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Welcome to Landmark Chambers' 'State Aid and subsidy control post-Brexit: an update' webinar

The recording may be accessed here.

Your speakers today are…

Tim Buley QC (Chair)

Topic:
What is the current position on State Aid (subsidy control) law in the UK?

James Neill

Topic:
The Subsidy Control Bill

Luke Wilcox

Topic:
The provisions of the Trade and Co-operation Agreement on State Aid

What is the current position on State Aid (subsidy control) law in the UK?

Tim Buley QC

THE CONTEXT

- The UK has left the EU (31/01/2020), and the Implementation Period is over (31/12/2020)
- UK no longer subject to the EU Treaties, but has signed up to a number of separate international treaties with EU including:
  - Withdrawal Agreement, 2019
  - Trade and Co-operation Agreement, 2020
- UK State Aid was previously derived from EU Law (Articles 107 and 108 TFEU) almost exclusively from EU law, but the European Communities Act 1972 (which gave effect to EU law in the UK) has been repealed
- So what is current position for procurement law after Brexit? Will address:
  - Repeal of UK state aid law and issues relating to that
  - Sources of UK international obligations
  - Direct legal effect of of TCA in UK?
- Do not cover *contents* of TCA which will be covered in next talk

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(A) EU STATE AID LAW AND ITS REPEAL

- Prior to Brexit, EU law is largely given effect in domestic law under section 2 ECA 1972.
- EU (Withdrawal) Act 2018 *repeals* ECA, but provides for *retention* of most pre-existing EU law ("retained EU law") through sections 2,3 and 4.
- Section 4 preserves, *inter alia,* EU law derived from EU Treaties. This therefore includes Articles 107 and 108 TFEU, which provide the basis for State Aid law in the EU.
- Preservation of "retained EU law" subject to section 8 of the 2018 Act, which gives ministers power to amend retained EU law "to prevent remedy or mitigate"

  (a) any failure of retained EU law to operate effectively, or

  (b) any other deficiency in retained EU law,

  arising from the withdrawal of the United Kingdom from the EU.
- *Limited* power to amend retained EU law with a view to dealing with issues arising from withdrawal. Hansard statements about the use of section 8 repeatedly make clear it was not to be used to make major "policy" changes

(A) EU STATE AID LAW AND ITS REPEAL (2)

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- Government original proposed to retain EU State Aid law, and published *draft* regulations under section 8 which would deal with deficiencies (for example, to transfer responsibilities of EU Commission to the Competition and Markets Authority ("CMA"). Paradigm example of use of section 8 power to address problems and incoherencies in EU law which would "arise from withdrawal"

- 2019 Regs were withdrawn and replaced with the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, the effect of which is to *repeal* EU State Aid law, so that it has no ongoing effect in UK law from time of EU exit (11pm on 31 December 2021)

(A) EU STATE AID LAW AND ITS REPEAL (3)

- Real issue about legality of 2020 Regs, which were made under section 8 of the 2020 Act. They do not appear to simply “prevent, remedy or mitigate” the deficiencies in EU State Aid law arising from withdrawal, which preserving the underlying policy of State Aid law pending intervention by Parliament by way of primary legislation. By abolishing State Aid law, they effect a major policy change

- The Good Law Project brought a challenge to the 2020 Regs at the start of the year, but withdrew it when the government announced a consultation on future primary legislation

- Question of legality of 2020 Regs therefore remains unresolved.

- Time limit for challenging the Regs directly expired by the end of March 2021. But not necessarily determinative of whether Regs can be challenged:
  - May be possible for party affected to raise argument in claim arising from being “affected” by Regs (see generally *R (Badmus) v SSHD* [2020] 1 WLR 4609). But query how one would establish that regs were being “applied” to individual operator given their general effect of repeal
  - Collateral challenge may also be possible (see *Badmus, Boddington* [1999] 2 AC 143)

(B) LEGAL EFFECT OF TCA SUBSIDY CONTROL PROVISIONS IN UK LAW

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- The TCA is an international legal agreement. But the UK is a "dualist" country, so that international law only takes effect in domestic law where implemented, generally by primary legislation

- Parliament made *hurried* implementing legislation by way of the EU (Future Relationship) Act 2020. The FRA makes quite detailed provision for implementing some parts of the TCA (e.g. security related provisions). But for other areas of the TCA, including subsidy control, very general provision is made in sections 29 and 31. Section 29 provides:

  <u>(1) Existing domestic law</u> has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement ... so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.

- Note two points:
  - Takes effect on "<u>existing</u> domestic law"
  - "so far ... <u>implementation</u> is necessary ..."

(B) LEGAL EFFECT OF TCA SUBSIDY CONTROL PROVISIONS IN UK LAW (2)

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- This must be read alongside TCA provisions. Detail will be covered in later talks. But note that generally, in relation to subsidy control, TCA does not provide for detailed subsidy control regime. Rather, many of the TCA subsidy control provisions have general form, exemplified in Article 366:

  ... each Party shall have in place and maintain an effective system of subsidy control that ensures that the granting of a subsidy respects the following principles

- So this does not set out a detailed regime which can be simply treated as part of UK law. Rather, it provides a framework for saying what subsidy control law implemented by the UK must achieve

- Absent a detailed code set out in primary legislation, therefore, very unclear how one is to work out what subsidy control law currently is in the UK. Two problems:
  - No pre-existing body of State Aid / subsidy control law, which can be tweaked under section 29 FRA so as to accord with TCA principles where inconsistent. No relevant body of law at all following (purported) repeal of retained EU State Aid law
  - TCA sets out general principles, not detailed code

- Problem would not arise if EU State Aid law remained in place!

(C) FILLING THE GAP: BEIS GUIDANCE

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- The Department for Business, Energy and Industrial Strategy ("BEIS") has published guidance, "Guidance on the UK's international subsidy control commitments" (last updated 24 June 2021): Guidance on the UK's international subsidy control commitments - GOV.UK (www.gov.uk)

- The Guidance explains that:

  This guidance is therefore designed to help public authorities understand the UK's international commitments on subsidy control, in advance of the development of the UK's own subsidy control regime, following the Government's consultation which closed on 31 March 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

- So plainly intended that UK public authorities should comply with the guidance herein and indeed with the international obligations to which it draws attention.

(C) FILLING THE GAP: BEIS GUIDANCE (2)

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- But what is the legal status of this guidance and the obligations to which it refers?
  - The part relating to Northern Ireland is issued under section 48 of the UK Internal Markets Act 2020, and public authorities must "have regard" to it in this context
  - For the rest, not clear what power BEIS / central government has to set binding legal obligations via statutory, let alone non-statutory, guidance
- The BEIS Guidance says, on "Enforcement and the role of courts":

  The TCA requires both parties to establish or maintain an *__independent body__* *with an appropriate role in their respective subsidy systems, while retaining full discretion over any functions that body may have. The Government has consulted on the role and functions of an independent body in its consultation which closed on 31 March 2021.*

  The TCA also includes *__provisions on the role of domestic courts in reviewing domestic subsidy decisions by way of judicial review__*. *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. ...

(C) FILLING THE GAP: BEIS GUIDANCE (3)

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- So legal status of obligations in BEIS Guidance is unclear. Plainly, UK public authorities would be well advised to comply with the guidance, and certainly a failure to do so may place the UK in breach of its *international* obligations, and thereby open up the UK to enforcement action on the international plain including perhaps the CJEU. But as to enforcement of the obligations in domestic law:
  - Guidance contemplates that TCA obligations could be enforced by judicial review by virtue of the FRA. This is *arguable,* but far from clear or easy, either as to the principle or as to what it means in practice
  - The Guidance itself may be something to which public authorities are required to “have regard” in public law (not clear for non-statutory elements), and hence enforceable as “soft law” in domestic public law. But again not clear, and fuzzy!
  - Guidance itself highlights that UK is presently in breach of TCA in some respects e.g. absence of independent body

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The provisions of the Trade and Co-operation Agreement on State Aid

Luke Wilcox

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The TCA – what is it?

- International treaty containing Brexit “deal” applicable after the end of the transitional period
- Final version dated 30 April 2021

TCA Title XI

- Title XI – “level playing field” provisions

- Concerned with competition and sustainable development

- Chapter 1 – general principles:
  – Recognition of desirability of open competition

  – Focus is on targeting trade and investment at achieving sustainable development (including climate neutrality by 2050: art 354(3))

Chapter 3 – subsidy control

- State aid renamed as “subsidy control”
- Chapter 3 of Title XI contains detailed provisions

Chapter 3 – what is a “subsidy”?

- Art 363(1)(b)
  - Arises from parties’ resources
    - Including grants, loans, guarantees, foregoing revenues, and direct provision of goods and services
  - Confers an economic advantage
  - Specific (i.e. some persons and goods/services more than others)
  - Has or might have an effect on UK-EU trade

Chapter 3 – when is a tax provision a subsidy?

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- Art 363(2): tax provisions may amount to subsidies if a person gets a more advantageous treatment than others in similar position within the “normal” tax regime

- But not “specific” if:

  – different treatment justified by the principles inherent in the design of the general system (e.g. respect for taxpayer’s ability to pay)

  – A special purpose levy required for a non-economic public policy purpose (e.g. environmental protection), as long as the purposes themselves are non-discriminatory on objective criteria

Art 364: exceptions

- Most important – art 364(4): de minimis threshold
  - 325,000 Special Drawing Rights over three fiscal years
  - Equals about £336,000, or €390,500
- Art 364(3) – temporary measures targeted at national/global economic emergencies
  - E.g. COVID-19 business grants

Art 365 – public interest actors

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- Where an economic actor tasked with a public interest function, subject to subsidy control only to the extant that it doesn’t interfere with the function

- Function must be assigned transparently and in advance

- Can’t cross-subsidise with these funds

Art 366 – the main principles

- Parties must have in place effective systems 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 objective
  - 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

Art 367 – prohibited and controlled subsidies

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- Prohibited subsidies:
  - Unlimited guarantees
  - Restructuring ailing companies where no credible restructuring plan
  - Restructuring that doesn’t meet social hardship/severe market failure public interest test (save in exceptional circumstances)

- For banks, insurance companies etc: restructuring subsidies only allowed:
  - Where a credible restructuring plan to restore long-term viability; or
  - To allow an orderly liquidation and market exit

Art 367 – prohibited and controlled subsidies

- Prohibited subsidies:
  - Certain export subsidies
  - Subsidies contingent on preference for domestic over imported goods
  - Anything which relieves an actor from liabilities as a polluter
  - Most air carriers

Art 368 transparency

- Details about subsidies must be published online within 6 months of grant
  - Exception – tax measures – 12 months of obligation falling due
- Also requirements to provide information on art 366 compliance for legal proceedings

Oversight of subsidies

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- Art 370 – inter-party consultations
- Art 371 – establishment of operationally independent bodies to administer subsidy control
- Art 372 – justiciability
- Art 373 – recovery mechanisms
- Art 374 – unilateral right to take remedial measures

The Subsidy Control Bill

James Neill

Overview

- Part 1: what is a subsidy
- Part 2: The subsidy control requirements
- Part 3: Exemptions
- Part 4: Referrals to the CMA
- Part 5: Enforcement: the role of the CAT

Some context: the BEIS White Paper

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“The Government wants a subsidy control system that strikes the right balance between allowing the benefits that can be derived from subsidies while limiting the most harmful impacts. The Government’s objectives for the future subsidy control regime are:

- *Facilitating interventions to deliver on the UK’s strategic interests*
- *Maintaining a competitive and dynamic market economy*
- *Protecting the UK internal market*
- *Acting as a responsible trade partner”*

The definition of subsidy in Part 1

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2 “Subsidy”

(1) In this Act, “subsidy” means 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.

What does financial assistance mean?

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Clause 2(2):

For the purposes of this Act, the means by which financial assistance may be given include—

(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.

Part 2: Six main duties as part of the Subsidy Control Requirements

Clause 12: the duty to consider the subsidy control principles

Clause 13: the duty to consider the energy and environment principles

Clauses 15 – 28: General prohibitions

Clause 29: Transparency requirements in relation to Services of Public Economic Interest (“SPEIs”).

Clause 31: Prohibition if mandatory referral to CMA until CMA has reported

Clause 33: Duty to enter subsidies in a central subsidy database

The Subsidy Control Principles – Schedule 1: broadly in line with Art 366?

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- 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 social difficulties or distributional concerns*"
- Proportionate and necessary
- Design to change of economic behaviour of beneficiary
- Not for costs that would be funded away
- Least distortive means of achieving policy objective
- "*Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom*.
- Beneficial effects to outweigh negative effects

The Energy and Environment Principles: Schedule 2

Para 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."

Part 3: Exemptions

- **Minimal financial assistance**:
  - – £315,000 over the last 3 financial years
  - – Exemption does not apply if contravenes export performance or use of domestic good prohibitions
  - – Minimal financial assistance notification

- **Service of Public Economic Interest Assistance**:
  - – £725,000 over last 3 financial years

- **Natural disasters/“other exceptional occurrences”/monetary policy/financial stability directions**

The role of the CMA

- Duty to refer before giving a subsidy “of particular interest”. S of S to define what “of particular interest” means in secondary legislation.
- CMA must respond within 5 working days whether request valid
- CMA has 30 working days to publish its report (S of S has discretion to extend)
- Cooling off period of 5 days post publication
- Voluntary referrals to CMA
- S of S has power to make post-award referrals 20 working days after subsidy entered into the database

Part 5: Enforcement

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- Aggrieved interested party can apply to the Competition Appeals Tribunal for a review of a “subsidy decision” (JR principles)
- Time limits:
  - 1 month after the “transparency date” – entry into the database or when the IP first “knew or ought to have known” of the decision
  - For post-award referrals: 1 month after CMA report received
- CAT powers re relief same as High Court JR plus:
- **Recovery powers** under Clause 74- confers right of recovery on public authority and requires the authority to exercise that right
- Cl.77: misuse of subsidies – general right to recover as if created by contract

Some key areas of controversy/criticism/uncertainty…

- Key improvement from State aid regime is removal of the rigid prior notification requirement to the Commission, coupled with set timescales for CMA reports
- However:
  - What is a subsidy of "particular interest" is critical as it ought to include high impact subsidies – but still to be determined via secondary legislation
  - Insufficient definition of "effect on trade" within definition of subsidy – will there be a tendency to apply State aid case-law by default?
  - Considerable guidance still required re meaning of subsidy control principles: in particular how to balance a subsidy's policy objective and its effects on domestic competition and international trade/investment?

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

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Thank you for listening

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