IdPS Interdisciplinary Political Studies
Volume 8 Issue 1 / July 2022
ISSN 2039-8573 online
DOI: 10.1285/i20398573v8n1p223
Published by
Università del Salento
Department of Human and Social Sciences

RESEARCH ARTICLE

The EU-UK Trade and Cooperation Agreement

The Level Playing Field Issue

António GOUCHA SOARES

Universidade de Lisboa

Abstract

The Trade and Cooperation Agreement (TCA) was completed at the end of 2020 and governs the relationship between the European Union and the United Kingdom, as a third country. The most controversial issue during the negotiations of the TCA was the so-called level playing field, by which the EU wanted the UK to follow its rules and standards on labor and social areas, on environmental policy and on State aid. The European Union claims to be a global regulatory power, being able to extend its normative weight in the framework of trade agreements with other nations. When compared to recent preferential trade agreements, the TCA allows the EU to extend its own rules and standards in the areas covered by the level playing field, even if it was the trade-off for UK goods to benefit from a greater degree of access to the single market. In any case, the TCA can be seen as a step forward in the EU ability to spread its regulatory influence.

Keywords: Post-Brexit deal; European Union; level playing field; regulatory power; State aid

Introduction

After the withdrawal of the United Kingdom from the European Union both parties went on arduous negotiations to rule on their future relationship, with the UK acting as a third country. The post-Brexit deal, officially known as the Trade and Cooperation Agreement (TCA), was completed at the end of 2020 and came into force immediately after.

According to the European Commission, the TCA is at the forefront of modern and sustainable trade policy by upholding high standards regarding the protection of labor and social rules, environmental protection and the fight against climate change and also adding common provisions on the use of subsidies. [1] Besides, the post-Brexit arrangement goes beyond the new generation of EU trade agreements with third countries by providing zero tariffs and zero quotas on the commerce of goods, including farming and fishing products (D'Erman 2021, p.223).

Even if the Trade and Cooperation Agreement did not reproduce the level of economic integration that existed when the United Kingdom was an EU member state, the European Union announced the TCA as an unprecedented free trade deal, overseeing an ambitious

[1] European Commission 2020, *EU-UK Trade and Cooperation Agreement. A new relationship, with big changes*, viewed 8 April 2022, https://ec.europa.eu/info/sites/default/files/brexit_files/info_site/6_pager_final.pdf

CONTACT António Goucha Soares, agsoares@iseg.ulisboa.pt, at ISEG – School of Economics & Management, University of Lisbon, Portugal

cooperation on economic, social and environmental issues, along with a partnership for citizens' security and providing an embracing governance structure[2].

From the beginning of Brexit negotiations, the EU warned that any free trade agreement should be balanced and comprehensive, furthermore underscoring: 'It must ensure a level playing field, notably in terms of competition and State aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.' [3]

The making of trade agreements with third countries is a good opportunity to extend the territorial scope of EU rules and standards. The EU is generally presented as a global rule maker considering the ability to spread its normative influence. Yet, some studies show that the whole amount of European Union legal authority is less than suggested by the literature that portrays as EU as a global regulatory power.

The level playing field issue was at the center of the negotiations of the post-Brexit agreement. When at the end of the formal rounds of talks the EU and the UK were close to achieving a compromise on trade in goods, services and investment, social security coordination and civil nuclear cooperation, there still were persistent divergences on a subject of crucial importance for the EU: the level playing field subject. [4]

This article intends to explore the level playing field subject in the framework of the EU-UK Trade and Cooperation Agreement. It seeks to understand why this matter became a major issue on EU trade agreements, by examining what the level playing field is about, what its main political and economic purposes are and why the European Union was so resolute about it during the negotiations with the United Kingdom. It then analyses how the main areas dealt under the level playing field heading were settled in the post-Brexit deal, aiming to understand the degree of regulatory influence the EU was able to exercise with the TCA, compared to the outcomes achieved in recent preferential trade agreements.

The level playing field issue

The European Union plays a leading role in international economic relations, namely, in the areas of trade and development aid. In fact, external relations are a pillar in the making of the European bloc as a global actor. With the failure of the Doha Round multilateral negotiations, the United States and the European Union undertook a trade policy shift to make bilateral pacts, in which they found it easier to impose their preferences on technical rules regarding the production and marketing of goods, in exchange for access to their markets (Dehousse & Miny 2018, p. 2). The joint effect of some dozens of bilateral trade agreements signed since the beginning of the century allowed the European Union to export its regulatory corpus in the field of technical regulation to many countries (Larik 2017, p. 324). As a result, the Union is said to become a global rule maker, given its ability to set regulatory standards in a wide number of areas, such as product safety, environmental protection, food safety, public procurement, financial regulation and accounting (Bradford 2020, p. 21).

According to Anu Bradford, bilateral trade agreements are an instrument of a broader strategy that aims to affirm the European Union's ability to impose its preferences on the global regulation of the markets. In addition, the Union impetus on technical regulation in order to achieve the single market also benefits from its growing external dimension, due

[2] Idem.
[3] European Council, Guidelines, EUCO XT 20004/17 (2017), para. 20, viewed 2 November 2021, https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf
[4] European Commission 2020, Statement by Michel Barnier following Round 9 of negotiations for a new partnership between the European Union and the United Kingdom, STATEMENT/20/1817, viewed 2 November 2021, https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1817

to the size of the European market. Indeed, multinational companies tend to incorporate EU technical standards in their production processes and marketing methods, with the purpose of guaranteeing access to the single market – the market with the largest number of consumers, among developed countries (Bradford 2020, p. 2). Hence, those companies have an increased interest to put pressure on the agencies of their home countries, as well as on regulators from other markets where they do business, to adopt the regulatory standards settled by the European Union – triggering the so-called Brussels effect. In this way, the Union acquires the ability to regulate international markets unilaterally.

Beyond the effect that European technical regulation of the single market can achieve externally through the spread of EU standards operated by the action of transnational industries, the European Union makes use of some legal tools to increase the global use of its rules. The making of trade agreements with third countries, or with regional organizations, is the most valuable means of the Union strategy to extend the territorial scope of its technical standards (Bradford 2020, p. 68).

The European Union imposes a kind of regulatory conditionality to grant access to the single market for goods produced by third countries. The intensity of the conditions depends on the degree of economic approximation of those countries. In the case of preferential trade agreements, the European Union finds it easy to externalize its regulatory framework, due to the negotiation asymmetry with its partners. The Union opens the access to a market of almost five hundred million consumers, with high purchasing power. In exchange, it requires the contracting countries to adopt its regulatory standards. In fact, the growing number of bilateral trade deals leads the Union to apply a common typology of regulatory requirements in the provisions of the agreements.

In terms of effective outcomes, Young notes that in the area of preferential trade agreements the EU has greater influence with smaller partners with lower regulatory capacity than with larger commercial partners. Concerning those trade deals, the EU ambition tend to vary with the power of the partners, pursuing more ambitious results with least influential countries than with the most powerful nations (Young 2015, p.1245). However, the author refers that the whole extent of influence is less that what could be suggested by the view of the EU as global regulatory power.

It is worthwhile to also mention a critical analysis on the use of conditionality in the framework of EU trade agreements made by Sandrin & Hoffmann. Taking a post-structuralist scrutiny of the narrative on common values and norms shared across a diverse continent they consider the European Union "places itself in a superior level [...] dictating what others should do, since it has already 'discovered' a better way of doing things" (Sandrin & Hoffman 2018, p.10). In their opinion, the European Union intends to shape a paradigm in international relations, on the basis that it has settled the patterns for the new technical and industrial challenges. According to the same authors, the Union discourse and practice in the field of diplomacy is "infused with a sense of moral superiority" (Id., p. 13) vis-à-vis countries with which is negotiating trade and cooperation agreements. A situation that underlies the narrative developed by the Union when projecting itself as a regulatory model, embodying an advanced political entity. The Union believes to play a leading role on global governance, as opposed to its contracting nations. Hence, the Union claims authority to lay down its own rules, as a legitimate producer of regulatory standards with international application.

If the rationale for the EU's external strategy could be reported to a worldview based on the leading role played by European cultural and political values in the evolution of global affairs, the economic justification for adding an extra-territorial dimension to its normative model is more prosaic. For the Union, the goal of achieving third countries' regulatory alignment with EU standards aims to prevent situations of competitive disadvantage for its

companies. Thus, imported products should be exposed to the same social and environmental requirements as goods manufactured in the Union. Likewise, goods exported by European nations should compete on equal terms in foreign markets. Hence, the main purpose for externalizing the EU regulatory system is to reduce the adjustment costs of European companies in the framework of international trade flows (Bradford 2020, p. 23).

In the scope of EU trade policy, regulatory alignment with European standards is an instrument for protecting the integrity of the internal market. In fact, fearing that countries with greater access to the single market could provide subsidies to their companies, or reduce production costs through less demanding social and environmental standards, the Union has settled a regulatory alignment strategy aimed at ensuring fair competition between European undertakings and companies from third countries - referred to in EU jargon as the level playing field issue.

The matching of production costs in third countries aims to break off competitive advantages from goods produced in those countries when compared to similar products manufactured in the European Union. Thus, the aim of ensuring a level playing field ultimately consists of a hidden attempt to implement EU protectionism. Free trade agreements are an instrument for the liberalization of international trade, and the Union has entered into such agreements with third countries on a regular basis. However, it takes advantage of its greater bargaining power, derived from the size of the single market, to introduce safeguard clauses in the content of those agreements (Barnard, 2020). Indeed, the level playing field can be seen as an understatement of EU trade defense strategy.

Post-Brexit negotiations

The issue of regulatory alignment was at the center of the EU strategy regarding the conditions to be observed by the United Kingdom in order to be granted access to the single market, on zero tariffs and zero quotas basis (Eeckhout 2021, p.14). According to the Union, the post-Brexit agreement was supposed to set 'high standards in the areas of State aid, competition, state-owned enterprises, social and employment standards, environmental standards, climate change, and relevant tax matters. In so doing, the agreement should rely on appropriate and relevant Union and international standards'. [5]

It is interesting to recall the origin of the expression that would become the most contentious subject in the post-Brexit negotiations. The level playing field was a saying used in the sports area to underline the importance of teams facing each other on equal terms, without the terrain tipping to one side. Football clubs used this aphorism to denounce a slope in the field before the game, in reference to extra-sports factors affecting the outcome of the match.

The level playing field was appropriated by the EU's vocabulary to mention the need for fair competition in trade agreements. However, its use is not limited to external relations; it is also employed in the framework of domestic regulation of the single market. For example, the adoption of a directive providing for new conditions for the posting of workers in the European Union was based on the need 'to guarantee a level playing field for businesses and respect for the rights of workers.' [6] The posting of workers is a common situation when a European company provides its services in another Member State. By reducing the length

[5] European Commission 2020, *Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland*, COM (2020) 35, para. 89, viewed 2 November 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0035

[6] European Parliament and Council 2018, Directive (EU) 2018/957 of June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, 2018 O.J.(L 173) Whereas 1, viewed 2 November 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018L0957

of posting and increasing the requirements for service providers, the new directive introduced greater restrictions on one of the economic foundations of the single market – the freedom to provide services. Thus, the new legal framework for posted workers was inspired by a desire for protection, aiming to shield home companies from competition from foreign providers of services and strike 'the right balance between the need to promote the freedom to provide services and ensure a level playing field (...).'[7] The legislative reform was achieved after strong political pressure from President Macron, who welcomed the new directive for allowing 'more protection and less fraud' (Tani, 2017).

The 2020 Council Guidelines stated that the post-Brexit agreement should ensure the application of EU rules on State aid to and in the United Kingdom, while also requiring the creation of an independent authority to enforce the applicable rules. The independent authority should work in close collaboration with the European Commission.[8] Hence, the Union aimed to hold its State aid rules, and supervise their implementation, as it does in the member states.

As far as labor and social protection was concerned, the European Union wanted the post-Brexit deal to ensure that protection would

> not reduce below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in relation to at least the following areas: fundamental rights at work; occupational health and safety, including the precautionary principle; fair working conditions and employment standards; and information and consultation rights at company level and restructuring. It should also protect and promote social dialogue on labor matters among workers and employers, and their respective organizations, and governments. [9]

Hence, the Union wanted to include the idea of non-regression in the area of labor and social protection covering a wide number of issues.

Regarding environmental protection, the Council Guidelines required that the post-Brexit deal also include a clause on non-regression from European protection standards applicable at the end of the transition period, but with an even larger scope of application:

> access to environmental information; public participation and access to justice in environmental matters; environmental impact assessment and strategic environmental assessment; industrial emissions; air emissions and air quality targets and ceilings; nature and biodiversity conservation; waste management; the protection and preservation of the aquatic environment; the protection and preservation of the marine environment; the prevention, reduction and elimination of risks to human health or the environment arising from the production, use, release and disposal of chemical substances; and climate change. [10]

For the European Union, the vast demand for regulatory alignment resulted from the United Kingdom being granted wider access to the single market, when compared to the scope of free trade agreements celebrated with third countries. In particular, the EU wanted

[7] *Id.*, whereas 4.
[8] European Commission 2020, *supra,* note 3, para. 91.
[9] *Id.*, para. 96.
[10] *Id.*, para. 98.

to safeguard that a portion of the so-called *acquis communautaire* – in the areas covered by the level playing field – would not be reversed by the UK in the future, since they were part of the overall attempt to complete the single market. If the UK goods would benefit from entering the internal market with no tariffs and quotas, the United Kingdom needed to be bound by the European standards in labor and social affairs, on environment and climate change policies, as well as on State aid rules. Hence, the position of the EU was largely to be defending the integrity of the single market.

Considering its market size, the European Union also aimed to sign a position of force in the negotiations on post-Brexit relationship (Bressanelli & Chelotti 2021, p. 2), asserting its status as an international trade power. The premises of its negotiating strategy were not only based on the purpose of maximizing trade, but rather on a power game vis-à-vis the United Kingdom, seeking to condition the aim of restoring regulatory autonomy in the above-mentioned areas (Munchau 2020), and to confront the UK Government with the pointless of recovering sovereignty. The Union intended to demonstrate the scarcity of meaning in the United Kingdom's taking back control over trade policy if the country did not have the negotiating force to impose its trade preferences, for it would be obliged to accept the dictates of commercial partners. Indeed, during the negotiations the Union took an approach aimed to show its stronger trade influence, pretending to expose the misunderstandings between power and sovereignty that inspired Brexit supporters (Stephens 2020).

For its part, the UK Government emphasized the need for the Union to assume that the withdrawal from the European bloc implied the recovery of sovereignty by the United Kingdom (Eeckhout 2021, p. 13). To that extent, the parties were to negotiate a free trade agreement, without any interference in the regulatory field. The emphasis on sovereignty also led Prime Minister Johnson to reject the EU's claims about the continuity of State aid rules, the incorporation of institutional mechanisms to supervise the implementation of the agreement and the role of the European Court of Justice in the settlement of disputes involving the post-Brexit deal (Brunsden 2020).

The European Union's request to keep the United Kingdom bound by EU social, labor and environmental standards contrasted with the requirements set out in trade agreements signed with other developed nations. For example, in the free trade agreement with Canada – a paradigm for the UK Government – the levels of labor or environmental protection were settled taking into account international law, such as the International Labor Organization conventions or the international agreements in the field of environmental protection. [11]

As far as the scope of EU regulatory power is concerned, Young ranked the extent of EU regulatory influence on recent preferential trade agreements showing that the EU was able to achieve a larger degree of regulatory alignment with Central American countries regarding competition policy, as well as on labor and environment areas, although the agreement reached a weak convergence on regulatory standards. Singapura was rated at a similar level in the hierarchy of regulatory influence, but with the degree of convergence limited to the labor field. A lower degree of convergence was recognized to the Korea trade

[11] *Chapter Twenty-Three - Trade And Labour:* "In this chapter the EU and Canada commit to respecting the labour standards set by the International Labour Organization), and to ratifying and implementing the international Labour Organization's fundamental conventions."
Chapter Twenty-Four - Trade And Environment: "This chapter commits the EU and Canada to putting into practice international environmental agreements. It: protects each side's right to regulate on environmental matters; requires each side to enforce its domestic environmental laws; prevents either side from relaxing their laws to boost trade."
EU- Canada Comprehensive Economic and Trade Agreement (CETA) 2016, viewed 2 November 2021, https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/

agreement, a country with larger commercial weight when compared to the previous nations. Finally, the commercial treaty signed with Canada was considered to have a very limited ability on rule changing (Young 2015, p. 1246). In any case, there was a full absence of legal harmonization in those trade agreements based on EU rules. Indeed, regulatory convergence was grounded on international standards, rather than on European rules. (Young (b) 2015, p. 1266)

For the United Kingdom, the refusal to align with EU rules was to report to the roots of Brexit itself (Holmes & Rollo 2020, p. 527), which was also motivated by the purpose of regaining national control over technical standards in the areas ruled by the Union. The rejection of EU law led Boris Johnson to announce that, as an alternative to a free trade agreement, the United Kingdom could follow the Australian model in post-Brexit relationship. In fact, in the absence of a bilateral agreement trade between Australia and the Union is governed by the World Trade Organization principles.

Negotiations for a post-Brexit deal were initiated in March 2020. However, the coronavirus and the spread of the pandemic in Europe prevented the due course of the trade talks, leading to the postponement of its timetable. Indeed, the rise of COVID-19 in Europe put post-Brexit talks on the back burner (Yeoh 2021, p. 62).

State aid

Having failed to lead the initial response to the cross-border dimension of the spread of the pandemic across the European Union, the Commission sought to adopt measures to ease member states' response to the economic problems derived from the lockdown. After declaring the suspension of the Stability Pact rules on fiscal policy for the eurozone countries, the Commission also announced the suspension of EU State aid provisions to

> allow Member States to use all the flexibility provided for in the State aid rules to support the economy in the context of the COVID-19 outbreak. (...) The Temporary Framework allows Member States to ensure the availability of sufficient liquidity for all types of companies and to preserve the continuity of economic activity during and after the outbreak of COVID-19.[12]

The so-called Temporary Framework on State aid announced by the Commission – allowing the granting of direct subsidies to companies, tax advantages, State guarantees for loans taken from banks, subsidized public loans for companies and export credit insurance – was used asymmetrically by the member states, due to their different fiscal situation. Thus, EU nations with lower public debt, and less affected by the first wave of the pandemic, benefited more from the freezing of State aid rules.

Indeed, countries such Germany, the Netherlands, Denmark or Austria injected huge amounts of money in national companies. In the first six weeks of suspension of State aid rules, the Commission approved ninety-five decisions, coming from twenty-six countries, for a total amount of €1.9 trillion of public aid. Germany's subsidies to its companies amounted to 52 percent of the whole public funding awarded (Fleming 2020).

In view of the disparity of subsidies granted, nations like Italy or Spain – among those most affected by the pandemic (Marcus et al. 2021) – feared that the avalanche of liquidity to the benefit of northern undertakings could erode the integrity of the single market, by increasing unequal conditions of competition between economic agents. Hence, the

[12] European Commission 2020, *State aid: Commission adopts Temporary Framework to enable Member States to further support the economy in the COVID-19 outbreak*, C 1863, viewed 2 November 2021, https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

cooling-off of European State aid rules, which the European Union wanted to include in the post-Brexit agreement, was used by member states in a way that threaten a level playing field between EU companies.

It should be noted that the lawfulness of the Commission's State aid scheme adopted in order to address the consequences of the COVID-19 pandemic was for the first time assessed by the EU General Court, in the framework of actions brought by Ryanair against subventions granted by France and Sweden to national airlines. Those actions challenged the Commission´s decisions to authorize loan guarantees granted by the Swedish Government and to defer tax payments conceded by the French authorities, raising the legality under Article 107(2)(b) TFEU of the State aid scheme that had been adopted to address the consequences of the COVID-19 pandemic.

In fact, during the pandemic, European governments injected more than thirty billion euros into their national air carriers. As the financial support was provided to flag-carrying companies, the low-cost airline Ryanair filed sixteen cases in the EU General Court to test State aid rules, arguing that national subsidies were discriminatory and would distort the level playing field in aviation for decades. In the framework of national subventions granted to airflight companies, the Irish based budget carrier made a distinction between State aid provided only to specific airlines and subventions open to all airflight companies. Curiously, the UK Government followed the later funding mechanism, through the so-called Covid Corporation Financing Facility, which allowed Ryanair to benefit from public money in the United Kingdom (Espinoza, 2021).

The EU General Court declared the national measures at issue were intended to remedy a serious disturbance in the economy of those member states caused by the COVID-19 pandemic, particularly the significant adverse effects of the pandemic on the aviation sector and on the air services of the same countries.[13] The General Court stated that the subsidies at stake were appropriate for achieving the objective of relieving the serious disturbance in the economy of those countries and that the Commission did not commit any error of assessment in considering that the aid schemes did not go beyond what was necessary to achieve the objectives, declaring that the aims of both the loan guarantee scheme and the deferral of tax payment satisfied the requirements of the derogation laid down in Article 107(3)(b) TFEU.

As mentioned above, the European Union wanted to impose its own State aid rules on the United Kingdom, as well as to ensure the Commission's collaboration with the British authority in charge of the implementation of those standards (Davison 2018, p. 101). This demand was rejected by the United Kingdom, based on the sovereignty claim. However, the impetus of EU demands weakened during the negotiations, in part due to the freezing of State aid rules in the Union.

The United Kingdom was open to the incorporation of provisions on the control of subsidies with harmful effects on competition into the post-Brexit agreement, provided they were inspired by the World Trade Organization principles. However, the UK Government rejected the claim for an ex ante control on public subventions, which is a distinctive element of the EU State aid system.

Trade and Cooperation Agreement

The Trade and Cooperation Agreement (TCA) concluded between the European Union and the United Kingdom on 2020 Christmas eve, [14] includes a chapter regarding the control of

[13] EU General Court 2021, *Ryanair DAC v. Commission,* Cases T-238/20 and T-259/20, 17 February.
[14] European Commission 2020, "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

subsidies, within the title devoted to the level playing field. The chapter of the TCA devoted to subsidy control recognizes the right of the parties to maintain an autonomous system on State aid, and to implement it in accordance with the procedures provided for in the respective legal system. The agreement establishes a set of common principles on subventions to companies. It also provides that the control of subsidies must be made by an independent authority or body (Art. 3.9).

The principles set out in the TCA allow the parties to grant subsidies to companies with the aim of remedying an identified market failure. The subsidies must be proportionate to the objectives, constituting an appropriate policy instrument to achieve a public policy objective, and the positive contributions of the grants should outweigh any negative effects (Art. 3.4). Subsidies must be granted in compliance with the principle of transparency, with the need to make information on the decision of State aid publicly available.

Under the TCA, the ban on subsidies does not apply to State aid granted to compensate for the damage caused by natural disasters or other exceptional non-economic occurrences, subventions of a social character, subsidies to respond to economic emergencies, subventions granted to agriculture, fisheries or related to the audiovisual sector, as well as State aid granted to services of public economic interest (Arts. 3.2 and 3.3).

The TCA prohibits subsidies in the form of unlimited State guarantees, as well as grants for the recovery of companies without a credible restructuring plan. The same principle applies to State aid provided to banks, credit institutions and insurance companies (Wardhaugh 2021, p. 85). Public aid subject to the incorporation of national products is prohibited. Export subsidies are limited to the so-called non-marketable risks. Subsidies to air carriers for the operation of routes are reduced to public service obligations, new routes to regional airports and, in special cases, where funding provides benefits for society at large (Art. 3.5).

The EU's perseverance on the effective implementation of the State aid rules led to the inclusion in the TCA of a provision recognizing the jurisdiction of the parties' courts to review subsidy decisions taken by the granting authority. The tribunals of the parties, at the request of private competitors, may decide on remedies that include the suspension, prohibition or even the recovery of the subsidy from its beneficiary, in accordance with the law of the party on State aid, implementing the principles of the TCA (Art. 3.10). Hence, a British airline may challenge in the Swedish courts subsidies granted to local companies, because of an alleged violation of the principles set out in the post-Brexit deal.

Considering the United Kingdom's traditional frugality in granting public aid, [15] British companies may resort to national courts across Europe to challenge subventions to German banks, credit loans to the French car industry, funding to Italian shipyards, tax benefits to Spanish telecommunications or subsidies to the Polish retail sector. In that case, the Union's persistence on control of subsidies could have a boomerang effect on the old industrial policy practices of the European nations.

Ireland, of the other part", COM (2020) 857 final, viewed 2 November 2021, https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/tca-20-12-28.pdf. The TCA was signed on December 30, 2020; was applied provisionally from January 1; and it entered into force on May 1, 2021.

[15] The United Kingdom was among the Member States spending less in State aids when compared to the EU average for the period 2013-2019. See: European Commission 2021, *Stated Aid Scoreboard 2020*, p. 44, viewed 8 April 2022, https://ec.europa.eu/competition-policy/system/files/2021-06/state_aid_scoreboard_note_2020.pdf

Regulatory alignment

British companies – from agriculture and food processing to car industry, from the chemical sector to the service industries – have a strong economic incentive to produce their goods and services in accordance with European standards, should they wish to export to the single market. In terms of technical regulation, the Brussels effect operates naturally on British economic agents who maintain trade relations with EU member states. Yet, regulatory alignment required by the European Union did not refer to technical rules on the manufacture of goods, but rather to issues related to production costs, such as subsidies to companies, workers' social rights or environmental protection (Mariani & Sacerdoti 2021).

At the beginning of the negotiations of the post-Brexit deal, the United Kingdom refused the demand for regulatory alignment with European standards, claiming that those issues were to be regulated according to international law conventions, in the same way as the EU trade agreement with Canada.

European standards in social and labor areas, as well as on environment protection, were adopted through EU directives. Directives are legal acts that need to be incorporated into the domestic law of the member states. According to the EU-UK Withdrawal Agreement, European law was to be applied to the United Kingdom until the end of the transitional period. Thus, EU rules on social and environmental protection were part of the UK domestic legal order, because of European law.

Directives aim for legal harmonization among the member states and are, therefore, seen as a privileged legal tool in the framework of Europeanization. This notion has generally been defined as a process of domestic change resulting from EU policies. Considered the EU multilevel governance system, studies on Europeanization tend to focus on a double dimension: the procedure whereby European institutions influence national policies; and the implementation of EU policies by the member states (Pollack 2015, p. 38). As far as the latter is concerned, it should be noted that implementation plays a central role within the Union because policy-making is normally achieved by EU directives, which later must be transposed by member states into their legal order and need further to be rightly enforced by national authorities.

However, the strength of EU policies depends not only on the capacity of the European Commission to ensure the accurate enforcement of EU directives, by supervising the work of national governments, but also on the by ability of national courts to refer domestic cases to the European Court of Justice concerning the scope of EU rules. Hence, the Union jurisdictional system plays an active role on the whole Europeanization procedure.

During the negotiations, the United Kingdom gave some signs that it could shift from its standpoint of rejecting regulatory alignment in social and environmental areas. As a matter of fact, those rules were already part of national law. Indeed, negotiators appeared to have reached consensus in the social and environmental field, on the basis that the United Kingdom would be bound by European standards that were in force at the end of 2020. Those rules were supposed to settle basic standards, with the United Kingdom being prevented from decreasing the levels of protection afforded in the same areas. In legal terms, the post-Brexit agreement would provide for a non-regression clause (Barnard 2020). In exchange, the Union waived its claim to involve the European Court of Justice in the governance mechanism of the post-Brexit agreement.

After the ninth round of negotiations, EU chief negotiator Michel Barnier mentioned the need for the parties to establish a "commitment to non-regression in social, fiscal, environmental and climate protection standards”. [16] Thus, the Union seemed to concentrate its claims in the incorporation of a non-regression clause.

[16] European Commission, *supra,* note 2.

However, UK receptiveness on the level playing field issue was faced with a new EU demand. Under pressure from some national leaders, namely, by French President Emmanuel Macron (Parker 2020), the European Union also wanted to extend the United Kingdom's duty on regulatory alignment in the social and environmental areas to standards to be settled after 2021, when it would be already separated from the scope of application of European law.

The EU updated its position in the negotiations due to concerns expressed by some member states on the risk that British companies could take advantage from less stringent labor and environmental protection standards than those set by future European rules. Indeed, the EU wanted the United Kingdom to be bound to follow its upcoming regulatory reforms. The negotiations on the level playing field thus faced a new development, with the request for a dynamic regulatory alignment (Parker 2020).

On the backstage of new EU demands, there would be the so-called pillar of social rights.[17] The European social pillar is a magnanimous document, aimed at strengthening social rights and supporting European construction. Having been only proclaimed by the EU institutions involved in the legislative procedure, it is not endowed with legal binding force. The main goal of the social pillar seems to be the adoption of a minimum wage at European level, providing for the satisfaction of the needs of the worker and his or her family in the light of national economic and social conditions.[18] Indeed, by the end of the post-Brexit negotiations, the European Commission announced a draft directive on adequate minimum wages in the European Union, to ensure that the workers in the Union are protected by minimum wages allowing for a decent living wherever they work.[19] However, the creation of a European minimum salary will be conditioned by the socio-economic constraints of member states with low-wage policies, which tend to be lower than the salaries received by low-paid British workers (Barnard 2020).

In any case, the United Kingdom rejected the idea of an evolution clause in the post-Brexit deal, as it would carry an automatic duty to accept future European legislation, without taking part in the law-making procedure. Such a provision could also have unpredictable domestic political effects. For instance, a potential improvement in workers' rights by a Labor Government could not be reversed by a future Conservative Cabinet, insofar as it would be seen as a decrease on social protection.

The struggle over the extent of regulatory alignment with European standards lasted until the end of the post-Brexit talks, increasing the political stalemate. The negotiators bounced around scenarios in search of a solution that would allow British freedom to settle its own rules while giving the Union assurance it could retaliate in case of significant regulatory divergence (Brunsden & Parker 2020).

A compromise would be reached around the so-called rebalancing mechanism. Nonetheless, there was no consensus on the extent of retaliatory measures. The European Union claimed the inclusion of sanctions in case of significant divergence in protection levels, with the application of tariffs on the import of goods or restrictions on the access to the single market (Barnard, 2020).

The provision on sanctions, labeled by the British as a ratchet clause, raised new disagreement: Would its application be automatic, as the Union intended, or should it be previously submitted to conflict resolution by an arbitration panel, as the United Kingdom

[17] European Commission 2021, *The European Pillar of Social Rights in 20 principles*, viewed 2 November 2021, https://ec.europa.eu/info/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.
[18] *Id.*, Chapter II, nº6 (Wages).
[19] European Commission 2020, *Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union*, COM(2020) 682 final 2020/0310 (COD), viewed 2 November 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0682&from=EN

defended? Could the sanctions involve cross-retaliation, that is, divergences in environment protection would determine restrictions on services, as the Union intended, or should its scope be limited to the area of dispute, as required by the UK Government? (Salter, 2020)

The chapter on labor and social standards included in the Trade and Cooperation Agreement covers all issues claimed by the European Union in the Council's Guidelines. However, the extent of the chapter on environment and climate is more limited than the long list of issues included in the Union's mandate, for the chapter does not include impact assessment and strategic environmental assessment, access to information, public participation and access to information and to justice, or goals and air quality.

In the chapter devoted to labor and social protection, as well as in the chapter dedicated to the environment and climate, the TCA recognizes the right of each part to set its policies and priorities, to determine the levels of protection that it deems appropriate, adopting laws and public policies in a manner consistent with each party's international commitments, including the agreement (Arts. 6.2 and 7.2). In line with this principle, the chapters on social and labor standards and on environment and climate settled non-regression clauses regarding the levels of protection (Leonelli 2021). Drafted in the same way, those provisions state that the parties should not weaken or reduce the protection below the levels in place at the end of 2020, including by failing to enforce its laws and standards, in a manner that could affect trade or investment between them.

All the issues included in the title of the TCA devoted to the level playing field – labor and social standards, protection of the environment and climate, competition policy, control of subsidies, companies of general interest and taxation – benefit from a special dispute settlement procedure. Thus, the general provisions of the TCA on dispute settlement are not to be applied to the different chapters under the head of the level playing field.

However, the dispute settlement procedure on labor and social norms and on environment and climate protection follows the model of the basic mechanism provided for in the TCA. If the consultation phase between the parties does not produce a consensual solution, a panel of experts will be convened. The panel of experts shall be composed of three members with specialized knowledge in labor or environmental law, without requiring qualifications for the exercise of high judicial functions, as is the case with the arbitration tribunal (Art. 9.2).

In the framework of the so-called non-regression areas, if the responding party chooses not to take any action to conform with the panel of experts' report and with the provisions of the TCA, the complaining party has the power to apply temporary remedies authorized under the provisions of Part Six of the agreement (Art. 9.3).

The Trade and Cooperation Agreement also provides for the so-called rebalancing mechanism, in case of significant divergences between the parties with respect the labor and social standards, environmental or climate protection, or subsidy control (Art. 9.4). This mechanism was included in the TCA to temper the claims of some EU countries that wanted the United Kingdom regulatory alignment to go beyond the principle of non-regression from levels of protection in those areas.

For rebalancing measures to be applied, it is required that the existence of significant divergences be capable of impacting trade or investment between the parties, in a manner that changes the circumstances that have formed the basis for the conclusion of the Trade and Cooperation Agreement. The impact assessment should be based on reliable evidence and not merely on conjecture or remote possibility. The rebalancing measures shall be proportionate to the impact caused on commercial relations and restricted with respect to their scope and duration to what is strictly necessary to remedy the situation. Moreover, priority shall be given to measures with lesser disturbing effects on the overall functioning of the TCA. The rebalancing measures can be submitted to an arbitration tribunal to decide

on their conformity with the TCA. The rebalancing mechanism does not apply to the parties' laws and standards relating to social security and pensions (Art. 6.1).

Conclusion

The Trade and Cooperation Agreement governs the relationship between the European Union and the United Kingdom, as a third country. The TCA goes beyond recent EU trade deals with third countries, like Canada or Japan, by providing for zero tariffs and zero quota on the whole commerce of goods. The completion of the TCA in a short period of time was a positive outcome, when compared to the risks faced in the event of failure, in a framework marked by the global pandemic, which caused a strong economic recession in all European countries.

The level playing field was the most controversial issue during the post-Brexit negotiations, and it almost threatened the accomplishment of a final deal between the European Union and United Kingdom, due to the struggle over of the extent of regulatory alignment with the EU. The Trade and Cooperation Agreement ensures the EU concerns on labor and social protection, as well as those on environment and climate standards, based on the principle of non-regression from the levels of protection conferred in these areas at the end of 2020. Yet, and under the level playing field umbrella, the Union failed to extend the application of EU State aid rules to the United Kingdom.

Compared to previous preferential trade agreements, the TCA allows the EU to extend its own rules and standards in the areas covered by the level playing field, which was considered to be the price for UK goods to benefit from a greater degree of access to the single market. In this sense, the TCA is a step forward in the EU ability to spread its regulatory influence. However, those EU directives were part of the UK domestic legal order at the end 2020.

Regarding the principle of non-regression to be applied by the TCA both to labor and social protection areas and to environmental policy it should be noted that the degree of UK Europeanization could face a further setback. Indeed, the post-Brexit deal does not recognize a direct role to the European Commission to oversee how the United Kingdom authorities enforce the EU standards covered by the level playing field. In the same way, the TCA prevents the jurisdiction of European Court of Justice insofar as the application of the agreement is concerned. Hence, UK courts will not follow a centralized interpretation of EU rules provided by the ECJ and will probably deviate on the application of those provisions across time.

The European Union sought to test a new dimension in commercial relations with third countries, endowing the TCA with a rebalancing mechanism applicable in the event of significant regulatory divergence in environmental protection or in the scope of workers' rights. Despite not having enshrined automatic and unilateral sanctions, the new mechanism allows for the application of trade remedies.

For its part, the UK Government proclaimed that the Trade and Cooperation Agreement formally endorses the United Kingdom claims of sovereignty – in line with its motto of taking back control. The UK recovered trade policy power, sovereignty over maritime waters, borders and migration and no longer needs to fund the EU budget. However, and despite Prime Minister Johnson statement that the TCA also allowed recovering control over the legal system, by affording no role for EU law and no jurisdiction for the European Court of Justice, [20] there will be some constraints stemming from the type of regulatory alignment

[20] UK Government 2020, *UK-EU Trade and Cooperation Agreement – Summary*, Viewed 14 April 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962125/TCA_SUMMARY_PDF_V1-.pdf

with the Union on labor and social standards and on environmental protection. In fact, whenever the UK will decide to review the regulatory commitments covered by the level playing field header it could face the application of retaliatory measures from the European Union.

ORCID
António Goucha Soares 0000-0002-4312-1406

Funding
The research received no grants from public, commercial or non-profit funding agency.

Acknowledgements
I am indebted to Professor Ann Henshall for her very helpful linguistic revision of the article.

REFERENCES

Barnard, C. (2020). *The wonky level playing field: the heart of the trade talks disagreement*, UK In A Changing Europe, viewed 3 December 2021, https://ukandeu.ac.uk/level-playing-field/

Bradford, A. (2020). *The Brussels Effects. How The European Union Rules The World*, Oxford University Press.

Bressanelli, E. & Chelotti, N. (2021). Assessing What Brexit Means for Europe: Implications for EU Institutions and Actors, *Politics and Governance*, vol. 9, nº 1, pp. 1-4.

Brunsden, J. (2020). Johnson's free trade vision hits familiar sticking points, *Financial Times*, 4 December, viewed 3 November 2021, https://www.ft.com/content/1b7d2890-46a4-11ea-aee2-9ddbdc86190d?fbclid=IwAR2rc2iVnkHoyIiU8oXnOkMXFZWbzg_wAi58UPSLYviZozSjjU8zcPM80us

Brunsden, J. & Parker, G. (2020). The final, frenetic hours that broke the Brexit deadlock, *Financial Times*, 24 December, viewed 10 November 2021, https://www.ft.com/content/461b466a-533e-4742-813d-596f868ca328?fbclid=IwAR2rqe_baE9wLkVVkL-V585ikkmEuKKP2egy3JNJpiXTa1_A6FNsKpFXlCI

D'Erman, V. (2021). Competing Logics of Integration: EU Trade Policy Post-Brexit, *International Studies,* 58(2), 219-233.

Davison, L.M. (2018) Envisaging the Post-Brexit Landscape: An Articulation of the Likely Changes to the EU–UK Competition Policy Relationship, *Liverpool Law Review*, pp. 99-121.

Dehousse, F. & Miny, X. (2018). What are the Judicial Options for the Future EU-UK Agreement?, *Journal of European Studies*, pp. 1-28.

Eeckhout, P. (2021). Brexit after the negotiation of the trade and cooperation agreement: who takes back control of what?, *Revista de Derecho Comunitario Europeo*, 68, 11-22.

Espinoza, J. (2021). EU court rejects Ryanair challenge to state aid for rival airlines, *Financial Times*, 17 February, viewed 10 November 2021, https://www.ft.com/content/1a366360-fb7b-4035-b6b8-1ed6dc7dbc3a?fbclid=IwAR0uYsCeJKgX9B7LtcGxewY-iaUPzroOQ0ytczoMDzQr6NXCJcVO-5ShOkY

Holmes, P. & Rollo, J. (2020). EU-UK Post-Brexit Trade Relations: Prosperity Versus Sovereignty?, *European Foreign Affairs Review* 25(4), 523-550.

Larik, J. (2017). EU foreign relations law as a field of scholarship, *American Journal of International Law (Unbound)* 111, 324.

Leonelli, G.C. (2021). From Extra-Territorial Leverage and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU–UK Trade and Cooperation Agreement, *Journal of Environmental Law*, https://doi.org/10.1093/jel/eqab010

Marcus, J et al. (2021). *The impact of COVID-19 on the Internal Market*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, PE 658.219, viewed 2 December 2021, https://www.bruegel.org/wp-content/uploads/2021/03/QA0221093ENN.pdf

Mariani, P. & Sacerdoti, G. (2021). *Trade in Goods and Level Playing Field*, Brexit Institute Working Paper Series, No 7/2021, Bocconi Legal Studies Research Paper No. 3797021, viewed 10 December 2021, http://dx.doi.org/10.2139/ssrn.3797021

Münchau, W. (2020). 'Britain and the EU are negotiating at cross purposes', *Financial Times*, 9 February, viewed 10 November 2021, https://www.ft.com/content/7a092804-49c0-11ea-aee2-9ddbdc86190d?fbclid=IwAR37qLnSMjXpuSvYaC4uYqv5H1tqJF7vAJWYmUUug5YoYus8N5sXoj9b3HY

Parker, G. (2020). 'Optimism for shift on 'level playing field' in Brexit trade talk's, *Financial Times*, 14 December, viewed 10 November 2021, https://www.ft.com/content/ca2da6a9-2446-4b61-ba95-860f8c1ee92c?fbclid=IwAR3Ahbd99QQzrIhOQ-4ObzfcBHmz5AlN8IsYwcyGuUhbLAVSGGnHwHbwpV4

Pollack, M.A. (2015). Theorizing EU Policy-making in Wallace H et al., *Policy-making in the European Union*, 7th ed, Oxford University Press, pp. 12-45.

Salter, J.P. (2020). *What does a level playing field mean?*, UK In A Changing Europe, viewed 3 December 2021, https://ukandeu.ac.uk/explainers/what-does-a-level-playing-field-mean/

Sandrin, P.O. & Hoffmann, A.R. (2018). Silences and hierarchies in European Public Diplomacy, *Revista Brasileira de Política Internacional*, 61(1), 1-18.

Stephens, P. (2020). 'The UK will now count the cost of Brexit sovereignty', *Financial Times,* 17 December, viewed 10 November 2021, https://www.ft.com/content/f5cf57f5-0d62-4158-b67b-46b2df5c04bd

Tani, C. (2017). EU overcomes divisions on posted workers*, EU OBSERVER*, 24 October, viewed 10 November 2021, https://euobserver.com/social/139599

Wardhaugh, B. (2021). Subsidies and Competition in the EU-UK Trade and Cooperation Agreement: All Pain for No Gain?, *Manchester Journal of International Economic Law,* 18(1), 70-100.

Yeoh, P. (2021). Post-Brexit Deal: The New Normal for the UK?, *Business Law Review*, 42, 62-109.

Young, A.R. (2015). The European Union as a global regulator? Context and comparison, *Journal of European Public Policy*, 22(9), 1233-1252.

Young, A.R. (2015b). Liberalizing trade, not exporting rules: the limits to regulatory co-ordination in the EU's 'new generation' preferential trade agreements, *Journal of European Public Policy*, 22(9), 1253-1275.