

# The UK's new subsidy control regime: What to expect

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One of the most politically charged legislative changes of late, the new Subsidy Control Bill (the Bill) sets out how the government will fully implement a UK wide subsidy control regime, fulfilling its commitments in the UK-EU Trade and Cooperation Agreement (TCA). Those commitments, which effectively represent the UK's current subsidy control regime, have applied since 11pm on 31 December 2020.

For the most part, the regime the Bill will establish does offer greater flexibility and procedural efficiency than the EU state aid regime to which the UK was previously subject (and which remains applicable in some cases in respect of Northern Ireland). That said, some subsidies will have to be notified in advance to the Competition and Markets Authority (CMA) and there is a risk of call-in by the Secretary of State (SoS). On the whole, the regime relies on self-assessment by public authorities for compliance with an expanded list of principles. The designation of the CMA as the independent regulator for subsidy control provides a route for guidance, but it remains to be seen how useful or efficient this will be in practice.

Until the Bill becomes law, public authorities and subsidy recipients should continue to refer to the TCA and guidance issued by the Department for Business, Energy and Industrial Strategy (BEIS) to satisfy themselves as to compliance with the UK subsidy control regime (and risk of challenge). It is anticipated that the Bill will become law in spring 2022 and that the act will be supported by guidance on key issues.

This briefing highlights key takeaways from the Bill for both subsidy recipients and public authorities.

## Main requirements on public authorities

Public authorities wishing to give a subsidy or make a subsidy scheme will have to assess for themselves whether their proposal complies with the subsidy control principles. They must not give a subsidy/make a scheme unless they are satisfied that the subsidy/the subsidies to be given under the scheme comply with these principles.

If the authority is satisfied the principles are met, it must publish information about the subsidy or subsidy scheme on the subsidy control information database (already established by BEIS). This is not required for a subsidy that does not exceed £500,000, has been awarded under a subsidy scheme and where an entry for the scheme has already been made on the database.

## The subsidy control principles – Bill adds UK internal market considerations

The Bill sets out seven subsidy control principles. Six of the principles are the principles set out in the TCA. The

seventh principle, trailed in the BEIS consultation on the UK subsidy control regime, is focused on protecting competition and investment within the UK's own internal market. As noted in the government response to the consultation on subsidy control, consideration of domestic impacts may also be relevant under some of the other principles. The government intends to publish more detailed guidance on the application of the principles and how public authorities can demonstrate compliance.

For certain categories of subsidies in relation to energy and environment (e.g. subsidies for renewable energy), a public authority must also consider how they comply with the energy and environment principles set out in the Bill. These principles reflect commitments made in the TCA. Subsidies for nuclear energy are specifically excluded from the application of the energy and environment principles (although not the subsidy control principles).

## Some exemptions available, but no safe harbours

Some subsidies will be exempt, including:

- financial assistance, including for services of public economic interest (SPEI), that does not exceed the minimal financial threshold of £315,000;
- financial assistance for SPEI that does not exceed £725,000;
- subsidies for combatting natural disasters such as flooding, safeguarding national security and responding to a national or global economic emergency; and
- subsidies given by or on behalf of the Bank of England in pursuit of monetary policy.

Specific procedural requirements apply in the case of most exemptions. This is an area where further guidance can be expected.

There are no safe harbours currently provided for in the Bill. However, the government has indicated that it may use streamlined subsidy schemes as a means to provide for a similar type of system, allowing lower risk subsidies to be given by public authorities more quickly and easily without having to assess compliance with the principles or other subsidy control requirements. The government response on the subsidy control consultation suggests that this route may be used for **"the creation of streamlined routes to reflect the specific nuances for different sectors and categories of subsidies, including transport, R&D, skills, disadvantaged areas and culture and heritage subsidies"**.

## Subsidies/schemes of "interest" or "particular interest" and referrals to the CMA

While self-assessment will be the norm for most public authorities, the Bill also sets out situations where referral of a subsidy or scheme may or must take place. Referral is to the CMA, which the Bill establishes as the UK's independent regulator on subsidy control.

Public authorities are required to notify the CMA before a subsidy is given/subsidy scheme is made where the subsidy/scheme is of "particular interest" (to be defined in regulations by the SoS) or where the SoS issues a call-in direction to do so. The SoS may do this in the case of a subsidy/scheme of "interest" (a lower threshold than "particular interest"), if there is a risk of failure to comply with certain requirements in the Bill, or if there is a risk of negative effects on competition or investment within the UK. The subsidy/scheme subject to mandatory notification is

prohibited until the relevant mandatory referral process has been followed. This does not appear to be the case for voluntary referrals, albeit practically speaking a public authority and indeed the subsidy recipient may not wish to proceed pending the outcome of that referral.

Voluntary referral in advance of giving a subsidy is possible where the subsidy/scheme is of "interest" (also to be defined in regulations by the SoS). However, a voluntary referral has the potential to become a mandatory referral if information required to be published by the CMA during the voluntary referral process brings the subsidy/scheme to the attention of the SoS who may issue a call-in direction.

The Bill also provides for post-award referrals of subsidies/schemes by the SoS to the CMA. Such referrals may be made within 20 working days beginning with the date information was published on the subsidy control database (if applicable) or the date the subsidy was given/the scheme was made. This provides a potential route for the review of awards which have been the subject of complaints, but not enforcement action (i.e. challenged in court).

The outcome of referrals to the CMA (voluntary, mandatory or post-award) will be a report setting out the CMA's view on the public authority's subsidy control evaluation, advice on improvements that can be made to the evaluation and changes that can be made to the subsidy/scheme. Further detail on the content of CMA reports may be addressed in regulations brought forward by the SoS. The CMA report will be published. This is something to which all public authorities will need to be alive, particularly if embarking on a voluntary referral process. However, the status of advice from the CMA will be non-binding. Potentially, therefore, a public authority could decide to adhere to some, but not all, of the advice.

It will be interesting to see the CMA specialist Subsidy Advice Unit develop. No doubt existing competition expertise will assist in the area of subsidy control, where there are many overlapping concepts. Whether the CMA's approach to application of the subsidy control principles will be similar or will diverge from that of the European Commission will be one point to watch. The possibility for these authorities to cooperate on areas of common interest, including application of these principles, is provided for in the TCA but that decision ultimately rests in the hands of the government, not the CMA.

## Enforcement

The power to review the making of a subsidy decision will sit with the Competition Appeal Tribunal (CAT). Interested parties may challenge the decision, provided they act quickly – within one month from the relevant date which may be, for example, the date on which a relevant entry is made on the subsidy control database. The CAT must apply the judicial review standard in its review in proceedings in England, Wales and Northern Ireland, and the same principles as the Court of Session would apply for proceedings in Scotland. The forms of relief that may be granted are in line with those available for a judicial review application. In addition, the CAT may order recovery of some or all of the subsidy where it has made an order (e.g. a quashing order) and in making its order found that the subsidy did not comply with the subsidy control requirements.

## UK nuances

Additional UK nuances of note are:

- The definition of public authority does not include the UK Parliament or the three devolved legislatures. This leaves open the possibility that any of these bodies could introduce a law providing for a subsidy without having to comply with the requirements set out in the Bill, albeit there are certain constraints on devolved legislatures in this regard.
- There is a prohibition against giving a subsidy on condition that an enterprise relocates all or part of its existing

activities from one part of the UK to another and the relocation would not have occurred but for the subsidy. This has been introduced by the government in response to consultation feedback which supported the introduction of additional measures to combat uneconomic relocation of jobs. The government itself has highlighted that this is an area of potential tension, balancing the levelling up agenda with protecting the UK internal market.

## More to come

The Bill does not yet change anything for public authorities or for subsidy recipients but does provide a clearer sign of what is to come. How much the Bill will change during the Parliamentary process remains to be seen, as does whether the EU may have any comments on this key proposed UK law.

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