

THE UK SUBSIDY CONTROL BILL

The UK Government has introduced draft legislation to flesh out the UK-specific subsidy control regime that has been in place since EU State aid rules ceased to apply on 1 January 2021.

The Bill provides important clarifications of how the UK's subsidy control regime will operate in the future, and in some areas goes further than the existing regime. In particular, it would give the Competition and Markets Authority a role in the assessment of certain subsidies that are granted by UK public bodies. However, this role would be purely advisory, with enforcement of the regime remaining the sole preserve of the courts.

PUTTING FLESH ON A BARE-BONES REGIME

On 1 January 2021, the EU State aid regime ceased to apply in the UK. Overnight, UK public bodies wishing to grant subsidies to businesses went from being able to refer to thousands of European Commission clearance decisions, hundreds of EU court judgments and 70 or so pieces of detailed legislation and guidance, to having just 17 pages of rules, as set out in the Subsidy Control chapter of the UK/EU Trade and Cooperation Agreement (TCA), which was implemented into UK law by virtue of the EU (Future Relationship) Act 2020.

The Subsidy Control Bill seeks to put flesh on this bare-bones regime. For the most part, it reiterates the rules and requirements set out in the TCA. Accordingly, and in contrast to the EU State regime, there is no longer any requirement for public bodies to obtain clearance before implementing subsidies (although the Government now proposes to introduce a requirement to obtain a non-binding opinion in certain cases - see below). Instead, public bodies must self-assess their subsidies against a set of "compliance principles" before granting them, and publish certain details in the online transparency register that is maintained by the Department of Business, Energy and Industrial Strategy (BEIS). Failure to apply the compliance principles, or failure to apply them properly, can be challenged in judicial review proceedings before the courts and may result, among other things, in the recipient having to repay their subsidy.

Key issues

- In what areas does the Bill go further than the current subsidy control regime, or clarify it?
- What will be the impact of broadening the regime's focus to include competition and trade within the UK, as well as trade and investment with non-EU countries?
- What is the role of the Competition and Markets Authority, and will its non-binding opinions carry weight?
- Will there be safe harbours for certain types of subsidy and, if so, when?

Various exemptions and exceptions that are available under the current TCA regime will also be transposed into the new legislation, such as exceptions for *de minimis* subsidies of up to £325,000 over a three year period and subsidies for services of public economic interest.

However, in a number of areas the Bill goes further than is required by the TCA and/or provides important clarifications of how the UK's subsidy control regime will operate in the future. The most significant of these are described below.

Definition of a subsidy

The definition of a subsidy under the TCA relies heavily on concepts developed by EU State aid law, but with changes to the terminology and no requirement for UK courts to follow the rulings of the EU Courts that developed those concepts.

However, under the TCA there is no regulated subsidy unless the financial support has an actual or potential effect on trade or investment between the UK and the EU. The Bill would expand the definition of a subsidy to include also those that affect competition or investment within the UK, as well as those affecting trade or investment between the UK and any other country (not just the EU). In doing so, it would give businesses (whether domestic or foreign) rights to challenge a wider range of subsidies than is possible at present.

The compliance principles

Under the current TCA regime, the compliance principles require subsidies to pursue certain policy objectives and to incentivise their achievement in a proportionate way that minimises the impact on trade or investment between the EU and the UK. Energy and environmental-related subsidies are subject to additional principles, chiefly to ensure that they assist in reducing carbon emissions.

The Bill supplements the six generally-applicable compliance principles contained in the TCA with requirements for public authorities to take into account any negative effects of their proposed subsidies on competition or investment within the UK, as well as adverse effects on all international trade or investment (the TCA specifies only EU/UK trade or investment). This additional requirement appears to be aimed at providing additional protections for the UK internal market, increasing the potential for challenges (see below).

Prohibited subsidies

The Bill prohibits outright the same subsidies as the current TCA regime, including unlimited State guarantees, export subsidies, subsidies that are conditional on the recipient buying UK goods or services and the rescuing of businesses in financial difficulty that do not present an appropriate plan for recovery.

In addition to these, the Bill includes a new prohibition for subsidies which would require enterprises to relocate economic activities from one part of the UK to another. This seeks to ensure that the granting of a subsidy does not come at the detriment to economically underperforming regions of the UK, reflecting the Government's "levelling-up" agenda. However, the prohibition applies only to subsidies conditioned on the relocation of existing activities. Subsidy "races" between different regional authorities to attract investment in new activities could, therefore, still happen, provided the "winning" subsidy meets the relevant compliance principles.

Role of the Competition and Markets Authority (CMA) and the Competition Appeal Tribunal (CAT)

The TCA requires the Government to create an independent authority with an "appropriate role". The Bill confirms that this will be the CMA, and requires the CMA to establish a Subsidy Advice Unit for the specific purpose of overseeing the subsidy control regime.

As for the "appropriate role", it is essentially advisory. Unlike the European Commission, the CMA will have no powers to prohibit subsidies or require changes to existing or proposed subsidies. Instead, it will publish non-binding opinions on whether a particular subsidy or subsidy scheme meets the relevant compliance principles:

- For certain types of subsidy (subsidies designated as of "particular interest" and those referred to the CMA by the Government on an ad-hoc basis), public bodies will be required to seek such an opinion, and to wait for 5 working days after receiving it, before they implement the subsidy.
- Certain other types of subsidy will be designated as being "of interest". For these, public bodies will be able to seek such an opinion voluntarily, although the CMA could decline that request.

The categories of subsidies that are deemed to be of interest, and of particular interest, will be defined in secondary legislation. The Government has indicated that they will capture a relatively small number of subsidies and schemes that are most likely to be inconsistent with the compliance principles.

A public body could proceed to grant a subsidy even in the face of an adverse CMA opinion. In particular, the CMA's opinions would not be binding on the courts, which have the final say on whether a subsidy is compliant. However, the CMA's opinions will undoubtedly be influential on the courts, so it would be a brave public body that ignored them, and any recipient would have to accept a significant risk of having to repay its subsidy. Conversely, a positive opinion from the CMA would be likely to give significant (but not absolute) comfort to the public body and recipient that the subsidy is unlikely to be challenged successfully in court.

The Government will also be able to refer subsidies and subsidy schemes to the CMA for a post-award review, where it appears that the requirements of the Bill have not been complied with and there is a risk of negative effects on competition or investment within the UK.

Any party whose interests may be affected by a subsidy will be able to apply to the courts for the judicial review of a public body's decision to grant the subsidy, as will the Government. The window for bringing such appeals is short – just one month from the time when details of the subsidy are published in BEIS' online database, or the date on which further information is provided to the potential appellant – and the Bill clarifies that this deadline would apply for all subsidy control appeals, not just those seeking repayment of a subsidy.

For most subsidies the relevant court will be the CAT, but for subsidies granted by primary legislation of the devolved authorities of Scotland, Wales and Northern Ireland it will be the High Court or the Court of Sessions, and subsidies that are granted by primary legislation of the UK Parliament cannot be appealed at all.

As required by the TCA, the CAT will have the power to issue a recovery order that a subsidy is repaid, if the subsidy is found to breach the subsidy control

rules, alongside the usual judicial review remedies. Public authorities may also recover misused subsidies through enforcement of a contractual right, rather than requiring a separate CAT order.

Safe harbours and guidance

The Bill and its accompanying notes envisage the establishment by the Government of a series of "streamlined subsidy schemes" that are assessed against the compliance principles in advance and so enable all public bodies to grant lower-risk subsidies without needing to carry out their own assessment. Other public bodies would also be able to issue their own schemes, which would have similar effect in respect of their own subsidies but, unlike the Government's streamlined schemes, would be susceptible to referral for an opinion of the CMA.

The Bill would also empower the Government to issue guidance on various aspects of the regime, to which public bodies granting subsidies would be required to have regard.

Comment

When it signed up to the subsidy control provisions in the TCA, the UK became the first country, other than EEA member states and countries seeking to accede to the EU, to agree to, and implement, such a far-reaching and domestically-enforceable subsidy control regime. However, as the TCA regime is a consequence of Brexit, its focus is on trade between the EU and the UK.

The Bill's most significant innovation is to broaden this focus so that it encompasses also competition and investment within the UK, and trade and investment with non-EU countries. The former is intended to strengthen the UK's internal market, and will also help to guard against a perception that the regime serves EU-based businesses more than those in the UK, while the latter will ensure that the UK meets its obligations under other international agreements, such as the WTO Agreement on Subsidies and Countervailing Measures. The purely advisory role of the CMA is consistent with this: no public authority, however independent, would have relished responsibility for enforcing the regime against subsidies granted to UK businesses at the behest of EU-based rivals.

While the Bill would substantially flesh out the UK's subsidy control regime, a number of additional measures will be required, including secondary legislation, guidance and "streamlined" safe harbour schemes. In particular, the absence of safe harbours under the current TCA regime, and the resulting lack of legal certainty, has created considerable difficulties for public bodies and subsidy recipients this year. Many have fallen back on applying the criteria of the EU General Block Exemption Regulation and the European Commission's guidance, despite the EU State aid rules having ceased to apply. Consequently, the prospect of easily-applicable safe harbours for subsidies will be welcomed. However, such safe harbours would be even more welcome if the Government introduced them now – which it can do under the current TCA regime – rather than waiting until the Bill is enacted. The Bill is expected to be enacted in the current Parliamentary session, which ends in Spring 2022, so it may be up to a year before the new regime is fully in place.

CONTACTS

Alex Noury
Partner

T +44 20 7006 8001
E alex.noury
@cliffordchance.com

Greg Olsen
Partner

T +44 20 7006 2327
E greg.olsen
@cliffordchance.com

Samantha Ward
Partner

T +44 20 7006 8546
E samantha.ward
@cliffordchance.com

Jessica Gladstone
Partner

T +44 20 7006 5953
E Jessica.gladstone
@cliffordchance.com

Daniel Harrison
Knowledge Director

T +44 20 7006 4136
E daniel.harrison
@cliffordchance.com

Daniel Schwarz
Senior Associate

T +44 20 7006 8924
E daniel.schwarz
@cliffordchance.com

Kieran John McCarthy
Senior Associate

T +44 20 7006 1374
E kieranjohn.mccarthy
@cliffordchance.com

Jeremy Stewart
Senior Associate

T +44 20 7006 4502
E jeremy.stewart
@cliffordchance.com

Oliver Carroll
Associate

T +44 20 7006 2146
E oliver.carroll
@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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