

decision also demonstrates the Board's evaluation of joint control as it takes into account factors such as the structure of the board of directors and the voting rights of the parties to the transaction.

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UK

SUBSIDY CONTROL

Legislation—Subsidy Control Act 2022—notification rules—subsidy control principles—review procedures—guidance—streamlined routes—contrast with proposed EU Regulation on Foreign Subsidies

📖 Comparative law; Competition and Markets Authority; EU law; Notification; Subsidies

UK Government announces Subsidy Control Act came into force on 4 January 2023

From 4 January 2023, certain subsidies granted by United Kingdom (UK) public authorities (Public Authorities) to businesses operating in the UK (Recipients) must be notified to the Competition and Markets Authority's Subsidy Advice Unit (SAU), and subsidy decisions by Public Authorities can be appealed to the UK's Competition Appeal Tribunal (CAT).

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.

Background

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 the State aid regime 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. Under the SCA, Public Authorities will still be able to grant most subsidies without having to obtain approval. Instead, and as with the TCA, Public Authorities will be required to self-assess whether their subsidies are compatible with the "Subsidy Control Principles" as set out in the SCA (Compliance Assessment), and then publish relevant details of said subsidy decision on the UK's subsidy database.¹ In addition, for subsidies granted under the so-called "streamlined subsidy schemes", Public Authorities will be able to proceed without conducting a Compliance Assessment.

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 before the CAT, which will only be able to assess the Public Authority's decision on (limited) judicial review grounds.²

The main change introduced by the SCA is that, from 4 January, the SAU has been tasked with reviewing larger subsidies. "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, subsidies of over £10m are SSoPI, and therefore must be referred to the SAU, whereas subsidies of between £5 to £10m are SSoIs, and therefore may be referred to the SAU. (The rules are more complex, however. For example, all restructuring subsidies, regardless of

¹ View subsidies awarded by UK government", available at: <https://searchforuksubsidies.beis.gov.uk/>.

² Under the TCA, such challenges were made to the UK High Court.

value, will be SSoPIs; subsidies that are explicitly conditional on relocations have different thresholds; there is a distinct approach to tax schemes; and subsidies of over £5m given in sensitive sectors will be SSoPIs.)

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 proposed subsidies. 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 a Public Authority's Compliance Assessment.

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.

Guidance and streamlined subsidy schemes

The UK Government and the SAU have also published their formal guidance on the operation of the regime,³ which provides extensive detail on how the UK Government and the SAU expect the regime to operate in practice. Further Regulations on the regime have been laid before Parliament, which set out the mechanics of the regime in further detail. As part of this, the UK Government appears to have listened to the feedback provided on the subsidy database and intends to require Public Authorities to provide greater details in their database entries.

Moreover, three "streamlined subsidy schemes" have come into force, covering: (i) research, development, and innovation; (ii) local growth; and (iii) clean energy.⁴ 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 need not be assessed against the Subsidy Control Principles, thereby further reducing the administrative burden on Public Authorities.

Conclusion

The UK's implementation of the SCA is part of the general international trend towards increased focus on subsidy control. In this context, on 23 December 2022, the European Union (EU) published the Foreign Subsidies Regulation in the *Official Journal* of the EU, 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 mergers and acquisitions (M&A) transactions and participation in public tenders. However, unlike the EU's Foreign Subsidies Regulation, the SCA does not seek to address the potentially distortive effects of subsidies granted by foreign governments relating to M&A activity in the UK.

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³ BEIS, "Statutory Guidance for the United Kingdom Subsidy Control Regime, Subsidy Control Act 2022" (November 2022); CMA, "SAU1, Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit" (November 2022).

⁴ BEIS, "Government response to the consultation on subsidy control statutory guidance, Subsidy Control Act 2022" (November 2022), fn.3.