



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

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### THE SUBSIDY CONTROL ACT 2022

**Date:** 7 June 2022

**Speakers:** Jonathan Branton, George Peretz QC BL and Tatiana Siakka

#### Basic Concepts and Structure

George Peretz opened the talk with a brief overview of the history of state aid and a comparison of the previous and new regimes. He highlighted that the old regime required the granting authority to work out if the measure falls within block exemption or if the query should be referred to the European Commission (EC) while the new regime places a public law duty (imposed by section 12 of the Subsidy Control Act 2022 (the Act)) on the grantor of aid.

The new definition of subsidy, which echoes the notion of subsidy and state aid, was discussed as well as the approach that should be taken when interpreting the legislation.

Prohibitions included in the Act were mentioned with a focus on the prohibition on subsidies from relocation as a particularly peculiar provision.

GP explained the application of the new regime to subsidy schemes, streamlined schemes, and primary legislation. It was flagged that duties concerning legislation made by the devolved parliaments fall on the promoter of the legislation.

#### Lawfulness of Subsidies

Jonathan Branton discussed the seven principles applied to subsidies under the new regime, comprising of the original six principles included in the TCA and one new principle. Even though the principles are not in force yet, it is advisable to observe them as initiatives such as the Levelling Up Fund Round 2 which already seek answers to how the rules are complied with by applicants.

*Observations on the individual principles included:*

- Authorities usually do not struggle with the principle A. Emphasis needs to be placed on the word 'specific' because if the objective is not properly defined, the chain of logic for the following principles will not be satisfactory.
- Principle B usually involves looking at viability gaps or similar analysis and is the most time-consuming.
- Principle C (behaviour changing effect) works in similar ways to State aid general incentive effect test but needs to be kept separate from principle D. Usual evidence includes board minutes or similar evidence of intended behaviour absent subsidy.
- Principle D checks whether main works on the project to be subsidised are not already committed so necessarily happening anyway. The principle is qualified by the word 'normally' so there is scope for exceptions.



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- Authorities commonly struggle with Principle E which requires consideration of alternatives to subsidies in order to be satisfied that subsidies (perceived as naturally more distortive) remain appropriate having regard to the objective set in the first principle.
- Principle F is new principle from the Act and requires consideration of the negative effect that the subsidy will have on competition. The principle imposes a double burden on the authorities by requiring them to both consider as well as actively minimize the negative effect.
- Principle G requires authorities to balance the positives of achieving the objective and negative effects on competition of the subsidy, in order to reasonably conclude the positives outweigh the negatives.

The principles are vaguer than the EU block exemptions and all of them include a margin of appreciation so it is important to build evidence and show the process behind decision making. The draft guidance published is complicated and may prove difficult for less well-resourced local authorities in particular to interpret.

Subsidies of Particular Interest (SoPI) require compulsory CMA notification. The headline issue with SoPI is the fact that the value threshold is provisionally set at £10 million and £5 million for sensitive sectors. There is a suspicion that the number of subsidies that will be caught may have been underestimated. This is expected to create a lot of work for the CMA.

Subsidies granted will need to be published on an official website. This will create an opportunity for the public to challenge the subsidies. Enforcement will revolve around the website which will be integral to the success or failure of the new regime.

### **Enforcement and role of the CMA**

Tatiana Siakka highlighted that the newly established Subsidy Advice Unit will provide an additional layer of review but, as its advice will be non-binding and it will have no powers to prohibit/approve or investigate subsidies or hear complaints, its function is a radical change from the EU regime in the sense that there will be no public enforcement.

The general idea is that only SoPI and Subsidies of Interest will be reviewed but given the low financial threshold, in practice the number of reviewable subsidies will likely be greater than expected. Conversely, the vast majority of subsidies (exempt and streamlined) will not be subject to CMA's review similarly to the EU regime.

The enforcement of the new regime will be through the CAT who will hear applications for judicial review from any 'interested parties affected by the subsidy decision'.

It is unclear what will have to be shown and how high the bar will be for local authorities and devolved authorities to qualify as 'interested parties'.

The new 30-day deadline to apply for judicial review is shockingly short compared to the 10 year limit the EC has to investigate under EU State aid rules.



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UK is moving to a private enforcement regime and is losing a layer of review as investigations will be carried out directly by the CAT. The Tribunal's review will be limited to judicial review grounds so any challenge will be difficult as the threshold for irrationality is notoriously high. This combined with the short deadline as well as the significant cost of legal proceedings (compared to the complaint route) is likely to deter challenges of lower value subsidies.

The headline point is that authorities will have significant discretion to apply the subsidy control principles within the confines of the act; with the CAT being able to step in only when those outer confines are being threatened – it will likely be similar to what we see in the merger control sphere where the standard of review is also judicial review. An added consideration here is that some of the subsidies will be highly political and the courts would be even less keen to interfere.

Finally, in terms of differences with the EU regime it is worth noting that in case of incompatible subsidies, the distortive effect will continue until the issue is finally decided by Courts which can take a number of years - in stark contrast with EU position where the Commission decision that declares the aid incompatible applies immediately and the aid must be recovered until the Courts ultimately decide.

### **Points raised in Q&A:**

- There is unlikely to be an avalanche of litigation in courts because state aid litigation in national courts has been possible for a long time and the number of cases has been limited. It is likely there will be countless CMA notifications if there is no series of block exemptions.
- The threat of litigation would make the granting authority careful about not following CMA's recommendation. If such recommendation is not followed, the authority would open itself up to a challenge even on the high Wednesbury standard.
- Funding will likely be split into a subsidy reaching just under £10 million and the rest will be provided as a commercial loan.
- If authorities comply with the Act, it is reasonably safe to assume that they will also comply with the TCA but the EC can always bring a WTO challenge if the subsidy is causing damage to their market.