

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



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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?

- 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

- Where an economic actor tasked with a public interest function, subject to subsidy control only to the extent 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

- 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

- 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

Thank you for listening

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