



SUBSIDY CONTROL IN THE UK FOLLOWING THE END OF THE BREXIT TRANSITION PERIOD

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Legal Briefings

The EU State aid regime in its current form ceased to be applicable in the UK as at the end of 31 December 2020, when the Brexit transition period expired. Going forward, State aid or “subsidy control” in the UK will be based on the subsidy control chapter under the UK-EU Trade and Cooperation Agreement (TCA) as further implemented by the UK, as well as the residual application of EU State aid law under the UK-EU Withdrawal Agreement and its Northern Ireland Protocol.

Ultimately, the subsidy control framework now applicable in the UK is ostensibly similar in substance to the EU State aid regime, but differs in terms of procedural and enforcement aspects, which remain in significant part, “under construction”. BEIS has recently issued a [consultation](#) on further developing the UK’s domestic subsidy regime, which provides for various options that could have a real impact on the process and risk exposure for aid beneficiaries going forward. The consultation is open for the next seven weeks, closing on 31 March.

THE SUBSIDY CONTROL CHAPTER UNDER THE TCA

Subsidy control proved to be one of the most controversial issues in the Brexit negotiations, with the EU and the UK taking very different stances. The EU’s opening position was to insist upon essentially the continued application of EU State aid law in the UK, whereas the UK pushed for the more relaxed types of subsidy disciplines found in traditional free trade agreements, based on transparency requirements rather than substantive standards that are subject to concrete enforcement. Ultimately, the agreed subsidy control chapter in the TCA falls somewhat in between, in that it is ostensibly similar in substance to the EU State aid regime, while affording the UK significant flexibility in relation to process and enforcement.

Substance

The basic substantive structure of the TCA subsidy control requirements comprises two legal assessment stages in line with the EU State aid regime: (i) qualification as a “subsidy”; and (ii) assessment of the compatibility or compliance of that subsidy with various governing “principles”, which are intended to ensure that the overall impact of the subsidy is positive and that any negative effects on trade and investment are kept limited.

In terms of qualification, the definition of “subsidy” which determines the scope of the TCA subsidy control requirements, is based on mostly the same key criteria used in the definition of “State aid”, although some of these have been given different labels, consistent with the UK’s favoured approach of limiting references in the TCA to existing EU law concepts. Under the TCA, a State intervention will therefore be qualified as a “subsidy” if it confers an “economic advantage” granted through the “resources” of a Party, that is “specific” insofar as it favours certain “economic actors” over others, and which has an “effect on trade or investment” between the UK and EU.

Where a State measure gives rise to a “subsidy”, the general rule under the TCA is that it may only be legally granted if it complies with certain high-level governing “principles”. These “principles” are very similar to the “common assessment principles” under EU State aid law which are used by the European Commission (the Commission) to assess the “compatibility” of State aid, and on which basis the Commission has prepared detailed aid measure-type specific and sector specific compatibility guidelines. Accordingly, under the TCA, a subsidy can only be granted if essentially, it pursues a specific public policy objective to remedy an identified market failure; it is proportionate and limited to what is necessary; it has an incentive effect on the beneficiary and does not compensate for costs the beneficiary would have funded in any event; the subsidy is an appropriate instrument; and the positive effects of the subsidy outweigh any negative effects on trade or investment between the UK and EU.

In addition, the TCA subsidy control chapter contains various relaxations of the rules that are aligned with the EU State aid regime, including in relation to de *minimis* subsidies and in relation to subsidies compensating for damage caused by natural disasters or in relation to economic emergencies, which are akin to the provisions used by the Commission to quickly approve much of the COVID-19 State aid during the past year. There are also supplementary “principles” for specific types of subsidies or sectors, such as rescue and restructuring subsidies, subsidies for large cross-border or international cooperation projects, and energy and environmental subsidies, which reflect at a high-level some of the more detailed Commission compatibility guidelines.

In overall terms therefore, there is significant commonality between the substantive TCA subsidy control requirements and the EU State aid rules. That said, there may well be scope for the application of the substantive requirements in the UK to diverge as practice develops. For example, it seems possible that the criterion of “effect on trade or investment” could be interpreted in a more “effects-based” manner than the equivalent criterion under EU State aid law, which has been interpreted as representing a very low threshold only and is therefore effectively superfluous in practice in many cases.

Process and enforcement

In contrast with the substantive requirements, the TCA requirements in relation to process and enforcement, differ materially from the EU State aid regime.

In particular, under EU State aid law, all State aid is subject to the so-called “standstill obligation” in that State aid cannot be implemented without prior approval by the EU’s State aid authority, the Commission. As explained above, the Commission has issued detailed compatibility guidelines which set out how it assesses State aid measures. It has also issued a number of block exemptions, which essentially “pre-approve” State aid measures fulfilling their conditions, and under which the great majority of State aid in the EU is granted. Finally, the Commission is also responsible for investigating alleged “unlawful aid” that has been granted in breach of the standstill obligation, a notable example of which includes the Commission’s ongoing high-profile enforcement activity in relation to multinationals’ tax-planning arrangements.

The Commission therefore, as the EU’s State aid authority, has a fundamental role under the EU State aid regime.

Under the TCA however, while the UK is required to set up an independent subsidy authority, the TCA does not prescribe the functions of the authority, which remains up to the UK, and there is no requirement for the UK to provide for a “standstill obligation” and a system of *ex ante* approval. Instead, the primary mode of enforcement under the TCA is to be *ex post*, through complainants bringing actions in the national courts, which are to have jurisdiction to assess the consistency of individual subsidies with the “principles”. The TCA aims to facilitate the bringing of such claims through transparency requirements which oblige public authorities to publish and make information in relation to individual subsidies available to complainants. On the other hand, given the absence of detailed compatibility guidelines or block exemptions, there is not much by way of safe harbours that could be used by public authorities and beneficiaries to confidently shield measures from *ex post* challenge.

The other contrast with the EU State aid regime is the potential for the EU and UK to impose unilateral “remedial measures” if it considers that a subsidy granted by the other Party causes “*a significant negative effect on trade or investment between the Parties*”, apparently irrespective of whether the subsidy complies with the “principles”. The TCA provides that these remedial measures must be restricted to what is “*strictly necessary and proportionate in order to remedy the significant negative effect*” but do not otherwise restrict the type of remedial measure that can be imposed. The Party against which the remedial measure has been taken has the possibility to refer the matter to arbitration, but the measure will remain in place during the course of the arbitration.

In summary, under the TCA subsidy control requirements, the UK would be able to move more quickly in granting subsidies and may have greater flexibility. However, that could potentially come at the cost of less legal certainty and greater risk of *ex post* challenge either through complainants in the national courts, and in the case of subsidies with significant distortive potential, by the EU itself.

STATUS OF THE TCA SUBSIDY CONTROL REQUIREMENTS IN THE UK

Whereas the provisions of an international treaty would normally not be directly effective in national law, and would need to be specifically implemented in the UK, the position with respect to the TCA is different. This is because, as part of its general implementation act for the TCA - the European Union (Future Relationship) Act - the UK included a broad catch-all implementation provision, which effectively provides for a form of temporary direct effect. Under section 29 of the Act, UK law is to have effect with such modifications as necessary for implementing the TCA provisions insofar as there is no more specific implementation for the time being.

The impact of this, is that the TCA subsidy control requirements may already be enforceable in the UK, notwithstanding the lack of specific implementation. This seems to have been acknowledged by BEIS itself in its [subsidy control guidance](#) issued to public authorities, in which it states that public authorities must comply with the TCA requirements from 1 January 2021 onward, making reference to their effect in domestic law due to the European Union (Future Relationship) Act, and the potential for court challenges already to be brought. It remains to be seen however, how long this temporary direct effect will subsist.

BEIS CONSULTATION ON THE UK SUBSIDY CONTROL REGIME

On 3 February, BEIS issued a consultation which begins to put more flesh on the subsidy control requirements under the TCA and sets out a number of possibilities and options that could have a significant bearing on the process and risk exposure for aid beneficiaries going forward.

In particular, the consultation puts forward a number of possible functions for the independent subsidy authority that the UK is required to establish under the TCA. These include more advisory and systemic-type functions, such as the development of guidance for public authorities and assistance in designing subsidies consistently with the principles, as well as enforcement powers in relation to complaints. Notably however, BEIS does not appear to be considering any kind of formal *ex ante* notification and clearance process, although it does refer to possible non-binding pre-award advice, which would serve to provide further comfort in relation to individual subsidies.

In terms of *ex post* enforcement in the national courts, the consultation indicates principally that this should be judicial review based on public law principles, as opposed to a merits review which would be more intrusive. However, the consultation also moots the possibility of appeals being made to the Competition Appeals Tribunal that is responsible for appeals against competition law decisions, in light of the particular legal economics overlay in subsidy control, which could mean a more intrusive level of review.

Notably, the consultation also proposes measures that would provide for presumed compatibility for "lower risk" subsidies, which appear to be the UK's answer to the Commission block exemptions. The consultation also discusses sector specific or aid measure-type specific provisions, although it is not entirely clear whether BEIS intends to go much further than the kind of high-level supplementary principles in these areas that are already set out under the TCA.

Finally, and more generally, the consultation places strong emphasis on the importance of limiting distortions to competition in the UK internal market. A new governing "principle" is proposed to this end, as well as additional provisions and assessments, including specific "competition impact reviews" for "high risk" subsidies.

The consultation is open for the next seven weeks, closing on 31 March. The consultation is likely to result in new legislation, as well as guidance, providing a more detailed framework for the UK's subsidy control framework.

RESIDUAL APPLICATION OF EU STATE AID LAW UNDER THE NORTHERN IRELAND PROTOCOL

The final main aspect of subsidy control in the UK going forward is the residual application of EU State aid law under the UK-EU Withdrawal Agreement and its Northern Ireland Protocol.

The Protocol provides for the continuing application of EU State aid law to measures that *affect trade* in goods and electricity between Northern Ireland and the EU. The meaning of the term "affect trade" and therefore the scope of this provision however, remains subject to very different interpretation by the EU and UK. The Commission takes the view that this should be interpreted consistently with the meaning of that term under EU State aid law, which as explained above, represents a very low threshold. On this basis, the Commission has claimed that EU State aid law continues to have significant "reach back" beyond subsidies granted directly to companies in Northern Ireland, and would also encompass subsidies to companies in Great Britain if they sell goods in Northern Ireland.

In contrast, the UK's position is that subsidies granted in Great Britain are only in scope where "*there is a clear benefit from*" and a "*genuine, direct link*" between the subsidy and companies in Northern Ireland. Therefore, where a subsidy is provided to a company in Great Britain that simply places goods on the Northern Ireland market alongside other markets, this would not be subject to EU State aid law.

It remains to be seen how the Protocol will be applied in practice in this regard and how the conflict will be resolved. It is also possible that these issues will be adjudicated by the UK courts in the coming months as complainants may seek to enforce the Protocol's provisions in relation to EU State aid law before the national courts.

CONCLUSION - RISKS AND OPPORTUNITIES FOR AID BENEFICIARIES

In light of the above, the legal position with respect to subsidies in the UK at present is not straight-forward and significant questions remain as to how the new requirements will be applied. While the UK would seem now to have greater flexibility in providing subsidies, this may come at the cost of increased legal uncertainty and consequently more risk for aid beneficiaries.

The steps that the UK is now taking to further develop its subsidy control regime however, including through the present consultation, may alleviate some of these uncertainties and stakeholders have the opportunity to contribute towards finding the right balance for the UK's subsidy control regime going forward.

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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