

SUBSIDY CONTROL IN THE UNITED KINGDOM FROM 1 JANUARY 2021

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[Revised 21 January 2021. This Note has been updated to incorporate guidance by the European Commission on the application of Article 10 of the Northern Ireland Protocol](#)

INTRODUCTION AND SUMMARY

On 24 December 2020, the UK and EU concluded the Trade and Cooperation Agreement (“TCA”). The TCA provisionally entered into force at 23.00 GMT on 31 December 2020 and was given effect in UK law by the European Union (Future Relationship) Act 2020.¹ On 31 December 2020, the UK government published guidance on how the TCA’s provisions on subsidy control will be applied in the UK. However, it has not yet published any proposals for a UK domestic subsidy control regime.²

In summary:

- the EU State aid rules apply to aid granted on or before 31 December 2020
- the EU State aid rules do not apply to subsidies granted thereafter, other than (i) aid within the scope of Article 10 of the Northern Ireland Protocol and (ii) funding provided under certain EU 2014-2020 Multiannual Financial Framework programmes in which the UK continues to participate
- subsidies granted from 1 January 2021 must comply with the UK’s obligations under international agreements, including the TCA, the Northern Ireland Protocol, various World Trade Organisation Agreements (which apply to goods) and some free trade agreements (such as that with Japan) that contain provisions on subsidies

¹ In relation to subsidy control, see European Union (Future Relationship) Act 2020, s.29.

² This is a ‘reserved matter’ (Scotland and Wales) or an ‘excepted matter’ (Northern Ireland): UK Internal Market Act 2020, s.52.

- the UK government has not yet created a domestic subsidy control regime and has not established an independent subsidy control authority, and it is unclear when (or even if) it will do so³
- the UK government has published guidance for public authorities on how to assess the proposed provision of subsidies for compliance with the UK's international obligations under the TCA, various World Trade Organisation (“WTO”) agreements and certain free trade agreements
- the TCA's provisions on subsidies are broadly similar to those in the EU State aid rules
- subsidies should not have an actual or probable negative effect on UK/EU trade or investment, which must be based on reliable evidence: this is a higher threshold than the ‘effect on inter-State trade’ test under the EU State aid rules, so may permit more subsidies with ‘a local character’ to be awarded, particularly by local authorities and Local Enterprise Partnerships
- a ‘de minimis’ threshold of approximately £346,000 over a three fiscal year period
- whilst most subsidies are unlikely to breach such international obligations, some may do so. Public authorities must therefore assess the legality of subsidies and keep appropriate records. Subsidy recipients should also ensure the legality of subsidies received by them
- subsidies that are not consistent with the TCA and which have, or could have, a material effect on trade or investment between the UK and EU may be subject to UK/EU dispute resolution proceedings under the TCA and may also be subject to judicial review proceedings in the UK courts, which can result in subsidies being prohibited and/or recovered

STATE AID GRANTED ON OR BEFORE 31 DECEMBER 2020

The EU State aid rules applied to all State aid granted by or in the United Kingdom before 23.00 GMT on 31 December 2020.⁴

The European Commission (“**Commission**”) may continue investigations opened before the end of this period.⁵ The Commission may, until 31 December 2024, open investigations into aid granted before the end of the Transition Period.⁶ The Commission may approve such aid (including subject to conditions) or may prohibit any such aid that it finds to be incompatible with the internal market; its decisions are binding on and in the UK.⁷ Unlawful aid granted before 23.00 GMT on 31 December 2020

³ In September 2020, it stated that it would publish a consultation on the design of a domestic subsidy control regime.

⁴ I.e. the end of the Transition (or Implementation) Period under the UK/EU Withdrawal Agreement, Art. 126.

⁵ UK/EU Withdrawal Agreement, Art. 92.

⁶ UK/EU Withdrawal Agreement, Art. 93.

⁷ UK/EU Withdrawal Agreement, Art. 95(1).

may also continue to be challenged in national courts.⁸ Prohibited or unlawfully-granted aid may therefore continue to be recovered from beneficiaries.

Public authorities that have awarded, and businesses that have received, subsidies (of whatever form) during 2020 (or, indeed, earlier years) should therefore ensure that they are compliant with the EU state aid rules, either because (i) they are not State aid,⁹ (ii) the aid benefits from an exemption,¹⁰ or (iii) the aid has been notified to and approved by the Commission.

CONTINUED APPLICATION OF THE EU STATE AID RULES FROM 1 JANUARY 2021

The EU State aid rules ceased to be applicable in the UK from 23.00 GMT on 31 December 2020.¹¹ This is subject to two exceptions.

First, the EU State aid rules will continue to apply to aid that is subject to Article 10 of the Northern Ireland Protocol. Under Article 10, the EU State aid rules continue to apply to aid which affects trade in goods (including agricultural goods) and electricity between Northern Ireland and the EU. Such an effect may be direct (e.g. aid to a manufacturer in Northern Ireland) or indirect (e.g. aid to a supplier to such a manufacturer, which could include a supplier of services). Article 10 is not limited to aid granted by public authorities or to undertakings located in Northern Ireland: it can apply to aid granted anywhere in the UK if it has the necessary effect on Northern Ireland/EU trade. [On 18 January 2021, the Commission published a ‘Notice to Stakeholders’ on the Withdrawal of the United Kingdom and EU Rules in the field of State aid.^{11a} In the Commission’s view, public support for any economic activity could fall within Article 10 if it is liable to affect trade between Northern Ireland and the EU \(which](#)

⁸ The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 SI 2020/1470, reg. 8 and Schedule 3, para. 1.

⁹ For example, because it does not affect trade between Member States, it satisfies the ‘market economy operator principle’ or it is compensation for the costs of providing a service of general economic interest and satisfies the four *Altmark* criteria.

¹⁰ For example, because it is *de minimis aid* (under €200,000 over a three fiscal year period), satisfies the conditions of the General Block Exemption Regulation, or is compensation for providing a service of general economic interest and satisfies the conditions of the Commission’s SGEI Decision.

¹¹ The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 SI 2020/1470. This does not affect existing or new claims (or defences to such claims) relating to a breach of Articles 107(1) or 108(3) TFEU, concerning, respectively, the prohibition on granting state aid that is incompatible with the internal market and the obligation not to implement aid until approved by the Commission.

^{11a} [The Notice is available at https://ec.europa.eu/info/sites/info/files/notice-stakeholders-brexit-state-aid_en.pdf.](https://ec.europa.eu/info/sites/info/files/notice-stakeholders-brexit-state-aid_en.pdf)

^{11b} [Accordingly aid granted by an EU Member State that affects EU/Northern Ireland trade is also subject to Article 10 of the Northern Ireland Protocol, although in practice this would invariably be subject to the EU State aid rules in any event.](#)

includes exports from the EU to Northern Ireland^{11b}), including aid to businesses in Great Britain that sell goods or electricity in Northern Ireland or which supply goods or services to businesses engaged in Northern Ireland/EU trade. The ‘effect on trade’ cannot be hypothetical or presumed and the aid measure must have a ‘genuine and direct’ link to Northern Ireland. However, according to the Commission, it is not necessary that the beneficiary of an aid measure (or a subsidy) is itself directly involved in such trade, but merely that it has customers that are involved, whether by exporting from Northern Ireland to the EU or by operating or selling goods in Northern Ireland, thereby in either case giving it an advantage over EU competitors in either the EU or Northern Irish markets. The Commission’s view is a broad one, and if confirmed by the European Court of Justice (which has sole jurisdiction to determine disputes concerning the Northern Ireland Protocol), would result in many apparently domestic subsidies remaining subject to EU State aid law , Brexit notwithstanding. Therefore, the possible application of Article 10 should be considered in all cases where its application may be possible.

Second, the EU State aid rules will also continue to apply to funding provided under EU 2014-2020 Multiannual Financial Framework programmes in which the UK continues to participate.¹²

SUBSIDY CONTROL PROVISIONS OF THE UK/EU TRADE AND COOPERATION AGREEMENT

The subsidy control provisions of the TCA are contained in Chapter 3 of Title XI (Level playing field for open and fair competition and sustainable development) of Heading One (Trade) of Part Two (Trade, Transport, Fisheries and Other Arrangements). It will be observed that, to a significant extent, these provisions are largely based on equivalent provisions of EU State aid law, even if the terms used are slightly different.

Subsidies subject to the TCA

The TCA’s subsidy control provisions apply to ‘subsidies’ granted to ‘economic actors’, i.e. an entity engaged in an economic activity by offering goods and services.¹³ A ‘subsidy’ is defined as

“financial assistance which:

(i) arises from the resources of the Parties, including:

(A) a direct or contingent transfer of funds such as direct grants, loans or loan guarantees;

(B) the forgoing of revenue that is otherwise due; or

¹² UK/EU Withdrawal Agreement, art. 138.

¹³ Title XI, art. 3.1.1(a).

- (C) *the provision of goods or services, or the purchase of goods or services;*
(ii) *confers an economic advantage on one or more economic actors;*
(iii) *is specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services; and*
(iv) *has, or could have, an effect on trade or investment between the Parties.”¹⁴*

Tax measures may, in certain circumstances, be subsidies within the scope of the TCA if their application results in some economic actors paying less tax than it would do under the normal tax regime.¹⁵ This reflects the position under the EU State aid rules. The concept of ‘specificity’ is used in the WTO Subsidies and Countervailing Measures Agreement (“**SCM Agreement**”) and is essentially the same as that of ‘selectivity’ used in EU State aid law.

Although the terminology used is slightly different, the definitions of ‘economic actor’ and ‘subsidy’ used in the TCA are strikingly similar to those used in EU State aid law for ‘undertaking’ and ‘aid measure’, respectively.

The TCA does not apply to ‘de minimis’ subsidies of under 325,000 Special Drawing Rights over a three fiscal year period.¹⁶ This is significantly higher than under the EU De Minimis Aid Regulation, which applies a threshold of €200,000 over a three fiscal year period.

The TCA does not apply to the following types of subsidies:¹⁷

- subsidies granted to compensate for damages caused by natural disasters or other exceptional non-economic occurrences
- subsidies of a social character that are targeted at final consumers
- subsidies granted on a temporary basis to respond to national or global economic emergency, provided they are targeted, proportionate and effective¹⁸
- subsidies for agriculture and fisheries¹⁹

¹⁴ Title XI, art. 3.1.1(b). Underlining added.

¹⁵ Title XI, art. 3.1.2.

¹⁶ Title XI, art. 3.2.4. This threshold is approximately £346,000 or €384,000.

¹⁷ Title XI, art. 3.2.

¹⁸ This exclusion is not to be found in the EU State aid rules.

¹⁹ Separate provisions apply to these subsidies.

- subsidies related to the audio-visual sector²⁰

There are also special rules for subsidies for ‘services of public economic interest’, a concept that is essentially the same as that of ‘services of general economic interest’ under EU state aid law. These are subject to the TCA’s principles on subsidies, provided that this “*does not obstruct the performance in law or fact of the particular task assigned to the economic actor concerned*”.²¹ Compensation for the provision of such services shall be limited to what is necessary to cover all or part of the costs incurred in discharging the task entrusted to an economic actor. The TCA does not apply to compensation of less than 750,000 Special Drawing Rights over a three fiscal year period (this is higher than the threshold under the EU SGEI De Minimis Aid Regulation).

Principles applicable to the granting of subsidies

In order to ensure that the UK and EU do not grant subsidies “*where they have or could have a material effect on trade or investment between the Parties*”, each must have in place and maintain, in its domestic law, an effective system of subsidy control that ensures that the granting of an individual subsidy respects the following principles:²²

- subsidies must pursue a specific public policy objective to remedy a market failure or address an ‘equity rationale’ (such as social difficulties or distributional concerns)
- subsidies must be proportionate and limited to what is necessary to achieve the objective
- subsidies should bring about a change in the beneficiary’s economic behaviour (i.e. have an incentive effect)
- subsidies should not compensate for costs that the beneficiary would have funded in any event
- subsidies must be an appropriate policy instrument for achieving the public policy objective
- a subsidy’s positive effects to achieving the objective must outweigh any negative effects, in particular on trade and investment between the Parties

Subsidies granted after 1 January 2021 under an existing aid scheme that was approved by the Commission before 31 December 2020 (e.g. Covid-19 related subsidies approved under the EU State Aid Temporary Framework) or met the requirements of the General Block Exemption Regulation (or

²⁰ This is not the case under the EU State aid rules (which do apply to such subsidies), but may reflect concerns by some EU Member States (notably, France) with strong views about protecting their ‘cultural’ sector from being subject to international trade agreements.

²¹ Title XI, art. 3.3.1.

²² Title XI, art. 3.4.

other exemption) meet the above principles and can continue to be awarded in compliance with the TCA.

Article 3.5 of Title XI identifies a number of categories of prohibited subsidy, including:

- unlimited state guarantees of the debts or liabilities of an economic actor, where the guarantee is unlimited as to amount and/or duration
- subsidies for rescuing and restructuring of an ailing or insolvent economic actor, unless there is a credible restructuring plan for the economic actor's return to long-term viability²³
- export subsidies, i.e. subsidies that are contingent on export performance relating to goods or services
- subsidies contingent on the use of domestic content over imported goods and services
- subsidies for air carriers (other than where there is a public service obligation, the subsidy provides benefits for society at large and for the start-up of new routes)

These subsidies are prohibited *per se*, without the need to show actual or likely negative effects on trade or investment. This reflects the provisions of the WTO SCM Agreement (which prohibits export subsidies and subsidies that require the use of domestic content) and EU law. Subsidies other than prohibited subsidies will (if within the scope of the TCA's provisions) be actionable only where, on the basis of credible evidence, they have, or could have, a negative effect on UK/EU trade and investment.

Subsidies may be granted for large cross-border or international cooperation projects, e.g. projects for transport, energy, the environment, R&D and the first deployment of new technologies.²⁴ They may also be granted for projects in the environment and energy sectors aimed at delivering secure, affordable and sustainable energy systems, well-functioning and competitive energy markets, and increased levels of environmental protection.²⁵

Other provisions

Transparency and publication of information on subsidies

The UK and EU must publish information on subsidies granted or maintained by them, on an official website or database.²⁶ This should enable 'interested parties' (persons whose interests may be

²³ Different provisions apply to subsidies to ailing or insolvent banks, credit institutions and insurance companies: Title XI, arts. 3.5.5 – 3.5.7.

²⁴ Title XI, art 3.5.13.

²⁵ Title XI, art 3.5.14.

²⁶ Title XI, art. 3.7.

affected by a subsidy, including competitors and trade associations) to be able to assess compliance. In the case of the UK, a granting authority must provide information to an interested party that indicates that it may apply for a review by a court or tribunal of the grant of a subsidy.

Independent subsidy control authorities and proceedings in national courts

The UK and EU must each establish or maintain “*an operationally independent authority or body with an appropriate role in its subsidy control regime*”.²⁷ It is not clear what is meant by ‘an appropriate role’. Such a regime does not need to have a system of *ex ante* control, as is the case under the EU State aid rules. However, the UK could implement such a system, which would give a higher degree of legal certainty to both public authorities and subsidy recipients, although *ex post* judicial review challenges would remain possible, as under the EU system.

Further, each party’s courts or tribunals must be competent to review subsidy decisions taken by a granting authority or independent authority, and to impose remedies (including the suspension, prohibition or recovery of a subsidy and the award of damages).²⁸ Each Party must have in place an effective mechanism for the recovery of subsidies that are not compliant with the principles set out in Title XI, Article 3.4; in the case of the UK, this will require a new remedy of recovery available in judicial review proceedings.²⁹ This has domestic effect in UK law pursuant to the European Union (Future Relationship) Act 2020, s.29(1). Exactly how a UK court will interpret and apply the TCA’s subsidy provisions remains unclear, whether in terms of the standard of review (any proceedings will be by way of judicial review) or the substantive analysis to be applied.

UK/EU dispute resolution

If a Party considers that a subsidy granted by the other causes, or that there is a serious risk that it will cause, “*a significant negative effect on trade or investment between the Parties*” in relation to identifiable goods, service suppliers or other economic actors (which effects must be based on reliable evidence) it may request information and consultations.³⁰ If the consultations are not resolved within 60 days (by the granting party taking remedial measures), the Party requesting consultations may unilaterally impose appropriate, strictly necessary and proportionate remedial measures to address such negative effects of the subsidy in question. If such measures are taken, the granting party may

²⁷ Title XI, art 3.9.

²⁸ Title XI, art 3.10.

²⁹ Title XI, art. 3.11.

³⁰ Title XI, art. 3.12.

refer the dispute to arbitration; if a negative effect is found, the complaining party may be authorised to suspend obligations under the TCA should the granting party not take appropriate remedial measures to comply with the arbitral tribunal's ruling.

The Joint Political Declaration on Subsidy Control Policies

The UK and EU have also made a Joint Political Declaration on Subsidy Control Policies. This provides non-binding guidance on how specific types of subsidy can be assessed under the Parties' respective subsidy control regimes. Guidance is provided for the following types of subsidy:

- *Subsidies for regional development*: the amount of the subsidy should relate to the level of disadvantage or deprivation of the area or region, the size of the beneficiary and the size of the investment project. The beneficiary should make a substantial contribution to the investment costs and the subsidy should not incentivize it to transfer product from the UK to the EU or vice-versa.
- *Subsidies for airports, roads and ports*
 - Subsidies to airports should take account of annual passenger volumes and operating aid should be granted only where an airport can be viable in the future without subsidies.
 - Subsidies for roads should be granted where the infrastructure will be available to all users on a non-discriminatory basis.
 - Subsidies may be granted to ports for infrastructure projects and dredging, provided they are the minimum necessary to commence the project.
- *Subsidies for R&D*: these may be granted for fundamental research, industrial research and experimental development, particularly for new and innovative technologies, but must be necessary and proportionate, and must not have as their main purpose or effect the transfer or closure of such activities in the territory of the other Party. Subsidies may also be granted for new production processes, R&D infrastructure, innovation clusters and digital hubs. The amount of subsidy should reflect the risk involved, the amount of technological innovation involved, how close the project is to market and the project's contribution to knowledge generation.

A keen observer will note that these principles are similar to those applied under existing EU State aid law.

THE UK GOVERNMENT'S GUIDANCE ON SUBSIDY CONTROL

The UK government has not yet set out the UK's new subsidy control regime: it has the power, under the European Union (Future Relationship) Act 2020³¹ to make regulations to establish a subsidy control regime for the whole UK. This is even though, under the TCA, the UK has committed to establishing an independent authority or body. This also means that, at present, there are no block exemption regulations on which public authorities and subsidy beneficiaries may rely to ensure the lawfulness of a subsidy.

Instead, on 31 December 2020, the Department for Business, Energy & Industrial Strategy ("**BEIS**") published guidance for public authorities, *Complying with the UK's international obligations on subsidy control: guidance for public authorities ("**BEIS Guidance**")*.³² Public authorities are required to have regard to the BEIS Guidance when providing subsidies.³³

The BEIS Guidance identifies five steps that public authorities must consider when awarding subsidies from 1 January 2021:

1. Is the proposed measure a 'subsidy' and, if so, what international obligations apply?
2. If so, is the proposed measure a 'prohibited subsidy'?
3. If not, does the subsidy meet the 'principles' of the TCA?
4. What is the likelihood of the award leading to a dispute under the TCA, WTO rules or other free trade agreements?
5. Recording the award of the subsidy, including on BEIS's proposed transparency database

These steps must be assessed on a case-by-case basis.

In general, the UK/EU TCA (which applies to goods and services) is the most likely international agreement of relevance to subsidies granted by public authorities, other than those awarded by the UK Government or the devolved administrations. Article 10 of the Northern Ireland Protocol may also be relevant in some circumstances. Where the beneficiary is active in an internationally 'sensitive'

³¹ European Union (Future Relationship) Act 2020, s.31.

³² The DBEIS Guidance is available at: <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities>. DBEIS has published both a 'Summary guide to awarding subsidies from 1 January 2021' and a more detailed 'Technical guidance on the UK's international subsidy control commitments from 1 January 2021'.

³³ UK Internal Market Act 2020, s.48.

sector (such as the steel, aerospace and automotive industries) and/or if the amount of the subsidy is particularly large, the WTO SCM Agreement may also be relevant.

In most cases, it will be obvious whether a measure is a 'subsidy' and, if so, whether it is a 'prohibited subsidy': the only issue will often be whether it will or may have negative effects on international trade or investment.

If a measure is a subsidy, it will need to meet the terms of *all* of the 'principles' set out in the UK/EU TCA (see above); if not, it could be challenged by way of judicial review. Reference should also be made to the principles contained in the UK/EU Joint Political Declaration, concerning subsidies for regional development, transport, and research and development (see above).

According to the BEIS Guidance, a subsidy is more likely to have a negative effect on international trade where:

- the recipient is a large business (as opposed to an SME)
- the value of the subsidy is very high
- the intervention rate (the subsidy as a proportion of total project costs) is high
- there are international competitors in the relevant market
- the subsidy will make it more difficult for international competitors to compete in the UK market
- the subsidy will enable the beneficiary to increase its sales and/or reduce its prices in other markets

Whilst the EU State aid rules are no longer applicable in the UK (other than where the Northern Ireland Protocol applies), they may still be of assistance in providing guidance on whether a subsidy will have a sufficient effect on trade and investment for the Commission to raise an objection under the TCA.³⁴ It would, for example, be difficult for the Commission to object to a subsidy that meets the requirements of the General Block Exemption Regulation or the SGEI Decision, or the requirements of Commission guidelines on aid for, for example, Research and Development and Innovation or Environmental Protection and Energy.

CONCLUDING REMARKS

The UK has entered a new world of subsidy control. This is particularly the case in respect of its trade and investment relationship with the EU. The UK/EU TCA contains new rules governing the award of

³⁴ The same may also be the case when a subsidy is challenged by way of judicial review in a national court.

subsidies by public authorities in the UK. The TCA will remain the body of subsidy control rules that is most relevant in most cases, along with the Northern Ireland Protocol in circumstances where subsidies are provided to manufacturers of goods that involve Northern Ireland/EU trade. Whilst the WTO subsidy rules have always been applicable, in practice the focus of subsidy-awarding bodies, other than central government, has always been on the EU State aid rules.

In many ways, the new rules in the TCA are less prescriptive than the EU State aid rules, particularly given the need for a subsidy to have a real possibility of negatively affecting UK/EU trade and investment, a threshold that most small subsidies granted in the UK will not satisfy. However, the risk of subsidies distorting competition *within* the UK will be increased, particularly where they are given only to some economic actors in a particular geographic market and not to others.³⁵

However, even though the new rules in the TCA resemble the EU State aid regime, they are different and public authorities, beneficiaries, competitors, advisers and the courts will all have to get to grips with them. In the absence of both an *ex ante* approval regime and the clear ‘brightline’ tests found in the EU General Block Exemption Regulation, authorities will have to engage in a degree of risk assessment and analysis, which in turn will lead to legal and commercial uncertainty as to whether a subsidy is lawful or is at risk of being challenged and, in a worst case scenario, being prohibited and ordered to be repaid.

This is regrettable and it is to be hoped that the UK Government will shortly publish and then implement proposals for a national subsidy control regime, including both a regulatory authority and a system of block exemptions for subsidies that are not problematic. Not only will this provide legal certainty, but it will also avoid intra-UK subsidy races and distortions of competition within the UK.

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³⁵ This is something that the UK government has previously indicated that it wished to avoid: see the Statement of the Secretary of State for Business, Energy and Industrial Strategy (9 September 2020), in which he said that “A UK-wide subsidy control regime will ensure that subsidies do not unduly distort competition within the UK’s internal market. For example, it will ensure that a Scottish firm is not unfairly undercut or disadvantaged by a subsidy decision in England, and vice-versa. It will also mean that big companies cannot play off the regions, nations, towns, and cities of the UK against each other in a competition to extract taxpayer subsidy – therefore ensuring a dynamic and competitive market economy throughout the UK”.

St John's Chambers, Bristol

21 January 2021