

COMPETITION & REGULATORY NEWSLETTER

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CAT rejects first application for review of a subsidy decision under Subsidy Control Act 2022

Introduction

On 27 July 2023, the UK Competition Appeal Tribunal (CAT) [rejected](#) the first application for the review of a subsidy decision under the Subsidy Control Act 2022 (the Act), holding that Durham County Council did not illegally cross-subsidise its two different waste collection operations. The CAT found that a subsidy must move between persons and that an economic benefit moving within a single person is no such thing and falls outside the statutory definition of “*subsidy*” in the Act.

The Subsidy Control Act 2022

The Act came into full effect on 4 January 2023. As explained in more detail in a [previous briefing](#), the Act developed the UK subsidy control regime that came into force at the end of 2020 as part of the implementation of the UK’s commitments in the EU-UK Trade and Cooperation Agreement. Section 70 of the Act provides that an interested party who is aggrieved by the making of a subsidy decision may apply to the CAT for a review of the decision.

Background

Durham County Council (the Council) has various responsibilities in relation to waste collection and disposal, including both household and commercial duties. The Council uses the same vehicles and employees to collect both household waste and most of the commercial waste it collects. Subject to certain exceptions, the Council may only charge for the collection and disposal of commercial waste. The Council charges for these services by seeking to recover the actual cost of employing staff that deal only with commercial waste and an approximated proportion of the costs common to household and commercial waste.

The Applicant, the Durham Company Limited (trading as Max Recycle), competes with the Council in respect of waste collection and disposal services. The Applicant contended that a decision was made by the Council in March 2023 to permit the household waste collection operation to subsidise the smaller commercial waste collection operation. The Applicant claimed that this allows the Council to charge individual businesses at less than the rate they would or could have charged had they run the commercial waste collection operation as an altogether separate, self-standing and independent operation.

Findings

Financial assistance given by a public authority to an enterprise

The CAT considered that a net advantage flowed from the Council’s household waste collection operation to its commercial waste collection operation, reasoning that as the

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commercial operation was the smaller of the two, the Council created an opportunity to use the vehicles and resources mainly engaged for the collection of household waste for commercial waste. The commercial waste operation thereby benefitted from economies of scale that would not have been available had the Council decided, as it was entitled, to contract the household waste collection service to a third party.

However, the CAT held that a subsidy, within the meaning of the Act, must involve financial assistance given by a public authority so as to confer an economic advantage on one or more enterprises. In this instance, it was common ground that the Council were the “*public authority*” giving the subsidy. However, the Applicant was not able to identify any person, other than the Council itself, implicated in the provision of the relevant waste collection or waste disposal services. As a result, the giver of the subsidy was the same person as the person on whom the subsidy was conferred.

The CAT found that the Council could not, in effect, subsidise itself. In the CAT’s view, the very essence of a subsidy, as defined in the Act, is that the subsidy moves subsidising from one person (the public authority) to another person (the enterprise). The very notion of one person subsidising themselves was considered “*illogical since it involves (by definition) taking away with one hand in order to give with the other*”. In other words, the advantage conferred did not involve subsidisation, because the “*economic benefit*” simply circulated within one entity, the Council.

Economic advantage to an enterprise

The CAT also found that, even if the Applicant was correct that it was possible for the Council to subsidise itself, it was not clear what “*economic advantage*” was being conferred. At most, the CAT reasoned, the “*economic advantage*” was the ability to charge less to the consumers of the service provided by the “*enterprise*”, that is those using the Council’s commercial waste collection services. However, the CAT considered that this economic advantage only arises if the “*enterprise*” charges less than the full economic cost of the commercial waste collection service calculated on a standalone basis. In the CAT’s view, if the “*enterprise*” does so reduce its charges, the economic benefit is sustained by the consumer and not the “*enterprise*”. The CAT considered that any attempt by the “*enterprise*” to gain an economic advantage by charging the “*full amount*” would potentially breach the Council’s duties to recover a “*reasonable charge*” for its services.

In short, the CAT judged no financial assistance was given; rather, common costs were being apportioned and consequently a subsidy did not arise.

The subsidy decision

Although the Council were successful in arguing no subsidy was conferred, the CAT rejected its argument that the “*decision*”, whereby the approach to charging for commercial waste management services was determined, did not fall within the scope of the Act. In the Council’s view, the “*decision*” in March 2023 amounted to no more than an annual review of the rates set by a March 2020 scheme, which was in effect before the entry into force of the Act in January 2023. The CAT rejected this approach, finding that the Council had made a series of related decisions, not a scheme followed by a series of decisions made under that scheme. The CAT therefore concluded that such a “*repeat decision*”, which does not adopt unquestioningly the prior decision but rather considers whether the prior decision continues appropriately to apply, could fall within the scope of the Act.

Conclusion

The CAT found that a public authority cannot, in effect, give a subsidy to itself for the purposes of the Act. However, by confirming the broad scope of decisions reviewable under the Act, the CAT has left open the possibility of a greater number of future applications.

OTHER DEVELOPMENTS

MERGER CONTROL

MaxLinear’s acquisition of Silicon Motion terminated shortly after receiving SAMR’s conditional approval

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On 26 July 2023, the Chinese competition regulator, the State Administration for Market Regulation (SAMR), conditionally [cleared](#) the proposed US\$3.8 billion acquisition of Taiwan-based Silicon Motion by US-based MaxLinear. Silicon Motion supplies NAND flash memory master control chips (chips) and solid-state disks, while MaxLinear is a provider of integrated circuits, and SAMR was concerned that the deal would restrict competition in relation to the chips.

SAMR's clearance of the transaction provides a useful insight on its "stop-the clock" mechanism, which was introduced by the revised Antimonopoly Law last August. The law does not require SAMR to make any public announcement that it has stopped the clock, nor does it specify when or for how long SAMR can stop the clock, but we can see from this case that the clock was stopped for over six months from 6 January to 14 July 2023. No reason was given in the decision as to why SAMR stopped the clock, although we see that the exercise of this power meant that the parties did not have to "pull and re-file" (which was common in previous conditional cases in China).

In terms of substance, SAMR's conditional decision included a fairly standard commitment to continue supplying chips in China on a fair, reasonable and non-discriminatory basis and maintain Silicon Motion's existing business relationships and contracts. SAMR also stipulated that no substantial alterations be made to Silicon Motion's business model or operations and that Silicon Motion's chip-related research and development work in Taiwan and field-application engineers in China be retained. More unusually, SAMR included a prohibition on the inclusion of any "malicious code" in the design of the chips sold in China. This is the first time SAMR has included such a condition.

In a move that surprised the markets, just eight hours after SAMR's clearance, MaxLinear terminated the deal, claiming conditions to closing were not, and could not be, satisfied, that Silicon Motion had materially breached its agreements and that Silicon Motion had suffered a "material adverse effect" that is continuing. While Silicon Motion's EBITDA was 93% lower than last year, when the deal was announced, MaxLinear appeared committed to securing SAMR's approval of the deal right to the very end, submitting the final remedy package to SAMR on 25 July (just a day before obtaining clearance from SAMR and two days before it announced it had terminated the deal).

ANTITRUST

European Commission opens investigation into possible anti-competitive practices by Microsoft regarding Teams

On 27 July 2023, the European Commission [announced](#) that it has opened a formal investigation to assess whether Microsoft may have tied or bundled communications and collaboration product Microsoft Teams to its productivity packages Office 365 and Microsoft 365. Tying or bundling occurs where a supplier makes the sale of one product conditional upon the purchase of another, or where products are offered at a discount when purchased together. Anti-competitive tying and/or bundling constitute a breach of Article 102 of the Treaty on the Functioning of the European Union which prohibits the abuse of a dominant position.

The Commission has raised concerns around the potential for Microsoft to abuse and defend its market position in productivity software by restricting competition for communication and collaboration products in the European Economic Area. The Commission cited the possibility that Microsoft may grant Teams a distribution advantage by not giving customers a choice as to whether to include access to the product when customers sign up Microsoft's productivity packages, as well as the fact that there may be limited interoperability between those productivity packages and competitor products to Microsoft Teams.

Margrethe Vestager, European Commissioner for Competition, has commented on the case, "[r]emote communication and collaboration tools like Teams have become indispensable for many businesses in Europe. We must therefore ensure that the markets for these products remain competitive, and companies are free to choose the products that best meet their needs". The Commission has stated it will carry out its in-depth investigation as a matter of priority.

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CMA consults on commitments offered by Amazon in abuse of dominance investigation regarding Amazon Marketplace

On 26 July 2023, the UK Competition and Markets Authority (CMA) [announced](#) that Amazon has offered proposed commitments regarding its treatment of third-party sellers on its Marketplace platform. The proposed commitments are offered in response to competition concerns raised by the CMA as part of a CMA investigation [opened](#) in July 2022, into whether Amazon has abused its dominant position as the UK's leading online retail platform by giving an unfair advantage to its own retail business or sellers that use its services, compared to other third-party sellers on the Amazon UK Marketplace.

The proposed commitments include ensuring that Amazon does not use rival sellers' data to gain an unfair advantage on Marketplace; providing a guarantee that all product offers are treated equally when Amazon decides which will be featured in the 'Buy Box' on a Marketplace product page; allowing third-party sellers using Marketplace to negotiate their own rates directly with delivery services (so that customers can benefit from lower delivery costs); and requiring Amazon to appoint an independent trustee to monitor its compliance with the commitments.

The CMA's preliminary view is that the proposed commitments will address its concerns. The CMA has opened a [consultation](#) on the proposed commitments, which will close on 1 September 2023.

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