

## **The State Aid row: UK and the devolved nations**

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At the cornerstone of “Brexit” is the idea that the UK would be better off outside of the EU. Though the motivation for Brexit was, in my opinion, largely political, we have since the 2016 vote observed the encroaching panic on how to deal with its impending economic implications.

As the EU is not only a political union but also an economic union, a seemingly outstanding (economic) question throughout the negotiation process has been how the UK could not only overcome the economic reality of exiting the Union, but how it could actually compete with the EU post-Brexit. This is why, just as ink on the 2019 Withdrawal Agreement had dried, State Aid (‘subsidies’) seemed to surpass the “Irish border” as the salient issue of EU-UK post-Brexit relations.

A considerable factor in the UK’s ability to compete with the EU is, as the UK has continuously referred, the ability to dictate the extent to which it may offer direct subsidies or tax breaks to organisations. But such is the nature of State Aid, its tendency to distort competition among countries can cause it to be deeply polarizing. Furthermore, it is interesting to observe how State Aid issues seem to cascade through the UK constitutional framework. At the surface is the row with the EU over post-Brexit ‘level playing field’ arrangements.

The Withdrawal Agreement outlined mutual commitment to ensure open and fair competition, though the UK has since retreated on the grounds of respect for its regulatory autonomy. The EU, contrarily, does not want a country, such as the UK, in such close proximity to obtain a competitive advantage. It is these stayed negotiations which hold up the prospective EU-UK Free Trade Agreement (‘FTA’).

But despite this disagreement, I opine that this issue is not so complex that a balanced solution isn’t possible. For both the UK and EU, their positions are reasonable. It is reasonable both that the UK would want regulatory autonomy on State Aid, inter alia, post-Brexit but also that the EU would not want a nation of such close proximity to have a competitive advantage. Totis Kotsonis recognises this and advances that a potential method of achieving a workable degree of regulatory alignment on State Aid could be that both sides agree to maintain common, or high, standards in certain regulatory areas but without legislative entanglement.[\[1\]](#)

This seems like a suitable solution, if even only temporary to get an FTA over the line in time. However, if such a manageable solution to these complex negotiations is possible, the pertinent question seems to be why negotiations are being drawn out for so long for what could be solved relatively quickly? Understandably, the contents of these negotiations are polarizing and complex, but in my opinion pale in comparison to issues which affect the devolved nations.

There are two particular issues which affect the devolved nations on State Aid: Centralisation of devolved state aid powers and the Northern Ireland Protocol issue. In July 2020, the UK was rocked by news that the UK government intended to centralise State Aid control to Westminster.[\[2\]](#)

The UK is of a unique constitutional structure where, in contradistinction to the US/Canada where individual states dictate what legislative power the federal government has, the UK Government dictates what power devolved nations have. Furthermore, the purpose of the UK’s devolved structure is to decentralise authority from Westminster, albeit only in certain contexts, to accommodate the specific and unique circumstances of a particular nation.

Though these idiosyncrasies may differ among the UK nations, they likely would have expected to be able to utilize State Aid individually post-Brexit. It is understandable that the UK government is trying to develop an internal market, but if its reasoning for centralizing State Aid is only to ensure legal clarity through a domestic level playing field, this will not quite satisfy Scottish First Minister Nicola Sturgeon who, among others, considered the proposal to amount to a “full scale assault on devolution”. Nor should it.

In my opinion, the reason that the devolved nations have reacted in such way is because, minded of previous attempts at UK inter-governmental relations on trade, they are fearful that they will be simply overlooked. Billy Melo Araujo encapsulates this fear:

“..the UK’s system of inter-governmental cooperation, as it currently stands, would not provide devolved administrations the type of influence on trade policy that is bestowed on ‘other’ provinces... Because the concordats are not legally binding, and therefore create no obligation to cooperate, the UK devolved administrations are left mostly reliant on the goodwill of the central government to adopt an inclusive and cooperative approach to engage with devolved administrations and reflect their viewpoints in national policy. There are also numerous examples where the UK has simply decided against involving devolved administrations in any type of consultative process, even in devolved matters, in order to avoid having to accommodate their views.”[\[3\]](#)

If previous attempts at inter-governmental relations on trade failed to meet the requirements of the devolved nations then it must be questioned how a post-Brexit UK, that is compounded by many strands of political and legal complexity and which plans to host a centralised State Aid regime, could possibly meet the specific and unique State Aid requirements of the devolved nations. This is the first State Aid issue among the devolved nations which, I propose, must be rectified.

Among the devolved nations it is ubiquitously recognised that Northern Ireland is of particular uniqueness. Its history of conflict (‘The Troubles’) has resulted in considerable tension in the country, which is reflected in its sensitive approach to matters pertaining to constitutional structure and is a recurring theme in the UK’s withdrawal from the EU and post-Brexit arrangements. To avoid a hard border on the Island of Ireland, the Ireland/Northern Ireland Protocol sets out that in certain legal contexts, Northern Ireland will remain under either EU or joint EU-UK jurisdiction.

This creates an unprecedented degree of complexity for both Northern Ireland and the UK and is perhaps most prominent on State Aid. In contrast to Customs and VAT treatment of goods, where Northern Ireland is under both UK and EU jurisdiction (which is already sufficiently complex), State Aid in Northern Ireland falls entirely under EU law and as such the UK will be ‘caught’ under jurisdiction of EU law, the Commission and may be subject to the CJEU if a UK measure concerns trade between Northern Ireland and the EU.

Though generally problematic, the highlight I would suggest is Peretz and Artley’s suggestion that a possible implication of Northern Ireland being subject to EU State Aid law is complication if the UK were to attempt to establish an independent WTO-style anti-subsidy regime.[\[4\]](#) In a similar vein I would question how Northern Ireland can expect to benefit from State Aid not only if it is subject to a domestic regime which is centralised at UK level, but if such regime (as shown above to have limited effect) is compounded by the risk that the EU law, which Northern Ireland will apply, restricts the UK in its own State Aid agenda.

Northern Ireland, I would be of the opinion, is subject to enough constitutional and political complexity when drafting policy. Not only does it not need any further legal complexity, like the

other devolved nations, it needs a State Aid regime which not only can allow it to compete but meet its basic needs as a unique jurisdiction. If the UK could successfully conclude its negotiations with the EU, perhaps it could ensure all members of the Union are in a better position on State Aid post-Brexit.

[1] <https://uksala.org/squaring-the-circle-level-playing-field-provisions-and-the-negotiation-of-a-uk-eu-free-trade-agreement/>

[2] <https://www.ft.com/content/0edf860e-c50d-11ea-9d81-eb7f2a294e50>

[3] Melo Araujo, B. (2019). *U.K. Post-Brexit Trade Agreements and Devolution. Legal Studies.*

[4] <https://www.taxjournal.com/articles/state-aid-under-the-northern-ireland-protocol>