Some observations on the tax-related provisions in the EU – UK Trade and Cooperation Agreement

Alice Pirlot[1]

More than four years after the Brexit referendum of June 2016, the EU and the UK finally reached an agreement on post-Brexit trade. The deal was announced on the 24th of December and a draft of the EU – UK Trade and Cooperation Agreement (EU – UK TCA) was made public on the same day.[2] The official version of the agreement was published a few days later, on the 31st of December.[3] In many aspects, the EU – UK TCA resembles other trade agreements concluded in the past by the EU or the UK with third countries, such as the EU – Japan Economic Partnership agreement or the UK - Japan Comprehensive Economic Partnership Agreement. However, some other aspects of the EU - UK TCA significantly differ from other bilateral trade agreements.

This short note gives an overview of the provisions in the EU – UK Trade and Cooperation Agreement (TCA) related to tax matters.[4] The objective is to clarify the impact that the EU – UK TCA might have on the future of UK tax policy. In order to fully appreciate the effects of Brexit on tax matters, this analysis should be complemented by a discussion of the tax-related provisions in the withdrawal agreement, in particular those related to the application of VAT and excise duties in Northern Ireland.[5]

Tax-related provisions in the EU – UK TCA can be divided into two main categories: first, the "traditional" tax-related provisions that are generally included in trade agreements (the provisions on customs duties, internal taxes, export duties, carve-out for double tax treaties and tax exception); second, the "new" tax-related provisions that have not been included in other trade agreements previously concluded by the EU (the provisions on good tax governance, fiscal subsidy, sector-specific exemption, carbon pricing and administrative cooperation).

1. "Traditional" trade related provisions

Many tax-related provisions in the EU – UK TCA are similar, if not identical, to provisions of World Trade Law (WTO) agreements, such as the General Agreement on Tariffs and Trade

[1] Research Fellow (Law) at the Oxford University Centre for Business Taxation (Alice.Pirlot@sbs.ox.ac.uk). I would like to thank Professors Henri Culot, Michael Devereux, Roland Ismer and John Vella for their helpful comments on this article. The usual disclaimers apply.

[2] Draft 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, published on the European Commission's website on the 24th of December 2020 and updated on the 28th of December.

[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 444, 31 December 2020, pp. 14-1462.

[4] This note focuses on provisions that explicitly relate to tax matters. It does not address other general provisions, such as "common and institutional provisions" that might affect tax as any other policies (on the potential impact of the good faith provision on tax policy, see J. Schwartz, "Good Faith and Treaty Interpretation", Kluwer International Tax Blog, 2 January 2021.

[5] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 12 November 2019, OJ CI 384/1 and Protocol on Ireland/Northern Ireland.

(GATT), the General Agreement on Trade in Services (GATS) or to provisions of trade agreements previously concluded by the EU or the UK. This international trade law context should be used as a basis to analyse the tax-related provisions in the EU – UK TCA.

1.1. The provisions on customs duties, national treatment on internal taxation and export duties

As any other international trade agreement, one of the objectives of the draft EU – UK TCA is to facilitate trade in goods.[6] Among other commitments, this objective is realized by a commitment of the parties to "reduce" or "eliminate customs duties on imports".[7] Unsurprisingly the EU – UK TCA prohibits "customs duties on all goods originating in the other party", unless otherwise specified in the agreement[8].[9]

As in other trade agreements concluded by the EU or the UK, the EU – UK TCA incorporates the national treatment principle expressed in Article III of the GATT. With respect to tax matters, GATT Article III contains a non-discrimination principle similar to the one expressed in Article 110 of the TFEU.[10] However, neither GATT Article III nor the provision in the EU – UK TCA that incorporates it have direct effect under EU law. [11] This means that the protection against discrimination under the EU – UK TCA will not be as effective as under article 110 of the TFEU as individuals will not be able to rely on GATT article III (or the provision incorporating it in the EU – UK TCA) before national courts.[12]

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[6] Article GOODS.1 of Title I, Heading one, Part two of the EU – UK TCA: "The objective of this Chapter is to facilitate trade in goods between the Parties and to maintain liberalized trade in goods in accordance with the provisions of this Agreements". See also GATT article XXIV(5).

[7] See, for example, Article 2.4. of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11, 14 January 2017, pp. 23-1079 [hereafter CETA]; Article 2.6. of the Free Trade Agreement between the European Union and the Republic of Singapore, OJ L 294, 14 November 2019, pp. 3-755 [hereafter EU – Singapore FTA]; Article 2.8 (and Annex 2-A) of the Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27 December 2018, pp. 3-899 [hereafter EU - Japan Economic Partnership Agreement]; Articles 2.4 and 2.8 of the Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership [hereafter UK – Japan Comprehensive Economic Partnership]. For a critical discussion of the UK – Japan agreement, see T. Lyons, "Tax and the UK/Japan Comprehensive Economic Partnership Agreement" (2020) 5 BTR 605-608.

[8] See, for example, Article FISH.9, para. 1; Article FISCH.14, para. 1(a), (b) and para. 2(b)(c).

[9] Article GOODS.5 of Title I, Heading one, Part two of the EU – UK TCA: "Prohibition of customs duties". On the determination of which goods will be deemed to originate in the UK, see HM Revenue & Customs, Guidance, Rules of origin for goods moving between the UK and EU, 29 December 2020, available at https://www.gov.uk/government/publications/rules-of-origin-for-goods-moving-between-the-uk-and-eu. The determination of which goods originates in the UK has already led to many controversial discussions. See, e.g., P. Foster, A. Beesley & S. Fleming, "Pan-EU food supply chains hit by Brexit trade deal", 6 January 2012, Financial Times.

[10] For a comparison of these two provisions, see Part III of the following book S. E. Gaines, B. Egelund Olsen & K. Engsig Sørensen (eds.), *Liberalising Trade in the EU and the WTO* (CUP Cambridge Books Online 2012). See also P. Demaret and R. Stewardson, "Border Tax Adjustments under GATT and EC Law and General Implications for Environmental Taxes" (1994) 28(4) Journal of World Trade pp. 5-65.

[11] See Article COMPROV.16 (Private rights) under title I, Part one of the EU – UK TCA: "(…) nothing in this Agreement (…) shall be construed as (…) permitting This Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties". See also S. van Thiel & M. Lamensch, "Possible Consequences of Brexit in the Area of Indirect Taxation: Why Prime Minister May Talks about a Hard Brexit, but Really Needs a Soft Brexit!" (2018) World Tax Journal 3-41, at p. 34. On the direct effect of free trade agreements under EU law, see P. Eeckhout, "Future trade relations between the EU and the UK: options after Brexit" (2018) Study requested by the European Parliament's Committee on International Trade, p. 16; A. Semertzi, "The preclusion of direct effect in the recently concluded EU free trade agreements" (2014) 51(4) Common Market Law Review 1125-1158.

[12] See also van Thiel & Lamensch, *supra* n. 11, at p. 34.

In the same way as customs duties on imports, duties on exports are considered as restrictions to trade.[13] This explains why many trade agreements[14], including the EU – UK TCA, restrict the use of export duties, taxes or other charge imposed on, or in connection with, the exportation of goods.[15]

> Article GOODS.6 of the EU – UK TCA states as follows:
> 1. *A Party may not adopt or maintain any duty, tax or other charge of any kind imposed on, or in connection with, the exportation of a good to the other Party; or any internal tax or other charge on a good exported to the other Party that is in excess of the tax or charge that would be imposed on like goods when destined for domestic consumption.*

The EU – UK TCA also includes a protocol on mutual administrative assistance in customs matters. Similar agreements have been concluded by the EU with other countries, including Canada, China, India, Japan, the United States and Norway.[16]

1.2. Carve-out for double tax conventions

Trade agreements often clarify that their provisions, usually those on non-discrimination, do not apply to double tax treaties. The EU – UK TCA follows this approach.

> Paragraph 1 of Article EXC.2[17] states as follows:
> *1. Nothing in Titles I to VII, Chapter four [Energy and raw materials] of Title VIII, Titles IX to XII of Heading One of Part Two or Heading Six [Other provisions] of Part Two shall affect the rights and obligations of either the Union or its Member States and the United Kingdom, under any tax convention. In the event of any inconsistency between this Agreement and any such tax convention, the tax convention shall prevail to the extent of the inconsistency. With regard to a tax convention between the Union or its Member States and the United Kingdom, the relevant competent authorities under this Agreement and that tax convention shall jointly determine whether an inconsistency exists between this Agreement and the tax convention.*

Recent trade agreements concluded by the EU and the UK with third countries include identical or similar provisions.[18]

Inconsistency between trade agreements and tax agreements could arise for many reasons. For example, the EU – UK TCA provides that investors, services and service suppliers of each parties should not be treated less favourably than investors, services and service suppliers of a third country.[19] A double tax treaty concluded between the UK and a third country would diverge from this non-discrimination principle – called the most-favoured-nation principle

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[13] See Article XXVIII bis, para. 1 of the GATT which recognises the importance of negotiations directed to the "substantial reduction of the general level of tariffs and other charges on imports and *exports* (…)". See also I. Espa, "WTO disciplines on export duties", in *Export Restrictions on Critical Minerals and Metals, Testing the Adequacy of WTO Disciplines* (2015 CUP).

[14] See, for example, Article 2.12 of the UK – Japan Comprehensive Economic Partnership.

[15] See Article 2.7 of the EU - Singapore FTA; Article 2.12 of the EU - Japan Economic Partnership Agreement.

[16] European Commission, Taxation and Customs Union, International Customs Co-operation and Mutual Administrative Assistance Agreements, available at https://ec.europa.eu/taxation_customs/business/international-affairs/international-customs-cooperation-mutual-administrative-assistance-agreements_en#heading_1

[17] Article EXC.2, title XII (exceptions), in Heading One, Part two of the EU – UK TCA.

[18] See, for example, Article 1.4, paras. 3 and 4 of the EU – Japan Economic Partnership Agreement; 16.6 para. 2 of the EU – Singapore Free Trade Agreement; Article 28.7, paras. 2, 3 and 6 of the CETA. See also Article 1.4., paras. 3 and 4 of the UK – Japan Comprehensive Economic Partnership.

[19] See Articles SERVIN.2.4(1) and SERVIN 3.5(1) in Title II (services and investment), Heading one, Part two of the EU – UK TCA.

under WTO law - if it leads to a better tax treatment for the investors or service suppliers from this third country. Therefore, the EU – UK TCA indicates that the most-favourable treatment it grants to EU and UK investors, services and service suppliers does not extend to benefits resulting from double tax treaties.[20] This is in line with GATS general practice, which provides for an exception to the most-favoured-nation principle when "the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound".[21]

1.3. Tax exception

Another common tax-related provision in trade agreements is aimed at clarifying that the agreement will not be interpreted as preventing the adoption of tax measures that "aim at ensuring the equitable or effective imposition or collection of direct taxes".[22] Such provision has also been included in the EU – UK TCA, largely replicating the language of the GATS general exception.[23]

> Paragraph 3 (a) of Article EXC.2[24] states as follows:
> *3. Subject to the requirement that tax measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade and investment, nothing in Titles I to VII, Chapter four [Energy and raw materials] of Title VIII, Titles IX to XII of Heading One of Part Two or Heading Six [Other provisions] of Part Two shall be construed to prevent the adoption, maintenance or enforcement by a Party of any measure that:*
> *(a) aims at ensuring the equitable or effective[69] imposition or collection of direct taxes;*

Moreover, the EU – UK TCA tax exception provision protects tax measures that distinguish "between taxpayers, who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested".[25] Such provision is also part of other trade agreements concluded by the EU.[26] Its language is very similar to part of article 65 of the TFEU.

2. New tax-related provisions

Although many tax-related provisions in the EU – UK TCA are based on a similar wording as provisions commonly found in trade agreements concluded by the EU and the UK with third countries, the EU – UK TCA also includes a number of provisions that can be described as "unique" in that they have not been included in any other trade agreements concluded by the EU or the UK so far.

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[20] See Articles SERVIN.2.4(3)(a) and SERVIN 3.5(2)(a) in Title II (services and investment), Heading one, Part two of the EU – UK TCA. See also Article EXC.2, para. 2. A similar provision is found in article 8.9, para. 3(a) and article 8.17, para. 2(a) of the UK – Japan Comprehensive Economic Partnership.

[21] Article XIV(e) of GATS.

[22] See, for example, Article 8.62(f) of the EU – Singapore Free Trade Agreement; Article 1.4, para. 6 and Article 8.3., para. 2 (d) of the EU – Japan Economic Partnership Agreement; Article 28.7, para. 4(d) of the CETA; Article 1.4., para. 6 and Article 8.3, para. 2 (d) of the UK – Japan Comprehensive Economic Partnership.

[23] See GATS XIV(d). Note that the tax exception provision in the EU – UK TCA has a much broader scope of application than the GATS, which is limited to trade in services and only cover violation of the national treatment principle.

[24] Article EXC.2, in title XII (exceptions), Heading one, Part two of the EU – UK TCA.

[25] Article EXC.2, para. 3, (b), in title XII (exceptions), Heading one, Part two of the EU – UK TCA.

[26] See Article 1.4, para. 6 of the EU – Japan Economic Partnership Agreement; Article 28.7, para. 1 of the CETA.

2.1. Provisions on good tax governance

First, the EU – UK TCA explicitly refers to international tax cooperation and international tax standards in its title on "level playing field for open and fair competition and sustainable development". These references indicate that the EU and the UK consider these international tax standards to be equally important as other international standards mentioned in trade agreements, such as labour and environmental standards.

To this author's knowledge, no other trade agreement includes a chapter on taxation as part of its title on sustainable development.[27] The EU – UK TCA seems to be the first trade agreement including a provision on "good (tax) governance" with references to "the global standards on tax transparency and exchange of information and fair tax competition", the "OECD Base Erosion and Profit Shifting (BEPS) Action Plan" and the "OECD minimum standards".[28] Moreover, the EU – UK TCA is the first agreement concluded by the EU to contain a provision requiring parties not to "weaken or reduce the level of protection provided for in its legislation (…) in relation to international tax standards".[29]

> Article 5.1. on Good governance states as follows:
> *The Parties recognise and commit to implementing the principles of good governance in the area of taxation, in particular the global standards on tax transparency and exchange of information and fair tax competition. The Parties reiterate their support for the OECD Base Erosion and Profit Shifting (BEPS) Action Plan and affirm their commitment to implementing the OECD minimum standards against BEPS. The Parties will promote good governance in tax matters, improve international cooperation in the area of taxation and facilitate the collection of tax revenues.*
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> Article 5.2. on Taxation Standards states as follows:
> *1. A Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period below the level provided for by the standards and rules which have been agreed in the OECD at the end of the transition period, in relation to:*
> *(a) the exchange of information, whether upon request, spontaneously or automatically, concerning financial accounts, cross-border tax rulings, country-by-country reports between tax administrations, and potential cross-border tax planning arrangements;*
> *(b) rules on interest limitation, controlled foreign companies and hybrid mismatches.*
> *2. A Party shall not weaken or reduce the level of protection provided for in its legislation at the end of the transition period in respect of public country-by-country reporting by credit*

[27] Note, however, that the EU – Singapore Free Trade Agreement already contained a reference to the "internationally agreed Standard for transparency and exchange of information for tax purposes, as spelled out in the 2017 OECD Model Tax Convention on Income and on Capital" (see Article 8.50, para. 4: "Each Party shall use its best endeavours to ensure that the Basel Committee's 'Core Principles for Effective Banking Supervision', the standards and principles of the International Association of Insurance Supervisors and the International Organisation of Securities Commissions' 'Objectives and Principles of Securities Regulation', and the internationally agreed Standard for transparency and exchange of information for tax purposes, as spelled out in the 2017 OECD Model Tax Convention on Income and on Capital, are implemented and applied in its territory.")

[28] See Article 5.1. and 5.2. in Chapter five (Taxation), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA. See also Article COMPROV.11, para. 2 on Global cooperation on issues of shared economic, environmental and social interest (in Title I, Part one of the EU – UK TCA).

[29] Article 5.2. in Chapter five (Taxation), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA. See also the joint political declaration on countering harmful tax regimes, which replicates parts of the text of the Code of Conduct (Council of the European Union, Code of Conduct, 23 November 1999, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/primarolo_en.pdf).

institutions and investment firms, other than small and non-interconnected investment firms.

Provisions on the "right to regulate and level of protection" are now common in trade agreements concluded by the EU and other countries, such as the United States, but they have never been adopted in relation to tax.[30] Rather, they refer to labour and environmental law standards and are often included in a chapter on "trade and sustainable development". For example, Article 16.2 (2) in Chapter 16 on "Trade and Sustainable Development" in the EU – Japan Economic Partnership Agreement states as follows: "The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations".

In general, "sustainable development" chapters in trade agreements concluded by the EU are subject to an *ad hoc* institutional set up and specific procedures in case of disagreement between the parties, including the possibility to hold consultations and refer the matter to a panel of experts.[31] Moreover, the EU has recently introduced a new complaints mechanism open to EU citizens, EU Member States, EU companies, EU NGOs and other EU stakeholders, allowing them to submit a complaint in relation to violations of commitments linked to trade and sustainable development chapters.[32] A "Chief Trade Enforcement Officer", appointed in July 2020, will supervise this new system.[33]

Interestingly, the taxation chapter in the EU – UK TCA sustainable development title will neither be subject to the general dispute settlement system[34] nor to the *ad hoc* procedures that apply for environmental and labour law standards.[35] Instead, disputes related to the taxation chapter will be resolved by the "Partnership Council", which is one of the main

[30] For an analysis of environmental and labour law provisions in free trade agreements, see, among others, L. Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" (2013) 40(4) Legal Issues of Economic Integration 297-314; L. Bartels, "Social Issues: Labour, Environment and Human Rights", in S. Lester, B. Mercurio and L. Bartels (eds.), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (CUP 2015), 364-384; M. Condon, "The Integration of Environmental Law Into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments" (2015) 33 Virginia Environmental Law Journal 102-152; M.-C. Cordonier Segger, "Sustainable Development in Regional Trade Agreements", in L. Bartels and F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (2006 OUP) 313-339; W.Th. Douma, "The Promotion of Sustainable Development through EU Trade Instruments" (2017) 28(2) European Business Law Review 197-216; G. Marín Durán, "Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues" 2020(57) Common Market Law Review 1031-1068; H. Schommer, "Environmental Standards in US Free Trade Agreements: Lessons from Chapter 11" (2007) 8(1) Sustainable Development Law & Policy.

[31] See, for example, Articles 24.13 to 24.16 of the CETA; Articles 16.13-16.19 of the UE – Japan Economic Partnership Agreement; Articles 12.15 – 12.17 of the UE – Singapore Free Trade Agreement. The EU – Cariforum Agreement is the only agreement which does not prevent the Parties from relying on the ordinary dispute settlement procedure (Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 30 October 2008, OJ L 289. See Marín Durán, *supra* n. 30, note 1214, p. 1041.

[32] European Commission, DG Trade, Access2Markets, single entry point for complaints about Trade and Sustainable Development non-compliance, available at https://trade.ec.europa.eu/access-to-markets/en/contact-form?type=COMPL_TSD_GSP.

[33] European Commission Webpage on the Chief Trade Enforcement Officer, available at https://ec.europa.eu/trade/trade-policy-and-you/contacts/chief-trade-enforcement-officer/

[34] See Article 5.3 in Chapter five (Taxation), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

[35] See Article 9.1.(1) (to be found under Chapter nine (Horizontal and institutional provisions), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA) which implicitly indicates that Chapter 5 is not part of the Chapters that can be subject to the horizontal and institutional provisions that apply to the labour and environmental chapters that are part of Title XI.

institutional body established by the EU – UK TCA. [36] Since the taxation chapter in the EU – UK TCA is to be found in title XI on "Level playing field for open and fair competition and *sustainable development*", the new system of complaint should nevertheless be available for violations of the provisions on good tax governance and tax standards.

The impact of environmental and labour in sustainable development chapters has been questioned in the literature.[37] First, in some cases, it will be difficult to determine that a Party is violating its commitment not to relax or lower the level of protection provided by its environmental, labour and, in the case of the EU – UK TCA, tax legislations.[38] Second, even when evidence of a violation can be reported, trade agreements do not provide for the possibility to apply sanctions. This has led some authors to recommend the adoption of a sanctions-based approach.[39] So far, however, the EU has refused to move towards a sanctions-based model. Therefore, the sustainable development chapters should primarily be seen as way for the EU to reinforce its dialogue with trade partners on sensitive sustainability issues and "strengthen the existing multilateral governance structures"[40], including international labour convention, multilateral environmental agreements and, in the case of the EU – UK TCA, international tax standards agreed in the OECD.

The impact of the "taxation chapter" as part of the EU – UK TCA should be understood in this context. Although its impact is likely to remain limited[41], it should not be disregarded. According to the UK government, "there are no provisions [in the "taxation chapter"] constraining our domestic tax regime or rates".[42] This statement should be nuanced. The UK government is right that the taxation chapter does not add any substance to the UK commitments in terms of standards and rules agreed in the OECD. However, the taxation chapter provides an additional legal basis for these commitments. The taxation chapter also carries a symbolic value, which is in line with the EU Good Tax Governance Agenda. Article 5.1. on "Good Governance" of the EU – UK TCA almost reproduces the EU standard provision on good tax governance for agreements with third countries issued by the Council of the European Union in June 2018.[43] From this perspective, the EU – UK TCA could pave the way to the integration of similar provisions in future trade agreements concluded by the EU.

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[36] Article INST.10, para. 3, in Chapter 1, title I, Part six (Dispute settlement and horizontal provisions) of the EU – UK TCA. The Partnership Council is established by Article INST.1, in Title III of Part one of the EU – UK TCA.

[37] See European Parliament, Workshop on The future of Sustainable Development Chapters in EU Free Trade Agreements, 2018; M. Bronckers and GI. Gruni, "Taking the Enforcement of Labour Standards in the EU's Free Trade Agreement Seriously" (2019) 56 Common Market Law Review 1591-1622; A. Marx, F. Ebert, N. Hachez and J. Wouters, "Dispute Settlement in the Trade and Sustainable Development Chapters of EU Trade Agreements" (2017) study by the Leuven Centre for Global Governance Studies. For a critical analysis of a sanction-based regime, see Marín Durán, *supra* n. 30.

[38] See A. Pirlot, "La dimension environnementale des accords de libre-échange une perspective européenne", forthcoming in *Revue internationale de droit économique.*

[39] See Bronckers and Gruni*, supra* n. 37; Marx et al., *supra* n. 37.

[40] See Non-paper of the Commission services, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 11 July 2017, p. 4; Non-paper of the Commission services, Feedback and way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreement, 26 February 2018. See also, on the EU's "promotional approach", Marín Durán, *supra* n. 30*,* pp. 1054-1058.

[41] According to some MEPs, this is also due to the fact that the scope of the taxation chapter is too limited. See Sam Fleming and Philip Stafford, "EU urged to push UK harder on tackling tax avoidance and money laundering", 5 January, Financial Times.

[42] UK, Agreements reached between the United Kingdom of Great Britain and Northern Ireland and the European Union, Summary Explainer, para. 90.

[43] Council conclusions on the EU standard provision on good governance in tax matters for agreements with third countries, 6 June 2018, OJ C 193, p. 5. See paragraph 4: "RECOGNISES therefore the need to include in relevant agreements to be concluded with third countries by the Union and its Member States, without prejudice to their respective competences, the updated provision on good governance in the tax area and considers the following text to be appropriate in this respect: 'The

2.2. Provisions on fiscal subsidy

As other trade agreements, the EU – UK TCA explicitly refers to WTO Agreement on Subsidies and Countervailing Measures (ASCM)[44] and its chapter on subsidy control contains language that is very similar to this agreement.[45]

However, the chapter on subsidy in the EU - UK TCA is much longer than in other agreements and even contains a definition of fiscal subsidy, which is based on the notion of fiscal state aid. Indeed, the agreement includes similar language to the one used in the 1998 Commission notice on State aid in the context of direct business taxation and the 2016 Commission notice on state aid.[46] Moreover, the EU – UK TCA affirms its priority over the WTO Agreement and other international agreement when it comes to the application of remedial measures.[47] This is important for tax matters. Although there are similarities between the provisions of the ASCM and EU State aid law, the role of the ASCM and EU State aid law in tax matters has been significantly different. At the WTO level, there has not been any major tax disputes similar to the recent State aid cases involving big multinationals.[48]

The EU – UK TCA defines the concept of "subsidy" by reference to four main criteria: a subsidy means financial assistance which (i) arises from the resources of the Parties (including the forgoing of revenue that is otherwise due); (ii) confers an economic advantage on one or more economic actors; (iii) is specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services; and (iv) has, or could have, an effect on trade or investment between the Parties.[49] These criteria largely replicate the conditions of application of Article 107 of the TFEU[50] as well as the

Parties recognise and commit themselves to implement the principles of good governance in the tax area, including the global standards on transparency and exchange of information, fair taxation, and the minimum standards against Base Erosion and Profit Shifting (BEPS). The Parties will promote good governance in tax matters, improve international cooperation in the tax area and facilitate the collection of tax revenues.'".

[44] See Article GOODS.17 (Trade remedies), in chapter 1, title I, Heading one, Part two of the EU – UK TCA.

[45] See Article 3.5, export subsidies, para. 8 and 12, in Chapter 3 (Subsidy control), in Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

[46] Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10 December 1998; 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 July 2016, pp. 1-50.

[47] Article 3.12, para. 13, in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two: "A Party shall not invoke the WTO Agreement or any other international agreement to preclude the other Party from taking measures pursuant to this Article, including where those measures consist in the suspension of obligations under this Agreement or under a supplementing agreement".

[48] Among the tax disputes that have been analysed under the ASCM, see WTO, Indonesia – Certain Measures Affecting the Automobile Industry, Panel Report, 2 July 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; WTO, United States – Tax Treatment for "Foreign Sales Corporations", Panel Report, 8 October 1999, WT/DS108/R and Appellate Body Report, 24 February 2000, WT/DS108/AB/R; WTO, Canada – Certain Measures Affecting the Automotive Industry, Panel report, 11 February 2000, WT/DS1139/R, WT/DS142/R and Appellate Body Report, 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/4; WTO, Brazil – Certain Measures Concerning Taxation and Charges, Panel report, 30 August 2017 , WT/DS472/R, WT/DS497/R and Appellate Body Report, 13 December 2018 WT/DS472/AB/R, WT/DS497/AB/R; WTO, United States – Conditional Tax Incentives for Large Civil Aircraft, Panel Report, 28 November 2016, WT/DS487/R and Appellate Body report, 4 September 2017, WT/DS487/AB/R.

[49] Article 3.1.(b), in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

[50] Article 107, para. 1 of the TFEU states as follows: "1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

conditions applicable under the ASCM for actionable subsidies.[51] However, the condition on "potential trade effects" is much less strict than under the ASCM, which requires evidence of adverse effects to the interest of other Members.[52] Moreover, the EU – UK TCA goes a step further than the ASCM by clarifying the conditions under which a tax measure will be considered specific.[53] The ASCM also contains a few references to tax measures, explaining which ones should not be assimilated to a subsidy[54] and which one should be deemed a prohibited subsidy[55], but it does not explain how a generic tax measure should be assessed in order to determine whether it amounts to a subsidy.[56]

Under the EU - UK TCA, a tax measure will be considered specific under two conditions: first, "certain economic actors obtain a reduction in the tax liability that they otherwise would have borne under the normal taxation regime" and, second, "those economic actors are treated more advantageously than others in a comparable position within the normal taxation regime".[57] In line with the Commission Notice on the notion of State aid, the EU – UK TCA indicates that "a normal taxation regime is defined by its internal objective, by its features (such as the tax base, the taxable person, the taxable event or the tax rate) and by an authority which is autonomous institutionally, procedurally, economically and financially and has the competence to design the features of the taxation regime".[58] Unless these two conditions are fulfilled, a tax measure should not be considered specific and, therefore, will not fall under the subsidy recovery Chapter of the EU – UK TCA.

Even if these two conditions are fulfilled, a tax measure will nevertheless be regarded as "not specific" if it can be justified. The EU – UK TCA mentions two grounds of justifications, which – again – echo the 2016 Commission notice on the notion of State aid.[59] First, a tax measure will "not be regarded as specific if it is justified by principles inherent to the design of the general system" (such as the "need to fight fraud or tax evasion, administrative manageability, the avoidance of double taxation, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, or the need to respect taxpayers' ability to pay").[60] Second, special purpose levies will "not be regarded as specific if their design is required by non-economic public policy objectives, such as the need to limit the negative impacts of

[51] Under the ASCM, the condition related to the effects on trade does not apply to prohibited subsidies (export subsidies and domestic content subsidies).
[52] Article 5 of the ASCM.
[53] See Article 3.1., para 2, (a), (b), (c) in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.
[54] See footnote 1 of the ASCM, which indicates that "the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed a subsidy". See also Article 2.2. of the ASCM and Annex II.
[55] See Annex I, (e), (f), (g), (h) of the ASCM.
[56] The case-law only gives partial indication as to how this assessment should take place. See, among other cases, WTO, Appellate Body Report, Brazil – Taxation, paras. 5.167 – 5.168.
[57] Article 3.1., para. 2 (a), in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.
[58] See the 2016 Commission notice, paras. 132 to 134.
[59] Article 3.1., para 2, (b) and (c) in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA. See the 2016 Commission notice, paras. 136 and 139. It is worth noting that the text of the ASCM does not include any similar provision.
[60] Article 3.1., para 2, b) in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

certain activities or products on the environment or human health, insofar as the public policy objectives are not discriminatory".[61]

It is difficult to predict the impact of these provisions on the UK's tax policy. On the one hand, the incorporation of specific subsidy rules in the EU – UK TCA suggests that UK fiscal subsidies might still be challenged in a similar way as they have been in the past under EU state aid law. On the other hand, the procedural and institutional mechanisms of the EU – UK TCA largely differ from the ones applicable to State aid law. If the EU considers that a UK tax measure amounts to a subsidy that "causes (or there is a serious risk that it will cause) negative effects on trade or investment", its main option will be to unilaterally adopt remedial measures.[62] This is similar to what would normally happen under the ASCM when a State decides to adopt countervailing duties.[63]

2.3. Sector-specific tax exemptions: the example of the aviation sector[64]

Unlike other trade agreements concluded by the EU, the EU – UK TCA includes detailed provisions on aviation, including air transport and aviation safety. Usually, these provisions are included in a separate agreement, either a bilateral agreement between a Member State and the third country (sometimes modified by a horizontal agreement negotiated at the EU level) or a comprehensive agreement concluded between the EU, the Member States and the third country.[65]

As in other air services agreements, a provision in the EU – UK TCA requires the exemption of equipment, fuel, lubricants, consumable technical supplies and other items used for international air transport, on the condition that they remain on board the aircraft.[66] This provision is very common and follows the approach of Article 24 of the Convention on International Civil Aviation ("Chicago Convention").[67]

In addition to this provision, the EU – UK TCA requires the exemption, on a reciprocal basis, of the supply of aircraft stores, lubricants and consumable technical supplies under certain condition.[68] This is also in line with general practice in air services agreements, which follows the recommendations of the International Civil Aviation Organisation (ICAO).[69] However, moving away from the ICAO recommendations, the EU – UK TCA does not exempt the supply

[61] Article 3.1., para 2, c) in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.
[62] Article 3.12 in Chapter 3 (Subsidy control), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.
[63] Article 19 of the ASCM.
[64] The EU – UK TCA also includes tax-related provisions in relation to road transport. See Article ROAD.12: Taxation in title I, Heading three, Part two of the EU – UK TCA.
[65] See European Commission, Mobility and Transport, External Aviation Policy – Horizontal Agreements, available at https://ec.europa.eu/transport/modes/air/international-aviation/external-aviation-policy/external-aviation-policy-horizontal_en
[66] Article AIRTRN.14 (fiscal provision), para. 1, in title I, Heading two, Part two of the EU – UK TCA.
[67] Convention on International Civil Aviation done at Chicago on the 7th of December 1944.
[68] Article AIRTRN.14 (fiscal provision), para. 2, in title I, Heading two, Part two of the EU – UK TCA.
[69] ICAO's Policies on Taxation in the Field of International Air Transport, Approved by the Council on 24 February 1999, 3rd edtn (2000), Doc. 8632, Council Resolution on Taxation of International Air Transport, Commentary on Council Resolution, Taxes on fuel, lubricants or other consumable technical supplies, para. 2, available at https://www.icao.int/publications/Documents/8632_3ed_en.pdf

of fuel.[70] This is a crucial point, given the plan of the European Commission to review the energy tax directive, which might include a revision of the current tax exemptions for aviation fuel.[71]

2.4. Carbon pricing

The EU – UK TCA contains a provision on carbon pricing, which requires the parties to "have in place an effective system of carbon pricing as of 1 January 2021".[72] Although this provision does not directly concern taxation, it might have an impact on the UK energy tax policy.

Carbon pricing is commonly achieved through emissions trading schemes (ETS), carbon taxes or charges or a mix of both.[73] In anticipation of Brexit, the UK considered two main options to transition out of the EU ETS: a UK ETS and a carbon emissions tax.[74] In December 2020, the UK made clear that a UK ETS would replace the EU ETS on 1 January 2021.[75] This suggests that carbon pricing will primarily take place via an ETS. Nevertheless, the UK, like some EU Member States, will also rely on tax measures as part of their carbon pricing strategy.[76]

The carbon pricing provision in the EU – UK TCA does not specify which instruments the parties should prefer to set up "an effective system of carbon pricing". However, these instruments should "cover greenhouse gas emissions from electricity generation, heat generation, industry and aviation".[77] Moreover, carbon pricing policies should "uphold the level of protection" of the climate policies that were in place at the end of the transition period.[78] It implies that the UK will have to maintain carbon prices as high as it had before 2021. In practice, this could mean that the UK will have to keep its carbon price support rate (which was adopted on top of the EU ETS to guarantee a sufficiently high carbon price).

2.5. Administrative cooperation and mutual assistance

The EU – UK TCA includes a protocol on administrative cooperation and combating fraud in the field of value added tax and on mutual assistance for the recovery of claims relating to tax and duties.[79] No similar provisions are found in other trade agreements concluded by the EU.

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[70] Article AIRTRN.14 (fiscal provision), para. 2 (c), in title I, heading two, part two of the EU – UK TCA.

[71] See Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, 11 December 2019, COM(2019) 640 final, section 2.1.5. See also European Commission, Commission Staff Working Document, Evaluation of the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, 11 September 2019, SWD(2019) 329 final, pp. 17-18.

[72] Article 7.3 (carbon pricing), in Chapter 7 (Environment and climate), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

[73] A. Pirlot, "Section 95 and Schedule 12: carbon emissions tax; Section 96: charge for allocating allowances under emissions reduction trading scheme" (2020) 4 BTR 490-497.

[74] *Ibid.*

[75] UK, Guidance. Participating in the UK Emissions Trading Scheme (UK ETS), 17 December 2020, available at https://www.gov.uk/government/publications/participating-in-the-uk-ets. See also Article 7.3 (carbon pricing), para. 6 that provides for the option of "linking" between the EU and UK schemes.

[76] For the UK, see the carbon price support rate introduced by Schedule 32 to the Finance Act 2012.

[77] Article 7.3, para. 2 (carbon pricing) in Chapter 7 (Environment and climate), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

[78] Article 7.3 (carbon pricing), paras. 3 and 5 in Chapter 7 (Environment and climate), Title XI (Level playing field for open and fair competition and sustainable development), Heading one, Part two of the EU – UK TCA.

[79] This protocol forms an integral part of the EU – UK TCA (see Article FINPROV.7, paras. 1 and 2 in part seven of the EU – UK TCA.). See also Article CUSTMS.19 in title I, Heading one, Part two of the EU – UK TCA.

However, the provisions of the EU – UK TCA are comparable to the ones in the agreement between the EU and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax.[80]

3. Conclusion

With the end of the Brexit transition period, one could think that the UK is no longer required to align its domestic tax policy to EU (tax) law requirements. This strong statement should, however, be nuanced. First, some aspects of EU tax law, in particular in relation to VAT and excise duties directives and regulations, remain relevant in Northern Ireland for the time being under the withdrawal agreement.[81] Second, UK tax policy will need to be aligned with the provisions of the EU – UK TCA.

As explained in this note, the EU – UK TCA contains several provisions on taxation, which might have an impact on the future of tax policy in the UK. This impact will certainly be more limited than the effect that EU law has on Member States' tax policy, but it should not be underestimated. Some of the tax-related provisions included in the EU – UK TCA are very similar to those included in recent free trade agreements or other international agreements concluded by the EU. Therefore, they are likely to have no different impact than those of other trade agreements concluded by the EU or the UK with third countries. Some other provisions, such as the "taxation chapter" and the "subsidy chapter" are truly unique, which makes it harder to anticipate their future impact.

[80] Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud and recovery of claims in the field of value added tax, 1 August 2018, OJ EU L 195/3. See also Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L 268, 12 October 2010, pp. 1-18.

[81] Protocol on Ireland/Northern Ireland, in particular Articles 8 and 10 and Annex 3.