

The Subsidy Control Bill



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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

“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

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?

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?

- 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

- 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?

Thank you for listening

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