

Subsidy Control: a view from the Competition Appeal Tribunal

Sir Marcus Smith, President of the Competition Appeal Tribunal¹

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1. Introduction

- 1.1. The first thing to say is that the jurisdiction is “live”. The second thing is that the cases are coming in. The third thing, extrapolating from new filings, and from what I am hearing “on the exchange”, as it were, is that there are a lot more cases to come.
- 1.2. The first challenge under the Subsidy Control Act 2022, *Durham Company Limited v Durham County Council*, is currently live at the CAT and due to be heard in early July. I have little more to say in anticipation given the jurisdiction is live and I am acting as the Chair in that case. I am instead going to focus on the treaty origins of subsidy control, and the subsidy control cases that have been heard since EU Exit, to see what these matters tell us about this new jurisdiction.
- 1.3. I will also briefly address what I believe this new jurisdiction needs to work effectively. This will, I hope, provide some assistance in understanding this jurisdiction and its potential direction of travel.

2. The Trade and Cooperation Agreement

- 2.1. Prior to EU Exit, the UK was subject to the EU state aid regime. Under EU law, state aid is generally prohibited, unless exceptionally justified. For those who are used to working with those rules, it is helpful to remember that the EU state aid regime is unusual (albeit it can be traced in some respects back to WTO rules). It has no comparable supranational or federal system with comparable prohibitions. This is a regime inextricably tied in with the notion and goal of an internal market, going back to the European Coal and Steel Community which was based on investment and state aid monitoring and control.
- 2.2. The laws aim to protect the internal market, by maintaining a level playing field across the EU, and preventing gaming between Member States which could distort that market, for example via subsidy races. The focus is on inter-state trade within the EU, with the aim of promoting an open and competitive internal market with fair opportunities for business across the EU to compete and grow. Further, the EU can and does use state aid as a policy tool, to allow for certain interventions perceived as beneficial or to achieve certain goals such as environmental protection or economic development.
- 2.3. For those accustomed to working under the EU state aid rules, it might perhaps be difficult to keep in mind how distinct the regime is from other subsidy control regimes generally. For example, when compared to WTO rules, the EU rules are much more stringent: they apply more broadly, have more powerful remedies which are available to more parties, are much less permissive, and apply prospectively.²

¹ I am very grateful to Charlotte McLean, one of the referendaires at the Tribunal, for the considerable assistance given in writing this. All views expressed are my own, and not those of the Tribunal. All errors and any infelicities are mine alone.

² [EU State Aid rules and WTO Subsidies Agreement - House of Commons Library \(parliament.uk\)](#).

- 2.4. Under the EU state aid laws, there is room for public and private enforcement. According to a DG Comp study analysing trends between 2007 and 2018,³ in those years there was a considerable increase in the number of private enforcement cases. That may reflect the increasing interest in private enforcement in competition law generally, both across the EU and in the UK. Despite this, the national courts in EU state aid cases rarely concluded that an unlawful aid had been granted and so rarely awarded remedies. In 66% of the identified cases of private enforcement, the national court rejected the claim. In the UK in this period, the number of public and private enforcement rulings was low compared to other Member States. The EU has since issued a new notice on the enforcement of EU state aid rules to assist national courts with enforcement.⁴
- 2.5. Following EU Exit, the UK and the EU entered into the Trade and Cooperation Agreement (TCA), a treaty whose subjects included trade in goods and services, energy, law enforcement, public procurement, and subsidy control. The TCA also contained sections on trade remedies. Announced in December 2020, it set out the framework for EU-UK trade following EU Exit.
- 2.6. State aid was one of the most controversial areas during negotiations over the TCA and one of the last issues to be resolved.⁵ During negotiations, a House of Commons briefing paper reports that the EU indicated that enforcement of state aid rules was one of its main concerns in the negotiations. The UK's negotiating objectives focused on the WTO rules as a basis for subsidy control, where both sides would notify the other bi-annually of their subsidies, with the possibility of requesting a consultation on a subsidy of concern and a requirement to use best endeavours to address any adverse effects. In contrast, the EU's negotiating position was that the UK should give effect to EU state aid law, with the referral of questions of interpretation of EU law to the CJEU. The TCA was a compromise between these two positions.⁶ The TCA required the UK to implement subsidy control based on a number of principles, to set up an independent authority to oversee its regime, and to ensure the UK courts had the power to review compliance with the principles.
- 2.7. Although the recitals to the TCA do not, of course, reference the benefits of an internal market, of which the UK is no longer a part, they do highlight the need to ensure the partnership is "underpinned by a level playing field for open and fair competition and sustainable development", and the need for an "open and secure market for businesses, including small and medium-sized enterprises, and their goods and services through addressing unjustified barriers to trade and investment".
- 2.8. The TCA is therefore still rooted in notions of the importance of a level playing field and fair competition between the EU and the UK. The subsidy control chapter of the TCA, which went onto form the basis of the Subsidy Control Act, echoes a number of aspects of the EU state aid regime, including, for example, many of the components of the definition of a "subsidy", the market economic operator principle, many of the exemptions, conditions and prohibitions on certain subsidies, and most of the principles which govern subsidy grants. It remains to be seen how this part transplantation of state aid rules and concepts from inter-member state subsidies into EU-UK subsidies works in practice.
- 2.9. It is also worth bearing in mind that the Government additionally created a new framework post EU Exit for trade remedies, which was previously an EU competence and performed by the Commission. I do not have the time to explain it in detail here. Very briefly, the Trade Remedies Authority has been set up pursuant to the Taxation (Cross border Trade) Act 2018 and the Trade Act 2021, to investigate alleged unfair trading practices against British industry. The UK maintained a number of the existing EU anti-dumping or anti-subsidy measures of the EU trade

³ [State Aid \(mybit.nl\)](#)

⁴ [2022 brochure state-aid new-enforcement-notice e-version.pdf \(europa.eu\)](#)

⁵ [The UK-EU Trade and Cooperation Agreement Level playing field.pdf.](#)

⁶ [The UK-EU Trade and Cooperation Agreement Level playing field.pdf.](#)

defence framework, and safeguard measures.⁷ The trade remedies regime is different to the subsidy control regime, although the TRA can conduct subsidy investigations and consider the implementation of countervailing measures.⁸ There does therefore seem to be some overlap between the two regimes, and there are certainly regimes that need to be applied consistently with each other. In many respects, they might be said to be two sides of the same coin.

- 2.10. Turning back to subsidy control, unusually, and in a significant departure from EU state aid law and the TCA, the Subsidy Control Act also governs subsidies which have a *UK only* effect. This is no longer only about a level playing field between members of a trading block or different sovereign states, but between enterprises within the UK (albeit it might concern competition issues between the devolved nations). In the Government's statutory guidance on the SCA, it states that "*the purpose of the subsidy control regime is to prevent public authorities from giving financial advantages to enterprises in a way that could distort competition*", with a particular focus on delivering value to taxpayers, delivery of policy priorities such as levelling up and net zero, and the provision of certainty to businesses investing in the UK.⁹ This is, arguably, a reformulation of the purpose of state aid in the UK (and EU), which to date had been focused on creating a trans-national level playing field. The question will no longer (always) be focused on measures which distort competition and affect trade between member states, but on measures which distort competition within the UK. I suspect those are quite different questions, and it will be harder in the latter case to assess which measures are compliant with and which infringe the new regime.
- 2.11. The relationship between subsidy control and the Chapter I and Chapter II prohibitions, with which competition lawyers will be familiar, is also new territory that will have to be explored. It is the Chapter I and the Chapter II prohibitions that are the primary controls over competition infringements in the UK; and the degree to which the subsidy control regime extends the scope of competition law will, I suspect, be a matter the subject of careful scrutiny.
- 2.12. Another significant change to the EU state aid regime is the focus on private enforcement. As already set out, the EU state aid rules do allow for private enforcement but, such challenges are brought infrequently and usually fail. Under the Subsidy Control Act, the only means of redress will be private enforcement.
- 2.13. Finally, the TCA is also in part derived from the rules of the World Trade Organisation, which regulate issues relating to the freedom of trade between signatory states (rather than between trading block members, or indeed between enterprises within one state).
- 2.14. Should this history inform the implementation of the subsidy control regime going forwards, and if so, how? At the very least, this brief and high level overview helps to explain *why* we now have a rather broad, self-standing state aid (or subsidy control) regime, which has moved away from a trans-national focus on regulating an internal market and instead looks at regulating trade and investment between the UK and the EU, as well as competition and investment internally.
- 2.15. The treaty origins of the subsidy control regime, the intense political debate surrounding the topic, and the close connection with trade remedy issues also indicate that the "light touch" approach adopted by the High Court in considering subsidy provisions, which I will turn to next, is correct for a number of reasons.

⁷ [trade-and-customs-in-the-uk-beyond-brexite.pdf \(cliffordchance.com\)](#)

⁸ [How we carry out a subsidy investigation - GOV.UK \(www.gov.uk\)](#).

⁹ [Statutory Guidance for the United Kingdom Subsidy Control Regime \(publishing.service.gov.uk\)](#) – 1.24, 1.26.

3. High Court Consideration of the TCA

- 3.1. As I mentioned, the first case to be brought under the Subsidy Control Act is currently making its way through the CAT and I cannot say much more about that. There have, however been a couple of cases heard in the High Court relating to the TCA provisions on state aid, which provide some potentially useful guidance.
- 3.2. In *British Sugar*,¹⁰ the claimant brought a challenge to a tariff introduced by the government relating to raw cane sugar, arguing that it was a breach of the subsidy control provisions under the TCA, and that it was unlawful state aid under the Northern Ireland Protocol. Foxton J dismissed both grounds, finding the measure was not unlawful state aid nor was it a subsidy. He did not consider the standard of review in this case, as the key issue in dispute was only whether the measure in question fell within the definition of a subsidy or a state aid, which is a pure legal question. He has granted the claimants permission to appeal, which is pending.
- 3.3. Singh LJ and Foxton J also rejected a recent challenge under the TCA to Octopus' takeover of Bulb, a case with which you may be familiar given its widespread media coverage.¹¹ British Gas, Scottish Power and E.ON challenged the takeover on both public law and subsidy control grounds. They argued that the decision of the government to provide funding to facilitate the sale of Bulb to Octopus, and the Government's approval of the energy transfer scheme which gave effect to the sale, failed to meet the requirements of the subsidy control principles in the TCA, amounted to a prohibited unlimited guarantee, and had made various errors in law in categorising the purpose of the subsidy under the TCA.
- 3.4. The challenge was refused due to undue delay by the claimants in bringing it, but the court made some relevant observations for our purposes. In particular, the court noted that the commercial context of the challenge is one where the court is called upon to perform a relatively light touch intensity of review. Although the court accepted that the review included consideration of the principle of proportionality, the context affected the intensity of review. In particular, an enhanced margin of appreciation will be given when reviewing decisions of the executive in a scientific, predictive or technical assessments. The court noted that when applying the EU principle of proportionality and considering measures of EU institutions exercising a discretion involving critical economic or social choices, the court will usually only intervene if the measure is "manifestly inappropriate".
- 3.5. Applying that light touch of review, the Court refused the challenge on all grounds, although it did state it would have granted permission for the challenge on the subsidy control grounds.
- 3.6. The court also highlighted it was permissible to have regard to CJEU case law as a supplementary means of interpretation of the TCA, and it looked to CJEU case law, BEIS statutory guidance about the SCA 2022, WTO case law, and European Commission Notices to assist its analysis. This indicates that post EU Exit, these authorities will continue to be useful.

4. Practicalities

- 4.1. As I have said a number of times, this is a new jurisdiction that will be articulated in the course of future decisions.¹² The CAT is keeping a very close eye on how we want the jurisdiction to evolve whilst, of course, ensuring a fair process for all the parties. We do not want the financial advantages of subsidies to be subsumed in challenges to their making or not making in terms of legal costs. It is intrinsic to subsidy cases that they can have an unfortunate "freezing" effect

¹⁰ *R (on the application of British Sugar plc) v. Secretary of State for International Trade*, [2022] EWHC 393 (admin).

¹¹ *R (on the application of British Gas Trading Ltd) v. Secretary of State for Energy Security and Net Zero*, [2023] EWHC 737 (Admin).

¹² As well as the recent decisions in *The Durham Company Ltd v. Durham County Council*, [2023] CAT 14, on appeal to the Court of Appeal, [2023] CAT 23 (permission to appeal).

on the giving or not-giving of subsidies. This means we want this to be a fast, cheap and simple jurisdiction.

- 4.2. Careful cost management is important in any case, but it will be particularly important in this jurisdiction given the likely size of the parties in many challenges, and the importance of costs not acting as an undue deterrent on those bringing, or those defending, challenges – including considerations for the public purse. We are feeling our way - and some of you may be aware that my decision to impose cost-capping in the *Durham* case is currently under appeal, so we will wait and see what the Court of Appeal rules on that.
- 4.3. Connected to this are the indications I have already provided in the *Durham* case that disclosure, witness and expert evidence ought to be minimal in these cases, to limit costs and aid efficiency and because, in most cases, extensive evidence should not be necessary. Further, I hope to see the issues narrowed as far as possible early on in the case, accompanied by a broad-brush approach to the points and general principles at issue rather than an excessive perusal of detail.

5. Conclusion

- 5.1. It is very early days for this jurisdiction, which has been, to some extent, untethered from its trans-national origins, which means that it is hard to predict future developments. However, I hope that my discussion of the treaty origins of this regime, its connection with trade remedies, and the arguable broadening of the jurisdiction following EU exit, has given some assistance with the potential direction of travel for subsidy control in the UK, as well as what to expect in terms of case management at the CAT.