



Presentation 14 January 2021

Subsidy Control – the new framework

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Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity — Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team work — Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance — IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance — Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication

Contents

- Purpose of today
- State aid's fate
- Basis of the new system
- Prohibited subsidies – World Trade Organisation
- Domestic legal basis
- Language and meaning
- Interim approach to Subsidy awards
- If in doubt

Purpose of today

- An subsidy overview
- Enable uninterrupted public support to be given
- A workable and safe approach to subsidy awards

State aid's fate

- Great Britain – does not apply to aid awarded after 31 December 2020
- Great Britain – EU Commission may investigate until 11 pm 31 December 2024 (Previous aid)
- Northern Ireland Protocol – continues to apply in relation to goods and electricity market
- Northern Ireland – otherwise the new UK system applies

The basis of the new Subsidy system

- Subsidy control an aspect of UK trade policy
- Not just about the EU
- Based on UK free trade agreements (**FTAs**)
- Does the FTA include subsidy provisions?
- Most FTAs inter-governmental – WTO remedies
- EU UK Trade and Cooperation Agreement (TCA) is more extensive

Prohibited subsidies – World Trade Organisation

- Will apply in all circumstances
- **WTO Prohibited subsidies:** subsidies that require recipients to:
 - meet certain export targets, or
 - use domestic goods instead of imported goods.
- They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries' trade.
- In practice unlikely you will be doing this! - I hope

Domestic legal basis

- Section 29 European Union (Future Relationship) Act 2020 (**EUFRA**)
- This incorporates aspects of the TCA into domestic law
 - With such modifications as required;
 - To implement the TCA and honour UK international obligations
 - if no UK regulations / legislation adopted
- EUFRA provides wide powers for regulations to be issued
- General public law provisions (acting rationally) – in relation to BEIS guidance
- Update the Localism Act 2011?

Language and meaning

- TCA descriptions of subsidy similar, but different, to state aid
- UK system will be distinct from 'state aid'
- TCA meanings are untested – 'could effect trade and investment'
- UK evolution – independent body and domestic rules
- TCA principles apply equally to EU's state aid and UK's system
- This aspect is useful at the beginning of the Subsidy journey

Interim approach to Subsidy awards

- Recite domestic legislation
- Have regard to the steps in BEIS guidance
- Have regard to the EU/UK Joint Declaration on subsidy control policies – regional, R&D and transport
- Most likely TCA Subsidy principles and provisions apply
- Does Subsidy control apply to the measure?

If in doubt

- Don't dither – Covid & the economy
- TCA covers both EU state aid & UK system
- State aid rules implied TCA compliant
- For routine awards – apply previous principles?

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Subsidy Control – TCA

Julian Jarrett, Solicitor

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TCA (1) - Scope

- **TCA - Subsidy Control - Part 2 Title XI Chapter 3**
- Subsidy:
 - financial assistance arising from the resources of the UK/EU states;
 - that confers an economic advantage on one or more economic actors;
 - is specific insofar as it benefits certain economic actors over others in relation to the production of certain goods and services; and
 - has, or could have, an effect on trade or investment between the UK and EU
- If subsidy - must comply with **TCA principles** and other provisions.
- New De Minimis level – SDR 325,000 (circa. £350,000)
- Carve-outs for: consumers; natural disasters; and global economic emergency (subject to conditions and UK Government declaring such); SPEIs

TCA (2) - Principles

- UK subsidy control system must ensure subsidies:
 - Pursue a specific public policy objective to remedy an identified market failure;
 - Are proportionate, limited to what is necessary;
 - Designed to bring about economic behaviour conducive to policy aims;
 - Do not duplicate what beneficiaries would fund themselves;
 - Are an appropriate policy instrument, with no other less distortive methods; and
 - Positive contributions outweigh negative effects.
- Sounds like state aid?
- Carve outs for, SPEIs, unlted guarantees, rescue and restructuring, financial institutions, export subsidies, domestic favour, international cooperation, energy and environment, air carriers.

TCA (3) – Transparency

- Must publish subsidy information within 6 months:
 - Legal basis & policy objective or purpose;
 - Name of recipient ;
 - Date of grant of subsidy, duration and other time limits; and
 - Amount of subsidy or amount budgeted for it.
- “Schemes” similar requirements
- “Interested parties” may request further detail – response deadline 28 days (proportionate)
- National database / official website – not yet operational
- EU-UK consultations

TCA (4) - Enforcement

- Independent subsidy body/authority to be established
- Judicial review
- Brought by “interested parties”
- EU-UK right to intervene
- “Recovery “ key remedy – introduced to judicial review
- Minimum limitation period one month from transparency publication (extended on further info request)

TCA (5) - Language

- Subsidy – state aid
- Economic actor - undertaking
- Economic advantage - benefit
- Trade and investment - Trade
- Specific – selectivity
- SDRs - Euros

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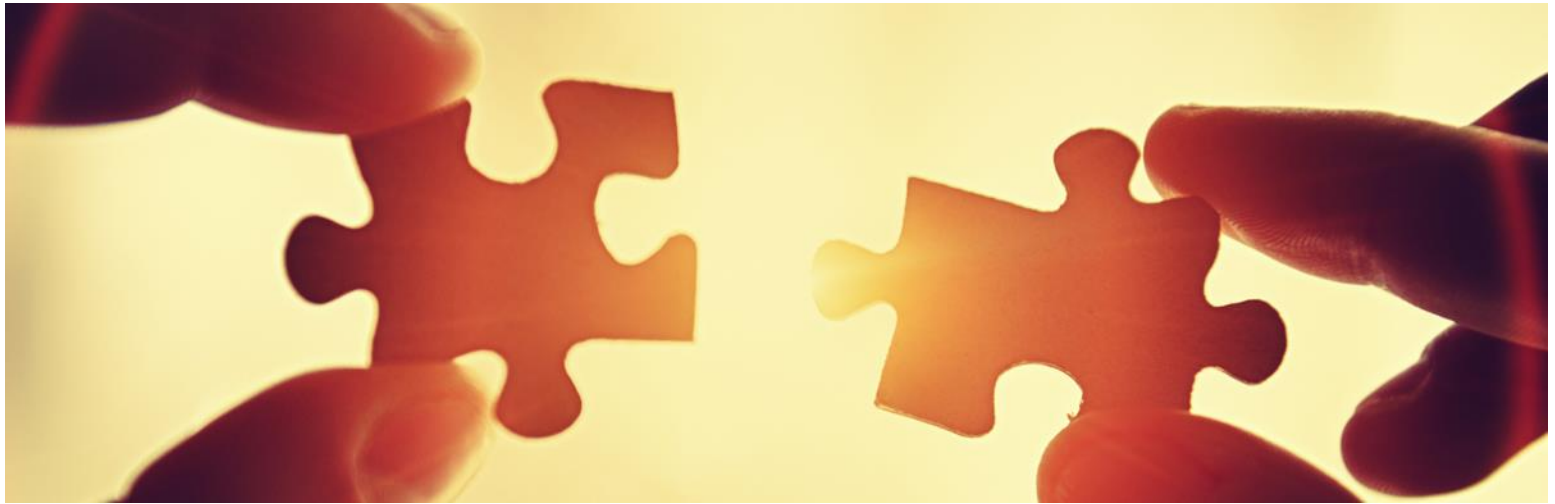


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Subsidy Control – SPEIs and BEIS guidance

Victoria Thornton, Senior Associate

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Services of Public Economic Interest (SPEI)

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SPEIs - TCA

- TCA
- Similar to SGEIs
- Tasks in the public interest
- Assigned in advance in transparent manner
- Satisfy TCA Principles subject to limited exceptions
- Capped at net costs plus reasonable profit
- No cross subsidy of other activities
- No need to publish subsidies below 15m SDR
- “*de minimis*” of 750,000 SDR – 3 year rolling period

SPEIs – other provisions

- Future domestic legislation?
- Other FTAs?
 - covering services?
 - Japan FTA
 - Article 12.3.2
 - excludes services to the general public for public policy objectives
 - transparent and limited to objectives

Complying with government guidance on subsidy decisions

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BEIS Guidance

- Technical guidance on the UK's international subsidy control commitments
- Applies to all public authorities
- Comply with subsidy obligations in:
 - WTO Agreements
 - TCA
 - Other FTAs
 - NI Protocol
- Some incorporated in UK law
- Guidance does not have legal effect
 - BUT public authorities must have regard
 - subject to judicial review

BEIS Guidance

- Case by case analysis
- Identify applicable international obligations
- Five step process

Step 1 – is it a subsidy?

- WTO ASCM definition
 - financial contribution
 - grants, loans, forgoing revenue, overpayment
 - provided by a public authority
 - provides a benefit
 - specific
 - enterprise(s)
 - sector/industry
 - region
- TCA – based on WTO and State aid definitions
- FTAs
 - usually based on WTO
 - evolve with new agreements

Step 1 (cont.) – Is it a subsidy?

- Distortion or harm to competition, trade or investment
 - WTO ASCM Article 5 – results in “adverse effects” for a Member
 - TCA – has *or could have* an effect on trade or investment between the Parties
 - Japan FTA - has *or could have* a significant negative effect on the trade or investment interests of Japan
 - NI Protocol – distorts *or threatens to distort* competition between EU and NI
 - “genuine and direct” link
 - “real foreseeable” effect

Step 1 (cont.) – Is it for goods or services?

- WTO ASCM – goods only
- TCA – goods and services
- FTAs – subject to individual terms
 - eg. Japan, Israel, Ukraine – goods and services
 - Canada, Korea – goods only
- NI Protocol – goods and wholesale electricity market

Step 1 (cont.) – Applicable exceptions?

- Annex 1 to the Guidance
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948733/subsidy-control-technical-guidance-annex-1.pdf
- Agriculture and fisheries
- Value thresholds - “*De minimis*”
- Natural disasters and exceptional occurrences
- Temporary response to national or global economic emergency
 - targeted, proportionate and effective
 - subject to TCA principles
 - Covid - 19

Step 2 – Is it a prohibited subsidy?

- WTO ASCM
 - dependent upon export performance
 - contingent on using domestic goods
- TCA and some FTAs (eg. Japan, Korea)
 - unlimited state guarantees
 - rescue without a credible restructuring plan

Step 3 – TCA principles

- General Principles
- Joint Declaration on Subsidy Control Policies
 - non binding but shared understanding
 - regional aid
 - transport
 - R&D
- SPEI

Step 4 – Likelihood of triggering dispute?

- Under WTO ASCM or FTAs
- Internal risk assessment against checklist – the more items the more likely a credible risk
 - high value
 - historically sensitive
 - number and size of international competitors and importance within its domestic economy
 - impact on sales, prices or profits of international producers
- NB. aimed at public bodies involved in international arrangements

Step 5 – Record subsidy award

- TCA requirements - disclosure within 6 months
- UK Transparency Database – in development
- Also required to meet reporting requirements in WTO ASCM and other FTAs
- Keep records of all subsidies granted since 1 Jan
- Record compliance with TCA principles
 - Annex 2 to the Guidance
 - [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948391/Public_authorities_assessment_of_how_individual_subsidies_comply_with_UK-EU_Trade_and_Cooperation_Agreement_principles .odt](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948391/Public_authorities_assessment_of_how_individual_subsidies_comply_with_UK-EU_Trade_and_Cooperation_Agreement_principles_.odt)
- Notify BEIS or DEFRA if Article 10 applies

Q & A

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