

THE SUBSIDY CONTROL ACT

WHAT YOU NEED TO KNOW ABOUT THE UK'S NEW SUBSIDY CONTROL REGIME

The Subsidy Control Act 2022 will come into full effect on 4 January 2023. The UK Government has also published the final versions of the regulations defining the categories of subsidies that the Competition and Markets Authority (CMA) will review.

The Subsidy Control Act represents a development of the UK subsidy control regime that came into effect at the end of 2020 as part of the implementation of the UK's commitments in the EU-UK Trade and Cooperation Agreement (TCA). The Act builds on the new procedural regime for the assessment of subsidies, with the introduction of a new Subsidy Control Unit at the CMA that will be able to review and issue opinions on certain types of subsidy.

What does the Subsidy Control Act do?

The TCA requires both the UK and the EU to operate and maintain “an effective system of subsidy control” that ensures that the granting of subsidies adheres to certain core principles. The main elements of this regime have been in effect in the UK since the end of the transition period (by virtue of the European Union (Future Relationship) Act 2020). The Subsidy Control Act expands the operation of this regime in certain respects and elaborates on how those provisions will operate in practice.

The **key changes** that are introduced by the Subsidy Control Act are:

- It widens the **definition of a subsidy** to include measures that have a (potential) effect on competition or investment within the UK as well as on trade or investment between the UK and other countries (which is the focus of the TCA regime). Certain types of measures that are excluded from the scope of the TCA (e.g. subsidies relating to the audio-visual sector) are also brought back within the scope of the UK regime (to a certain extent).
- It introduces a **new, seventh, principle** that public authorities must have regard to when evaluating possible subsidies. This again extends the focus of the regime to include intra-UK effects that are outside the scope of the TCA. The Act requires public authorities to consider, in addition to the existing TCA principles, the need for subsidies to be “designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom”.
- It empowers **the CMA** to perform the functions of the “operationally independent authority” that is required by the terms of the TCA to have an “appropriate role” in the subsidy control regime. The Subsidy Control Act creates a role for the CMA to review and give a (non-binding) opinion on:
 - **Subsidies of Particular Interest (SoPI)**, which includes subsidies over £10 million and smaller subsidies in sensitive sectors (such as steel, motor vehicles or electricity production) or involving sensitive activities (such as restructuring and relocation subsidies); and
 - **Subsidies of Interest (Sol)**, which includes subsidies over £5 million or in particular categories of subsidy (such as rescue subsidies and relocation subsidies that are not large enough to be SoPI).
- A CMA report is mandatory for SoPIs. For Sols public authorities have the option to request a report (and the Secretary of State also has a power to direct an authority to request a CMA report). The CMA's findings will be published but are not binding on the subsidy granting authority.

How different in practice is the UK regime compared to EU State aid law?

The **key difference** between the UK subsidy control regime and EU State aid law is **procedural**. The UK regime is to a large extent based on self-assessment by the entity that is giving a subsidy. It has no equivalent to the mandatory pre-notification and approval requirements of EU State aid law, with the new role of the CMA, whilst public, being advisory.

Enforcement of the UK subsidy control rules is therefore largely a matter for the courts. An additional change that the Subsidy Control Act will introduce is that it will enable the Competition Appeal Tribunal (CAT) to hear private legal challenges in relation to subsidies. The transparency requirements - whereby information on a subsidy must now generally be published within three months of the decision to grant the subsidy (rather than the six months permitted by the TCA) - are designed to aid private enforcement.

By contrast, the substantive subsidy rules under the new UK regime remain similar in scope and intent to the EU rules. As the TCA rules in their terms apply to both the EU and the UK, it is reasonable to work on the basis that, whilst the two regimes are not necessarily required to be identical, measures that would be acceptable under the EU rules are unlikely to be regarded as problematic under the TCA.

Against that background, and in the absence (for now) of a significant body of UK decisions, the EU rules continue to be a relevant point of reference in approaching the UK regime.

What about the Northern Ireland Protocol?

The significance of the Northern Ireland Protocol to the UK subsidy regime is that it preserves the **operation of the EU State aid rules** in relation to measures that affect the trade in goods and electricity between Northern Ireland and the EU. The key open question on the Protocol, from a subsidy control perspective, remains the jurisdictional scope of these provisions; i.e. the circumstances in which a measure that is not specifically directed at Northern Ireland might be

considered to have an effect on EU-Northern Ireland trade.

This issue was canvassed, but ultimately unresolved, in *British Sugar plc, R (On the Application Of) v Secretary of State for International Trade [2022] EWHC 393 (Admin)*, which was the first subsidy case to be heard following the end of the Brexit transition period and concerned changes to sugar import tariffs. The complainant, British Sugar (a domestic sugar producer) alleged that the decision to introduce a zero-duty autonomous tariff of 260,000 metric tonnes of raw cane sugar (i) breached EU State aid law, as applied under the NI Protocol; and (ii) amounted to a subsidy prohibited by the TCA.

The claim was ultimately dismissed, essentially on the basis that there was no selectivity/specificity in the measure (a requirement under both regimes for there to be a subsidy). The tariffs in issue would apply consistently to all importers (although in practice there was only one significant importer) and the court considered that the complainant, as a domestic producer who did not pay import tariffs, was not in an equivalent position.

The court therefore did not have to conclude on the issues relating to the scope of the NI Protocol, although it did express a view that even though, in principle, import tariffs could fall within the NI Protocol and thus be subject to EU State aid law, on these facts the Protocol should not apply as it was clear that there was no material trade in sugar from Northern Ireland to the EU.

What next and where to find guidance?

The main parts of the UK Subsidy Control Act will come into full effect on **4 January 2023**.

In addition to the [statutory guidance on the operation of the regime](#), the Government has published a [subsidy assessment template](#) to assist public bodies in applying the subsidy control principles. Meanwhile, the CMA published the final version of its [guidance on the operation of the subsidy control functions of its Subsidy Advice Unit \(SAU\)](#).

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