

The UK has [launched a public consultation](#) on a new subsidy control system. This follows the UK's decision to leave the EU state aid regime on 31 December 2020, since which time an interim system based on the UK-EU Trade and Cooperation Agreement (TCA) has been in effect. The consultation is an important step in determining the long-term future of subsidy control in the UK.

1. Background

At 11 p.m. on 31 December 2020, EU rules on state aid ceased to apply in the UK, save for limited exceptions relating to trade between Northern Ireland and the EU.

The TCA that was signed on 24 December 2020 obliges the UK to put in place "an effective system of subsidy control." It also lays down certain requirements for that system, including a set of principles with which all subsidies must comply. Through further UK legislation (Section 29 of the EU (Future Relationship) Act 2020), these requirements have effect in domestic law and are binding upon public bodies that grant subsidies.

In addition, certain subsidies can be challenged by the UK's trading partners under the terms of its other free trade agreements (FTAs), such as the FTA with Japan. The UK is also subject to subsidy control in its capacity as a member of the World Trade Organization (WTO).

For the most part, however, the UK's non-EU FTAs and the WTO rules only bind the UK as a state. Unlike the TCA, they do not create obligations that affect public authorities directly. Moreover, because the TCA has a broader scope than other agreements and involves a higher standard of review, a subsidy that satisfies the requirements of the TCA is unlikely to conflict with any other set of rules.

2. Public Consultation Announced on 3 February 2021

The Business Secretary has now launched a consultation on possible further changes, including new legislation. The consultation addresses key issues, including:

- Whether the UK should apply its own principles on subsidy control in addition to those set out in the TCA
- The possible roles and responsibilities of a new independent body that will oversee the system, including its role in enforcement
- Whether the UK should introduce new "block exemptions" from subsidy control

The consultation is open until 31 March 2021.

3. New Names for Familiar Concepts

A notable feature of the consultation document, like the TCA, is that it does not use the term "state aid." Instead, it refers to "subsidies." Other terms that are familiar from the EU rules have also been replaced. For instance, "economic actor" replaces "undertaking" to describe a company or group that receives a subsidy.

Such changes may not make a significant difference in practice. For example, the definition of a subsidy in the TCA is very similar to the EU definition of a state aid. It would be prudent to assume that any measure that would have been a "state aid" under the EU rules will be a "subsidy" under domestic law. This includes grants, loans, guarantees, transactions on non-market terms, selective tax arrangements and a range of other measures.

Nevertheless, abandoning the EU terms is more than symbolic for the UK. It means that the interpretation of key concepts can be re-argued before the domestic courts, and neither EU case law nor the European Commission's past practice are binding. At least in principle, this provides scope for the UK to diverge further from the EU in the future.

4. New Obligations on Authorities: The Need for Self-assessment

A bedrock of the EU state aid rules is the requirement to notify all measures to the European Commission for approval before they are implemented, unless they fall under a block exemption. This system of notification and approval no longer applies in the UK. The European Commission has no jurisdiction to review UK subsidies and it has not been replaced – so far – by an equivalent domestic body.

The consultation paper shows that the government is considering giving a new independent body the power to review subsidies either before or after they are granted, or possibly both – i.e. it may have powers to review notifications *ex ante* and conduct investigations *ex post*. The independent body is also likely to have an advisory function and issue guidance on the new rules.

Until this body is created, however, UK authorities are obliged to self-assess whether any measures they plan to adopt fall within the definition of a subsidy, and, if so, whether they comply with the principles in the TCA. Failure to satisfy these principles could result in a legal challenge and an order to recover the subsidy. The self-assessment must be robust and well documented, as it will be open to review by third parties in light of new rules on disclosure (see below).

5. No Block Exemptions

The UK has so far not transposed any equivalents of the EU state aid block exemptions into the new system. These exemptions, notably the General Block Exemption Regulation (GBER), provided the basis for more than 90% of state aid measures adopted in the UK. They allowed authorities to grant aid for a range of purposes – such as regional aid, support for SMEs, R&D aid and aid for local infrastructure – without prior approval and with reduced risk of challenge, provided certain conditions were met.

Without block exemptions and with no body in place to approve measures, public authorities may be hesitant to grant new subsidies. Companies that hope to receive support may also fear an increased risk of their subsidy being challenged and having to be repaid.

It is clear from the consultation that the UK is considering introducing block exemptions or, at minimum, other measures that provide greater legal certainty for “low-risk” subsidies. The consultation also invites views on what subsidies should be defined as “low-risk”.

6. New Principles for Granting Subsidies

As explained above, public authorities are now obliged to ensure, on a case-by-case basis, that all subsidies that they grant respect certain principles that are set out in the TCA. These are:

- a. Subsidies must pursue a specific public policy objective to remedy an identified market failure or address an equity rationale such as social difficulties or distributional concerns (“the objective”)
- b. Subsidies must be proportionate and limited to what is necessary to achieve the objective
- c. Subsidies must be designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided
- d. Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy
- e. Subsidies must be an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means
- f. Subsidies’ positive contributions to achieving the objective must outweigh any negative effects, in particular the negative effects on trade or investment between the UK and the EU

The principles are uncontroversial and consistent with the approach that the European Commission has taken when approving state aid and creating block exemptions. However, UK courts are not obliged to interpret the principles in light of EU case law and European Commission decisions, potentially creating further uncertainty for authorities and businesses.

The UK is obliged to observe the six principles above and will not be able to depart from them in future legislation. The UK is, however, considering adding one further principle, which is set out in the consultation: “Public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that may arise from a subsidy.” This would appear to be aimed at preventing “subsidy wars” between regions within the UK.

7. Permitted Subsidies

Although the UK system does not currently have any block exemptions, certain types of subsidies effectively fall outside the TCA. This means they can be granted without applying the principles above. Expressly permitted subsidies include:

- Subsidies granted to compensate for damage caused by natural disasters or other exceptional non-economic occurrences
- Subsidies of a social character that are targeted at final consumers rather than businesses
- Subsidies related to trade in fish and fish products
- Subsidies to the audio-visual sector

In a Joint Declaration annexed to the TCA, the UK and the EU agreed further principles that may apply (i.e. they are not binding) to specific types of subsidies. These include subsidies for the development of disadvantaged areas; subsidies for transport; and subsidies for research and development. This gives the UK scope to adopt tailored provisions in these important areas, which is referred to in the consultation.

8. Prohibited Subsidies

Certain types of subsidies are expressly prohibited under the TCA, meaning that they cannot be granted under any circumstances. These include:

- Unlimited state guarantees
- Subsidies to restructure an insolvent or failing business, in the absence of a credible plan to restore it to viability – there are also specific rules on subsidies to restructure banks, credit institutions and insurance companies

The prohibited subsidies are measures that the European Commission has also never approved, meaning that this should not reduce the UK’s ability to grant subsidies.

9. Increased *De Minimis* Threshold

Another notable change concerns *de minimis* aid, i.e. low-value subsidies that essentially fall outside the system of control. Public authorities in the UK can now grant subsidies of up to £340,000 per beneficiary in any three-year period under these rules, which is almost double the amount that could be granted under the EU rules (€200,000). The consultation paper seeks views on whether this level is appropriate or if a lower threshold should be set in the future.

10. New Transparency and Disclosure Rules

The TCA introduced important new rules on transparency and disclosure, which are immediately binding on UK authorities. Details of all new subsidies must be published on an official website or public database within six months of being granted. They must include the legal basis and policy objective of the subsidy; the name of the recipient; the date of the grant; and the amount of the subsidy. The government will establish a UK-wide transparency database, but this is not yet in place. Authorities may consider publishing the required information on their own websites in the meantime, with a view to triggering the limitation period for recovery (see below).

In addition, if any “interested party” informs an authority that it may apply for review of a subsidy, the authority must provide, within 28 days, “information that allows the interested party to assess the application of the principles set out in Article 3.4” (i.e. the principles in section 6 above).

This creates significant new rights for parties seeking to challenge subsidies. In principle, the information that could fall within the scope of this rule may include authorities’ minutes and other contemporaneous decision-making documents. This removes a major barrier to bringing a challenge to state aid under the previous rules, namely the ability to access necessary information in good time. Moreover, an “interested party” could include not just a competitor of the business that receives a subsidy, but also individuals and groups that can show that they might be affected by it.

It is to be hoped that the government will give authorities clear guidelines on complying with these rules, and their scope is likely to be tested in the courts. The risk of disclosure (and the possibility of Freedom of Information-style requests) underlines the importance of authorities ensuring that their decisions have a clear audit trail.

The consultation paper seeks views on whether authorities should also be obliged to publish competition impact reviews in relation to all grants, and whether the transparency obligation should apply to subsidies below the *de minimis* threshold or below a lower threshold of £50,000.

11. Challenges, Limitation Periods and Remedies

Under the TCA, the UK is required to ensure that a court or tribunal can review authorities’ compliance with the TCA principles. In the absence of further legislation, this means that challenges in the UK must, for now, be brought by way of judicial review.

If the claimant seeks recovery of the subsidy, judicial review proceedings must be brought within one month of the mandatory transparency information being published. The limitation period is extended by one additional month if the claimant submits a request for disclosure (see above).

The enforcement of the UK’s subsidy rules is likely to be an area that will develop significantly in the coming months. Key issues to be determined include whether the new independent subsidy control body will have its own enforcement powers, what form these might take, and how this would interact with judicial enforcement. The consultation seeks views on these questions, as well as whether a specialist forum (such as the Competition Appeal Tribunal) should hear challenges to subsidies.

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