

UK SUBSIDY CONTROL REGIME ENTERED INTO FORCE ON 4 JANUARY 2023

On 4 January 2023, the main provisions of the UK's Subsidy Control Act 2022 (**SCA**) entered into force. From this day, subsidies granted by UK public authorities (**Public Authorities**) to businesses operating in the UK (**Recipients**) will be subject to the SCA. Following Brexit, most subsidies granted by Public Authorities were governed by the Trade and Cooperation Agreement between the UK and the EU (**TCA**), whereas the EU's State aid rules applied prior to Brexit.

This shift in legislative landscape presents opportunities for Public Authorities and Recipients alike, as the UK seeks to forge a less burdensome pathway towards economic growth, facilitated by financial assistance originating from the public sector. Early navigation of this territory will nevertheless be tricky, as questions over the interpretation and enforcement of the regime are as of yet unsettled.

NEW SUBSIDY CONTROL REGIME – OVERVIEW

Under the SCA, the UK has established what it hopes will be a more streamlined approach to the granting of subsidies by Public Authorities, as compared to (in the UK Government's view) the more burdensome State aid regime applicable in the EU.

For the most part, the requirements of the SCA are materially the same as those which have applied since 1 January 2021 under the TCA, which was incorporated into UK law by the EU (Future Relationship) Act 2020. However, as set out below, there are some important differences.

Public Authorities will still be required to self-assess whether their subsidies are compatible with certain Subsidy Control Principles (**Compliance Assessment**), although, as explained below, the formulation of those principles in the SCA differs in certain respects from that which applied previously. In addition, for subsidies granted under the so-called "streamlined subsidy schemes", Public Authorities will be able to proceed without conducting a Compliance Assessment. The main change introduced on 4 January 2023 is that some subsidies over relevant thresholds will be subject to

Key issues

- The UK's subsidy control regime entered into force on 4 January 2023, replacing the (largely similar) regime that has applied since 1 January 2021.
- Unlike under EU State aid rules, a public authority will no longer be required to obtain permission prior to granting most subsidies; rather, it must self-assess the compliance of the subsidy against a set of principles.
- The Subsidy Advice Unit at the UK's Competition and Markets Authority is tasked with providing non-binding legal advice to public authorities in respect of subsidies over relevant thresholds.
- Public authorities are required to enter details of subsidies granted on the UK's subsidy database.
- Interested parties may challenge the granting of a subsidy before the Competition Appeal Tribunal within three months of publication of the public authority's entry in the subsidy database.
- The UK Government and the Competition and Market Authority's Subsidy Advice Unit have separately published detailed guidance to help public authorities and subsidy recipients navigate the new regime.

either voluntary or mandatory referral to the Subsidy Advice Unit (**SAU**) for a non-binding opinion on the relevant Public Authority's view as to the compatibility of the proposed subsidy with the Subsidy Control Principles.

Public Authorities must then publish relevant details of their subsidies on the UK's subsidy database (**Transparency Obligation**). This obligation also applies to subsidies that do not meet the thresholds for referral to the SAU. Following this, and within a specified window (1 – 3 months, depending on the circumstances), interested parties will be able to challenge a Public Authority's decision to grant the relevant subsidy before the UK's Competition Appeal Tribunal (**CAT**), which will only be able to assess the Public Authority's decision on (limited) judicial review grounds (under the TCA, challenges were made before the High Court).

Finally, it is important to note that EU State aid law continues to apply to subsidies relating to Northern Ireland. However, the degree to which the subsidy must relate to Northern Ireland before EU State aid law applies remains unsettled.

SUBSIDY DEFINITION AND THE SUBSIDY CONTROL PRINCIPLES

Definition of a subsidy

The SCA defines a subsidy as financial assistance which: (i) is given, directly or indirectly, from public resources by a public authority; (ii) confers an economic advantage on one or more enterprises; (iii) 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 (iv) has, or is capable of having, an effect on competition or investment within the UK, trade between the UK and a country or territory outside the UK, or investment as between the UK and a country or territory outside the UK. This last criterion is significantly broader than the equivalent criteria under the TCA, which provided that a measure amounted to a subsidy only if it affected trade or investment between the UK and the EU.

Although there are differences between the above terminology and EU State aid rules (and the UK Government has stated that the two regimes are "not the same"), it is likely that the definition of a subsidy, as defined above, will be broadly aligned with EU law, as well as the WTO rules that regulate subsidies under international law (in particular the Agreement on Subsidies and Countervailing Measures). Similarly, as a general principle and consistent with EU State aid and WTO rules, financial assistance received by a Recipient from a Public Authority on market terms will not qualify as a subsidy, since the Recipient derives no economic benefit from the financial assistance (the so-called Commercial Market Operator, or 'CMO' test).

Subsidy Control Principles

To the extent that a Public Authority's assistance amounts to a subsidy, the subsidy must respect all of the following Subsidy Control Principles to be a lawful subsidy (there are separate Principles for certain subsidies in the energy and environmental sectors):

- the subsidy pursues a specific public policy objective to remedy an identified market failure or to address an equity rationale ("the objective");
- it is proportionate and limited to what is necessary to achieve the objective;

- it is designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided;
- it should not normally compensate for the costs the beneficiary would have funded itself in the absence of any subsidy;
- it is an appropriate policy instrument to achieve a public policy objective, and that objective cannot be achieved through other less distortive means;
- should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the UK. This is a new principle that was introduced by the SCA; and
- its positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on (i) competition or investment within the UK; and (ii) international trade or investment. This principle is broader than that which applied under the TCA, as the latter required only that any negative effects on the EU/UK trade be taken into account.

NEW SUBSIDY REGIME – DETAIL

As noted above, Public Authorities are now able to grant most subsidies without having to seek prior approval. However, the UK Government recognised that larger subsidies have a greater prospect of distorting competition, and may therefore require prior notification. The SAU has been tasked with providing its non-binding legal advice in respect of these larger subsidies. In particular, "Subsidies and Schemes of Particular Interest" (**SSoPIs**) must be referred to the SAU, whereas Public Authorities can choose to refer "Subsidies and Schemes of Interest" (**SSoIs**) to the SAU. In general:

- An **SSoPI** is any: (i) subsidy exceeding £10 million in value; (ii) restructuring subsidy (regardless of value); or (iii) subsidy valued between £5-10 million relating to the following 8 sensitive sectors: (a) manufacture of basic iron and steel and of ferro-alloys; (b) aluminium production; (c) copper production; (d) manufacture of motor vehicles; (e) building of ships and floating structures; (f) manufacture of motorcycles; (g) manufacture of air and spacecraft and related machinery; and (h) production of electricity.
- A **SSoI** is any: (i) subsidy valued between £5-10 million that does not relate to sensitive sectors; or (ii) rescue subsidy (regardless of value).
- The rules are more complex, however. For example, subsidies that are explicitly conditional on relocations have different thresholds, there is a distinct approach to tax schemes, and related subsidies granted to the same Recipient within a specific timeframe cumulate towards the relevant **SSoI** / **SSoPI** thresholds. The Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022 provide further detail on the **SSoI** and **SSoPI** thresholds.

Following pre-notification (which the SAU expects will be a limited process), the SAU will generally have 30 working days to issue its report on the Public Authority's Compliance Assessment in respect of the proposed subsidy. This period commences once the SAU has confirmed to the Public Authority that its referral is complete, which must occur within 5 working days from when the SAU receives the referral. While the SAU's report will not be a simple "pass-fail" report, it has stated that it does not expect that its decisions will be lengthy, nor will they be *de novo* assessments of the Public Authority's

Compliance Assessment. Following receipt of the SAU's report in relation to an SSoPI only (i.e. mandatory referrals), the Public Authority must wait 5 working days before it may proceed with formally granting the relevant subsidy or setting up the relevant subsidy scheme.

A Public Authority must fulfil its Transparency Obligation within 3 months of granting a subsidy or setting up a subsidy scheme. However, the relevant timeframe for a subsidy in the form of a tax measure is one year. The Government published the Subsidy Control (Subsidy Database Information Requirements) Regulations 2022, which specify the details that Public Authorities must include in their entries on the UK's subsidy database.

CHALLENGES TO SUBSIDIES OR SUBSIDY SCHEMES

If an interested party (i.e. any person or legal entity whose interests might be affected by the granting of a subsidy or the Secretary of State) communicates in writing to the Public Authority within 1 month of the Public Authority meeting its Transparency Obligation that it may apply for a judicial review of the subsidy, the Public Authority will have 28 days to provide that interested party with the information necessary for that party to assess the Public Authority's Compliance Assessment. The interested party will then have a further month in which to apply for judicial review by the CAT (i.e. there is potentially up to a 3-month challenge window from the Public Authority's fulfilment of the Transparency Obligation). Alternatively, the interested party may bypass the information gathering stage altogether by applying for a judicial review within 1 month of the Public Authority meeting its Transparency Obligation.

The CAT will review the Public Authority's decision on limited judicial review grounds and has the power to provide the following kinds of relief in the event it finds fault with the Public Authority's decision: (i) a mandatory order; (ii) a prohibiting order, (iii) a quashing order; (iv) a declaration; or (v) an injunction.

GUIDANCE PUBLISHED BY BEIS AND THE SAU

The Department for Business, Energy, Industry and Strategy (**BEIS**) has published [statutory guidance](#) on the United Kingdom subsidy control regime. This extensive document draws heavily from the European Commission's Notice on the Notion of State Aid and seeks to distil decades worth of State Aid precedent into a "manual" for Public Authorities to consult prior to awarding subsidies or setting up subsidy schemes to ensure that such awards are SCA compliant. As these will be the most pressing concerns to Public Authorities and Recipients, the emphasis of the guidance is on the definition of a subsidy, how Public Authorities should assess their proposed subsidies against the Subsidy Control Principles, and the subsidies prohibited under the SCA.

Moreover, the CMA has published its own [guidance](#) on the operation of the subsidy control functions of the SAU. For those subsidies or schemes which will be referred to the SAU (either mandatorily SSoPIs or voluntarily SSols), the guidance provides insight into how the SAU understands its statutory role and intends to carry out its functions, including important details of the processes it will follow when performing its duties.

STREAMLINE SUBSIDY SCHEMES

Three "streamlined subsidy schemes" also entered into force on 4 January 2023, covering: (i) research, development, and innovation; (ii) local growth; and (iii) clean energy. The UK Government has published draft [guidance](#) on

the operation of these schemes, including additional [guidance](#) on agricultural subsidies.

Subsidies granted under a "streamlined subsidy scheme" do not need to be assessed against the Subsidy Control Principles, thereby further reducing the administrative burden on Public Authorities. These schemes introduce a mechanism akin to the safe harbour provided for by the EU's General Block Exemption Regulation, which specifies categories of aid that Member States can grant without prior permission from the European Commission.

COMMENT

The UK stands alongside the EU as having one of the strictest regimes for regulating domestic subsidies that can be enforced before national courts. Indeed, in some respects, the UK's regime goes further than the EU State aid rules, as it will now catch not only measures that affect trade or investment between the UK and the EU, but also those that affect trade or investment with any other country, as well as competition or investment within the UK itself. For example, the UK government's statutory guidance gives examples of subsidies to a newsagent or a hairdresser in a remote rural village as measures that could fall under the new regime, which would rarely have been considered to have effects on international trade under the EU State aid rules or the TCA.

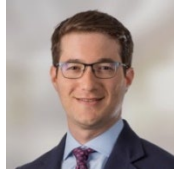
The UK's implementation of the SCA is one part of the general international trend towards increased control of subsidies. However, that trend is now focusing on subsidies that are granted by foreign countries, something that the SCA does not seek to regulate. In particular, the EU Foreign Subsidies Regulation will become applicable from 6 July 2023, giving the European Commission broad powers to investigate subsidies granted by non-EU governments (including the UK) and linked entities and to impose remedies on those which it considers distort the EU's internal market, with mandatory filing obligations for certain M&A transactions and participation in public tenders.

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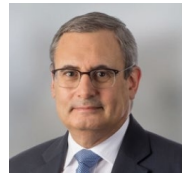
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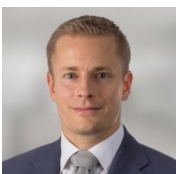
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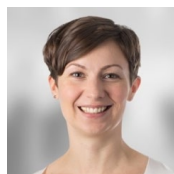
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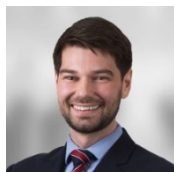
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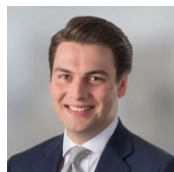
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