

On 20 October 2022, the Department for Business, Energy & Industrial Strategy (**BEIS**) published [the Regulations](#) that define the categories of subsidies that must be, or may be, referred to the Competition and Markets Authority (**CMA**) for review before they are awarded.

BEIS also announced that the substantive provisions of the Subsidy Control Act 2022, including the rules on referrals, will come into force on 4 January 2023.

Commentary

- The UK's partly mandatory and partly voluntary referral system for subsidies will enter into force in a little over two months, on 4 January 2023.
- The thresholds for referral are low: all subsidies in excess of £10 million (or £5 million in sensitive sectors) must be notified to the Competition and Markets Authority (**CMA**), and all subsidies in excess of £5 million can be notified. This is expected to generate a significant number of referrals and a heavy workload for the CMA's new Subsidy Advice Unit (**SAU**).
- The fact that the thresholds take into account the aggregate total of all "related subsidies" to the same recipient for the same project, costs or activities in a three-year period further widens the scope of the rules, and places a burden on recipients of public grants to continuously monitor public funding that they receive.
- It is likely that public authorities will, in most cases, voluntarily refer subsidies of interest for review as a precaution, to give both the authority and the recipient greater comfort that they will not be challenged. This may have the unintended consequence of burdening the SAU with a high volume of unproblematic subsidies to review.
- The SAU will have a relatively short formal review period of 30 working days. Since the review does not begin until the SAU has received all of the necessary information, reviews may take longer in practice if there is a lengthy 'pre-referral' phase before the clock officially starts.
- The CMA's reports on subsidies will be non-binding: an authority is free to award a subsidy even if the CMA has adopted a report finding it incompatible with the subsidy control rules.
- It must be assumed, however, that doing so will create a considerable risk of the authority's decision being declared unreasonable on judicial review. Moreover, the CMA's reports will be published, as well as being sent to the referring authority. Such reports will be of great interest to the competitors of companies that receive subsidies, and other interested parties.

Background: the Subsidy Control Act 2022

The Subsidy Control Act 2022, which established the UK's post-Brexit rules on state aid and financial assistance, introduced a system requiring public authorities to refer "**Subsidies or Subsidy Schemes of Particular Interest**" to the CMA for review before they are awarded, and giving them discretion to refer "**Subsidies or Subsidy Schemes of Interest**":

- Public authorities **must refer** subsidies of particular interest to the CMA before they are awarded, and must either (i) wait for the CMA's report on the subsidy and then observe a five-day cooling off period, or (ii) wait for the CMA's 30 working day review period to expire, before they can proceed with their award.
- Public authorities **can voluntarily refer** subsidies of interest to the CMA, but they are not obliged to do so and are not obliged to wait for the CMA's report before proceeding with their award.
- In addition, the Secretary of State can issue a "call-in" direction that requires a public authority to request a report from the CMA in relation to any proposed subsidy or subsidy scheme.

The Regulations that have now been published define the two relevant categories of subsidies and schemes for these purposes.

For further information on the rules on referral and review, please see [our previous client alert](#) on the Subsidy Control Act.

“Subsidy or subsidy scheme of particular interest”

Subsidies of particular interest include:

- Subsidies of over £1m that, when combined with related subsidies in the applicable period, result in a total exceeding £10m to any one enterprise;
- Subsidies of over £1m that are in a sensitive sector and, when combined with related subsidies in the applicable period, result in a total exceeding £5m to any one enterprise;
- All relocation subsidies (i.e., subsidies that require an enterprise to displace its activity from one part of the UK to another) exceeding £1m; and
- Restructuring subsidies (but not rescue subsidies).

A subsidy scheme will be of particular interest if it allows for one or more subsidies of particular interest to be given under it.

“Subsidy or subsidy scheme of interest”

Subsidies of interest include:

- Subsidies of over £1m that, together with related subsidies in the applicable period, result in a total exceeding £5m to any one enterprise;
- All rescue subsidies; and
- All tax measures and relocation subsidies that are not large enough to be subsidies of particular interest.

A subsidy scheme will be of interest if it allows for one or more subsidies of interest to be given under it.

Relevant definitions

“Related subsidies”	A related subsidy is a subsidy given by any public authority in respect of the same or substantially the same project, costs or activities which pursues the same or substantially the same policy objective .
“The applicable period”	The applicable period is the period comprising the elapsed part of the current financial year and the two previous financial years .
“Sensitive sector”	Offering goods or services on one of the following markets: (a) Manufacture of basic iron and steel and of ferro-alloys (b) Aluminium production (c) Copper production (d) Manufacture of motor vehicles (e) Building of ships and floating structures (f) Manufacture of motorcycles (g) Manufacture of air and spacecraft and related machinery (h) Production of electricity – or providing goods or services to one of the above markets (an “ input activity ”).

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