

LIDC Conference 8 November 2024

Session 2B -UK Subsidy Control & the EC State Aid Regime

Reflections from those engaged in the development of EU State Aid & the new UK subsidy control regime

Panel: Sattam Al-Mugheiry (Counsel & Editor, UK Subsidy Control Insider)
Totis Kotsonis (Pinsent Masons), George Peretz KC (Monckton Chambers)
Claire Frotzeim (Competition and Markets Authority, Subsidy Advice Unit)
Chaired by Christophe Rapin (Kellerhals Carrard)

SUMMARY OF SESSION

Introductions

Christophe Rapin (Chair) introduced the panel and opened the session by summarising the position regarding state aid in Switzerland. It was noted that Switzerland is in negotiations with the EU regarding introduction of a state aid regime.

EU State Aid

Sattam Al-Mugheiry summarised the main principles of EU state aid:

- State aid in the EU is clearly defined as (i) an advantage, usually cash, but it can be in any form, i.e. it could be tax break, any sort of resource, (ii) by a national public authority (not foreign funds or the EU itself), (iii) to an undertaking, someone engaged on business (iv) on a selective basis.
- Generally, aid is prohibited where one firm or group obtains a competitive advantage however the position is more permissive to deal with market failure.
- Position on state aid enforcement currently is somewhat controversial with recent enforcement by the Commission appearing more permissive since Covid. With the relaxation in enforcement, France and Germany have provided more significant aid than other states.

Totis Kotsonis summarised the background and principles of FSR:

- Historically, the EU has the most stringent set of subsidy control rules. Politically, it has become more pressing that others don't have a regime. The FSR Regime came from a position of needing to regulate foreign subsidies coming from the US and China.
- It is not a secret that Chinese subsidies were a driving political factor in implementing the FSR regime.
- The FSR includes power by the Commission to carry out *ex officio* investigations. There have been three investigations since entry into force, all three relating to Chinese companies. The Commission states that it is neutral although China is unhappy.

- The FSR does seem to be fair and compatible with WTO. Whilst it does create red tape, keeping an open mind, where the EU does regulate internal subsidies it is logical to also regulate foreign subsidies.

UK Subsidy Control

George Peretz KC summarised the UK subsidy control regime:

- Background to the Subsidy Control regime was the UK withdrawal from EU. The Trade and Cooperation Agreement (**TCA**) included comprehensive subsidy control commitments by both parties to commit to subsidy control, with a role for an independent authority. The TCA essentially had direct effect in UK until detailed domestic regulation came into force.
- The definition of subsidy in the Subsidy Control Act is wider than under the TCA. Subsidy control now applies to subsidies having an impact on trade within the UK, resulting in subsidies now being caught that were never caught under the TCA.
- Under the Subsidy Control Act, the granting authority has a duty to establish that the principles have been satisfied. The independent authority is the CMA, but its role is only to give non-binding advice. The advice is published but that advice does not express a view as to whether the subsidy complies with the principles. The authority's reasoning is not published.
- Due to the Windsor Framework, UK authorities are still subject to EU State Aid when a UK measure has an impact on trade with Northern Ireland.

It was noted by Totis Kotsonis that a key issue of the UK regime was lack of transparency especially where the system relies on policing by businesses generally.

Claire Frotzeim summarised the role of the subsidy advice unit (**SAU**):

- The SAU has a review function and a monitoring function. Under the review function, the role of SAU is to give advice, to review the effectiveness of the subsidy control regime and provide independent expert advice to the public authority.
- Fundamental responsibility is on the public authority granting the subsidy. SAU role is to look at how the public authority assessed the subsidy, to see if there are gaps in the analysis and the evidence-base and give advice on strengthening their analysis and design.
- SAU is not the police of the regime. Role is to advise public authorities when assessing their subsidies. SAU is not designed to delay the process. It has a 30-working day period to publish its report.
- The SAU also has a monitoring role, ie to monitor and report on the effectiveness of the regime and its impact on competition and investment in the UK. The SAU first monitoring report on the effectiveness of the regime will be published in 2026. The SAU consulted on the methodology for the report and responses were published in July. The report will assess whether the regime works as intended.

Christophe Rapin asked the panel its views on the value of the SAU's advice:

- Sattam Al-Mugheiry commented that compared to the EU, where the EU acts as judge, jury and executioner, the UK system is lacking in transparency. While the transparency database has some value, it does not provide sufficient insight.

- George Peretz KC commented that more information could be requested if you are at the stage of challenging a subsidy, but only with that information would you have an idea if you have the basis of a claim.
- Totis Kotsonis commented that from a taxpayer perspective it would be useful to know that money was being effectively spent and further noted that the UK has an international law obligation to ensure that it has an effective subsidy control regime.
- Sattam Al-Mugheiry commented that in the EU most aid is not controversial, i.e. for museums, busses, schools, so the EU has a broad framework that it then lightly monitors for local authorities to follow. The UK does not have an equivalent and small local authorities suffer as they don't understand the principles and have to reinvent to wheel each time.