
On 28 April 2022, the UK's new regime to regulate subsidies received Royal Assent. The Subsidy Control Act 2022 (the Act), some parts of which enter into force immediately, replaces the rules that have been in place since Brexit. Although there is substantial carry-over from the interim rules, the Act also introduces some significant changes that affect both public authorities and private businesses.

- In Part One of this note, below, we will explain the central aspects of the new Act and highlight the key changes
- In [Part Two](#), we will discuss five important questions that the new legislation raises

1. What Is a Subsidy?

The Act defines a subsidy as follows:

Financial assistance that:

- (a) Is given, directly or indirectly, from public resources by a public authority,
- (b) Confers an economic advantage on one or more enterprises,
- (c) Is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and
- (d) Has, or is capable of having, an effect on:
 - (i) Competition or investment within the UK,
 - (ii) Trade between the UK and a country or territory outside the UK, or
 - (iii) Investment as between the UK and a country or territory outside the UK.

This is similar to the definition of a state aid, and it is reasonable to assume that any measure that would have been a state aid under the EU rules will be a subsidy under the Act. The definition of a subsidy, therefore, covers a wide range of public interventions, including grants, loans, guarantees, transactions on non-market terms, selective tax arrangements and many other measures.

One crucial change is that the Act applies to measures that are capable of having an effect on competition or investment within the UK. This is a significant difference from the state aid rules, which only applied to measures that could affect competition or trade between the UK and an EU member state. This excluded measures that would have a purely local impact. Now, under the Act, public authorities and businesses that receive support must consider whether a subsidy might have an impact on the UK's internal market, not just a cross-border impact.

2. Assessment Under the Subsidy Control Principles

Under EU state aid rules, all aid measures are (in principle) prohibited unless expressly approved or permitted. In practice, due to the existence of many block exemptions, only a very limited proportion of state aids were notified to the European Commission for approval. Nevertheless, one of the main advantages that the government is claiming for the Act is that it takes the opposite approach: all subsidies are permitted, provided that they comply with seven Subsidy Control Principles that are set out in Schedule 1 of the Act.

The Subsidy Control Principles are as follows:

A	Common interest	Subsidies should pursue a specific policy objective in order to: (a) Remedy an identified market failure, or (b) Address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns)
B	Proportionate and necessary	Subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.
C	Designed to change economic behaviour of beneficiary	(1) Subsidies should be designed to bring about a change of economic behaviour of the beneficiary. (2) That change, in relation to a subsidy, should be: (a) Conducive to achieving its specific policy objective, and (b) Something that would not happen without the subsidy
D	Costs that would be funded anyway	Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.
E	Least distortive means of achieving policy objective	Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means.
F	Competition and investment within the UK	Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the UK.
G	Beneficial effects to outweigh negative effects	Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on: (a) Competition or investment within the UK, or (b) International trade or investment.

With the exception of a limited group of subsidies that are always permitted or always prohibited, respectively (see below), and "minimum financial assistance", public authorities are obliged to self-assess whether any subsidy that they plan to grant satisfies the above principles. Failure to satisfy the principles could result in a successful legal challenge and an order to recover the subsidy.

It is critical that public authorities' assessments against the principles are both robust and well documented. The written records of an authority's decision-making will be open to review by third parties, in light of new rules on disclosure (see below), and could ultimately be scrutinised by the Competition Appeal Tribunal.

Moreover, we are increasingly seeing authorities ask the recipients of subsidies to provide an assessment against the principles as a condition precedent to receiving an award.

The difficulties that authorities and private parties may face when applying these principles are discussed in [Part Two](#).

3. Permitted and Prohibited Subsidies

Certain categories of subsidy are exempt from the Subsidy Control Principles and effectively fall outside the scope of the Act, meaning that they are always permitted. These are relatively exceptional, and include:

- Subsidies for the purpose of safeguarding national security
- Subsidies given by, or on behalf of, the Bank of England in pursuit of monetary policy
- Subsidies given to compensate the damage caused by natural disasters, or other exceptional occurrences
- Subsidies given to respond to a national or global economic emergency

Other types of subsidies are always prohibited and cannot be granted, notably:

- Unlimited state guarantees
- Subsidies to restructure an insolvent or failing business, in the absence of a credible plan to restore it to viability

4. Minimum Financial Assistance

The Act exempts from the subsidy control rules “minimum financial assistance”, meaning subsidies of up to £315,000 per beneficiary in total over a three-year period. This is an increase from the amount of *de minimis* state aid that can be granted under EU rules, which is capped at €200,000 per three years.

5. Oversight by the CMA – The New Subsidy Advice Unit

The Act creates a new Subsidy Advice Unit (SAU) within the Competition and Markets Authority (CMA), which will replace the European Commission as the body exercising oversight over the UK subsidy control rules. Authorities will be obliged to send their self-assessment of “Subsidies of Particular Interest” to the SAU before they are awarded, and they will have the option of sending their self-assessment of “Subsidies of Interest” – although these can also be granted without a prior review.

As we explain in [Part Two](#), there have so far only been limited indications of what types of subsidies will fall into either category. New regulations will have to be introduced by the secretary of state to clarify these important aspects of the new rules.

The SAU’s role will be to review public authorities’ assessments against the Subsidy Control Principles and, where relevant, make recommendations on how to improve those assessments, or better design the subsidy. Such recommendations will be non-binding: an authority may still award a subsidy that has been the subject of a negative report, after a “cooling-off period” of five working days. As such – unlike the European Commission – the SAU will have no authority to prohibit subsidies.

Nevertheless, ignoring the SAU’s views would create exposure for the awarding authority and the beneficiary. The SAU’s reports will be published, and a finding that an authority’s assessment was defective may greatly assist an interested party bringing a challenge under judicial review.

6. Streamlined Routes

The Act allows the government to adopt “Streamlined Routes” (also referred to as “Streamlined Subsidy Schemes”), which are intended to ease the compliance burden for awarding authorities in some circumstances.

The government will introduce Streamlined Routes for subsidies “at especially low risk of causing market distortions, that promote UK strategic policy objectives and which the government judges to be compliant with the Subsidy Control regime” (as explained in a January 2022 Government Policy Statement). If an awarding authority can show that a subsidy satisfies the conditions of one of the Streamlined Routes, it will not have to separately assess compliance with the Subsidy Control Principles. As such, the Streamlined Routes will function in a similar way to block exemptions under EU state aid.

As we discuss in [Part Two](#), this is another area where there has been limited further information to date, and new regulations will be required to ensure an effective approach that minimises the burden on authorities for less problematic subsidies.

7. New Transparency Requirements – The UK Subsidy Database

The Act provides for the secretary of state to introduce a new UK subsidy database, in which information on subsidies that have been awarded will be made public. In practice, the database already exists, as authorities were required to follow similar transparency requirements during the interim period after Brexit.

Authorities will be required to make an entry in the database within three months of their decision to award a subsidy. The information that will be published will include:

- The policy objective of the subsidy
- The name of the beneficiary to which the subsidy is given
- The date the public authority confirms the decision to give the subsidy
- The duration of the subsidy
- Any time limits or other conditions attached to the use of the subsidy
- The amount of the subsidy or the amount budgeted for
- The location of any other publicly available information relating to the subsidy

In addition, if an “interested party” informs an authority that it might seek judicial review of a subsidy (see below), the authority is obliged to provide within 28 days “information that allows the interested party to assess the application of the [subsidy control] principles.”

This is a significant new right for parties that may want to challenge subsidies, and underlines the importance of authorities robustly documenting their assessments. The information that could fall within the scope of this rule, subject to confidentiality, could include authorities’ minutes and other contemporaneous decision-making documents.

8. Challenges and Rights of Third Parties

Under the EU state aid rules, the main route for a third party to challenge an aid measure was by submitting a complaint to the European Commission. No equivalent to this provision exists under the Act – specifically, the SAU will not be tasked with investigating complaints. Moreover, it is unclear from the Act whether third parties will be able to submit comments or otherwise be heard when the SAU reviews subsidies following a mandatory or voluntary referral (in the same way that third parties have some rights to be heard during European Commission investigations).

Although they cannot file a complaint, under the Act an “interested party” has the right to challenge a subsidy by way of judicial review. This review will be carried out by the Competition Appeal Tribunal (CAT) rather than the High Court, which is the standard forum for judicial review.

As we discuss in more detail in [Part Two](#), these changes curb the rights of third parties to challenge subsidies in two important ways.

First, actions for judicial review before the CAT will be subject to a very short limitation period of only one month. This compares to the European Commission’s power to investigate state aid up to 10 years after it is granted. The limitation period can be extended by one further month if an interested party makes a request for further information within 28 days (see above).

Second, the new rules make it arguably harder and almost certainly more expensive to bring a challenge. Rather than simply submitting a complaint using the European Commission’s *pro forma* system and then putting the investigation in the European Commission’s hands, an interested party must now begin an action for judicial review (which may incur significant costs) and then discharge the burden of making its case before the CAT. The standard for quashing a public authority’s decision on judicial review has traditionally been high, which will further add to this burden.

Entry Into Force

Some parts of the Act have come into force immediately. These include the secretary of state’s powers to adopt new regulations regarding Subsidies of Particular Interest/Subsidies of Interest and Streamlined Routes, and to create the SAU. For the most part, however, the new provisions of the Act are expected to come into force after the summer in 2022.

Part Two

In [Part Two](#) of this note, we will consider the following questions raised by the Act:

- Does the Act give public authorities, businesses and investors sufficient certainty?
- When will a subsidy have “negative effects on competition or investment within the UK”?
- What subsidies will have to be notified to the CMA?
- What subsidies will benefit from Streamlined Routes?
- Are third parties’ interests adequately protected?

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