

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almost exclusively from EU law, but the European Communities Act 1972 (which gave effect to EU law in the UK) has been repealed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

(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)

- 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- 2019 Regs were withdrawn and replaced with the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020, the effect of which is to *repeal* EU State Aid law, so that it has no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

- 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:
(1) Existing domestic law 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 “existing domestic law”
 - “so far ... implementation is necessary ...”

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

- 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

- 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 \(www.gov.uk\)](https://www.gov.uk/guidance/guidance-on-the-uk-s-international-subsidy-control-commitments)

- 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)

- 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)

- 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

Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

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