

The Subsidy Control Act 2022

Basic concepts and structure

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Birth pangs

- Abolition of State aid rules
 - An “advantage” of Brexit
 - Deed done (lawfully?) by SI under EU Withdrawal Act
- Government equivocation on whether would accept subsidy commitments in TCA
- In the end – TCA provisions – Arts 363-375

State aid rules in two images



or



The SCA22 in one image



The keystone: the public law duty in section 12(1)

“A public authority

- (a) must consider the subsidy control principles before deciding to give a subsidy; and
- (b) must not give the subsidy unless it is of the view that the subsidy is consistent with those principles.”

What is a subsidy? – sections 2-4

- Financial assistance (see s.2(2) – various forms)
- To an enterprise (s.7)
- From public resources (see s.2(3) – indirect and s.6 (“public authority”))
- Economic advantage (see s.3 – MEOP)
- Specific (see s.4 – tax measures – in effect CJEU test)
- Effect on competition in UK or UK international trade/investment

How to approach?

- Look at EU definition of State aid?
 - Use of TCA concepts – which must cover EU regime (so “subsidy” not > “State aid”)
 - Incorporation of EU approach (eg on tax subsidies)
- Start again?
 - Different terminology – from WTO – so Art 516 TCA applies
 - Art 4(2) TCA (no obligation to interpret in accordance with other party’s domestic law)
 - See *British Sugar* [2022] EWHC 393 (Admin) at §54
 - Problem: WTO case-law not as developed

Here be krakens: the prohibitions

- WTO prohibited subsidies
 - Export performance (s.16)
 - Use of domestic goods or services (s.17)
- TCA prohibitions
 - Unlimited guarantees – in duration or extent (s.15)
 - Rescue/restructuring (conditions) (ss.19-26)
 - Air carriers (conditions) (s.28)
 - SPEI (conditions on necessity and transparency)
- Other prohibitions
 - Relocation (s.18) (subsidy conditional on relocation)
 - Unless: grant is to reduce social or economic disadvantage of new area and
 - Overall reduction in social/economic disadvantage across the UK

Subsidy Schemes: s.10

- By any authority, for its own subsidies
- By UK and devolved governments [etc] for themselves and others
- Effect:
 - S.12 duty applies to scheme, not to subsidy made under it (s.12(2) and (3))
 - CMA review, and challenges, are to the subsidy scheme, not subsidies made under it

Streamlined subsidy schemes: s.10(4)-(6)

- Category of subsidy scheme
- Made by UK Ministers (not devolved governments)
- Laid before Parliament: negative resolution (40 days)
- No CMA review (s.64(1)(a))
- Subject to s.12 duty and CAT judicial review

Schedule 3: primary legislation

- UK and devolved parliaments are not “public authorities” (s.6(1)) => no s.12 duty
- Schedule 3:
 - Act generally applies to devolved (but not UK) legislatures
 - Duties fall on “promoter” of legislation
 - Challenge in High Court or Court of Session, not CAT
 - UK Parliament
 - Possibility of voluntary CMA review

Thank You

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