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ARTICLE

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The United Kingdom (UK) is no longer part of the European Union (EU). The new relationship between the two parties has led to a trade and cooperation agreement (TCA). While the agreement contains some specific tax provisions and ensures the freedom of movement, in principle, it has no direct effect. This raises questions about the actual impact of this agreement for taxpayers. The authors discuss the direct and indirect effect of the agreement, concluding that courts may, in accordance with World Trade Organization (WTO) law, still be held to interpret their domestic (tax) laws in compliance with the principles from the agreement, including comparably formulated fundamental freedoms.

Keywords: Brexit, treaty, WTO, direct effect, indirect effect, EU, interpretation, dispute resolution.

1 Introduction

When the trade and cooperation agreement[1] (TCA) between the European Union (EU) and the United Kingdom (UK) entered into effect on 31 December 2020, the UK distanced itself from the European internal legal order.[2] The agreement is the result of nearly five years[3] of negotiations between the EU and the UK.[4] It avoids the – feared[5] – hard Brexit and should bring back stability and calm in the relationship between the EU and the UK.[6] However, what is the exact structure of the TCA, and what does this mean for interpretational issues?

This contribution delineates the Brexit's consequences. More specifically, it researches the potential interpretational impact of the TCA. The authors will first examine the TCA and its functioning (paragraph 2). To do so, the aim and provisions comparable to the fundamental freedoms (and may therefore affect direct taxation), state aid, and specific provisions in relation to taxes in the TCA will be highlighted in paragraph 2. The TCA includes fundamental freedoms that are worded comparably to the fundamental freedoms included in the Treaty on the Functioning of the EU (TFEU). As such, the scope of the TCA's fundamental freedoms is to be established before determining whether those provisions might have a direct or an indirect effect. Paragraph 3 examines the direct effect of trade agreements and EU agreements, in general, where the question will be specifically raised of when taxpayers can directly invoke the rights of a trade agreement and the TCA between the EU and the UK in particular. In light of the – absence of – direct effect of the TCA, paragraph 4 offers insight into the possibilities for dispute resolution that the TCA foresees in in EU-UK situations. Paragraph 5 discusses treaty-consistent interpretation (also referred to as 'indirect effect'). The authors end with a conclusion in paragraph 6.

Notes

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1 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 149/10 (30 Apr. 2021).

2 For the sake of completeness, the United Kingdom formally left the EU on 31 Jan. 2020. This was followed by a transitional period during which almost the entire body of EU law still applied to the United Kingdom (*see* Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ C 384I/1 (12 Nov. 2019) (Withdrawal Agreement)).

3 As from the Brexit referendum on 23 June 2016.

4 *See* for an overview of the negotiations on the Brexit: NL Government, *Brexit – EU-UK akkoord: stand van zaken*, rijksoverheid.nl/onderwerpen/brexit/brexit-stand-van-zaken (accessed 11 Nov. 2021).

5 *See* by way of illustration: Redactie, *Brexit overleg onder hoogspanning hervat in Brussel*, NL newspaper Trouw (5 Dec. 2020).

6 UK Government, *Prime Minister's Statement on EU Negotiations* (24 Dec. 2020), gov.uk/government/speeches/prime-ministers-statement-on-eu-negotiations-24-december-2020 (accessed 11 Nov. 2021).

2 THE TRADE AND COOPERATION AGREEMENT

2.1 *'Global' Britain*

The UK left the EU as the former was aiming for more sovereignty and autonomy.[7] As part of this, it has now formed a separate market with its own regulations.[8] While the country has moved towards sovereignty and autonomy, it has departed from the pros and cons of EU membership at the same time. Thus, the European freedoms as included in the TFEU basically[9] no longer apply to the country.[10] Furthermore, the UK can no longer claim the bilateral agreements and cooperation that the EU has concluded or negotiated with third countries in various fields.[11] The country must negotiate these agreements itself and can, when possible, negotiate a rollover deal as a result of which existing agreements and arrangements (from the time when the UK was an EU Member State) will continue to apply.[12] Another point is that the Court of Justice of the European Union (CJEU) lost its jurisdiction over the UK's taxes and other laws.[13] During the Brexit negotiations – as part of gaining sovereignty and autonomy – this was a major matter of principle for the country in regaining independence and control over its own laws.[14] It is agreed in the TCA that provisions are applicable as per 1 January 2021.[15] This means that the CJEU no longer has legal powers on new disputes. Based on the withdrawal agreement,[16] the CJEU remains competent to answer preliminary ruling requests by UK courts if these questions were submitted to the CJEU before 31 December 2020.[17,18] The European Commission can still initiate infringement procedures against the UK until 31 December 2024 if the infringement originates before 31 December 2020.[19] To summarize, the UK must once again engage with and develop on the world stage – and it must now do so individually. The TCA is a major step in this respect as it forms the basis of the cooperation between the EU and the UK in various areas.[20]

The TCA embodies the EU's and the UK's effort to achieve ambitious, broad, and flexible cooperation in various fields[21] for which purpose the agreement's legal basis is Article 217 TFEU.[22] The TCA contains agreements on issues of shared interest stemming from the parties' shared history, geographical proximity, and general European values[23] such as the guarantee of individual rights and the fundamental freedoms.[24] Specifically, the agreement encompasses the following areas: trade, transport, fisheries, UK participation in EU programmes, financial provisions, dispute settlement, institutional provisions, and a number of general and other matters.[25] In summary, the

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7 UK Government, *International Treaty, Summary Explainer* (11 Mar. 2021), Foreword from the Prime Minister, para. 14, gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union/summary-explainer#part-2–trade-transport-fisheries-and-other-arrangements (accessed 11 Nov. 2021).

8 *See* among others: preamble TCA, point 7.

9 For the sake of completeness, free movement of capital generally applies to third countries. *See* Art. 63 Treaty on the Functioning of the European Union (TFEU). As a result, the EU Member States are still not allowed to apply restrictions to this treaty freedom in relation to the United Kingdom. The United Kingdom, however, is no longer bound to that provision. Furthermore, the TCA contains some provisions on the freedoms. *See* e.g., the national treatment of service suppliers (Art. 137 TCA).

10 Article 26(2) TFEU.

11 For insight into the range of areas of work and the progress of negotiations and/or EU agreements, *see* European Commission, ec.europa.eu/info/index_nl (accessed 11 Nov. 2021).

12 For an overview of the UK's negotiations (which are ongoing) regarding trade agreements, *see* UK Government, *UK Trade Agreements With Non-EU Countries*, gov.uk/guidance/uk-trade-agreements-with-non-eu-countries (accessed 11 Nov. 2021); and T. Edgington, *Brexit: What Trade Deals Has the UK Done so Far?*, BBC (15 June 2021).

13 The CJEU and its case law has only limited effect in relation to third countries (*see* for the powers of the CJEU: Art. 19 Treaty on European Union (TEU), Arts 251–281 TFEU; and Protocol (no. 3) regarding the Statute of the Court of Justice of the European Union, *OJEU* 2016, C 202). Moreover, the TCA contains a provision that completely excludes the influence of the CJEU (Art. 754(5) TCA). The authors will discuss this in detail in para. 4.

14 *See* among others: UK Government, *supra* n. 9; and C. van de Wiel, *De EU is groter en machtiger dan het VK – maar heeft zij ook 'gewonnen' in dit akkoord?*, NL newspaper NRC (24 Dec. 2020).

15 Article 783(2) TCA.

16 Withdrawal Agreement, *supra* n. 2.

17 The end of the transitional period, in conformity with *ibid.*, Art. 126.

18 *Ibid.*, Art. 86.

19 *Ibid.*, Art. 87.

20 Article 1 TCA.

21 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ C 384 I/178 (12 Nov. 2019), para. 3.

22 *See* among others: preamble of Decision (EU) 2021/443 of the Council of 18 Feb. 2021 on the position to be taken on behalf of the European Union within the Partnership Council established by the 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, as regards the date on which provisional application pursuant to the Trade and Cooperation Agreement is to cease, OJ L 85/198 (12 Mar. 2021).

23 Preamble TCA, point 2; and Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *supra* n. 21, paras 3 & 77.

24 European Commission (24 Dec.. 2020), *Questions & Answers: EU-UK Trade and Cooperation Agreement*, 36, ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532 (accessed 11 Nov. 2021).

25 Parts 1–7 TCA.

TCA contains cooperation arrangements on the one hand; on the other hand, it aims to guarantee the parties' autonomy and sovereignty.[26]

2.2 *Fundamental Freedoms and Most-Favoured-Nation Treatment Under the TCA*

After a more general introduction, provisions in the TCA are examined that may be relevant to direct taxation in EU-UK situations. The TCA contains very few concrete tax provisions.[27] In this respect, a broader examination will be taken at what ramifications the TCA may have for direct taxes. Provisions comparable to the TFEU fundamental freedoms will be investigated. After all, the TFEU's fundamental freedoms would prohibit disadvantageous (tax) treatment of cross-border situations compared to domestic situations, justifying the question of whether the scope of the TCA's fundamental freedoms is equally broad. Furthermore, the most-favoured-nation treatment will be discussed.

As already noted,[28] because the geographical scope of most TFEU fundamental freedoms is limited to EU situations, these freedoms, in principle, no longer apply to the UK. As a result, cross-border obstacles cannot be challenged by invoking the freedoms of goods, persons, and services. Continuing, insight will be provided into the fundamental freedoms in the TFEU that may still be relevant to direct taxation in EU-UK situations, i.e., the free movement of capital.[29]

From the perspective of the EU, the Brexit does not necessarily affect the free movement of capital. This freedom is already effective in relation to non-EU (or third) countries,[30] which is what the UK is now,[31] subject to the application of justifications or the standstill clause.[32] Hence, restrictions in the EU Member States' legislation relating to the UK, e.g., regarding investments there, can be eliminated by invoking the free movement of capital unless these restrictions already existed on 31 December 1993.[33] In encouraging the UK to not introduce new obstacles as part of the free movement of capital in relation to the EU, the TCA also includes a provision similar to the free movement of capital.[34] It determines that both the EU and the UK shall allow, with regard to transactions on the capital and financial account of the balance of payments, the free movement of capital for the purpose of liberalization of investment. It is assumed that this is to ensure some reciprocity of the free movement of capital.

In terms of a potential impact on direct taxation, it is interesting to highlight the provision on the freedom of establishment in the TCA. Article 129 reads as follows:

> *1. Each Party shall accord to investors of the other Party and to covered enterprises treatment no less favourable than that it accords, in like situations, to its own investors and to their enterprises, with respect to their establishment and operation in its territory.*
>
> *2. The treatment accorded by a Party under par. 1 means:*
> *a) with respect to a regional or local level of government of the United Kingdom, treatment no less favourable than the most favourable treatment accorded, in like situations, by that level of government to investors of the United Kingdom and to their enterprises in its territory; and*
> *b) with respect to a government of, or in, a Member State, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Member State and to their enterprises in its territory.*

The definition of the freedom of establishment in the TCA clearly differs from its counterpart in Article 49 TFEU.[35] The TFEU concept generally prohibits restrictions on the

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[26] Article 1 TCA and Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *supra* n. 21, paras 4 and 5.

[27] These will be detailed in *supra* para. 2.4.

[28] *See infra* para. 2.1.

[29] For the sake of completeness, only the freedoms that may impact tax matters are discussed. For a broader view on the fundamental freedoms in respect of the TCA, *see* among others: some important trade-related aspects of the EU-UK TCA: A brief comparison with the EU's four freedoms and WTO rules (Part I & II), *see* F. Jiang, *Leidenlawblog* (4 Mar. 2021), leidenlawblog.nl/articles/some-important-trade-related-aspects-of-the-eu-uk-tca-a-brief-comparison-with-the-eus-four-freedoms-and-wto-rules-part-i & lei denlawblog.nl/articles/some-important-trade-related-aspects-of-the-eu-uk-tca-a-brief-comparison-with-the-eus-four-freedoms-and-wto-rules-part-ii (accessed 11 Nov. 2021).

[30] *Also see* A. P. Dourado & P. Wattel, *Third States and External Tax Relations*, in *European Tax Law* 179 et seq. (P. Wattel, O. Marres & H. Vermeulen eds, Kluwer 2018); A. P. Dourado, *The EU Free Movement of Capital and Third Countries: Recent Developments*, 45(3) Intertax 192 (2017); and D. S. Smit, *Freedom of Investment Between EU and Non-EU Member States and Its Impact on Corporate Income Tax Systems Within the European Union* (Doctoral dissertation Tilburg University 2011).

[31] Article 63 TFEU.

[32] Article 64 TFEU.

[33] *Also see* A. P. Dourado, *Free Movement of Capital: The European Union Anti-Tax Avoidance Package and Brexit*, 44(12) Intertax 870–873 (2016).

[34] Article 215 TCA. In this respect, the TCA does not seem to contain a standstill clause based on which restrictions that already existed in the relationship between the United Kingdom and the EU on 1 Jan. 2021 may remain in place from the UK's perspective. Whether this has consequences for the county also depends on whether Art. 215 of the TCA has a direct effect, which will be addressed later. The free movement of capital encourages EU investments in the United Kingdom but not so much UK investments in the EU because the date of the standstill provision in Art. 64 TFEU has not been changed in the wake of the Brexit. In this light, *see* G. Beretta, P. J. Jonge & E. Thomas, *EU-UK Trade and Cooperation Agreement (With Several Comments of the Editorial Board of H&I)* (Kluwer 2021), para. 2a.7.

[35] That is also the case for the different terminology of the free movement of capital provisions in Art. 63 TFEU and Art. 215 TCA.

freedom of establishment of nationals of a Member State in the territory of another Member State. For corporate taxation, the broad scope of this freedom for companies[36] is particularly important. It follows from CJEU case law that the freedom of establishment brings about wide cross-border mobility for companies. Consider, e.g., the use of a foreign company[37] or a cross-border merger.[38,39] The question is whether the interpretation of the differently worded provision in the TCA should be the same as the freedom of establishment in the TFEU. In the authors' opinion, this question should be answered affirmatively. Specifically, Article 129 of the TCA is broad in scope just like the TFEU freedom, and it is identical to Article 49 TFEU in terms of aim and purpose.[40] This is in accordance with the fundamental freedoms being among the EU's and the UK's shared values on which the TCA is based.[41]

In terms of the other formulation of the freedom of establishment, it is noted that it can be inferred from the TBG case[42] that different wording of a provision does not necessarily mean that the interpretation of that article deviates from the comparable TFEU concept.[43] The TBG case concerns the Decision on the Association of the Overseas Countries and Territories (OCT) with the EU[44] and how the freedom of capital is interpreted which, in the OCT Decision, is also formulated differently from the TFEU free movement of capital principle. The CJEU states that the relevant provision of the OCT decision can be interpreted in line with the TFEU concept as the aim and purpose of the capital provisions are similar:

> *By referring to balance of payments and by prohibiting, first, all restrictions on payments in freely convertible currency on the current account of that balance and, second, restrictions on the movement of capital linked to investments in companies and which concern transactions on the capital account of that balance, art. 47(1) of the OCT Decision has a particularly wide scope, close to the scope of art. 56 EC in the relations between Member States and third countries (…).*[45]

The authors interpret the judgment in the Wächtler case[46] in a comparable manner. This case concerns the EU-Switzerland agreement on the free movement of persons (AFMP).[47] The CJEU holds that the provisions on the free movement of persons contained in the AFMP – which, as in the TBG case, is worded differently from the comparable TFEU freedom of movement – and the principle of equality must be interpreted in accordance with EU law.[48] Stated otherwise, the free movement of persons in the AFMP must also be interpreted in the way that the CJEU interprets the provisions on the free movement of persons in the TFEU. Wächtler thus also seems to reflect a form of EU law interpretation of concepts from bilateral treaties.[49] It is worth noting that the AFMP states that EU case law – and thus the European interpretation of a concept – remains valid in the context of the agreement.[50] That means that, for the interpretation of concepts from the AFMP, not only case law dating back to before the entry into force of the AFMP needs to be taken into account, but also posterior case law will be relevant if it merely clarifies or confirms the principles as formulated in the case law at the date of signature of the AFMP.[51]

Therefore, the interpretation of EU law of the AFMP already follows directly from the agreement and not only from the case law.

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[36] Article 54 TFEU gives substance to the concept of companies as part of the freedom of establishment. This concept is also broadly defined (*see* second subsection of Art. 54 TFEU).

[37] For example, CJEU 9 Mar. 1999, Case C-212/97, *Centros*, ECLI:EU:C:1999:126.

[38] For example, CJEU 13 Dec. 2005, Case C-411/03, *SEVIC Systems,* ECLI:EU:C:2005:762.

[39] *See* in more detail: M. J. Kroeze & C. Assers, *Rechtspersonenrecht, De rechtspersoon*, *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht* 372 (Kluwer 2015), para. 7.4.

[40] Several authors share this view; *see* among others: D. Weber & J. Steenbergen, *Applying CJEU Case Law in Tax Treaties With the UK: The Indirect Effect of the EU/UK Trade Agreement*, Kluwer International Tax Blog (3 June 2021); and *Verzamelwet Brexit gewijzigd*, Vakstudie Nieuws, 2021/9.4, 22 (16 Dec. 2020).

[41] *See supra* para. 2.1.

[42] CJEU EU 5 June 2014, Joined Cases C-24/12 and C-27/12, TBG, ECLI:EU:2014:1385.

[43] *Also see* E. Ros, *Hoe het EVA-hof in een fiscaal arrest een bijzondere symbiose tussen context, homogeniteit en effectiviteit tot stand bracht*, 251 Weekblad Fiscaal Recht (2019). The author explains the context within which a provision from an association agreement that is comparable to an internal EU law provision is to be interpreted. He concludes that, in the event that the context is comparable, the interpretation from the provision in the association agreement should be the same as the interpretation under one of the TFEU fundamental freedoms. He refers to this as the 'Polydor-principle'. *Also see* Dourado, *supra* n. 30, at 201–203; and, Smit, *supra* n. 30, at 368.

[44] Currently included in Decision 2021/1764/EU of the Council of 5 Oct. 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other, OJ L 355/6 (7 Oct. 2021).

[45] *TBG* (C-24/12 and C-27/12), *supra* n. 42, point 48.

[46] CJEU 26 Feb. 2019, C-581/17, *Wächtler*, ECLI:EU:C:2019:138.

[47] The Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJ L 114/6 (30 Apr. 2002).

[48] Wächtler (C-581/17), *supra* n. 46, points 38–40 & 55.

[49] *See* comparable: H. Vermeulen, *'Brexit: belastingen'*, Bedrijfsjuridische berichten 2021/37 (26 Mar. 2021), para. 3.5; and H. Vermeulen, *Uitvergroot: Brexit: direct effect exit?*, Vakstudie Nieuws 2021/14.0 (24 Mar. 2021).

[50] Article 16(2) AFMP.

[51] Wächtler (C-581/17), *supra* n. 46, points 38–39. *Also see* E. Ros, *Het vrije verkeer van personen tussen Zwitserland en de EU: Zwitserse autonomie onder druk?*, 46 Maandblad Belastingbeschouwingen 505 (2019).

In the authors' opinion, the reasoning following from the case law mentioned previously likewise applies to the freedom of establishment in the TCA and the TFEU, respectively. In concrete terms, this means that Article 129 of the TCA provides, among other things, that UK investors investing in a Member State must be treated in the same manner as the residents of that Member State and vice versa.

Finally, it is worth noting that the TCA contains a most-favoured-nation clause.[52] Probably as a result of the D case,[53] this provision has been declared inapplicable to provisions of tax treaties.[54] Therefore, this most-favoured-nation provision is generally irrelevant for taxes.[55]

2.3 *State Aid and the TCA*

The TCA contains provisions on state aid (*subsidy control).*[56] The terminology and principles included in these articles are remarkable as they appear to be based on EU[57] and the World Trade Organization (WTO) case law[58] although the specific wording of the TCA definition of state aid is different from its TFEU counterpart.[59] There are some points on state aid, though, for which the TCA provision appears to be broader than the rules in the TFEU.[60]

In principle, the TCA prohibits subsidies. Various conditions must be met to qualify as a subsidy, including a selectivity criterion similar to that for state aid law.[61] However, the TCA contains quite a few exceptions when it comes to tax provisions. Although the TCA 'subsidy' definition may include tax benefits, it is also stated that tax benefits are basically not assessed to be selective in the context of TCA state aid. On the other hand, tax benefits are considered to be a prohibited subsidy within the TCA if certain taxpayers pay less tax than they would have had to under the normal regime while similar taxpayers are not awarded this more favourable treatment.[62] Still, if selectivity does exist, the subsidy may be justified by principles inherent to the design of the general system.[63] Thus, many corporate income tax schemes will remain outside the 'prohibited subsidy' regime. More specifically, it should also be noted that selectivity does not apply to special purpose levies if their design is required by non-economic public policy objectives such as the need to limit the negative impacts of certain activities or products on the environment or human health insofar as public policy objectives are not discriminatory.[64]

The TCA also contains principles for a system of control over state aid. Within the lines of these principles, the EU and the UK can design their own state aid rules.[65] They did not need to be amended after the Brexit because the EU's current state aid rules[66] obviously adhere to the basic principles of the TCA.[67] Since the UK before Brexit did not have its own state aid rules – being an EU Member State – it will implement new regulations.[68,69] As the outlines of their design must align with the principles of the TCA, those new

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[52] Article 130 TCA.

[53] CJEU EU 5 July 2005, C-376/03, *D*, ECLI:EU:C:2005:424. *See* in more detail on the D case: G. T. K. Meussen, *Exit meestbegunstiging*, Weekblad Fiscaal Recht 2005/1027 (1 Jan. 2005).

[54] Article 130(3)(a) TCA.

[55] Comparable: Vermeulen, *supra* n. 49, para. 3.4.

[56] Articles 363–375 TCA.

[57] Articles 93 & 107–109 TFEU.

[58] More specifically: WTO, Agreement on Subsidies and Countervailing Measures.

[59] *See* among others: P. Hardy, L. Korsten & R. Sterneberg, *Brexit 'Done': The UK-EU Trade and Cooperation Agreement*, Bedrijfsjuridische berichten 2021/7, para. 5, M. van Wanroij, *Brexit: gevolgen voor mededinging, staatssteun en aanbestedingen*, Bedrijfsjuridische berichten 2021/42 (28 Apr. 2021), para. 3, Vermeulen, *supra* n. 49, para. 3.2; and F. de Lillo, T. Morales & O. Popa, *European Union/United Kingdom – Brexit: Selected Tax Implications of the Trade and Cooperation Agreement*, 61(4) Eur. Tax'n (2021), para. 3. For a more detailed consideration of the design of the state aid rules in the trade and cooperation agreement, the authors refer to the literature mentioned previously.

[60] van Wanroij, *supra* n. 59, para. 3.

[61] *See* Art. 366 TCA; and Art. 107 TFEU.

[62] Article 363(2)(a) TCA.

[63] Article 363(2)(b) TCA.

[64] Article 363(2)(c) TCA.

[65] Article 366 TCA.

[66] Articles 93 & 107–109 TFEU.

[67] After all, Arts 636–675 TCA are partly based on EU law and less strict in some areas (*see* the first section of this paragraph).

[68] Awaiting the UK's own control regime, temporary state aid rules are currently in place (*see* UK Government, *Guidance on the UK's International Subsidy Control Commitments*, gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments#section-7 (accessed 11 Nov. 2021); and UK Government, *Government Response to the Consultation on Subsidy Control, a Flexible, Principles-Based Approach for the UK*, CP 469 (June 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/998078/subsidy-control-government-response.pdf (accessed 11 Nov. 2021).

[69] For the sake of completeness, the EU state aid rules continue to be in force for businesses in Northern Ireland if the aid can promote trade in goods or electricity in EU-Northern Ireland situations (Art. 10 Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29/7 (31 Jan. 2020) and; UK Government, *Government Response to the Consultation on Subsidy Control*, *supra* n. 68, at 21).

UK rules would probably mirror the TCA. Hence, taxpayers who receive a subsidy from the UK as a result of the Brexit are subject to slightly different or more lenient state aid rules, respectively.[70]

UK subsidy rules for tax purposes can, if necessary, be enforced through the dispute resolution procedure described in section 4.[71] It is emphasized that this corresponds with the exclusion of direct effect, as will be elucidated in paragraph 3. However, recovery of a subsidy may not be enforced if it has been awarded following a decision by the Council of the EU, by the Council of the EU and the European Parliament, or by the UK Parliament.[72] Hence, if a tax subsidy was to be classified as a 'prohibited subsidy', which the authors expect to happen in only a very few cases, it does not seem as if the UK would actually have to recover the granted tax benefits from beneficiaries because the tax subsidy would generally be the consequence of rules of law that followed the standard domestic legislative process. Therefore, the authors doubt the effectiveness of TCA subsidy rules in the field of direct taxation.[73]

2.4 *Tax Provisions in the TCA*

Generally, taxation remained beyond scope of the TCA. However, Brexit does have an effect on the Anti-Tax Avoidance Directive (ATAD)[74] obligations, especially from the perspective of the UK. This is because the tax and other directives no longer apply to the UK post-Brexit thus the country will no longer have to conform to the ATAD obligations. To prevent the country from abolishing the anti-tax avoidance rules, which could create a competitive advantage for British companies, the TCA includes agreements on this subject:

> *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:*
>
> *{ … }*
>
> *b) rules on interest limitation, controlled foreign companies and hybrid mismatches.*[75]

While the UK has the possibility to adjust the earnings stripping rules, controlled foreign companies (CFC) provisions, and anti-hybrid mismatch articles under this provision, it is prohibited from dropping below the minimum level agreed on at the Organization for Economic Co-Operation and Development (OECD) level.[76] This provides the UK some margin of freedom as the ATAD does not seamlessly link to the OECD Base Erosion and Profit Shifting (BEPS) action plans.[77] The ATAD provisions that are not explicitly mentioned like the exit tax rules and ATAD's general anti-abuse rule can even be abolished. These rules were probably not mentioned in the TCA as they do not originate from the OECD's BEPS Project and do not concern one of the BEPS minimum standards. For now, though, the UK has not yet amended the ATAD implementation provisions.

3 DIRECT EFFECT

On the back of the question of the scope of the TCA in respect of direct taxes, the question of whether taxpayers can also directly invoke a provision of the TCA, such as one of the fundamental freedoms, must be answered. First, the direct effect of treaties and EU agreements, in general, will be discussed. Subsequently, the authors will deal extensively with the TCA in particular. Paragraph 5 will discuss the indirect effect of the TCA also referred to as treaty consistent interpretation.

The EU constantly negotiates trade agreements with third countries and organizations.[78] Until 2008, these

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70 For the sake of completeness, the British Government may – like the EU – introduce stricter state aid rules than the principles of the trade and cooperation agreement require. However, considering the British Government's response to the consultation on state aid rules, this will not happen (UK Government, *Government Response to the Consultation on Subsidy Control*, *supra* n. 68).

71 Article 375 TCA. However, some elements of the arbitration process have a different effect. van Wanroij, *supra* n. 59, para. 3 has more details on the dispute settlement of the TCA in the context of state aid.

72 Article 373(5) TCA.

73 Superfluously, the authors note that the United Kingdom is no longer subjected to the code of conduct on business taxation as a consequence of the Brexit. Based on this code, the European Council attempted to coerce the EU Member States to amend or abolish their harmful tax arrangement by mostly using political pressure.

74 Council directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (19 July 2016) (ATAD1) & Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries OJ L 144/1 (7 June 2017) (ATAD2).

75 Article 384(1)(b) TCA. For the sake of completeness, Art. 384(1)(a) TCA states that the same applies to the exchange of information regarding tax rulings, country reports, and reportable cross-border arrangements.

76 If the result would be that the transposition of the BEPS actions by the United Kingdom is more attractive to multinationals than the transposition of the BEPS actions in the EU, tax competition between regional blocs could occur; *see* Dourado, *supra* n. 33, at 877.

77 Just as the UK has already used that margin of freedom with regard to DAC6 by applying that directive only to hallmark D. *See* e.g., UK Government, *Guidance Agent Update: Issue 82* (17 Feb. 2021), gov.uk/government/publications/agent-update-issue-82/agent-update-issue-82#man (accessed 11 Nov. 2021).

78 Trade agreements EU, *see* European Commission, *EU Trade Agreements* (2021), https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159174.pdf (accessed 11 Nov. 2021).

bilateral agreements contained no or hardly any provisions on their effect in national law.[79] It was thus left to the CJEU to interpret the effect of relevant treaties and agreements in the internal legal order of individual Member States.[80] However, from 2008 onwards, the direct effect has been explicitly excluded for all or almost all treaties. One of the ways this is implemented is through a provision in the treaty or in the decision of signature of the treaty.[81] The reason behind this shift, or actually limitation, on the effect of provisions in trade agreements and agreements on national law has not been crystallized.[82] This is unlike the rationale for the exclusion of the *direct* effect, which is clear. Specifically, A-G Bot concludes the following in a dispute concerning the trade agreement between Canada and the EU[83]:

> *In practice all the free trade agreements recently concluded by the European Union expressly exclude their direct effect. The main reason for excluding the direct effect of those agreements is to guarantee effective reciprocity between the parties, in a manner consistent with the objectives of the common commercial policy.*[84]

The guarantee of reciprocity seems to also be the reason behind the exclusion of the direct effect in the relationship between the EU and the UK. In itself, of course, the reciprocity of provisions need not be affected by the conclusion of a treaty, however, if certain jurisdictions are excluded from common judicial control, this may be different. After all, in such cases, it could happen that – if a provision of the treaty has a direct effect – one country finds that the provision is breached while a court in the other country concludes there is no such breach. This could impede the balance of the treaty, especially in the absence of a common arbitrator to resolve the dispute on a reciprocal basis for which following uniform interpretation is ensured. Partly because of the special rules for dispute settlement and the exclusion of the jurisdiction of the CJEU (see paragraph 4), the authors understand the initial lack of reciprocity and thus the explicit exclusion of the direct effect of the provisions of the TCA in Article 5 of that agreement:

> *Without prejudice to art. SSC.67 of the Protocol on Social Security Coordination and with the exception, regarding the Union, of Part Three of this Agreement, nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties.*

It is noted that some items have been omitted from the exclusion of the direct effect. They are social security and the cooperation on law enforcement and justice in criminal matters.[85] Hence, the exceptions to the exclusion of a direct effect do not apply to direct and other taxes. In this respect, in reading the text of Article 5 of the TCA, it could be concluded that taxpayers cannot derive any direct rights from the agreement.[86] The authors believe that this may be an oversimplification which is why Article 5 of the TCA should be considered in light of different methods of interpretation. This will provide a broader context and thus more clarity about the exclusion of the direct effect for tax issues.

The commencement is a grammatical approach to Article 5 of the TCA. As already noted, the text unambiguously shows that, in tax matters, taxpayers cannot directly invoke the provisions of the agreement.[87] Otherwise stated, taxpayers would then be unable to claim, e.g., that a provision of national law infringes the freedom of establishment provided for in the TCA.

Besides that, in the rationale for excluding a direct effect, two points are prominent. First of all, in light of the rationale of the chapter of the TCA containing Article 5, the exclusion of a direct effect is logical. This is because the aim and purpose of Part 1, Title II, TCA are as follows. The British Government wants the new relationship of the EU

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79 *See* in more detail about the developments on the direct effect and the preclusion thereof: A. Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, 51(4) Common Mkt. L. Rev. (2014), para. 1.

80 CJEU 26 Oct. 1982, Case C-104/81, *Hauptzollamt Mainz/Kupferberg & Cie,* ECLI:EU:C:1982:362, point 17; CJEU EU 23 Nov. 1999, Case C-149/96, *Portugal v Council*, ECLI:EU:C:1999:574, point 34; and CJEU EU 21 Dec. 2011, Case C-366/10, *Air Transport Association of America*, ECLI:EU:C:2011:864, point 49. *Also see* Smit, *supra* n. 30, at 363.

81 *See* among others: Art. 8, Council Decision 2011/265/EU of 16 Sept. 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127/ 1 (14 May 2011), preamble, point 9 & Art. 7, Council Decision 2012/735/EU of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354/1 (21 Dec. 2012), para. 9, preamble & Art. 7, Council Decision 2012/734/EU of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters, OJ L 346/1 (15 Dec. 2012), Art. 30.6, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11/23 (14 Jan. 2017); and preamble, point 5 & Art. 23.5, Agreement between the European Union and Japan for an Economic Partnership, OJ L 330/3 (27 Dec. 2018).

82 *See* among others: Semertzi, *supra* n. 79.

83 Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, *supra* n. 81.

84 Opinion Advocate General Bot 30 Apr. 2019, Case C 1/17, *Petronas Lubricants Italy,* ECLI:EU:C:2019:341, point 91.

85 Article 5 in conjunction with part three and Art. SSC.67, Protocol on Social Security Coordination, TCA.

86 In this respect, *see* NL: Parliamentary Papers II 2020/21, 35393, no. 32, at 1.

87 That the provisions might have an indirect effect will be discussed in para. 5.

and the UK to be based on international law – so not on EU law – and the exclusion of the direct effect contributes to this.[88] After all, the CJEU is sidelined in relation to the UK partly because of the exclusion of the direct effect.[89] For the sake of completeness, because excluding the jurisdiction of the CJEU has always been the UK's objective, the above analysis likewise aligns with the method of historical interpretation of the law. Less influence of the EU and its judges means more autonomy and sovereignty[90] for the UK.

The second point concerns the rationale of excluding a direct effect. As already noted, the purpose of excluding it is to ensure reciprocity between parties as is the case here between the EU and the UK. However, the CJEU has stated that, in the absence of a direct effect, it is precisely that reciprocity that may be at issue: *'However, the lack of reciprocity { … } may lead to disuniform application of the WTO rules'.*[91]

It is noted that this statement relates to a case on agreements of the World Trade Organization (WTO agreements)[92] that have been concluded on the basis of reciprocity and mutual benefit. At the time of this judgment, the mutual obligations in EU agreements with third countries were often asymmetrical.[93] However, in the recently concluded EU agreements – including the TCA – reciprocity is important.[94] At the same time, the design of the EU's trade agreements seems to be increasingly moving towards that of the WTO agreements. The TCA is no exception.[95] In the authors' opinion, the CJEU's judgment thus accords logically with the context of the TCA. Attributing a direct effect to provisions when this contributes to the safeguarding of reciprocity is appropriate. As part of this, the provision on the freedom of establishment in the TCA is more comprehensively examined because this article could have a major impact on direct taxation. On top of this, if reciprocity is achieved, it is believed that a case can be made for giving this article a direct effect.

On close examination of the text[96] of the provision on the freedom of establishment in the TCA, the following is noteworthy. Paragraph 2 clearly states that – from the UK's perspective – the less favourable treatment must originate at a *regional or local government level.* From the EU Member States' perspective, the origin should lay with *a government.* Effectively, this defines the *party* that must have introduced the restrictive legislation or regulation. The TCA does not precisely state these specifications of the term *party* for the general application of the TCA nor for the application of specific TCA provisions.[97] Therefore, paragraph 2 of the TCA may possibly fail to achieve full reciprocity because, in concrete terms, this grammatical interpretation of the freedom of establishment results in the following: In terms of the national levy of corporate income tax there, if Dutch investors make investments in the UK, the latter does not have to treat Dutch investors the same as UK residents. This is because any obstacle would not be caused by a *regional or local government* but by the UK's national government. If the situation is the other way around, i.e., the Netherlands treats a UK entity less favourably for Dutch corporate income tax purposes, the breach is caused by a qualifying authority. This creates a non-reciprocal application of the freedom of establishment. For the sake of completeness, it is stressed that no specification on this article has been stipulated – for example, in an explanatory comment or a political statement.[98] Stated differently, the grammatically more limited designation of the governmental body concerned may be interpreted less restrictively in the UK although, for now, that continues to be ambiguous. Furthermore, as the title *national treatment* of Article 129 of the TCA would suggest, this could also be a reason for a less strict interpretation at the governmental level of Article 129 at the UK level so as not to exclude the statutory provisions of the national government. The foregoing points would thus be indications in favour of reciprocity. Although the authors acknowledge the arguments, they do not seem clear enough to conclude sufficient reciprocity and thus a direct effect.

Besides that, it can be argued that the TCA should not have a direct effect given the context of the agreement. After all, the TCA contains its own dispute settlement procedure departing from the mutual agreement (see section 4) thus directly invoking the TCA before national courts should not be an option. After all, the starting point is to solve disputes in mutual agreement between the EU and the UK and not

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88 UK Government, *supra* n. 7.

89 The authors will discuss this extensively in para. 4.

90 This is, after all, the aim of the trade and cooperation agreement, specifically for the United Kingdom (Art. 1 TCA; and UK Government, *supra* n. 7, Foreword from the Prime Minister). *See* in more detail: para. 2.1.

91 *Portugal v. Council* (C-149/96), *supra* n. 80, point 45.

92 The agreements and memoranda included in Annexes 1 up to and including four of the Agreement on the Establishment of the WTO.

93 *Portugal v. Council* (C-149/96), *supra* n. 80.

94 *See* para. 2.1, from 2008 onwards, direct effect has always been explicitly excluded as part of reciprocity.

95 Semertzi, *supra* n. 79; and N. Saccardo, *Tax Implications of Brexit*, Bloomsbury Professional (2021), paras part 2: 1.41 & 1.48.

96 *See* para. 2.2 for the full text of Art. 129 TCA.

97 For example, the most-favoured-nation clause (Art. 130 TCA) and the provision on the free movement of capital (Art. 215 TCA).

98 *See* e.g., UK Government, *supra* n. 9, para. 16.

to leave dispute resolution unilaterally to a judge in one of the parties to the TCA. Even though the TFEU also foresees in its own dispute resolution procedure, the contextual approach in the TCA is different from that in the TFEU because the latter method departs from supranationality within the internal market. That is not the case under the TCA. Furthermore, the authors note that the contextual argument would mostly be supportive in nature in concluding a lack of a direct effect.

In the authors' opinion, however, considered from a broad teleological perspective, another method could also be conceivable. The prohibition of a direct effect undermines several of the obligations imposed on the parties to the TCA such as guaranteeing the freedom of establishment.[99] After all, what use does the right to freedom of establishment have for taxpayers if it cannot be enforced? We obviously acknowledge that treaties must be interpreted in good faith[100] and that EU Member States are bound by the European principle of Union loyalty.[101] Hence, any provision included in an agreement should be complied with – even without a direct effect. This is not always observed (or fully observed) though.[102] A typical example of this is the liquidation loss regime of Article 13d(2)(a)(2) Dutch Corporate Income Tax Act 1969 (CITA 1969). This section contains a territorial condition for recognizing a liquidation loss in excess of the franchise amount. Specifically, it can be inferred from this article that, as part of the freedom of establishment, the legislator wishes to offer foreign taxpayers the possibility of discerning a higher liquidation loss. However, this is subject to the condition that the country involved has concluded an association agreement with the Netherlands that has both a direct effect and includes a provision on the freedom of establishment (provided the latter is comparable to the Union law concept).[103] Taxpayers from countries such as Ukraine[104] with which the EU has concluded an association agreement without a direct effect but with a provision on the freedom of establishment, fail to meet the territorial condition.[105]

In summary, the exclusion of the direct effect of the TCA accords with the grammatical interpretation of Article 5 with the aim and purpose of (that part of) the agreement and with its historical background. When examining this from a broad teleological perspective, however, exclusion may be less obvious, but the question is whether this is sufficient to lead to a direct application of the agreement (or any of its individual provisions).

4 Dispute resolution

As already noted, the TCA provides its own dispute resolution procedure.[106] This section will examine (the structure of) this procedure and subsequently discuss how it affects tax disputes between the EU and the UK and relates to the absence of a direct effect.

As far as the authors are concerned, the TCA needs to provide for a separate dispute resolution procedure. This was prompted by the UK's desire to escape the CJEU's influence.[107] In this respect, the TCA explicitly excludes the national courts' decision-making power (for the EU, including the CJEU) in respect of the agreement[108]: *'For greater certainty, the courts of each Party shall have no jurisdiction in the resolution of disputes between the Parties under this Agreement'*.[109] This bars taxpayers from invoking the agreement and consequently disregards the opinion of the courts in those cases. This is why providing for an alternative dispute resolution procedure is required.

The commencement of the arbitration process is the search for a political[110] solution through mutual

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[99] Article 129 TCA.

[100] Article 31 Vienna Convention on the Law of Treaties; and Art. 3 TCA.

[101] Article 4(3) TEU.

[102] *See* comparable: Saccardo, *supra* n. 95, para. part 2: 1.42.

[103] NL: Parliamentary Papers *I* 2020-21, 35568, no. C, at 3–4.

[104] Preamble, point 5 and Art. 5, Council Decision of 17 Mar. 2014 on the signing, on behalf of the European Union, and provisional application of the association agreement between the European Union and the European Atomic Energy Community and their Member States of the one part and Ukraine of the other part as regards the Preamble, Art. 1, and Titles I, II, and VII thereof (2014/295/EU), OJ L 161/1 (29 May 2014); and Art. 88(2), Association Agreement between the European Union and the European Atomic Energy Community and their Member States of the one part and Ukraine of the other part, OJ L 161/3 (29 May 2014).

[105] NL: Art. 2c(2) Implementation Order Corporate Income Tax 1971.

[106] Articles 734–762 TCA.

[107] *See* para. 2.1.

[108] The EU entered into the TCA as an independent party (among others, this follows from the full title of the agreement: 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). Hence, the CJEU – and, thus, not the national courts or Member States – is considered to be the court of the EU. For the sake of completeness, the fact that the EU is a party to the TCA also means that the CJEU can adjudicate as part of the agreement; this occurs if a Member State does not comply with the agreement. Logically, this has no binding implications for the United Kingdom. The CJEU is therefore completely side-lined when the United Kingdom is involved. *See* in more detail: Saccardo, *supra* n. 95, paras part 2: 1.44 & 1.46.

[109] Article 754(5) TCA.

[110] UK Government, *supra* n. 7, para. 15; UK-EU future-relationship: the deal, governance, instituteforgovernment.org.uk/publication/future-relationship-trade-deal/governance (accessed 11 Nov. 2021); and J. Larik, *De handels- en samenwerkingsovereenkomst tussen de EU en het VK, Veertienhonderd bladzijden aan schadebeperking*, 5 Nederlands juristenblad 355 (2021).

consultation between the EU and the UK.[111] If that fails, the complainant may request the establishment of an arbitration tribunal.[112] The established arbitration tribunal – consisting of three independent arbitrators[113] – assesses whether the defendant has indeed failed to fulfil its obligations under the TCA.[114] If so, the defendant must take measures to still fulfil the relevant requirements. If necessary, this may be enforced by suspending obligations imposed on the complainant. In the first instance, the suspension applies to the part of the TCA in dispute (*retaliation).* If the non-compliance continues, it may also apply to other parts (*cross-retaliation).*[115]

As already noted, the TCA contains only a few articles on taxation. The EU and the UK (once again) express their support for the BEPS Project in these articles.[116] Strikingly, the articles on taxation are excluded from all arbitration possibilities.[117] Hence, the agreements on taxation in the TCA cannot be enforced. In more concrete terms, if the UK fails to comply with, e.g., the CFC rules – deriving from the BEPS Project and included in the ATAD1[118] – the EU cannot impose sanctions. After all, there is no access to the (enforcement possibilities resulting from the) dispute settlement and, due to the lack of a direct effect, both the CJEU and UK courts have no jurisdiction under the agreement. Perhaps if political or social pressure is applied, the UK will still align the rules with the TCA, but this is not legally enforceable. In the authors' opinion, this undermines the legal force of the TCA in terms of taxation. From a contextual perspective, the absence of a dispute settlement procedure for taxation is also flawed. After all, as noted before, the exclusion of a direct effect, to a certain extent, is comparable to the inclusion of a dispute settlement mechanism.[119] The absence of such a procedure for tax issues could raise the question of whether excluding a direct effect from the TCA in respect of taxes can still be fully defended or that, for instance, a national court should still be entitled to judge on such matters. Presumably the latter is not the case, at least not concerning direct taxation. The authors consider it as an insufficient basis for assigning the TCA a full direct effect solely based on the exclusion of dispute resolution for tax matters.

For the sake of completeness, it is noted that some elements of the TCA have their own or partly deviating arbitration process.[120] Besides that, a number of sections that include the articles on taxation are excluded from the dispute resolution procedure.[121]

5 Treaty-consistent interpretation

As explained before, the TCA would, in principle, not appear to have a direct effect nor does the TCA's dispute resolution mechanism apply to matters of direct taxation. However, if this would be the case, interpretative possibilities to make provisions from the TCA effective are still available under the CJEU's doctrine of treaty-consistent interpretation. This principle, also known as an indirect effect, will be detailed in this paragraph.

Treaty-consistent interpretation means that courts should, as much as possible, interpret national law in conformity with a particular treaty or agreement.[122] In such a case, national statutory provisions are not declared to be in breach of EU law as a result of which they may no longer be applied as such. Instead, the statutory provisions concerned are interpreted such that they can remain in force and still accord with the framework of EU law. In concrete terms, this means that an interested party – through the interpretation of the court – may have a right (enforceable or otherwise) to a provision from a treaty or agreement even if a direct effect is excluded. Stated differently and in relation to the TCA, the statutory provision is explained in accordance with a TCA provision (such as the freedom of establishment) even when that provision would lack a direct effect. For the sake of completeness, the authors note that treaty-

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[111] Articles 7, 735 & 738 TCA.

[112] Article 739 TCA.

[113] Articles 740 & 741 TCA.

[114] Articles 742–745 TCA.

[115] Articles 746–749 TCA.

[116] Articles 383–384 TCA. For elaboration, *see* para. 2.4.

[117] Article 735(2)(e) & Art. 385 TCA. For the sake of completeness, the authors of this contribution note that some authors argue that the articles excluded from the general dispute procedure are covered by the political arbitration process. This would follow from Art. 735(3) TCA (*see* e.g., S. Peers, *Analysis 4 of the Brexit Deal: Dispute Settlement and the EU/UK Trade and Cooperation Agreement*, EU Law Analyses (8 Jan. 2021), eulawanalysis.blogspot.com/2021/01/analysis-4-of-brexit-deal-dispute.html (accessed 11 Nov. 2021)). In the authors' opinion, however, a careful reading of this paragraph – even though it is carelessly worded – should lead to the conclusion that the articles involved are certainly encompassed within the regular dispute resolution.

[118] Article 384(1)(b) TCA.

[119] *See* para. 3; and the first section of this paragraph.

[120] *See* e.g., Art. 411 TCA.

[121] Article 735(1 & 2) TCA.

[122] About different degrees of indirect and direct effect, *see* D. van Eeckhoutte & A. Vandaele, *Doorwerking van internationale normen in the Belgische rechtsorde*, Instituut voor Internationaal Recht, Working Paper No. 33 (2002), para. 22.

consistent interpretation is restricted; the method is prohibited if the outcome is incompatible with EU law.[123]

Treaty-consistent interpretation has thus far particularly been applied by the CJEU in relation to the WTO agreements that do not have a direct effect[124] just like the TCA. The CJEU held that, in some cases, interested parties should still be entitled to a benefit from WTO law because of the indirect effect. In respect of the WTO agreement on trade-related aspects of intellectual property rights (TRIPS), the CJEU ruled as follows (emphasis added by authors)[125]:

> *It is true that the measures envisaged by Article 99 and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade mark. However, since the Community is a party to the TRIPs Agreement and since that agreement applies to the Community trade mark, the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPs (…).*[126]

In the judgment in question, the CJEU applied a treaty-consistent interpretation in an area in which the EU has implemented regulations, in this case, through a regulation on the EU trademark. The CJEU subsequently confirmed this case law several times.[127] This leads to the conclusion that, at least in cases when the EU has implemented regulations, national law must be interpreted in accordance with WTO law. As a part of direct taxes, directives fall under the EU's regulatory law.[128]

This obviously raises two questions:

(1) Can the principle of treaty-consistent interpretation as developed by the CJEU be applied to agreements other than the WTO agreements (such as the TCA); and

(2) can it be used in areas where the EU has not yet implemented rules?

Regarding the first question, an opinion by Advocate General Jääskinen contains an indication for such a broader application. The case concerns a dispute on the Aarhus Convention,[129] therefore, it is not encompassed within the context of WTO agreements.[130] Nevertheless, the advocate general stresses the importance of treaty-consistent interpretation by drawing a comparison with the treaty-consistent interpretation previously accepted in relation to the WTO Agreement in the dispute on the Aarhus Convention as well:

> *However, nothing in the foregoing calls into question the fundamental rule that the GATT and the WTO agreements are part of Community law and, in principle, are therefore binding on the Community. Thus, in the view of the Court, the WTO rules (…) are, as an integral part of the Community legal order, provisions which must be referred to when interpreting acts of EU law.*[131]

As far as the authors are concerned, this is a tentative indication that treaty-consistent interpretation extends beyond WTO law.[132] Unfortunately, the CJEU did not address this issue in its judgment in the case on the Aarhus Convention.[133] Therefore, it is not (or not yet) possible to be certain about whether treaty-consistent interpretation will also apply to the TCA. As far as the authors are concerned, it should, for that matter; there is no reason why treaty-consistent interpretation should be limited to WTO law. The application of treaty-consistent interpretation would mean that, when applying national rules, a national court should also take into account the text and background of provisions from the TCA such as the freedom of establishment even though taxpayers cannot directly invoke them. The relevance of the aim and purpose of the freedom of establishment provision should

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[123] *See* among others: CJEU 16 Dec. 1993, Case C-334/92, *Wagner Miret*, ECLI:EU:C:1993:945, point 22; and CJEU 22 Dec. 2010, Case C-277/09, *RBS Deutschland Holding*, ECLI:EU:C:2010:810, point 44.

[124] *Portugal v. Council* (C-149/96), *supra* n. 80, points 36–47.

[125] The agreement included in annex 1 C of the Agreement on the Establishment of the WTO.

[126] CJEU 16 June 1998, Case C-53/96, *Hermès International*, ECLI:C:1998:292, point 28.

[127] CJEU 10 Sept. 1996, Case C-61/94, *Commission v. Germany*, ECLI:EU:C:1996:313, point 52; CJEU 14 Dec. 2000, Case C-300/98, *Dior*, ECLI:C:2000:688, point 47; and CJEU 6 July 2010, Case C-428/08, *Monsanto Technology*, ECLI:EU:C:2010:402, point 72. Furthermore, treaty-consistent interpretation is – implicitly – reflected in: CJEU 27 Sept. 2007, Case C-351/04, *IKEA Wholesale,* ECLI:EU:C:2007:547, points 29–30; and CJEU 14 Apr. 2011, Case C-288/09, *British Sky Broadcasting and Pace*, ECLI:EU:C:2011:248, point 83. On the implicit treaty-consistent interpretation, *see* in more detail: N. van den Broek, *Doorwerking van het WTO-recht in de Europese rechtsorde: het toenemende belang van de verdragsconforme interpretatie*, 3 Nederlands tijdschrift voor Europees recht (2015).

[128] In this respect, one should particularly consider Directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 (29 Dec. 2011); and Directive 2003/49/EC of the Council of 3 June 2003 on a common tax regime for payments of interest and license fees between affiliated companies of different Member States, OJ L 157/49 (26 June 2003).

[129] Convention on access to information, public participation in decision-making, and access to justice in environmental matters, OJ L 124/4 (17 May 2005).

[130] Opinion Advocate General Jääskinen 8 May 2014, Joined Case C-401/12 and 403/12, *Council v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2014:310.

[131] *Ibid.*, point 44.

[132] Comparable: van den Broek, *supra* n. 127, at 97.

[133] *Council v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 and 403/12), *supra* n. 130.

therefore not be confused with the aim and purpose of the prohibition on direct effect.

Treaty-consistent interpretation does require taking an additional step, however, i.e., regarding the second question raised. Until now, the application of the treaty-consistent interpretation has been limited to areas based on positive harmonization under EU law; in other words, areas for which, for instance, a directive has been enacted that fully or partially harmonizes the laws of the Member States. This will not be the case for the application of all national tax provisions since positive harmonization in terms of direct taxation has been limited. Nevertheless, the authors do observe opportunities for broader interpretation, especially (but possibly not exclusively) with respect to situations involving negative harmonization; stated otherwise, in areas where the CJEU has already established a breach of EU law. Possibly, national tax provisions that had to undergo a change as a result of CJEU case law (and thus were the subject of negative harmonization) could also be subject to a treaty-consistent interpretation. However, the authors anticipate this position to require litigation before being accepted on a broad scale.

Following up on this, an opinion of Advocate General Keus in a civil procedure[134] in a dispute on WTO law is noteworthy. The authors find it remarkable that the advocate general's reasoning on treaty-consistent interpretation is not limited to the EU's regulatory law, which confirms the conclusion in the above paragraph:

> *The Dutch courts are not unfamiliar with the interpretation of national law in conformity with the Treaty (also in areas other than those covered by Community law). The case law even offers indications as to how the court in general should proceed when applying treaty-consistent interpretation. In a judgment of 16 November 1990,([135]) the Supreme Court ruled that the court must, as far as possible, interpret and apply Dutch law in such a way as to ensure that the State complies with its treaty obligations, and that if the legislation necessary to implement these obligations is not in place, the court must fill this gap in the law in a manner that fits in with the system of the law and is consistent with regulated cases.*[136]

Just as the CJEU did not discuss the details of Advocate General Jääskinen's conclusion regarding treaty-consistent interpretation, in its judgment, the Dutch Supreme Court also did not address the above.[137] Nevertheless, this conclusion seems to provide a starting point for the proposition that treaty-consistent interpretation may play a role in both harmonized and non-harmonized law based on EU law principles (including the non-discrimination principle and the equality principle and thus possibly also of the freedoms of movement derived from those principles).

6 Conclusion

The EU-UK TCA contains, among others, fundamental freedoms, rules concerning state aid, and specific tax provisions but also an explicit prohibition of a direct effect. Stated differently, taxpayers cannot claim that, in a cross-border situation between an EU Member State and the UK, a restriction in domestic tax law is contrary to, for instance, the freedom of establishment under the TCA. Text, aim, context, and history all predominantly point in the direction of the non-existence of a direct effect. Thus, if taxpayers feel their freedom of establishment is being hampered, invoking the freedom of establishment in the TCA would not appear to lead to fruition. The lack of a direct effect for these freedoms of movement mainly turns these provisions into a political means of pressure without any genuine power to produce the desired effect. However, two comments can be made in respect of this conclusion. First, from a broad, teleological perspective, the exclusion of a direct effect is not evident. Secondly, the exclusion of a direct effect results in the absence of a judicial process for tax disputes between the UK and the EU. Of course, this could be intentional, but it also raises the question of the use of including, e.g., the provision similar to the freedoms of movement. In the authors' view, however, before the conclusion can be reached that the agreement has a direct effect, many steps still need to be taken.

On the other hand, the authors do see another possibility to make the TCA effective for direct tax purposes, i.e., by applying treaty-consistent interpretation. It means that national legal provisions must be interpreted in accordance with the text and purpose of the provisions of the TCA. Taxpayers may thus still be able to invoke, albeit indirectly, the agreement's principles, and domestic courts are held to interpret domestic tax rules in light of those provisions such as the TCA's version of the freedom of establishment. As the aim of those provisions must thus be kept in mind, invoking the freedom of establishment may indirectly succeed after all. All in all, the UK's new status and the application of the TCA in particular is likely to lead to new case law in the future.

Notes

[134] NL: Opinion of 19 Apr. 2002, C97/291 16812, ECLI:NL:PHR:2002:AD8168.

[135] NL: Supreme Court 16 Nov. 1992, 13997, ECLI:NL:HR:1990:ZC0044, point 3.2.3.

[136] NL: Opinion of 19 Apr. 2002, *supra* n. 134, point 2.14.

[137] NL: Supreme Court 19 Nov. 2002, C97/291 16812, ECLI:NL:HR:2002:AD8168.