the running and enforcement of a new British competition policy and once secured would facilitate its **major infrastructure plans and levelling up agenda.**[[15]](#footnote-15) **On** 30th June 2021 the government unveiled its Subsidy Control Bill (UK Parliament, 2021) as its planned mechanism for dealing with state aid post Brexit. The bill became law on 28th April 2022 (UK Parliament, 2022).[[16]](#footnote-16)

The UK government insists the bill marks a ‘clear departure from the EU state aid regime’ and according to Kwasi Kwarteng, minister for business, ‘we’re seizing the opportunities of being an independent trading nation to back new and emerging British industries, create more jobs and make the UK the best possible place to start and grow a business’ (BBC News, 30th June 2021 at <https://www.bbc.co.uk/news/business-57656812>).

On the one hand it looks as if the UK government had designed a new Act that is designed to meet British needs and is one that places much greater emphasis on the governments ‘key domestic priorities’. Dominic Cummings, a former senior advisor to Johnson and a key Brexit strategist, had long strongly advocated for a purely British subsidy regime as a means to allow investment in the fourth industrial revolution facing huge start-up costs with substantial risk in the areas of high-tech development and artificial intelligence. Brussels’ state aid rules as George Peretz has argued, had always permitted such investment subsidies (Politico, 2020) and there were doubts over how transformative any new Act could be. It was arguably the politically messaging that was more important and the Act enables the government to claim that is delivering Brexit and this new piece of legislation will appeal to many new Conservative voters in the North of England and Wales who were responsible for securing Johnson’s emphatic general election win in December 2019.

However, on the other hand and under closer observation the 66 page long Act makes for a rather difficult (in terms of the language), if fascinating, read. When deciphered it shares at its core striking similarities with the EU state aid regime and especially in relation to many of the seven underpinning principles (as agreed under the TCA). Its definition of subsidy where financial aid, designed to favour one undertaking over another and hence, thwart the competitive process, is the same. There are no real fundamental changes to the meaning and content to the situation pre-Brexit. Interestingly, the drafters of the new Act tried hard to make it look rather different from the EU regime and more inherently British in their use of language by referring to subsidies rather than ‘state aid’, enterprises rather than ‘undertakings’ and services of public economic interest rather than services of general economic interest (DGEI). This led one practitioner to comments that ‘despite differing wording’ … the text… ‘ adopted substantially similar criteria to the definition of state aid under EU law’ (Herbert, Smith Freehills, 2021). Moreover, t**he British government had already enacted legislation as part of the Withdrawal Act which under Section 16 brought the EU state aid rules and the existing block exemptions into domestic law.**

**Ultimately and given power and geographical dynamics EU law on state aid is likely to remain an authoritative source of case law, even if it is not legally binding in most of the UK (but not Northern Ireland. This creates an additional problem here for the UK as it has now lost influence in the shaping of EU state aid policy and becomes a taker of policy. Some commentators argue that the UK’s ability to diverge and to do things better and faster were actually much more limited in practice and would be constrained by *Realpolitik* concerns from the EU’s perspective and unsettling for policy within the UK given that Northern Ireland has remained under EU state aid rules under the Withdrawal Agreement.**

While there is much in common, however, the UK Act **does have a degree of distinctiveness which are on display in an additional 9 principles (that go beyond the TCA) and which relate for example to environmental and energy subsidies and administrative processes for low risk subsidies.** The Act identifies two further specific categories of subsidies – namely subsidies of interest (SoIs) and subsidies of particular interest, (SoPIs), effectively meaning the latter requires more examination.[[17]](#footnote-17) In contrast to the EU state aid regime the new UK Subsidy Control rules only apply to financial aid that is over £315,000 million over a three year period and additional exemptions can be made in cases of natural disasters, economic and national emergencies and issues pertaining to national security.[[18]](#footnote-18) This *de minimis* threshold figure is higher than the €200,000 that currently applies in the EU but less than the £331,000 set out in the TCA. The Act does mention the need for mandatory referral for subsidies of a particular interest and it has been left to the Secretary of State for business to determine the scope of the voluntary and mandatory categories. The Subsidy Control Act, in line with the TCA’s (Article 371) establishes an ‘independent authority with an appropriate role in the subsidy control regime’ in the form of a new Subsidy Advice Unit within the existing UK Competition and Markets Authority (CMA). **These allow the UK government to maintain that is has both improved on the EU regime and brought state aid home.**

The CMA assumes responsibility for state aid but its powers are much more limited than in relation to the ones held by the Commission. The CMA is not a decision making body and in accordance with Article 59 of the Bill is only tasked with evaluating the effects of a subsidy and to issue a report on its conclusions. Its views are not binding. The CMA is not empowered to investigate complaints as does the DG COMP. The logic runs that public authorities would step back from providing aid if a negative report is delivered in the face of the possibility of third party legal private enforcement challenges. A UK Competition Appeal Tribunal (CAT) will hear such challenges in England with responsibility for such cases falling on the relevant High Courts in the devolved nations. Under such circumstances authorities could appeal directly to the Secretary of State to refer a subsidy query to the CMA but this may be a non-starter if the government supports a particular scheme. It is important to stress that the CAT can annul subsidy decisions and recover money that has been awarded by public authorities.

**T**he new UK Subsidy Control Act passes responsibility for state aid to the Secretary of State for BEIS and accordingly, establishes the role of a UK minister for the new policy. It is expected that the Secretary for State will elaborate on the Act and establish which cases should be brought to the CMA’s attention. In this sense Brexit has been delivered! Much here has yet to be determined in how such aid is approached by the CMA. Consistency in approach will be essential. Consistency has its advantages but also some drawbacks. The CMA’s new role as the principle actor in state aid cases brings an additional, and arguably unwanted challenge; it brings officials directly into the firing line of politicians who may have special projects to finance (e.g. a bridge between Northern Ireland and Scotland). In the past Brussels was the conduit for venting any anger from national, regional and local politicians, whether deserved or not. Officials from the CMA will now take centre stage.

**However, it should be noted that t**he European Commission retains its authority to initiate new state aid investigations for up to four years after the end of the transition period for cases where aid occurs before the 31st December 2020. Technically the Commission can challenge such decisions and thereby effectively delay the process and the final decision until it has given its approval. The Commission’s ability to vet aid is not what Brexiteers imagined leaving the EU meant. The UK will certainly want speedy decisions but it is hard to imagine that the Commission may be as ready to treat such cases as a priority, now that the UK has left the EU.

In retrospect, the emergence of state aid as a potential dealbreaker was somewhat surprising given that UK governments had been so little exercised historically about this area, but securing a pure Brexit meant escaping the role of the Commission and the Court of Justice, the UK ‘getting Brexit done’ government’ needed to abandon the EU regime. The reality is that the process of carving out a British regime has been surrounded by degree of smoke and mirrors at their **core these new rules bare similarities with the old ones albeit in a repackaged format, but this in only a part, and arguably the more minor point in reference to state aid in the UK post Brexit. Contrary to frequent pronoucements from government ministers that Brexit has been delivered, Northern Ireland remains subject to the EU state aid rules. In its determination to liberate the UK from any EU rules the Johnson government opted to have, through the terms of the Protocol on Ireland/Northern Ireland, a separate arrangement for Northern Ireland with regard to state aid. In haste the UK government had accepted Article 10 (formerly Article 12 in May’s WA) either because it failed to appreciate the potential implications for the wider UK or because it intended to override the international agreement as the first available opportunity. Delivering Brexit for the rest of the UK mattered more to the UK government, but did it work as planned?**

**A Region Apart: A Second State Aid regime just for Northern Ireland?**

The Protocol has been a very divisive issue in Northern Ireland politics since it entered i**nto force on 1st January 2021** with generally, the nationalist community fully supporting it and the Unionist community mostly opposing it.[[19]](#footnote-19) The protocol **explicitly addressed ‘the unique circumstances on the island of Ireland, the need to avoid a hard border and the necessary conditions for North-South cooperation. To this end it** keeps all of Northern Ireland within the EU’s single market for goods and all rules pertaining to it, including state aid. In theory this arrangement brings economic and financial advantages to many Northern Ireland companies in so far as they now have immediate access to GB and EU markets.

However, this arrangement became problematic for many Unionists because in order to ensure the free movement of goods across the island of Ireland – to protect the 1998 peace settlement and the integrity of the EU single market – it was necessary to introduce checks on goods being dispatched across the Irish Sea from Great Britain to Northern Ireland. This gave rise to the so-called ‘Irish Sea border’ issue.

**Viewed from a nationalist perspective the protocol was the mechanism and in effect, an insurance policy to prevent a border on the island of Ireland. Viewed from a unionist perspective, however, the protocol is regarded as an act of betrayal and all t**he main (four) main unionist parties in Northern Ireland (BBC News, 28 September 2021) lambasted the Protocol as effectively undermining Northern Ireland’s position in the UK.[[20]](#footnote-20) Three of the main Unionist parties (the DUP, the TUV and the PUP) have consistently called for the removal of the Protocol and made it a key policy platform ahead of the May 2022 Assembly elections. What can the UK do here? Can it act in a unilateral fashion as the unionist parties demand? Is the Johnson government prepared to unilaterally revoke the Protocol to fully deliver Brexit if it creates further tensions across the EU and angers the US administration? It is important to stress that the protocol does not change the constitutional status of Northern Ireland as an integral part of the UK in any way, but this is a case where politics and sense of identity are trumping the legal realities, both in relation to political developments in Northern Ireland and in the UK’s approach to delivering Brexit.

**In retrospect, the significance of the ‘Irish’ question and the importance of preserving the peace settlement in Northern Ireland were underappreciated in the corridors of Whitehall and Westminster in the run-up to the referendum. Few there could have imagined how Northern Ireland, the UK’s smallest devolved region (with some 1.8 million people) would take centre stage in the first phase of the negotiations between the UK and the EU over 2017/18, remain a constant feature up to the passing of the Withdrawal Agreement in December 2019, and how far the Protocol on Ireland/ Northern Ireland Protocol has bedevilled EU/UK relations ever since. Theresa May’s 2018 Withdrawal proposal under Article 12 (and subsequently rejected by the House of Commons including all 10 members of the DUP in the chamber) had intended for EU state aid rules to apply to all of the UK after Brexit albeit alongside a new domestic agency taking over the role of the Commission, but crucially still allowing for EU oversight. Johnson’s administration in its pursuit of a purer Brexit rejected the idea of EU state aid applying in GB and even though aware of the more sensitive position of Northern Ireland in the overall Brexit package, negotiated with the EU a bespoke arrangement for Northern Ireland.**

**The Protocol should be regarded at best as a fudge for the UK government. It was a calculated and deliberate necessity to secure a larger UK Brexit deal with the EU. According to a senior civil servant, the UK government had ‘fairly and squarely’ (BBC, 29 April 2022 at** <https://www.bbc.co.uk/news/uk-northern-ireland-61252259>**) been responsible for this arrangement. Northern Ireland became collateral damage in the process. Emerging evidence now suggests that Johnson had really intended to ‘tear up’ the Protocol (according to DUP MP, Ian Paisley, interviewed on BBC Newsnight, 14th October 2021) and ‘ditch it’ (according to Dominic Cummings, The Guardian, 14 October 2021) when the time arose. But such views, and the now frequent interventions from David Frost, are part of a ‘revisionist’ narrative that seeks to suggest that the UK was always in control of the negotiations. A more accurate account (according to interviews) is one where the UK government spent more time floundering and on the backfoot. This analysis sees A UK government in its desperation for the larger deal, not grasping the implications of the protocol for state aid in the UK. Only after the deal between the EU and the UK was struck did the UK negotiating team come to understand these implications and last minute scramble by Frost to Brussels to re-open the issue of state aid after the agreement proved in vain.**

**The Protocol applies to trade between Northern Ireland and the EU. From the outset it unleashed a number of questions about both its implementation and application and the ‘fit’ to the wider UK context. The provisions relating to state aid are anything but straightforward to navigate and it not the easiest document to read to ascertain its meaning and purpose. According to George Peretz QC, one of the UK’s leading state aid practitioners, it requires a very ‘diligent’ (Peretz, 2022) eye and appreciation of legalese to decipher its full significance and implications.**

**In operation Article 10 means UK subsidies for undertakings that affects Northern Irish goods with the EU27 potentially falls under the scope of the EU state aid rules. This article also affirms that the EU state aid rules will not just continue to apply to trade between Northern Ireland and the EU but also by extension applies to GB as well. It goes further and states that any new EU state aid legislation will apply to Northern Ireland (and the UK).**

**For example, if the UK government decided to support a Liverpool based company manufacturing glass, and that company had a subsidiary in Northern Ireland which was exporting glass freely across the Irish border, this would be problematic for the European Commission and because of DG COMP’s involvement also the for the UK government. How would the government be able to provide money to British banks that in turn lend money to banks in Northern Ireland? The same issues arise for car manufacturers in GB who sell their models in Northern Ireland. From a political perspective, of course, the idea that Brussels could still retain powers in this area of public policy is highly problematic. The government wanted its own state aid regime and was intent on removing all EU state aid law from the statue books after the transition period ended. This Protocol was a major obstacle to realise this objective.**

Is it is only with hindsight that the UK government came to appreciate the wider significance of the protocol’s potential significance for state aid in Great Britain. Boris Johnson had instructed his negotiating team (Guardian, 24 February 2020 <https://www.theguardian.com/politics/2020/feb/23/brexit-uk-reneging-on-northern-ireland-pledges-risks-trade-deals-with-us-and-eu>) to get around the Withdrawal Agreement provisions on Northern Ireland or more ideally, abandon them altogether.

**Moves to rework the Protocol culminated in the Johnson government’s Internal Market bill that was published (September 2020) and effectively allowed ministers to bring forth legislation to simply override the terms of the Protocol when issues of conflict in the functioning of the UK’s single market arose. That this ran contrary to the international agreement signed between the EU and the UK at the end of 2019 is something of an understatement and amidst the fury of parliament and concerns about the impact of any other international agreements signed by the UK, that the bill was abandoned.**

**Currently the UK, as Peretz points out, is subject to two ‘entirely separate subsidy control regimes’ (Peretz, 2022), namely the new Subsidy Control Act and the protocol (Article 10). Both are mutually exclusive and in practice this means that a large number if subsidy measures in Northern Ireland will be subject the Article 10 and be excluded from the UK regime.**

**For the moment EU state aid rules will continue to apply to Northern Ireland for as long as the protocol remains in place. The Protocol states that these rules remain applicable to Northern Ireland until at least 31 December 2024 and from that date so long as democratic consent for its continuation until 2028 has been received from the Northern Ireland Assembly. The Assembly will be expected to vote every four years on the terms of the protocol unless another arrangement can be agreed between the UK government and the EU. Until then the Commission and the Court of Justice will still be managing state aid in this part of the UK.**

**A**rticle 10 requires the CMA to liaise closely with the Commission, even having to send drafts of all of its reports. The UK government will naturally be reluctant to inform the Commission about public grants and their rationale post Brexit, but **given what it signed up to for Northern Ireland, is the logic not that (Nicholaides, 2020) the UK will ‘follow, if not adhere to the EU’s practices and evolving rules.**

State aid in a devolved Northern Ireland falls under the responsibility specifically of the Department for the Economy (DfE). Within DfE there is a State Aid Unit (SAU) which forms part of its Analytical Services Division. SAU is expected to provide ‘advice and guidance to all NI departments and their arm’s length bodies’ on whether state aid is permissible in their plans for public funding, and how proposals could be altered to meet appropriate EU rules.[[21]](#footnote-21) As part of wider UK and EU connections, SAU liaises with the Department of Business Energy and Industrial Strategy (BEIS), UKREP in Brussels and the other devolved administrations in Scotland and Wales. There were in February 2020 24 GBER schemes in place in Northern Ireland. These cover areas such as HMS Caroline, the ‘Game of Thrones’ Touring Exhibition, Northern Ireland Screen Fund, Derry Airport, Urban development schemes and several in relation to agriculture (rural development plans and agricultural research.

**Much discussion is being had on how substantial these distinct arrangements for Northern Ireland might be. It is to be imagined that measures regarded as tax breaks or tax incentives to companies operating in NI would fall under the scope and this, many firms based in the UK may rightly request compensation from the UK government as facing new trade barriers for operating in NI. It could be that initiatives (e.g. tax incentives) taken in Westminster could to run contrary to EU state aid rules and even to British undertakings manufacturing goods in Northern Ireland. This is important because it entitles the European Commission to investigate pan-UK tax schemes. Is there a scenario where state aid to banks might also fall within the remit of the protocol, if NI manufacturers were able to access cheaper credit? The problem is that there is no precedent for the EU to apply the state aid rules to a part of a country’s territory. Establishing where activity in GB has repercussions in NI will be difficult and open many new doors for lawyers and consultants specialising in state aid.**

**The Protocol has soured relations between the UK government and political unionism with the latter feeling more disconnected economically to Great Britain now than pre-Brexit. The tensions over the protocol have intensified further following elections to the Northern Ireland Assembly on 5 May 2022 with the DUP refusing to enter the necessary mandatory coalition government. Senior DUP politicians (e.g. Sammy Wilson and Lord Dodds) always feared inter-regional competition within the UK and a possibility of NI losing out if greater subsidy arrangements were available for GB but not for Northern Ireland. Post Brexit the UK remained under the jurisdiction of the Court of Justice of the European Union as it was still able to adjudicate over issues relating to Northern Irish and secondly, there was the possibility that the protocol provides a backdoor (Peretz, 2019) for the application of the EU’s state aid rules in the UK.**

 **In a debate on the new State Subsidy Control bid in parliament on 22nd September 2021 Kwasi Kwarteng, the Secretary of State for Business, Energy an Industrial Strategy, stated that it is clearly no longer necessary for Northern Ireland to be subject to the EU state aid regime and that is precisely why we proposed a change to the Northern Ireland protocol on order to bring all subsidies within the scope of the domestic regime’. This change was only possible with the EU’s approval.**

**All trade agreements normally have within them clauses that allow signatory parties to take unilateral action if parts of any agreement lead to negative consequences. Such clauses are safeguard measures and are rarely used but they give the parties to the agreement a formal course of action and as such a high degree of comfort and security. The Northern Ireland protocol is no exception and the possibilities for unilateral action are contained within Article 16 if the deal gives rise to ‘serious economic, social or environmental difficulties that are likely to persist’. Such difficulties are not defined and are open therefore to interpretation. The important point to note about Article 16 is that it constitutes a mechanism of last resort. It provides for a process and is designed for either the EU or the UK government to alert the other about such difficulties and to see ways to overcome them. Cooperation and consensus lies at its core.**

**A joint Working Consultative Group was established under the Protocol to maintain regular interchanges and lines of communications between the UK and the EU on the working of the Protocol. Where difficulties arise it is expected that the Joint Consultative Group will be informed and the UK and EU will seek to redress the problems, if possible. Under ‘exceptional circumstances’ Article 16 can be invoked immediately and safeguard measures can be put in place by one side, but the other party is entitled to bring in ‘proportionate rebalancing measures’ to ensure that the rights and obligations under the Protocol are protected. Article 16 does not remove the Protocol or bring it to an end. It is a mechanism to voice and address concerns over the application and implementation of the protocol itself. This point is often misunderstood and as Rice argues (Rice 2021) it is not simply a case of returning to life before the protocol. However, the UK’s chief negotiator, Lord Frost, announced his intentions in October 2021 of wanting to rewrite the entire protocol and by April the following year it was reported widely (Groves, 2022; that Johnson was drawing up plans to suspend parts of the Protocol and especially the border checks to ‘fix’ the issues. This is an extremely risky political move as it would anger leading players across Europe and in Washington (Waterfield and Wright, 2022) and severely undermine the UK’s credibility and trustworthiness.**

**Conclusions**

Brexit and the Protocol have dominated the political landscape for almost 6 years and both will continue to shape discourse and policy development. Brexit has still not been fully delivered. One of the central claims of the ‘leave’ campaign was to take back control. This simple slogan was a highly effective one, often relying on nostalgia and past histories (or more accurately selected historical events). It often ignored modern realities and an increasingly regulated world but it also amounted to ‘rhetorical entrapment’. The case of state aid policy makes for a fascinating story in point. We find a government searching for a home grown policy to fulfil the Brexit agenda, when the previous regime had presented the UK with few problems. In theory, Brexit provided the means for the UK to have its own state aid policy that could determine how to assist industries in difficulty. In practice, complexities surrounding economic philosophies, policy preferences and level playing fields made this objective immensely difficult to achieve given the commitments in a series of international and legally binding treaties that the UK government had signed up to. Brexit has been both a challenge and a trap of its own making for the UK government.

Rather than taking back control in the area of state aid, the UK government through arguably a misunderstanding or deliberate subterfuge in the rush for a deal, had actually agreed legal commitments (through the TCA and the protocol) that meant that the UK remained in many senses within Brussels’ orbit. The government had always intended such arrangements to be temporary! The Subsidy Control Act is the realisation of the government’s post Brexit state aid policy and its high-profile levelling up agenda but its passing is something akin to a magician’s smoke and mirrors trick as it does not just resemble many aspects of the EU regime but is wedded firmly to it and the Court of Justice through the Protocol. Indeed, it may be that given the rules adopted under the WA and the new Subsidy Control Act there may be more ‘than a sufficient basis to guarantee that there will be no significant distortion to goods between the UK and the EU, whether from Great Britain or Northern Ireland, thus making the existing provisions in Article 10 redundant in their current form’ (UK Government). The Protocol is quickly moving centre state (May 2022) and Johnson desperately needs to find a solution to this ‘political problem’ to enable the restoration of devolved government to Northern Ireland. Tweaking it, however, will not satisfy Unionist politicians and abandoning it will anger the European Union, the USA and Ireland. Risks abound and there will not be any possibility for smoke and mirror obfuscations.

**References**

Sam Ashworth-Hayes and H. Dixon, 2019. ‘We lose control of much of our state aid policy’, at <https://infacts.org/surrender-deal-gives-eu-control-of-much-state-aid-policy/> (accessed 19 February 2020)

Bernhard Leighton Paisner, 2018. Written evidence submitted to the House of Lords European Union Committee, 2018. Brexit , Competition and State Aid, 12th report of 2017-18 sessions, 2nd February and at <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/67/6702.htm> (accessed 12 September 2021).

Jonathan Branton, Alexander Rose and Alex Easton, 2022. The Subsidy Control Act 2022 – Legislation to create a UK statutory State Aid regime receives Royal Assent, UK State Law Association, 11 May <https://uksala.org/the-subsidy-control-act-2022-legislation-to-create-a-uk-statutory-state-aid-regime-receives-royal-assent/> (accessed 12 May 2022).

Herbert Buch-Hansen and Angela Wigger, 2011. The Politics of European Competition Regulation: A critical political economy perspective, Routledge, London.

Emilio Casalicchio, 2020. Britain grapples with post Brexit state aid riddle, Politico, 10th September at <https://www.politico.eu/article/britain-grapples-with-post-brexit-state-aid-riddle/>

Michelle Cini, 2011. ‘The soft law approach: Commission rule making in the EU state aid regime’, Journal of European Public Policy, 8(2), 192-207.

Michelle Cini and Lee McGowan, 2008. Competition Policy in the European Union, Palgrave MacMillan, London, 2nd edition.

Nicholas Crafts, 2017. Brexit and State Aid, Oxford Review of Economic Policy, 33(1) 105-112.

Ariel Ezrachi, 2021. EU Competition Law: An analytical guide to the leading cases, Hart Publishing, 7th edition.

European Commission, 2020. Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, Official Journal of the EU, C34, 1-16, 31 January.

Foo Yung Chee, 2021. EU wants to extend looser state aid rules to virus hit companies until mid-2022, Reuters, 30. September at <https://www.reuters.com/world/europe/eu-wants-extend-looser-state-aid-rules-virus-hit-companies-mid-2022-2021-09-30/>

Groves, 2022. ‘Boris Johnson is ready to tear up the Northern Ireland Protocol as he prepares for a fresh clash with Brussels over post Brexit deal’, Daily Mail, j <https://www.dailymail.co.uk/news/article-10745267/Boris-Johnson-ready-tear-Northern-Ireland-protocol.html> (accessed 27 April 2022)

Herbert, Smith, Freehills, 2021. State Aid’s coming home: Government’s publishes details on new state subsidy control regime, 8. July at <https://www.herbertsmithfreehills.com/latest-thinking/state-aids-coming-home-government-publishes-details-of-new-uk-subsidy-control-regime> (accessed 24 September 2021).

House of Lords European Union Committee, 2018. Brexit , Competition and State Aid, 12th report of 2017-18 sessions, 2nd February and at <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/67/6702.htm> (accessed 12 September 2021).

Shelby D. Hunt, 1999. A general theory of competition: Resources, Competences, productivity, Economic Growth, Sage Publications, London.

Pablo Ibanez Colomo, 2019. The shaping of EU competition law, Cambridge University Press, Cambridge.

Giorgio Leali and Mari Eccles 2021. ‘Italy’s new airline cleared for take-off without Alitalia’s baggage’, Politico, 10. December at <https://www.politico.eu/article/alitalia-ita-airline-italy-eu-mario-draghi-margrethe-vestager-subsidies-state-aid/>

Sandra Marco Colino, 2019. Competition Law of the EU and the UK, Oxford, Oxford University Press.

Marley Morris, 2020. ‘The Agreement on the Future Relationship: A First Analysis’, Institute for Public Policy Research, December.

Marey Morris and Tom Kibasi, 2019. State Aid Rules and Brexit, Institute for Public Policy Research, January

Massimo Motta, 2004: Competition Policy: Theory and Practice, Cambridge University Press, Cambridge.

Lee McGowan and Stephen Wilks, 1995. ‘Competition Policy: The first supranational policy in the European Union’, European Journal of Political Research, 32(3),

Phedon Nicholaides, 2020. The Agreement on the Withdrawal of the UK from the EU and Euratom and its impact on the future application of state aid rules in the UK, Maastricht Journal of European and Comparative Law, June.

Oxera, 2018. Written evidence submitted to the House of Lords European Union Committee, 2018. Brexit , Competition and State Aid, 12th report of 2017-18 sessions, 2nd February and at <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/67/6702.htm> (accessed 12 September 2021). Oxera had used the European Commission’s own state aid scoreboard as a means of calculating these figures as well as materials from the World Bank.

George Peretz, 2022. ‘State Aid’ in Goods, Customs and the Single Market in the Protocol, edited by Christopher McCrudden, Cambridge, Cambridge University Press.

Nick Pimlott, 2021. It’s coming home: The Subsidy Control bill and the repatriation of state aid law, Fieldfisher, 19th July at . <https://www.fieldfisher.com/en/services/competition-and-consumer/competition-connect-blog/it-s-coming-home-the-subsidy-control-bill-and-the>

Claire Rice (2021). Article 16 of the Northern Ireland Protocol, UK in a Changing Europe, <https://ukandeu.ac.uk/explainers/article-16-of-the-northern-ireland-protocol/>

Maroc Schito, 2021. ‘The Politics of State Aid in the European Union: Explaining variation in aid allocation among member states’, Journal of Public Policy, 41(2),

Alison Sufrin and Brenda Jones, 2019. EU Competition Law: Text, Cases and Materials, Oxford University Press, Oxford, 7th editio277-306 at  <https://doi.org/10.1017/S0143814X2000001X>.

UK Government, 2021. New Subsidy system to support UK jobs and businesses, boost the economy and strengthen the union, 21 June at <https://www.gov.uk/government/news/new-subsidy-system-to-support-uk-jobs-and-businesses-boost-the-economy-and-strengthen-the-union>

UK Parliament, 2021. ‘Subsidy Control Bill and Government Response to the Consultation on Subsidy Control’, Written Questions, Answers and Statements, <https://questions-statements.parliament.uk/written-statements/detail/2021-06-30/hlws129> (accessed 22 April 2022). Subsidy Bill

UK Parliament, Subsidy Control Act 2022, 28th April 2011, <https://bills.parliament.uk/bills/3015> (accessed 29th April 2022)

UKSALA (UK State Aid law Association), 2018, written evidence submitted to the House of Lords European Union Committee, 2018. Brexit , Competition and State Aid, 12th report of 2017-18 sessions, 2nd February and at <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/67/6702.htm> (accessed 12 September 2021).

Bruce Wardhough, 2021. Subsidies and Competition in the EU-UK Trade and Cooperation Agreement: All Pain or no Gain,

Laurent Warzoulet, 2018. Governing Europe in a globalised world: Neoliberalsm and its alternatives in following the 1973 oil crisis, and specifically chapter 8 ‘The rise of European Competition Policy, Routledge, London.

Bruno Waterfield and Oliver Wright, 2022. ‘Boris Johnson urged to protect Northern Ireland Protocol’, The Times <https://www.thetimes.co.uk/article/boris-johnson-urged-to-protect-northern-ireland-protocol-ddg8nfmmt> (accessed 2 May 2022).

Stephen Wilks, 1999: In the Public Interest: Competition Policy and the Monopolies and Merger Commission, Manchester University Press, Manchester.

1. The term UK is used in its proper legal sense and when appropriate throughout this paper. While we often see references to the UK, Great Britain and Britain it is important to stress that these terms are not synonymous. The geographical territory for each term is distinct. The United Kingdom of Great Britain and Northern Ireland is the legal name of the state comprising the nations of England, Scotland, Wales and Northern Ireland. The term Britain refers to England and Wales only with the inclusion of Scotland making up Great Britain. This is very much about politics and identity and the necessity for such clear distinctions becomes evident in this paper. [↑](#footnote-ref-1)
2. For further details on the roles and tasks of this new ministerial position see government website at <https://www.gov.uk/government/ministers/minister-of-state-minister-for-brexit-opportunities-and-government-efficiency> (accessed 5 April 2022). [↑](#footnote-ref-2)
3. See for example, ‘The Labour case for a leave vote in the referendum’, The Guardian, 21 June 2016 at <https://www.theguardian.com/politics/2016/jun/21/the-labour-case-for-a-leave-vote-in-the-eu-referendum> (accessed 27 July 2021). [↑](#footnote-ref-3)
4. Indeed, t**he European Commission had responded positively to most British requests as occurred, for example, w**hen it approved support measures for building of the nuclear power station at Hinkley Point C in 2014 and when it sanctioned the use of subsidies following the British government’s decision to nationalise LloydsTSB during the financial crisis of 2007-09. [↑](#footnote-ref-4)
5. There are **185 articles in some 6 parts and accompanied by 3 protocols and nine annexes. The six parts of** the WA are as follows: One deals with Common provisions; two Citizens’ rights; Part three with separation divisions; part four with transitions provisions; Part five with financial provisions and part 6 with institutional and final provisions. The other two Protocols within the Withdrawal Agreement apply to the UK’s sovereign bases in Cyprus and Gibraltar respectively. [↑](#footnote-ref-5)
6. The current numbering of the Articles changed under the Treaty on the Functioning of the European Union and now are covered by Articles 101-110. [↑](#footnote-ref-6)
7. Full details of Article 107 can be found at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E107> [↑](#footnote-ref-7)
8. The European Commission (Commission, 3rd July 2013) launched an in depth investigation into this case for aid and concluded that the subsidy was compatible with the internal market, future viability of the firm and recognising the difficulties within the car market. Further details at <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_757> [↑](#footnote-ref-8)
9. The Irish governments was accused of allowing Apple to create its own customised variation of a tax avoidance scheme and in effect supplying the US giant with illegal state aid. Apple was ordered to pay €13 in Irish taxes. The Irish government immediately launched a challenge of the decision but lost. Full press release is <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923> [↑](#footnote-ref-9)
10. The GBER enables Member States to provide aid without going through the EU’s full notification process. However, aid givers must register the award of aid, or the scheme under which it operates within 20 days of its starting date. The GBER was revised in 2014 and 2017 to cover ports and airports and higher notification thresholds of measures supporting culture and sports/recreational infrastructure. It covers a range of economic sectors and different types of state aid. Most are related to the support of small and medium sized industries. [↑](#footnote-ref-10)
11. The European Commission poses a number of well-defined questions: Is the purpose of the aid to deliver a certain and acceptable policy objective; is such aid an appropriate policy instrument to reach this policy objective; will such aid alter the behaviour of the recipient and to what extent such aid distorts competition. [↑](#footnote-ref-11)
12. Outside the EU arena the UK Competition Act of 1998 and the Enterprise Act 2002 remain the bedrock of British competition policy. The provisions largely reflect the EU regime and Articles 101 (restrictive practices) and 102 (abusive monopolies) of the TEU. [↑](#footnote-ref-12)
13. Stated in a speech delivered at the Free University of Brussels on the 17. February 2020. See <https://www.bbc.co.uk/news/uk-politics-51538491> (accessed 18 February 2010). Frost, a British diplomat by profession, was appointed as the Head of Taskforce Europe in early 2020. Foster’s background is steeped in EU affairs. He had been Boris Johnson’s a special advisor on Europe when Johnson has been British Foreign Secretary (2016-18), previously having been the EU Director within the Foreign and Commonwealth Office, British Ambassador to Denmark (2006-08), Director for Strategy and Policy Planning in the FCO (2008-10) and then Director for Europe in the Department for Business, Innovation and Skills. [↑](#footnote-ref-13)
14. **Recourse to state aids was rarer in the UK than in the EU as a whole where subsidies were deemed to run anathema to neoliberal philosophy and simply distorted free market competition, only sustaining unprofitable and costly industries. The UK could certainly have been more adept at playing the system, had it been minded to do so. Yet the policy has its deterrents on both the left and the right of the political spectrum. The latter believes that it has empowered Brussels over issues of sovereignty like tax (E.G. Apple Inc decision) while the left has decried the Commission’s ability to thwart the government to support industries under stress (such as steelmaking) as a sign of unwanted neoliberal economics.**  [↑](#footnote-ref-14)
15. Boris Johnson has pledged to spend on major infrastructure projects. In part he has always been keen on these but in part needs to secure the continued support of many of those voters in Northern England who opted for the Conservative Party at the 2019 General Election. Some might see these schemes as a way of diverting attention from the trade negotiations as examples of real visible delivery. These schemes are costly and include the plans to build HS2 train service from London to Leeds and even assessments in building a 20 mile bridge between Northern Ireland and Scotland. [↑](#footnote-ref-15)
16. For details see UK Parliament, Subsidy Control Act 2022, 28th April 2011, <https://bills.parliament.uk/bills/3015> (accessed 29th April 2022) [↑](#footnote-ref-16)
17. At the time of writing these are subject to a public consultation which is due to finish in May 2022. [↑](#footnote-ref-17)
18. To avoid the need for pre-notification in the EU content all aid above the EU threshold is exempt from notification if it falls within the scope of the GNER. [↑](#footnote-ref-18)
19. According to the 2011 census 48% of Northern Ireland’s population were Protestant (largely unionist) and 45% were Catholic (largely nationalist). It is expected thar the 2021 census will show parity. [↑](#footnote-ref-19)
20. The leaders of the four main unionist parties (DUP, UUP, TUV and the PUP) signed a joint declaration in late September 2021 stating their continued ‘opposition towards the Northern Ireland Protocol, its mechanisms and structures …..and reaffirm our unalterable position that the Protocol must be rejected and replaced by new arrangements which fully respect Northern Ireland’s position as a constituent and integral part of the United Kingdom’. Quoted on BBC News, 28 September 2021 at <https://www.bbc.co.uk/news/uk-northern-ireland-58716994>. All four parties had campaigned for Brexit without grasping the possible scenarios of what this could manifest itself as in the case of Northern Ireland. [↑](#footnote-ref-20)
21. SAU has produced its own Beginner’s Guide to State Aid in 2017 and <https://www.economy-ni.gov.uk/publications/state-aid-beginners-guide-public-bodies-northern-ireland> [↑](#footnote-ref-21)