

Welcome to Landmark Chambers' 'Subsidy Control: the new regime' webinar

The recording can be accessed [here](#).

Your speakers today are...



James Neill (Chair)

Topic:
Main changes in
UK Subsidy Control
under the Act and
the subsidy control
principles



Barney McCay

Topic:
Review and
enforcement:
the role of the
CMA and CAT

Main changes in UK Subsidy Control under the Act and the subsidy control principles



James Neill

Overview

- The current position: the Trade and Co-operation Agreement, and central Govt guidance
- The new Subsidy Control Act
 - What is a subsidy
 - What are the subsidy control principles
 - Exemptions: permitted and prohibited subsidies
 - Minimum financial assistance
 - Streamlined routes

State subsidy control: what is the current position? 「Landmark Chambers」

- State Aid (Revocations and Amendments) EU Regulations 2020: EU state aid law abolished, so no ongoing effect in UK law from time of EU exit.
- The Trade and Co-Operation Agreement provides framework for saying what subsidy control law implemented by UK law must achieve, but does not specify that regime. Article 366 just states: “*each Party shall have in place and maintain an effective system of subsidy control that ensures the granting of a subsidy respects the following principles*”.
- The EU (Future Relationship) Act 2020 did not implement specific parts of the TCA applying to subsidy control into domestic law (unlike for instance some of the security provisions). The UK therefore (was) and is still in a limbo period.
- BEIS Guidance dated 24 June 2021 purports to “fill in the gap” by advising UK public authorities to comply with the UK’s international commitments (including the TCA): “*all public authorities should read this guidance and assure themselves they understand the UK’s commitments and comply with their obligations in relation to the award of subsidies from 1 January 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*”

Subsidy control in the “limbo” period: the current BEIS Guidance

- Legal status of BEIS guidance unclear: not statutory guidance. No express legal duty to comply with it. Enforceable as “soft law” under general public principles relating to material considerations?
- Enforcement section : *“the Agreement also includes provisions in Article 372 on the role of domestic courts in reviewing domestic subsidy decisions by way of judicial review which may be sought by interested parties. This means any natural or legal person, economic actor or association of economic actors whose interest might be affected by the granting of a subsidy, in particular the beneficiary, economic actors competing with the beneficiary or relevant trade associations (Article 369). The UK government will legislate in the Subsidy Control Bill to give clarity on the role of the courts in subsidy cases (including as regards recovery of subsidies) but 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.”*

The key provisions of the TCA on subsidy control

- Chapter 3 of Title XI contains detailed provisions, covering:
 - The definition of subsidy, including the test of what “*might have an effect on UK-EU trade*”
 - De minimis threshold: 325,000 special drawing rights over three fiscal years (approx. £336K)
 - Article 366 sets out the main principles. Parties must have in place effective system 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 objectives
 - 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

The UK Subsidy Control Act 2022 in a nutshell

- Received Royal Assent 28 April 2022
- Substantive provisions will come into force on **4 January 2023**. Any subsidy given on or after that date will be subject to the duties and procedures set out in SCA 2022.
- Part 1: definitions
- Part 2: the “subsidy control requirements” that apply to giving of subsidies or making of subsidy schemes
- Part 3: exemptions
- Part 4: the CMA functions
- Part 5: Enforcement

What is a subsidy: the 4 tests

“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.”*

Financial assistance includes:

- (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.*

The 7 Subsidy Control Principles

- **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 local or regional disadvantage, social difficulties or distributional concerns)
- **Proportionate and necessary:** subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.
- **Designed to change economic behaviour of beneficiary:** (1) Subsidies should be designed to bring about a change of economic behaviour of the beneficiary. (2) That change, in relation to a subsidy, should be (a) Conducive to achieving its specific policy objective, and (b) Something that would not happen without the subsidy
- **Costs that would be funded anyway.** Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.

Subsidy control principles cont. (2)

- **Least distortive means of achieving policy objective:** Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means.
- **Competition and investment within the UK:** Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the UK.
- **Beneficial effects to outweigh negative effects:** Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on: (a) Competition or investment within the UK, or (b) International trade or investment.

The Energy and Environment Principles (Schedule 2)

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.”

B: “Subsidies in relation to energy and environment shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of England and Wales, Scotland or Northern Ireland.”

Permitted and prohibited subsidies

- Subsidies exempt from the Subsidy Control Requirements (Part 3 of the Act):
 - Subsidies for the purpose of safeguarding national security
 - Subsidies given by, or on behalf of, the Bank of England in pursuit of monetary policy
 - Subsidies given to compensate the damage caused by natural disasters, or other exceptional occurrences
 - Subsidies given to respond to a national or global economic emergency
 - Minimal financial assistance (“**MFA**”)
 - Services of public economic interest (“**SPEI**”) assistance less than £315,000
- Other types of subsidies are always prohibited and cannot be granted, notably
 - Unlimited state guarantees
 - Subsidies to restructure an insolvent or failing business, in the absence of a credible plan to restore it to viability

Services of Public Economic Interest (SPEI)

- SPEI enterprise is defined as an “*enterprise that is assigned with particular tasks in the public interest (including public service obligations)*”: s.29
- Section 29(2): “*the public authority giving the subsidy must be satisfied that the amount of the subsidy is limited to what is necessary to deliver the SPEI services, having regard to*
(a) Costs in delivering the SPEI services, and
(b) Reasonable profits to be made in doing so”
- Section 29(3): must be given in a transparent manner (need for written contract or legally enforceable arrangement in writing and specified information)
- Modified s.12 duty for subsidies to a SPEI enterprise: s.29(6): “*The duties under section 12(1) apply to the giving of a subsidy in accordance with this section to a SPEI enterprise for the provision of SPEI services only so far as the carrying out of that duty does not obstruct the carrying out of those services.*”

Minimum or SPEI financial assistance

- £315,000 of subsidies can be awarded to an enterprise within a three year period (more generous than the E200,000 threshold for *de minimis* in the EU De Minimis Regulation)
- Services of public economic interest: if subsidy is given to SPEI enterprise for the provision of SPEI services, total amount should not exceed £725,000, subject to transparency requirements (section 38(4)). No requirements apply at all if under £100,000.

Subsidy schemes and streamlined subsidy schemes

- Subsidy scheme means a scheme made by a public authority providing for the giving of subsidies under the scheme
- Streamlined Schemes – issued via secondary legislation. Do not need to be referred to CMA for review. Seem to be similar to EU Block Exemptions ie if a subsidy satisfies the conditions of one of the streamlined schemes, it will not have to comply with the section 12 duty to act consistently with the Subsidy Control Principles. No need to be referred to CMA (SAU) for review.
- See UK Government Policy Statement January 2022: *“Govt will introduce schemes “at especially low risk of causing market distortions, that promote UK strategic policy objectives and which the government judges to be compliant with the Subsidy Control regime”*

Statutory guidance under section 79

- Duty to have regard to this guidance when giving a subsidy. However, “not an authoritative statement of the law”.
- Guidance issued on 25 November 2022
 - Ch.3 is the key chapter on subsidy design and assessment (i.e against the 7 SCPs). *“Depth of analysis conducted needs to be commensurate to the size and potential distortive impact of the subsidy or scheme in question”*:
 - Four-step assessment framework (para. 3.9, page 32):
 - Step 1: Identifying the policy objective, ensuring it addresses a market failure or equity concern, and determining whether a subsidy is the right tool to use.* This step ensures that the subsidy or scheme is consistent with Principle A and Principle E.
 - Step 2: Ensuring that the subsidy is designed to create the right incentives for the beneficiary and bring about a change.* This step ensures that the subsidy or scheme is consistent with Principle C and Principle D.
 - Step 3: Considering the distortive impacts that the subsidy may have and keeping them as low as possible.* This step ensures that the subsidy or scheme is consistent with Principle B and Principle F.
 - Step 4: Carrying out the balancing exercise.* This step ensures that the subsidy or scheme is consistent with Principle G.

Conclusion: what are the main features of the scheme that are different to the EU scheme

- More flexibility – but less certainty? Prescriptive conditions of the GBER are gone. But application of the 7 high-level SCPs and statutory guidance likely to give rise to uncertainty (although only subject to JR review not merits review).
- Removal of onerous notification requirements and delay in Commission considering notifications. Much more limited number of subsidies will need to be referred to the CMA.
- Novel “intra-UK” test when assessing effect on competition or investment sets a low bar. Need for streamlined schemes to assist levelling up agenda, in absence of the “regional aid” exemption under the EU regime.
- Need for a significant number of streamlined schemes to replace the GBER and the multiple categories of State aid that did not need to be notified. Details yet to be announced.

Review and enforcement: the role of the CMA and CAT



Barney McCay

Overview

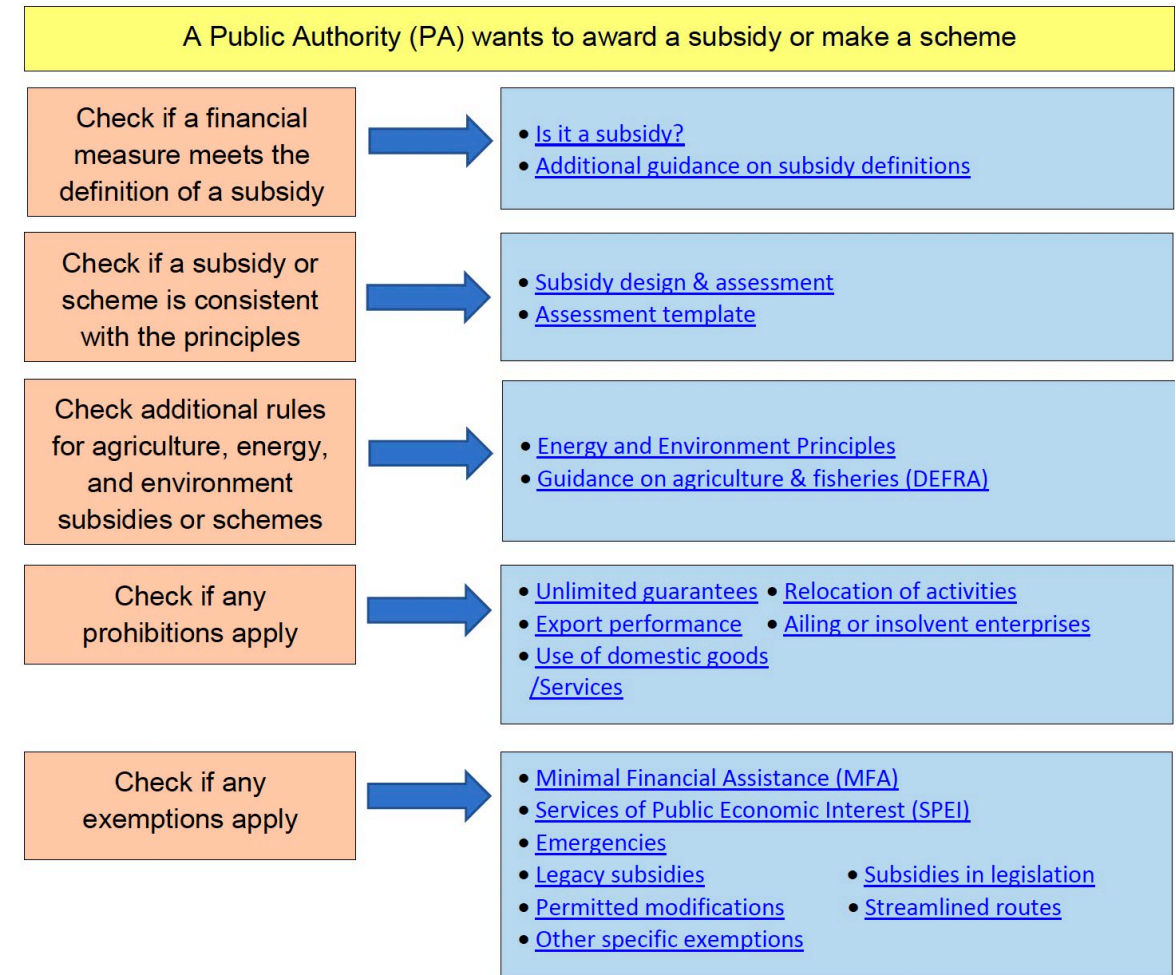
1. Referrals to the Subsidy Advice Unit (SAU).
2. Transparency requirements on public authorities.
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Overview

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Recap

- Is the measure a “subsidy” or “subsidy scheme”?
- Does a “prohibition” apply?
- Does an “exemption” apply or will the subsidy be awarded under a “streamlined route”?
- If the measure is a subsidy – and the subsidy is not exempted or prohibited – the PA must assess the subsidy against the subsidy control principles (“the self-assessment”). If consistent → the PA may award the subsidy.



Overview of referrals

- Certain subsidies require further assessment and (potentially) need to be referred to the SAU before they are awarded:
 - Subsidies of Particular Interest (SOPIs) must be referred to the SAU → mandatory.
 - Subsidies of Interest (SOIs) may be referred to the SAU → voluntary.
 - Certain subsidies must be referred to the SAU if SoS issues a “call-in” direction → mandatory.
- If a subsidy is referred to the SAU, then the SAU examines the subsidy and provides advice to the PA about the proposed award.
- At the instigation of SoS, certain subsidies may be referred to the SAU after they have been awarded by the PA → post-award referral.

Mandatory referral of SOPI

- PAs must refer SOPIs to the SAU. If PA does not refer the SOPI, the subsidy is prohibited.
- SOPI is defined in the Regulations.
- A subsidy is an SOPI if:
 - The total amount of the subsidy exceeds £10 million; **or**
 - It concerns a “sensitive sector” and exceeds £5 million; **or**
 - The subsidy is expressly listed as a SOPI in the legislation.



Voluntary referral of SOI

- PA may refer SOIs to the SAU.
- SOI is defined in the Regulations.
- A subsidy is an SOI if:
 - The total amount of the subsidy exceeds £5 million (and it is not a SOPI); **or**
 - The subsidy is listed as an SOI in the legislation.



Secretary of State call-in direction

- At the direction of SoS, the PA must refer other subsidies to the SAU. If the PA doesn't request a report from the SAU, the subsidy is prohibited.
- SoS can make a call-in direction for:
 - An SOI; **or**
 - Any subsidy in respect of which SoS considers (a) there is a risk of non-compliance with the subsidy control principles/requirements; or (b) there is a risk of negative effects on competition or investment within the UK



What should the PA provide the SAU with?

- An explanation as to why the PA considers that the subsidy would meet the criteria for being a SOPI or SOI.
- The assessment carried out by the PA into the subsidy's compliance with the subsidy control principles. And any evidence that is relevant to the PA's assessment.
- All the information that the PA would be required to upload to the subsidy database (discussed below).
- See the separate guidance published by the CMA:
www.gov.uk/government/publications/guidance-on-the-operation-of-the-subsidy-control-functions-of-the-subsidy-advice-unit.
- PAs should use the SAU's online Public Authority Portal when making a referral.



What happens after a referral is made to the SAU?

- For mandatory referrals, the SAU must:
 - Notify the PA within 5 days as to whether the PA complied with the procedural requirements for requesting a SAU report; and
 - If the procedural requirements *were* complied with, publish a report within 30 days. There is then a “cooling off” period of 5 days in which a PA cannot give the subsidy.
- For voluntary referrals, the SAU must:
 - Decide whether to prepare a report (though it does not have to prepare one);
 - Notify the PA within 5 days that a report will be prepared or explain to the PA why the SAU will not prepare a report; and
 - If the SAU decides to prepare a report, publish it within 30 days. There is no cooling off period.
- The CMA Guidance outlines the circumstances in which the SAU may produce a report in response to a voluntary referral.



What does the SAU's report include?

- The SAU report will contain the same content irrespective of whether the referral was mandatory or voluntary.
- The report must include “an evaluation” of the PA’s assessment of why the subsidy complies with the subsidy control principles. The evaluation must take into account “any effects of the proposed subsidy on competition or investment within the UK”.
- The report may also include advice about how the PA’s assessment could be improved, and how the subsidy could be modified to ensure compliance with the subsidy control principles and requirements.
- SAU reports and advice are non-binding on PAs.
- SAU reports are published, with copies provided to SoS.



Post-award referral

- SoS may also refer a subsidy to the SAU after the subsidy has been given if SoS considers that (a) there has been a failure to comply with the subsidy control principles/requirements or (b) there is a risk of negative effects on competition or investment within the UK.
- SoS must direct the PA to provide its assessment to the SAU as well as evidence in support.
- SAU must publish a report within 30 days, though this period can be extended by agreement between the SAU and PA.



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The database

- BEIS has created a publicly accessible subsidy database:
<https://searchforuksubsidies.beis.gov.uk>. BEIS has also created a portal for PAs to upload subsidy information:
<https://manageuksubsidies.beis.gov.uk>.
- PAs must ensure that details of subsidy schemes are entered on the database within 3 months of the PA's confirmation of its decision to make the scheme.
 - Exemption for individual subsidies under a subsidy scheme that are valued at £100,000 or less.
- PAs must ensure that details of all individual subsidies are uploaded onto the database within 3 months of the PA's confirmation of its decision to make the scheme.
 - There is no threshold exemption.
- Modifications to subsidies should also be entered on the database.

View subsidies awarded by UK government

There are two ways to view subsidies awarded to businesses.

You can answer a number of questions to search for particular subsidies.

Start search

You can view the full list of active subsidy schemes and all the businesses that have received subsidies under each scheme.

View all subsidy schemes

View all subsidy awards

[Search for subsidies awarded before 1 January 2021.](#)

Information to be included on the database

- SoS has introduced Regulations that make provision about the information that should be included in each entry on the database.
- E.g. the policy objective of the subsidy, the name of the beneficiary, the duration of the subsidy etc.
- Failure to provide information delays the expiry of the limitation period for challenging the subsidy award decision.

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Reviews before the CAT

- An IP can apply to CAT for a review of a PA's decision to give a subsidy or make a subsidy scheme. SAU reports and advice should not be the target of an IP's challenge.
- An IP is anyone whose interests may be affected by the giving of the subsidy e.g. a competitor of the beneficiary.
- Information provided by PA as part of its transparency obligations is designed to assist IPs. But IPs can also request additional pre-action information which the PA must provide.
- Time limit = 1 month from the “relevant date” (the uploading of information onto the database). NB the exceptions.



Determination of reviews by the CAT

- The proceedings follow the Competition Appeal Tribunal Procedural Rules 2015.
- CAT can review whether the PA discharged its duties, including whether the PA lawfully assessed the subsidy against the subsidy control principles, on public law grounds (applying principles of judicial review).
- CAT's powers on review are similar to judicial review.
- Sections 31 of the Senior Courts Act 1981 applies.
- If CAT grants relief, it can make a recovery order enabling the PA that has given a subsidy to recover the subsidy from the beneficiary

Appeals and recovery of misused subsidies

- Parties can appeal a CAT decision on a point of law to the Court of Appeal.
- A PA can recover a subsidy from a beneficiary if the subsidy has been used for a purpose other than the purpose for which it was intended.
- The PA's right to recover a misused subsidy is enforceable as if the subsidy were created by contract between the PA and the beneficiary.



Key rules and regulations

- Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022.
- Subsidy Control (Subsidy Database Information Requirements) Regulations 2022.
- Competition Appeal Tribunal Rules 2015 (SI 2015/1648).

Key guidance

- BEIS Statutory Guidance for the United Kingdom Subsidy Control Regime (November 2022).
- SAU Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (November 2022).

Thank you for listening

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