

Kluwer Competition Law Blog

A New UK Subsidy Control System

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Following its exit from the European Union, the UK is no longer bound by the EU's rules governing public subsidies. At the end of April 2022, the UK Parliament passed the Subsidy Control Act 2022, which sets out a new framework for granting and controlling public subsidies. The Act is expected to enter into full force in Autumn 2022. This blogpost outlines its main provisions.

Introduction

Since the United Kingdom (UK) has left the European Union (EU), the UK has control over how any UK public subsidies are granted and controlled. The UK's desire to shape public subsidies was a subject of discussion during the 2016 Brexit referendum and became a major point of debate in post-Brexit trade negotiations with the EU.

While the UK argued that the EU's "State Aid" rules were unduly burdensome and wanted to introduce more flexible rules, the EU wished to ensure a "level playing field" to avoid UK companies receiving subsidies that the EU argues may unfairly distort competition. As part of the EU-UK Trade and Cooperation Agreement (TCA),^[1] the UK therefore agreed to introduce rules on the control of public subsidies.^[2]

In June 2021, the UK Government introduced a Bill to Parliament setting out a new subsidy control regime.^[3] Parliament has now approved the *Subsidy Control Act 2022* (SCA), and it received Royal Assent on 28 April 2022. The SCA is expected to become fully applicable in Autumn 2022.^[4]

The SCA establishes a legal framework that allows UK public authorities to award subsidies. Local authorities, public bodies, and the devolved administrations in Scotland, Wales and, in certain cases, Northern Ireland,^[5] will be able to decide if they can award subsidies to businesses pursuing domestic policy objectives. Unlike the EU State Aid system, which centralises review with the European Commission, if a UK local authority decides to grant a subsidy, this decision will not have to be approved centrally by national authorities. As explained below, the UK's Competition and Markets Authority (CMA) has to give its view on some proposed subsidies, but that is the exception, and its view is only advisory.

The SCA also aims to bring UK law into compliance with the UK's international commitments, notably the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (WTO SCM)[6] and the TCA.

What is a Subsidy?

The definition of a "subsidy" mirrors that of "State aid" in EU law. A subsidy is financial assistance (in kind or pecuniary) with four elements:[7]

1. It is given from public resources by a public authority.
2. It confers an economic advantage on one or more "enterprises" (i.e. persons or companies engaged in an economic activity) (the "advantage" condition).
3. It is specific in that it benefits one or more companies rather than other companies (the "selectivity" condition).
4. It affects or is capable of affecting competition or investment within the UK, or trade and investment between the UK and another country.

General Principles

Under the SCA, public authorities must consider seven principles before deciding whether to grant subsidies:

1. Subsidies should pursue a specific policy objective to remedy a market failure or address an "equity rationale" (for example, a social problem).
2. Subsidies should be proportionate and limited to what is necessary to achieve their objectives.
3. Subsidies should change the beneficiary's economic behaviour, and this change should be conducive to achieving the subsidies' objective.
4. Subsidies should not cover costs that the beneficiary would itself have been able to fund absent the subsidy.
5. Subsidies should be the least distortive means for achieving a policy objective.
6. Subsidies should be designed to minimise any negative effects on competition or investment within the UK.
7. The beneficial effects of subsidies should outweigh their negative effects on competition or investment in the UK and international trade.

There are also separate governing principles that apply to energy and environmental subsidies.

Prohibited Subsidies

The UK Government's press release announcing the introduction of the Subsidy Control Bill stated that "[t]he system will not be a return to the failed 1970s approach of government trying to run the economy, 'picking winners' or bailing out

unsustainable companies”.^[8]

Reflecting that approach, the SCA establishes additional conditions regarding grants of rescuing and restructuring aid to ailing or insolvent companies and to air carriers.

The SCA also prohibits unlimited guarantees, subsidies contingent on export performance, and subsidies requiring use of domestic rather than imported goods or services. These provisions are consistent with the UK’s international obligations under, for example, the WTO SCM and the TCA.

At a domestic level, the SCA prohibits the granting of subsidies conditioned on relocation of businesses within the UK. This reflects the general principle that subsidies should be designed to minimise any negative effects on competition or investment within the UK.

Streamlined Scheme and Exemptions

The SCA allows the government to adopt a “*Streamlined Subsidy Scheme*”. If the granting authority satisfies the (yet to be defined) requirements of the Streamlined Subsidy Scheme, subsidies can be considered to comply with the SCA without being assessed individually. This system is similar to the EU’s block exemption of certain subsidies.

Certain subsidies do not require approval. Notably, subsidies that do not exceed defined amounts over a three-year period are considered “*de minimis*” (of insignificant effect) and do not require approval. In addition, subsidies need not be approved if they are granted in response to a national or global economic emergency or to compensate for damage caused by natural disasters or other exceptional occurrences. There are also some exemptions for subsidies related to national security or nuclear energy.

The CMA’s Role and the Referral System

The SCA establishes a “*Subsidy Advice Unit*” within the CMA, and the CMA is required to review the SCA’s effectiveness and its impact on competition and investment in the UK.^[9]

Mandatory referrals. The SCA requires granting authorities to request a report from the CMA before giving a subsidy “*of particular interest*”. The SCA does not define the precise scope of subsidies “of particular interest,” but this will be established in secondary legislation.^[10] It is envisaged that these subsidies will be defined by monetary thresholds with lower thresholds applying to certain sectors, which potentially may include production of basic iron, steel, and ferro-alloys, aluminium, copper, motor vehicles and motor cycles, ships and floating structures, air and spacecraft, and electricity.

Subsidies of particular interest cannot be granted until the CMA has completed the mandated procedure. The CMA must publish a report regarding the proposed subsidy within 30 working days. This period may be extended by a written agreement between the CMA and the relevant public authority. The CMA's report is non-binding. Once the CMA publishes the report, the public authority must wait five working days before granting a subsidy.

The Government can also direct a public authority to request a report from the CMA before it may give a proposed subsidy.

Voluntary referrals. In addition to the mandatory referral system, a public authority may voluntarily request a report from the CMA *before* granting a subsidy “of interest”.^[11] For such subsidies “of interest”, the CMA has discretion whether to prepare a non-binding report on the proposed subsidy. Public authorities can decide to grant subsidies of interest before the CMA has prepared or published its report.

Post-award referral. The Secretary of State may also refer a subsidy to the CMA *after* the subsidy has been granted. This must happen within 20 working days from when the subsidy was awarded or publicised. The Secretary of State can make post-award referrals when he or she considers that the subsidy does not comply with the SCA's principles or that there is a risk of negative effects on competition or investment in the UK. The CMA must publish its non-binding report within 30 working days.

Enforcement - CAT Judicial Review

Review of subsidy decisions. The Secretary of State or an interested party that may be affected by a subsidy may apply to the Competition Appeal Tribunal (CAT) for judicial review of a subsidy decision made by a public authority (there is no review of CMA reports). Interested parties could include competitors of a subsidy beneficiary or bodies representing persons whose interests may be affected.^[12]

The CAT may issue a recovery order, either allowing or requiring the public authority to recover the subsidy. Points of law arising from a decision of the CAT may be appealed to the Court of Appeal (or Court of Session in Scotland).

Time limit. Applications for judicial review must be brought within one month starting from the “*transparency date*”, i.e. the entry of information about the subsidy on the SCA's central subsidy database or when the interested party first “*knew or ought to have known*” about the decision.

This one-month period contrasts with the position under the EU State Aid regime, where it is possible for the European Commission to investigate alleged unlawful subsidies for up to 10 years after the aid was granted.

International Enforcement

One of the stated purposes of the SCA is to ensure that the UK complies with its international obligations regarding the granting of subsidies. The TCA notably allows either the EU or the UK to take unilateral “remedial measures” if it believes that a subsidy that the other party has granted has caused or has a serious risk of causing a significant negative effect on trade or investment between the UK and the EU.[13] The TCA also allows either the EU or the UK to challenge subsidies using a streamlined arbitration procedure.[14]

Lastly, the EU is currently developing legislation (the Foreign Subsidies Regulation[15]) that would allow it to address distortive effects of foreign subsidies on competition and investment in the EU Single Market. To date, subsidies granted by non-EU governments have not been subject to any scrutiny in the EU. The EU is currently proposing that the European Commission should have the power to investigate financial contributions granted by public authorities of a non-EU country that benefit companies engaging in an economic activity in the EU. Previous drafts of the Foreign Subsidies Regulation suggested that the European Commission would consider whether the non-EU country has a rigorous system for reviewing subsidies when analysing the effects of a foreign subsidy in the EU. The latest draft does not include equivalent language, but we would expect that, in practice, the European Commission would take account of how the non-EU country has granted the subsidy. At this point, it remains unclear how the future Foreign Subsidies Regulation and the TCA will interact.

WilmerHale has extensive experience advising on subsidies/State Aid, both at national and EU level, and on advising on implications at international level (for instance, WTO rules). For further information, please contact Cormac O’Daly, John Ratliff, Frédéric Louis, Georgia Tzifa, Edouard Bruc or Su Şimşek. The post was first issued here: <https://www.wilmerhale.com/insights/client-alerts/20220803-a-new-uk-subsidy-control-system>

[1] See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)&from=EN); and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf

[2] See Articles 363-373 of the TCA.

[3] See <https://www.legislation.gov.uk/ukpga/2022/23/contents/enacted>.

[4] The precise date will be set out in secondary legislation in due course. The UK Government recently opened a consultation on statutory guidance explaining the SCA’s provisions and providing advice to public authorities and potential subsidy recipients. See <https://www.gov.uk/government/consultations/statutory-guidance-on-the-subsidy-control-act-2022>.

[5] The 2019 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union contains a specific Protocol on Ireland/Northern Ireland (since Northern Ireland has a land-border with the EU). Under Article 10 of the Protocol and Annexes 5 and 6 thereof, EU State Aid rules apply to a limited extent in Northern Ireland. See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=EN). The UK Government has recently proposed legislation (the Northern Protocol Bill, 2022) that would override certain provisions of the Protocol, including on State Aid, as a matter of domestic law in the UK. See <https://bills.parliament.uk/bills/3182>.

[6] See https://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

[7] All references to subsidies also encompass subsidy schemes under which multiple subsidies are awarded.

[8] See <https://www.gov.uk/government/news/new-subsidy-system-to-support-uk-jobs-and-businesses-boost-the-economy-and-strengthen-the-union>.

[9] The CMA recently published draft guidance and a draft policy statement on how its Subsidy Advice Unit will operate. See <https://www.gov.uk/government/consultations/draft-guidance-and-draft-policy-statement-for-the-cmas-subsidy-advice-unit>.

[10] On 25 March 2022, the UK Government launched a public consultation on this. See: <https://www.gov.uk/government/consultations/subsidies-and-schemes-of-interest-and-of-particular-interest>. The consultation period closed on 6 May 2022.

[11] This term again will be defined in secondary legislation.

[12] For example, a local authority if people in that authority's area may be adversely affected.

[13] See Article 374(3) of the TCA.

[14] See Article 374(9) and Article 739(2) of the TCA. Equally, the EU or the UK could complain to the WTO instead of using the TCA's procedures. This happened in March 2022 when the EU complained about a UK low carbon energy subsidy scheme; see https://www.wto.org/english/news_e/news22_e/ds612rfc_30mar22_e.htm and the EU's announcement in early July 2022 that the dispute had been resolved at https://policy.trade.ec.europa.eu/news/eu-and-uk-agree-way-forward-wto-dispute-concerning-uks-green-energy-subsidy-scheme-2022-07-01_en.

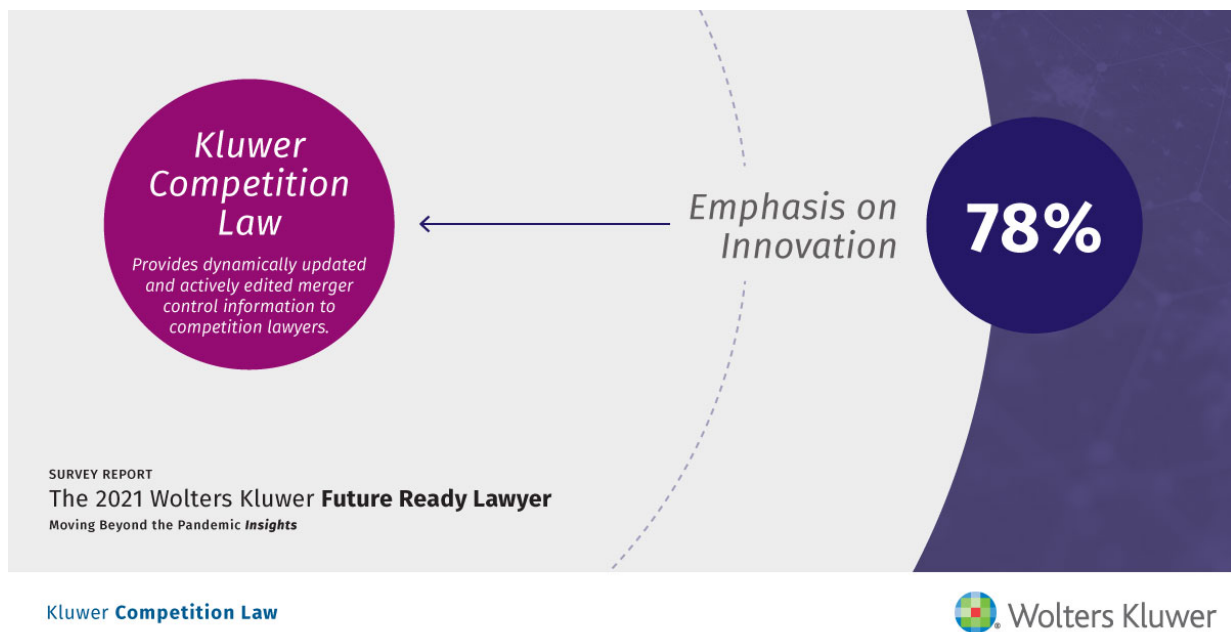
[15] See <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/>.

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