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# Current Notes

## Fiscal subsidy control in the post-Brexit era (part 2)

A current note earlier this year discussed the fiscal subsidy control provisions in the EU–UK Trade and Cooperation Agreement (TCA).<sup>1</sup> At the time of that current note the details of the UK domestic subsidy control regime were not yet known, and a public consultation was underway about the possible shape of that domestic regime.<sup>2</sup> The provisions of the TCA on fiscal subsidies were drafted in some detail, and the previous current note speculated that the domestic legislation to introduce a system of subsidy control would in all probability adopt the same drafting and the same approach. Details of the subsidy control regime have now been published in the form of the Subsidy Control Bill 2021 which was presented to parliament on 30 June 2021. The speculation proved to be correct, and the drafting of this Bill follows closely the wording on fiscal subsidies in the TCA.

### The Subsidy Control Bill 2021 measures on fiscal subsidies

Most of the detail in relation to fiscal subsidies is found in clause 4 of the Bill. The legislation adopts the TCA concept of financial assistance which is “specific”, which can be regarded as the cognate of the EU state aid law concept of “selectivity”. Financial assistance is the equivalent to the EU law concept of “advantage” and includes the forgoing of revenue.<sup>3</sup> Financial assistance in the form of a tax measure may be justified by principles inherent in the design of the arrangements of which that financial assistance is part.<sup>4</sup> Examples of the principles that may be relevant in respect of a tax measure are given in the legislation and include: the need to fight fraud or tax evasion; administrative manageability; the avoidance of double taxation; the principle of tax neutrality; the progressive nature of income tax and its redistributive purpose; and the need to respect taxpayers’ ability to pay.<sup>5</sup> As the previous current note again speculated, it may in the future be necessary for HMRC to justify potential fiscal subsidies on the basis of these principles. It will be interesting to see whether proposed tax legislation will from now on be accompanied by a statement that the legislation makes a provision for financial assistance (effectively, a tax expenditure) which is justified on the basis of one or more of these principles.

<sup>1</sup> See Philip Baker, “Fiscal subsidy control in the post-Brexit era” [2021] B.T.R. 14; Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L444/14 (31 December 2020) (TCA), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2020.444.01.0014.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG) [Accessed 16 September 2021].

<sup>2</sup> See Department for Business, Energy & Industrial Strategy, *Subsidy Control: Designing a New Approach for the UK* (2021), <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk> [Accessed 20 August 2021].

<sup>3</sup> See Subsidy Control Bill 2021 cl.2(2)(c).

<sup>4</sup> Subsidy Control Bill 2021 cl.4(2).

<sup>5</sup> Subsidy Control Bill 2021 cl.4(3).

The Bill also follows the approach adopted under EU state aid law by providing that financial assistance in the form of a tax measure is not to be regarded as specific unless an enterprise obtains a reduction in the tax liability that it would otherwise have borne under the “normal taxation regime”.<sup>6</sup> There is then some guidance in identifying the normal taxation regime based on the internal objective of the regime, the features of the regime including “tax base, the taxable person, the taxable event or the tax rate”, and that the public authority that introduced the regime is autonomous institutionally, procedurally, economically and financially and has the competence to design the features of the regime.<sup>7</sup> It is clear from other provisions of the Bill that this legislation applies to HMRC,<sup>8</sup> and also the devolved authorities in Scotland, Wales and Northern Ireland.

There are a number of exceptions to the subsidy control regime. One that merits mention is found in clause 49 of the Subsidy Control Bill 2021 which applies an exemption for “tax measures”. This is narrower than the heading might lead one to expect, and it excludes from the control regime only subsidies which are permissible under article 413 TCA. That article first provides that any advantage accorded under a double taxation convention will fall outside of the subsidy control regime. Secondly, it provides that the fiscal subsidy control regime does not apply to measures aimed at “ensuring the equitable or effective imposition or collection of direct taxes”, or measures that distinguish “between taxpayers, who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested.”<sup>9</sup> This is subject to the requirement that such tax measures are not applied “in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where like conditions prevail, or a disguised restriction on trade and investment”.<sup>10</sup> The drafting of this provision clearly derives from the wording of article 65 of the Treaty on the Functioning of the European Union.<sup>11</sup> Broadly, therefore, provisions in a double taxation convention, and tax measures that distinguish between resident and non-resident taxpayers, are not within the scope of the fiscal subsidy control regime.

### **The new subsidy control regime (in outline)**

The subsidy control regime set out in the Subsidy Control Bill 2021 is significantly softer than the former, EU state aid regime prior to Brexit. As predicted, the administration of the regime will be in the hands of the Competition and Markets Authority (the CMA), largely through a new Subsidy Advice Unit within the CMA. However, unlike the European Commission, the CMA will not have any investigatory role. Mandatory reference to the CMA for proposed subsidies is limited only to “subsidies of particular interest” or cases where the Secretary of State considers that a reference is appropriate. In other circumstances reference to the CMA is voluntary, and is for advice purposes only.

<sup>6</sup> Subsidy Control Bill 2021 cl.4(4).

<sup>7</sup> Subsidy Control Bill 2021 cl.4(5).

<sup>8</sup> See, for example, the references to HMRC as an “appropriate authority” in Subsidy Control Bill 2021 Sch.3, para.2(1).

<sup>9</sup> See TCA art.413(3)(b).

<sup>10</sup> See TCA art.413(3).

<sup>11</sup> Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47. There is an interesting footnote to TCA art.413(3)(a) giving illustrative examples of measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes.

The subsidy control regime is a principle-based regime, and public authorities<sup>12</sup> must consider the “subsidy control principles” before deciding to give a subsidy or make a subsidy scheme, and must not give the subsidy or make the scheme unless the public authority is of the view that the subsidies will be consistent with those principles.<sup>13</sup> Unlike the EU state aid rules, there is no question of a subsidy being unlawful if it has not been referred to the CMA and prior approval received. Even if advice from the CMA is sought, and that is against the subsidy or the subsidy scheme, the public authority may still proceed to introduce the subsidy.

The “subsidy control principles”, to which regard must be had, are set out in Schedule 1 to the Bill. Those principles largely reflect those that were contained in the TCA. Additionally, there are “energy and environment principles” in Schedule 2 covering subsidies related to energy and the environment. This includes a principle (Principle F) that “subsidies in the form of partial exemptions from energy-related taxes and levies in favour of energy-intensive users shall not exceed the total amount of the tax or levy concern”.<sup>14</sup> That appears to be the only one of the principles that is specifically addressed to taxes and levies.

One aspect of the subsidy control regime which was already heralded in the TCA is the emphasis on transparency. Subsidies and subsidy schemes are to be included on a subsidy database. The obligation to include information in the subsidy database includes information about tax measures, and specific provision is made for extended time limits for information about subsidies in the form of tax measures to be included on the database.<sup>15</sup>

While the subsidy control regime gives minimal enforcement powers to the CMA, the main enforcement process relies upon the courts and tribunals. In particular (and again this was presaged in the TCA) enforcement largely relies upon interested parties<sup>16</sup> who can bring an action for a review of the decision to give a subsidy or make a subsidy scheme. These applications are to be brought before the Competition Appeal Tribunal which may, *inter alia*, quash the decision to grant the subsidy or make the subsidy scheme, and may issue a recovery order requiring the public authority that has given a subsidy to recover the amount of the subsidy from the beneficiary. Thus, where an enterprise has been granted a subsidy, it will be possible for a competitor of that enterprise to bring an action seeking to quash the subsidy and to have it recovered from the enterprise if it can show that the competitor has a sufficient interest to bring the action.<sup>17</sup>

To take a practical example, the Bill contains specific provisions dealing with the circumstances when subsidies may be given to ailing or insolvent enterprises for the purpose of rescuing or restructuring those enterprises.<sup>18</sup> If, for example, HMRC agree arrangements for a delay in collecting tax payments from an ailing or insolvent enterprise (as part of its restructuring, for

<sup>12</sup> Defined in Subsidy Control Bill 2021 cl.6.

<sup>13</sup> Subsidy Control Bill 2021 cl.12.

<sup>14</sup> Subsidy Control Bill 2021 Sch.2, para.F.

<sup>15</sup> See Subsidy Control Bill 2021 cl.33.

<sup>16</sup> Defined in Subsidy Control Bill 2021 cl.70(7) as a person whose interests may be affected by the giving of the subsidy or the making of the subsidy scheme.

<sup>17</sup> The same principles shall apply to the bringing of an application before the Competition Appeal Tribunal as apply in proceedings on judicial review in England and Wales—see Subsidy Control Bill 2021 cl.70(5).

<sup>18</sup> See Subsidy Control Bill 2021 cll.19 and 20. There are more specific provisions dealing with the restructuring and rescuing of deposit takers or insurance companies in cll.21–23, and a definition of an “ailing or insolvent” enterprise in cl.24.

example) then prima facie that would be a fiscal subsidy.<sup>19</sup> HMRC would need to disclose details of that fiscal subsidy on the subsidy database, and a competitor, considering itself disadvantaged by the subsidy, might bring an action before the Competition Appeal Tribunal on the basis that the subsidy was not in accordance with the subsidy control principles.

The position where subsidies are provided for in *primary legislation* seems to be potentially a little vague. Schedule 3 to the Bill covers this, and focuses mainly on “devolved primary legislation”, that is primary legislation passed by the Scottish, Welsh and Northern Ireland devolved legislatures. With regard to Acts of the Westminster Parliament, however, the principle that one parliament cannot bind a subsequent parliament comes into play. Thus, the subsidy control principles, and the prohibitions and exemptions, only expressly apply to devolved legislation.<sup>20</sup> However, the obligation of transparency (which requires subsidies to be included on the subsidy database) applies to *all* primary legislation,<sup>21</sup> and there is also provision for a voluntary referral to the CMA in connection with proposed primary legislation (including Acts of the Westminster Parliament).<sup>22</sup> At the same time, it appears that the jurisdiction of the Competition Appeal Tribunal to quash a subsidy also applies to subsidies granted in an Act of the Westminster Parliament, though recovery orders seem to be limited only to devolved primary legislation.<sup>23</sup> The point may need clarification, but it appears at least on an initial reading of the Bill that an interested party could still bring an action before the Competition Appeal Tribunal to quash a subsidy or a subsidy scheme granted or established under a measure contained in an Act of the Westminster Parliament, but the point is less than entirely clear from the wording of the Bill.<sup>24</sup>

At the time of writing,<sup>25</sup> the Subsidy Control Bill 2021 has received its first reading in the House of Commons. During the passage of the legislation through parliament, some further clarification may be expected in connection with its application to fiscal subsidies.

**Philip Baker\***

<sup>19</sup> This is subject to the de minimis limits on subsidies which, for example, exclude subsidies which involve minimal financial assistance of less than £315,000—see Subsidy Control Bill 2021 cl.36.

<sup>20</sup> Subsidy Control Bill 2021 Sch.3, paras 6 and 7.

<sup>21</sup> Subsidy Control Bill 2021 Sch.3, para.8.

<sup>22</sup> Subsidy Control Bill 2021 Sch.3, para.9.

<sup>23</sup> Subsidy Control Bill 2021 Sch.3, para.10.

<sup>24</sup> The jurisdiction of the Competition Appeal Tribunal is to review the subsidy decision and, if appropriate, to quash that decision. However, it seems difficult to see on what basis that remedy would be granted where the subsidy control principles do not apply to a subsidy contained in an Act of the Westminster Parliament. Any review would presumably be of the grant of the subsidy or the making of the scheme, and not a review of the primary legislation itself, which would conflict with the principle that the courts do not review primary legislation. Exactly what role the Competition Appeal Tribunal and other courts may play in respect to subsidies or schemes based on primary legislation could usefully be clarified. In the case of taxes, for example, the imposition of the tax would be based on primary legislation, and any tax expenditures are likely to be contained in primary legislation. If the subsidy control regime does not apply at all in that situation (except for inclusion on the subsidy database) then it is hard to see why the Subsidy Control Bill 2021 contains detailed provisions relating to fiscal subsidies.

<sup>25</sup> 19 August 2021.

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