

Main changes in UK Subsidy Control under the Act and the subsidy control principles



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Overview

- The current position: the Trade and Co-operation Agreement, and central Govt guidance
- The new Subsidy Control Act
 - What is a subsidy
 - What are the subsidy control principles
 - Exemptions: permitted and prohibited subsidies
 - Minimum financial assistance
 - Streamlined routes

State subsidy control: what is the current position? Landmark Chambers

- State Aid (Revocations and Amendments) EU Regulations 2020: EU state aid law abolished, so no ongoing effect in UK law from time of EU exit.
- The Trade and Co-Operation Agreement provides framework for saying what subsidy control law implemented by UK law must achieve, but does not specify that regime. Article 366 just states: “*each Party shall have in place and maintain an effective system of subsidy control that ensures the granting of a subsidy respects the following principles*”.
- The EU (Future Relationship) Act 2020 did not implement specific parts of the TCA applying to subsidy control into domestic law (unlike for instance some of the security provisions). The UK therefore (was) and is still in a limbo period.
- BEIS Guidance dated 24 June 2021 purports to “fill in the gap” by advising UK public authorities to comply with the UK’s international commitments (including the TCA): “*all public authorities should read this guidance and assure themselves they understand the UK’s commitments and comply with their obligations in relation to the award of subsidies from 1 January 2021...The overview below summarises the key steps public authorities should take when awarding subsidies after 1 January 2021. However public authorities should also refer to the detail of our commitments as set out in the chapters covering the World Trade Organisation’s Agreement on Subsidies and Countervailing Measures (ASCM), the UK-EU Trade and Co-operation Agreement, and the Northern Ireland Protocol*”

Subsidy control in the “limbo” period: the current BEIS Guidance

- Legal status of BEIS guidance unclear: not statutory guidance. No express legal duty to comply with it. Enforceable as “soft law” under general public principles relating to material considerations?
- Enforcement section : *“the Agreement also includes provisions in Article 372 on the role of domestic courts in reviewing domestic subsidy decisions by way of judicial review which may be sought by interested parties. This means any natural or legal person, economic actor or association of economic actors whose interest might be affected by the granting of a subsidy, in particular the beneficiary, economic actors competing with the beneficiary or relevant trade associations (Article 369). The UK government will legislate in the Subsidy Control Bill to give clarity on the role of the courts in subsidy cases (including as regards recovery of subsidies) but public authorities should be mindful of the possibility that some complainants will challenge subsidy awards by reference to the principles and their effect in domestic law by virtue of provisions in the European Union (Future Relationship) Act 2020.”*

The key provisions of the TCA on subsidy control

- Chapter 3 of Title XI contains detailed provisions, covering:
 - The definition of subsidy, including the test of what “*might have an effect on UK-EU trade*”
 - De minimis threshold: 325,000 special drawing rights over three fiscal years (approx. £336K)
 - Article 366 sets out the main principles. Parties must have in place effective system of subsidy control that meets six principles:
 - Subsidies only to address specific public policy objectives to remedy identified market failures
 - Necessary and proportionate
 - Necessary to change actor’s behaviour to achieve the objectives
 - Can’t subsidise costs that would be borne in any event
 - Can’t achieve the objective via less distortive means
 - Positive contribution to objective outweighs negatives from market distortion

The UK Subsidy Control Act 2022 in a nutshell

- Received Royal Assent 28 April 2022
- Substantive provisions will come into force on **4 January 2023**. Any subsidy given on or after that date will be subject to the duties and procedures set out in SCA 2022.
- Part 1: definitions
- Part 2: the “subsidy control requirements” that apply to giving of subsidies or making of subsidy schemes
- Part 3: exemptions
- Part 4: the CMA functions
- Part 5: Enforcement

What is a subsidy: the 4 tests

“Financial assistance which

- (a) is given, directly or indirectly, from public resources by a public authority,*
- (b) confers an economic advantage on one or more enterprises,*
- (c) is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and*
- (d) has, or is capable of having, an effect on—*
 - (i) competition or investment within the United Kingdom,*
 - (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or*
 - (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom.”*

Financial assistance includes:

- (a) a direct transfer of funds (such as grants or loans);*
- (b) a contingent transfer of funds (such as guarantees);*
- (c) the forgoing of revenue that is otherwise due;*
- (d) the provision of goods or services;*
- (e) the purchase of goods or services.*

The 7 Subsidy Control Principles

- **Common interest:** Subsidies should pursue a specific policy objective in order to: (a) Remedy an identified market failure, or (b) Address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns)
- **Proportionate and necessary:** subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.
- **Designed to change economic behaviour of beneficiary:** (1) Subsidies should be designed to bring about a change of economic behaviour of the beneficiary. (2) That change, in relation to a subsidy, should be (a) Conducive to achieving its specific policy objective, and (b) Something that would not happen without the subsidy
- **Costs that would be funded anyway.** Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.

Subsidy control principles cont. (2)

- **Least distortive means of achieving policy objective:** Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means.
- **Competition and investment within the UK:** Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the UK.
- **Beneficial effects to outweigh negative effects:** Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on: (a) Competition or investment within the UK, or (b) International trade or investment.

The Energy and Environment Principles (Schedule 2)

A: “Subsidies in relation to energy and environment shall be aimed at and incentivise the beneficiary in—

(a) delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market, or

(b) increasing the level of environmental protection compared to the level that would be achieved in the absence of the subsidy.”

B: “Subsidies in relation to energy and environment shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of England and Wales, Scotland or Northern Ireland.”

Permitted and prohibited subsidies

- Subsidies exempt from the Subsidy Control Requirements (Part 3 of the Act):
 - Subsidies for the purpose of safeguarding national security
 - Subsidies given by, or on behalf of, the Bank of England in pursuit of monetary policy
 - Subsidies given to compensate the damage caused by natural disasters, or other exceptional occurrences
 - Subsidies given to respond to a national or global economic emergency
 - Minimal financial assistance (“**MFA**”)
 - Services of public economic interest (“**SPEI**”) assistance less than £315,000
- Other types of subsidies are always prohibited and cannot be granted, notably
 - Unlimited state guarantees
 - Subsidies to restructure an insolvent or failing business, in the absence of a credible plan to restore it to viability

Services of Public Economic Interest (SPEI)

- SPEI enterprise is defined as an “*enterprise that is assigned with particular tasks in the public interest (including public service obligations)*”: s.29
- Section 29(2): “*the public authority giving the subsidy must be satisfied that the amount of the subsidy is limited to what is necessary to deliver the SPEI services, having regard to*
 - (a) *Costs in delivering the SPEI services, and*
 - (b) *Reasonable profits to be made in doing so*”
- Section 29(3): must be given in a transparent manner (need for written contract or legally enforceable arrangement in writing and specified information)
- Modified s.12 duty for subsidies to a SPEI enterprise: s.29(6): “*The duties under section 12(1) apply to the giving of a subsidy in accordance with this section to a SPEI enterprise for the provision of SPEI services only so far as the carrying out of that duty does not obstruct the carrying out of those services.*”

Minimum or SPEI financial assistance

- £315,000 of subsidies can be awarded to an enterprise within a three year period (more generous than the E200,000 threshold for *de minimis* in the EU De Minimis Regulation)
- Services of public economic interest: if subsidy is given to SPEI enterprise for the provision of SPEI services, total amount should not exceed £725,000, subject to transparency requirements (section 38(4)). No requirements apply at all if under £100,000.

Subsidy schemes and streamlined subsidy schemes

- Subsidy scheme means a scheme made by a public authority providing for the giving of subsidies under the scheme
- Streamlined Schemes – issued via secondary legislation. Do not need to be referred to CMA for review. Seem to be similar to EU Block Exemptions ie if a subsidy satisfies the conditions of one of the streamlined schemes, it will not have to comply with the section 12 duty to act consistently with the Subsidy Control Principles. No need to be referred to CMA (SAU) for review.
- See UK Government Policy Statement January 2022: “*Govt will introduce schemes “at especially low risk of causing market distortions, that promote UK strategic policy objectives and which the government judges to be compliant with the Subsidy Control regime”*”

Statutory guidance under section 79

- Duty to have regard to this guidance when giving a subsidy. However, “not an authoritative statement of the law”.
- Guidance issued on 25 November 2022
 - Ch.3 is the key chapter on subsidy design and assessment (i.e against the 7 SCPs). “*Depth of analysis conducted needs to be commensurate to the size and potential distortive impact of the subsidy or scheme in question*”:
 - Four-step assessment framework (para. 3.9, page 32):
 - Step 1: Identifying the policy objective, ensuring it addresses a market failure or equity concern, and determining whether a subsidy is the right tool to use.* This step ensures that the subsidy or scheme is consistent with Principle A and Principle E.
 - Step 2: Ensuring that the subsidy is designed to create the right incentives for the beneficiary and bring about a change.* This step ensures that the subsidy or scheme is consistent with Principle C and Principle D.
 - Step 3: Considering the distortive impacts that the subsidy may have and keeping them as low as possible.* This step ensures that the subsidy or scheme is consistent with Principle B and Principle F.
 - Step 4: Carrying out the balancing exercise.* This step ensures that the subsidy or scheme is consistent with Principle G.

Conclusion: what are the main features of the scheme that are different to the EU scheme

- More flexibility – but less certainty? Prescriptive conditions of the GBER are gone. But application of the 7 high-level SCPs and statutory guidance likely to give rise to uncertainty (although only subject to JR review not merits review).
- Removal of onerous notification requirements and delay in Commission considering notifications. Much more limited number of subsidies will need to be referred to the CMA.
- Novel “intra-UK” test when assessing effect on competition or investment sets a low bar. Need for streamlined schemes to assist levelling up agenda, in absence of the “regional aid” exemption under the EU regime.
- Need for a significant number of streamlined schemes to replace the GBER and the multiple categories of State aid that did not need to be notified. Details yet to be announced.

Thank you for listening

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