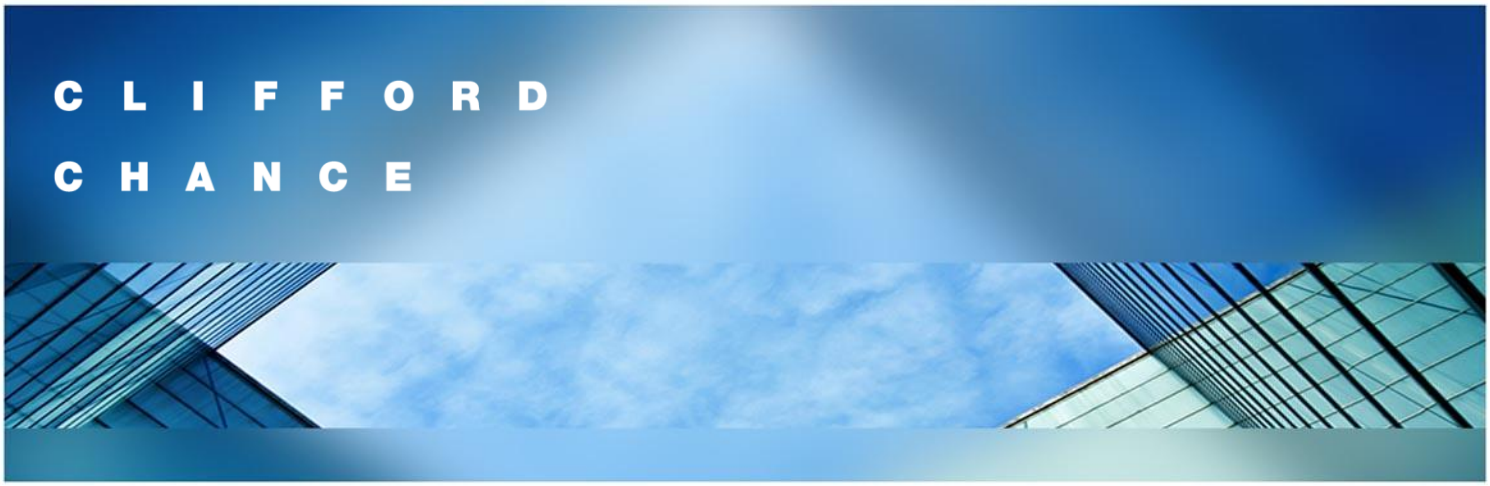

TARIFF SWEETENER NOT A SUBSIDY: THE FIRST TEST OF THE UK'S POST-BREXIT-SUBSIDY CONTROL REGIME

In the first detailed consideration by the English courts of the subsidy control provisions of the UK-EU Trade and Cooperation Agreement (TCA), and the continuing application of EU State aid rules under the Northern Ireland Protocol, the High Court in *R (on the application of British Sugar Plc) v Secretary of State for International Trade* ruled that the UK's autonomous tariff quota for raw cane sugar did not constitute either a subsidy or State aid.

The decision provides important guidance on the scope, role and interpretation of EU and WTO jurisprudence under the UK's post-Brexit independent trade and subsidy policy.

The Court of Appeal will now determine these issues following British Sugar's successful application for permission to appeal.

BACKGROUND: SUGAR BEET VS SUGAR CANE

Following the conclusion of the Brexit transition period, the UK's new independent tariff regime came into force on 31 December 2020. Among a series of changes, this regime included an autonomous tariff quota (ATQ) for raw cane sugar,[1] which provided that no import duty was payable on the first 260,000 metric tonnes (mt) of raw cane sugar imported into the UK for refining. In the absence of this ATQ, the UK Global Tariff provided for a tariff of £28.00/100kg of unrefined sugar imported for the purposes of refining (subject to certain exceptions for imports from countries benefitting from tariff preferences (e.g. the EU under the TCA and the African, Caribbean and Pacific (ACP countries), and the UK's Generalised Scheme of Preferences).

While access to the ATQ was available to any importer on a first-come-first-serve basis, in practice T&L Sugars Limited (T&L Sugars) imports over 99% of the raw cane sugar for refining and so was the primary user of the ATQ.

On 15 January 2021, British Sugar (the producer of 50% of the UK's refined white sugar) applied for a judicial review of the Secretary of State for International Trade's decision to recommend to Her Majesty's Treasury the promulgation of the ATQ.[2] Unlike T&L Sugars, which produces sugar from imported cane sugar, British Sugar produces sugar using domestically grown sugar beet (and thus would benefit from the tariffs imposed on T&L Sugars' cane sugar imports in the absence of the ATQ). British Sugar claimed the ATQ was unlawful because it amounted to:

[1] Customs (Tariff Quotas) (EU Exit) Regulations 2020
[2] The judicial review was made pursuant to Article 369.5(a) of the TCA and s.29 of the European Union (Future Relationship) Act 2020

1. unlawful State aid to T&L Sugars, in breach of Article 10(1) of the Northern Ireland Protocol (the "**NI Protocol**"); and
2. an unlawful subsidy to T&L Sugars in breach of Chapter Three of Title IX of Part II of the UK-EU Trade and Cooperation Agreement ("**TCA**").

British Sugar's two-pronged challenge reflects the post-Brexit structure of UK subsidy control/State aid regulation. That is, the new subsidy provisions of the TCA apply to subsidies granted by the UK; and EU subsidy control rules continue to apply to UK subsidies in certain circumstances pursuant to the Northern Ireland Protocol (see further below).

THE COURT'S ASSESSMENT OF BRITISH SUGAR'S CLAIMS

Central to the Court's assessment of British Sugar's claims was the question of whether the ATQ was 'selective' under EU State aid rules, or 'specific' under the subsidy control provisions of the TCA. To constitute State aid under EU rules, a measure must be 'selective' in the sense that it favours some entities over others. The TCA's subsidy control provisions include a similar requirement that a subsidy be 'specific,' drawing on the language of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

'SELECTIVITY' UNDER EU STATE AID RULES

British Sugar argued that, because T&L Sugars was the dominant beneficiary of the ATQ, the ATQ provided a *de facto* selective (and specific) advantage to T&L Sugars. In British Sugar's view, this *de facto* advantage was not mere coincidence, but a consequence of the ATQ being "drafted for the purpose" of favouring T&L Sugars. In support, British Sugar relied on evidence of the UK Government's internal policy deliberations obtained under the Freedom of Information Act—including documents indicating that the Government's objective of ensuring the "viability" of T&L Sugars (as the UK's sole cane sugar refiner, and a significant employer) featured heavily in both the decision to promulgate the ATQ, and the level at which the ATQ was set.

While the Court accepted that the "Government's expectation when introducing the ATQ was that the overwhelming majority of the ATQ would be used by [T&L Sugars]," it found that there was nothing in the objective features of the ATQ which showed it was *designed* to favour T&L Sugars at the expense of potential new entrants to the market. In this regard, the Court found that the ATQ was not "selective" merely because there is "only one undertaking operating in the relevant market," and therefore rejected British Sugar's argument that—despite being generally available to all importers of raw cane sugar —the ATQ was designed to selectively benefit T&L Sugars. The Court also observed that a decision to set a zero tariff, or to set a quota above the level of realistic imports (which would have had the same effect as a zero tariff) would not have involved a selective subsidy, so it would be a surprising outcome if a decision to set the quota at a level below the volumes that T&L Sugars would import, which would benefit T&L Sugars less, was considered to be a selective subsidy.

The Court also rejected British Sugar's argument (based on the test in ECJ case *Commission v World Duty Free Group and others*[3]) that the ATQ constituted a derogation from the "standard" tariff position, and that it differentiated between operators in a comparable factual and legal situation. In this regard, the Court found that British Sugar and T&L Sugars cannot properly be understood to be "comparable" given that British Sugar exclusively refines domestic beet crops and T&L Sugars exclusively refines imported raw cane sugar. Accordingly, given that (in principle, if not economic reality) any importer had the same access to the ATQ as

[3] Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group and others* [2017] 2 CMLR 22

T&L Sugars; it could not be said that T&L Sugars' access to the ATQ was a derogation from the "normal" tariff position.

'SPECIFICITY' AND 'BENEFIT' UNDER THE TCA SUBSIDY CONTROL RULES

The High Court also considered the distinct question of whether the ATQ constituted a "subsidy" within the meaning of Article 363(1)(b) of the TCA. Similarly to the requirement of "selectivity" under EU State aid rules, the TCA only disciplines subsidies that are "specific" (i.e. they benefit certain economic actors over others in relation to the production of certain goods or services).

While noting the similarity between the TCA definition of "subsidy" and the principle of selectivity under EU State aid law (particularly in the context of tax measures, which are specifically addressed in Article 363(2) of the TCA in a manner that is similar to the EU State aid test in *World Duty Free Group*), the Court notably highlighted that the "immediate source of these provisions of the TCA appears to be the WTO [SCM Agreement]." Against that background, and consistent with Article 516 of the TCA, the Court analysed the question of specificity having regard to WTO (rather than EU) jurisprudence. While the Court's decision to focus on WTO jurisprudence to interpret the provisions of the TCA was potentially significant, on the facts of the case the Court held that WTO jurisprudence ultimately led to a similar conclusion as EU State aid jurisprudence; namely that the ATQ was not "specific" as it benefited all importers of raw cane sugar equally and was not offered solely on the basis that it applied to any single importer.

To constitute a subsidy under the TCA, a subsidy must also arise "from the resources of [a Party to the TCA]," for example by way of the "forgoing of revenue that is otherwise due." The Court addressed this question in conjunction with the question of "specificity" outlined above (an unconventional approach, given the distinct issues involved in determining each of these questions). Citing the WTO Appellate Body decision in *Brazil – Certain Measures Concerning Taxation and Charges*, the Court found that it would be artificial for it to conclude that the ATQ represented an "exception" to the rates established under the UK Global Tariff, when in practice the broad applicability of exceptions (in the form of the ATQ and other preferential tariffs) mean that it cannot be said that a rule and exception existed that caused the UK Government to forgo revenue.

THE "EFFECT ON TRADE" REQUIREMENT UNDER THE NORTHERN IRELAND PROTOCOL

While the Court found that the ATQ was not 'selective' under EU State aid rules (and therefore did not constitute State aid in the first place), the Court also addressed the novel and important question of whether the ATQ had the requisite 'effect on trade' required for State aid rules to apply under Article 10(1) of the Northern Ireland Protocol.

Post-Brexit, EU State aid rules only apply in the UK to the extent they are made applicable under the terms of the Northern Ireland Protocol. Subject to some exceptions for permitted agricultural support, Article 10(1) of the Northern Ireland Protocol provides that EU State aid rules continue to apply in respect of UK measures "which affect that trade between Northern Ireland and the Union which is subject to this Protocol." The language used in Article 10(1) of the Northern Ireland Protocol is similar to that used in Article 107 of the TFEU (which defines State aid for the purposes of the EU State aid regime) and which has been interpreted broadly to cover direct and indirect trade effects on trade between EU Member States. If the ECJ's interpretation of Article 107 TFEU were to be applied to assessing the effect of

a UK measure on trade between Northern Ireland and the EU under Article 10(1) of the Northern Ireland Protocol—this would potentially set a low bar for the application of EU State aid rules to UK government measures.

Following the conclusion of the Northern Ireland Protocol (but before its entry into force) the UK and EU issued unilateral declarations in December 2020, with the EU declaring (among other things) that the trade effect of a measure under Article 10(1) "*cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland.*"[4] The significance of this unilateral declaration remains the subject of some debate—with the language potentially still leaving the door open to the application of EU State aid rules to a range of UK measures which may indirectly affect trade between Northern Ireland and the EU. The potentially broad scope of Article 10(1) was emphasised by a January 2021 "Notice to Stakeholders" published by the European Commission, which stated among other things that the EU's Unilateral Declaration "*clarifies, but does not alter, the notion of "effect on trade" as interpreted by the Union Courts*."

Against this backdrop, the High Court's decision is significant in that it draws a distinction between the EU law interpretation of "effect on trade" under Article 107 of the TFEU (on the one hand) and the interpretation of the Northern Ireland Protocol based on the treaty interpretation principles of the Vienna Convention on the Law of Treaties (on the other). In this respect, the Court held that the EU's Unilateral Declaration should be given "*purpose and effect when interpreting and applying Article 10(1)*" and that the "*Effect on Trade Issue is not to be approached solely by reference to the general body of EU law*." The Court also rejected the Commission's Notice to Stakeholders as inadmissible.

On the basis of this conclusion, the Court found that the potential 'effect on trade' for the purposes of Article 10(1) of the Northern Ireland Protocol was essentially limited to the "unproven assertion" that there may be displacement of EU refined sugar from Northern Ireland as a result of the ATQ. Given the relatively small quantity of T&L Sugars refined sugar imported to Northern Ireland from Great Britain, the Court held that finding the 'effect on trade' requirement to be satisfied in such circumstances would be to "permit a barely discernible tail to wag a very large dog" and that "the EU Unilateral Declaration was intended to prevent precisely this kind of argument."

While the High Court's decision on this issue —which goes to the heart of how broadly EU State aid rules continue to apply in the UK—is subject to a Court of Appeal ruling, it provides an indication that English courts may be willing to narrow the scope of application of EU State aid rules in the UK. Legislative developments may also affect the future application of EU State aid rules in the UK, with the UK Government's Northern Ireland Protocol Bill proposing to exclude the application of the State aid provisions of the Protocol in UK law.

KEY TAKEAWAYS

1. **The WTO SCM Agreement and related WTO jurisprudence are likely to inform English Courts' interpretation of the subsidy control provisions in the UK-EU TCA.** While the Court recognised that there was significant overlap between the concepts in the EU State aid provisions (as applicable in the UK pursuant to the Northern Ireland Protocol) and the subsidy control provisions found in the UK-EU TCA, it concluded that the "immediate source" of the TCA's subsidy control provisions "appears to be the WTO [SCM Agreement]." This

[4] The Unilateral Declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol of 17 December 2020)

sends a clear signal that relevant WTO jurisprudence should be taken into account when applying subsidy control law in the UK—particularly in circumstances where WTO obligations or jurisprudence differ from EU State aid rules.

2. **The High Court's finding that the EU's Unilateral Declaration influences the interpretation of the Northern Ireland Protocol potentially narrows the scope of application of EU State aid rules in the UK.** The Court held that the 'effect on trade' requirement under Article 10(1) of the Northern Ireland Protocol is not to be interpreted solely by reference to EU State aid jurisprudence (which encompasses the indirect effects of a State aid measure), but is informed by the EU Unilateral Declaration (which among other things requires a "genuine and direct link" to Northern Ireland). While unlikely to be the final word on this highly contentious issue, the Court's decision provides an initial indication that English courts may exercise restraint in applying the State aid provisions of EU law by way of the Northern Ireland Protocol.

3. **The High Court confirmed the UK Government's ability to set non-discriminatory ATQs and tariff exemptions in a manner different from the EU.** While the Court rejected the Secretary of State's argument that the UK Global Tariff Regime was not capable of falling within the remit of the EU State aid rules, it nevertheless upheld the lawfulness of the particular ATQ in question and in so doing, (i) demonstrated the UK Government's ability to develop an independent, post Brexit tariff regime and (ii) showed how future ATQs are likely to be assessed against State aid and subsidy control provisions. Overall, the Court set a high threshold for a non-discriminatory tariff quota to constitute State aid or a subsidy—making it difficult (particularly given the unique facts of the case) for a complainant to demonstrate that a non-discriminatory tariff rate quota is unlawful.

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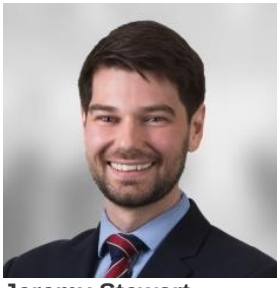

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