



# Subsidy Control in the UK Post-Brexit

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# Subsidy control in the UK

- What has happened to the State aid rules?
- What are the current rules?
- What are the proposals for the future?

# What has happened to the State aid rules?

- State aid rules repealed from 31 December 2020
  - Still apply to State aid given before that date
  - Still apply for purposes of Northern Ireland Protocol – measures affecting trade between NI and EU in goods or wholesale electricity

# What are the current rules?

- Subsidies chapters in Free Trade Agreements
- World Trade Organisation Agreement on Subsidies and Countervailing Measures
- EU-UK Trade and Cooperation Agreement (TCA) – Part Two, Title XI: Level Playing Field
  - directly part of UK law by virtue of section 29 of the European Union (Future Relationship) Act 2020
  - will be displaced in due course by proposed primary legislation for a new UK subsidy control regime

# TCA subsidy control regime

- Set of rules for the control of subsidies
- Concept of ‘subsidy’ – mirrors concept of ‘State aid’
- Other terminology changes:
  - Economic actor (rather than economic undertaking)
  - The economic advantage is ‘specific’ (rather than ‘selective’)
  - Effect on trade or investment between UK and EU (rather than between Member States of the EU)

# TCA's six subsidy principles

- To ensure no material effect on trade or investment between UK and EU, any subsidy must respect six subsidy principles
- The six principles closely mirror principles for assessing compatibility of State aid

# TCA's six subsidy principles

- (a) Subsidy pursues specific public policy objective, identified market failure or addresses an equity rationale (e.g. social difficulties or distributional concerns)
- (b) Subsidy is proportionate and limited to what is necessary
- (c) Subsidy is designed to bring about change in economic behaviour of recipient
- (d) Subsidy does not cover costs recipient would have funded in any event
- (e) Subsidy is an appropriate policy instrument and the policy objective cannot be achieved through less distortive measures
- (f) The positive contribution of the subsidy outweighs any negative effects, especially negative effects on trade or investment

# TCA subsidy control regime

- Onus on public authority to assess and satisfy itself as to compliance with the subsidy principles
- Currently no regulator to provide guidance
- Currently no block exemptions to provide a safe harbour
- Cannot notify and get advance approval

# TCA subsidy control regime

- Looking on the positive side:
  - Significant scope for discretion, especially since court review is based on judicial review and will not address merits of decision
  - Subsidy principles likely to be satisfied where a State aid block exemption would have applied – but full reasoning and justification still required
  - No obligation to notify subsidies and wait out standstill period pending approval

# TCA subsidy control regime

- Looking on the positive side:
  - Given similarity of rules, tools in the State aid tool box still available
  - MEOP and other ‘no aid’ arguments
  - ‘Material effect on trade or investment’ – perhaps more of a substantive requirement now than under State aid law. Not always easy to assess.

# TCA subsidy control regime

- Exemptions
  - Subsidies of a social character targeted at final consumers
  - Subsidies below 325,000 Special Drawing Rights (currently about £340,000) over three years (presumably will be applied like the State aid *de minimis* exemption)
  - Subsidies in relation to fish and fish products and some agricultural subsidies
  - Subsidies for audio-visual sector

# TCA subsidy control regime

- Partial exemptions
  - Subsidies to compensate damage caused by natural disasters and other non-economic occurrences – no need to satisfy subsidy principles, but transparency requirements apply
  - Slightly different rules for subsidies to combat national or global economic crisis
  - Slightly different rules for subsidies to airlines

# TCA subsidy control regime

- Services of public economic interest (public service obligations and other tasks in public interest)
  - Mirrors SGEI rules in State aid law – subsidy principles will generally apply
  - Compensation below 15 million Special Drawing Rights (SDR) exempt from transparency requirements
  - Exemption for SPEI compensation below 750,000 SDR over 3 years

# TCA subsidy control regime

- Following types of subsidy prohibited if they have or could have material effect on trade or investment between EU and UK (even if subsidy principles would be satisfied):
  - State guarantees which are unlimited in time or which cover unlimited liabilities
  - Subsidy to ailing or insolvent economic actor unless there is a credible restructuring plan and, save in exceptional circumstances, a public interest objective such as avoiding job losses or a severe market failure. NB Definition of 'undertaking in difficulty' now gone, replaced with: 'would almost certainly go out of business in short to medium term without the subsidy'.

# TCA subsidy control regime

- Following types of subsidy prohibited if they have or could have material effect on trade or investment between EU and UK (even if subsidy principles would be satisfied):
  - Subsidies contingent on export performance (except certain short-term credit insurance/export guarantees)
  - Subsidies which require use of domestic rather than imported goods and services

# TCA subsidy control regime

- Following types of subsidy are subject to extra requirements if they have or could have material effect on trade or investment between EU and UK:
  - Subsidies in relation to energy and environment
  - Subsidies to banks, credit institutions and insurance companies
  - Subsidies for large cross-border or international cooperation projects
  - Subsidies to air carriers

# TCA subsidy control regime

- Transparency requirement
  - Details of subsidy to be published on public database within 6 months (Subsidy Award Transparency Database)
  - If uncertain whether something is a subsidy, publish details on a protective basis (sets challenge period running)
  - Recipient of subsidy has an interest in ensuring transparency requirements observed (sets challenge period running)

# TCA subsidy control regime

- Transparency requirement
  - ‘Interested party’ considering court challenge has right to ask for information which must be provided within 28 days
  - Must provide information which allows them to assess application of subsidy principles (so the public body’s reasoning, expert reports etc.)
  - Subject to restrictions for legal privilege or where information is commercially sensitive or confidential
  - ‘Interested party’ defined widely – includes any party whose interests may be affected by the subsidy, including the beneficiary, its competitors and relevant trade associations

# TCA subsidy control regime

- Basis of challenge:
  - Breach of statutory duty – challengeable by applying for judicial review
    - Have the subsidy principles been considered?
    - Have the principles of public law been satisfied?
    - Not a review of merits of the decision

# TCA subsidy control regime

- Basis of challenge:
  - New remedy of recovery of the subsidy
    - Provided challenge brought within 1 month of publication of subsidy on the public database, or after a further 1 month period where a request for information is made
    - Recovery available only if the challenge on JR basis is successful
    - Beneficiary of subsidiary cannot seek to resist recovery by raising argument based on legitimate expectation

# Tips for risk mitigation

- Very careful and thorough application of subsidy principles – and keep careful records
- Consider other relevant areas: e.g. well being of future generations, public sector equality duty
- If time allows, wait out challenge period before giving subsidy
- Publish on database if unsure whether it qualifies as a subsidy
- Right to request information may make bringing a challenge easier, so ensure the information you provide supports your case strongly

# Proposals for the future

- Government consultation underway
- Proposes primary legislation to create new subsidy regime which mirrors (and supersedes) TCA rules, perhaps with some gold plating
- Statutory or non-statutory guidance
- Secondary legislation or guidance on low-risk subsidies (i.e. block exemptions)
- Template for demonstrating compliance with subsidy principles
- Focus on striking balance between clarity and certainty on the one hand, and flexibility on the other
- Big focus on protecting integrity of UK internal market

# Proposals for the future

- Proposed seventh subsidy principle: Any distortive effects on competition within the UK internal market which may arise from the subsidy have been minimised
- Possibly more detailed review, or review by the regulator, required where high risk of distortion of UK internal market
- High risk? May depend on value of subsidy, sector, market share of recipient – NB economic/market factors of the sort seen in competition law but not so much in State aid law
- Perhaps prohibit uneconomic relocation between UK regions
- Maybe lower the *de minimis* limit below 325,000 SDR

# Proposals for the future

- Possibly sector specific guidance in areas such as:
  - Energy and environment
  - Disadvantaged or deprived areas (but no suggestion there will be something equivalent to the assisted areas map)
  - Transport: road, rail, ports
  - Research and development

# Proposals for the future

- Court review: proposed it is the JR standard of review.
- Therefore, proposes subsidy is lawful unless:
  - material error of law
  - failure to apply the subsidy principles
  - irrationality
  - breach of other public law principles

# Proposals for the future

- Independent review body
  - Who? CMA? New regulator?
  - Information and guidance role?
  - Compulsory provision of advice for high-risk subsidies?
  - Consider complaints and investigate on own initiative?
  - Enforcement powers, including recovery?

# Any questions



# Contact details



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