

NINE MONTHS IN AND THE UK'S NEW SUBSIDY CONTROL REGIME IS COMING INTO SHARPER FOCUS ...

On 4 January 2023 the Subsidy Control Act 2022 (**SCA**) came into force, establishing a regime for regulating, post-Brexit, the grant of subsidies in the UK¹. Nine months later, the first ruling by the Competition Appeals Tribunal (**CAT**) and the publication of the Subsidy Advice Unit's (**SAU**) first report on a subsidy assessment are beginning to shed light on how the new regime will operate in practice.

CAT DECISION

The Durham Company Limited (trading as Max Recycle) v Durham County Council concerned whether, by permitting the collection of household waste (for which the Council was not permitted to charge) to subsidise the collection of commercial waste, a subsidy was being conferred on businesses who were being charged less for waste collection than would have been the case if residential collections had been operated separately².

The CAT provided helpful guidance on the following three aspects of the SCA regime.

What is a "decision"?

An interested party who is "aggrieved" by the making of a subsidy "decision" is entitled to apply to the CAT for a review of that decision³. Identifying whether a "decision" has been made and, if so, what that "decision" is, is therefore of critical importance.

The CAT noted that a "decision" can be detailed and long, or (in the case of a "repeat" decision, based on circumstances that have not materially changed since a prior more detailed analysis) short. In *Durham* a series of decisions relating to charging for commercial waste management services beginning in 2020, before the SCA came into force, was held to include a "decision" on 31 March 2023 which was subject to the SCA⁴.

What is a "subsidy scheme"?

For a right to review by the CAT to arise, SCA, s 70(2) specifies that that review must relate to a subsidy given under a "subsidy scheme". The CAT held that a "subsidy scheme" involves an element of appropriate "fettering" (or "controlling of discretion") in the form of binding criteria being set out in accordance with which a subsidy will or may be granted. On the facts, a series of decisions as to the rate charged to commercial customers for waste disposal, which had been set annually, did not have the tenor of sufficient "predictability and consistency" to amount to the grant of a subsidy (although the CAT was careful to say that this did not mean that a single decision, taken annually, can never come under the "umbrella" of a "subsidy scheme" - but, to do so, that decision would "have to be closely justified")⁵.

¹ Excluding trade in goods between Northern Ireland and the EU, to which EU state aid rules apply.

² The sharing of common costs provided scope for efficiency and, therefore, cost savings and, by virtue of combining both types of waste, the Council was in a position to negotiate better rates with third party undertakings to whom disposal (but not collection) was outsourced.

³ SCA, s 70(1).

⁴ [2023] CAT 50, para 49(1).

⁵ [2023] CAT 50, paras 49(2) and 51.

What is a "subsidy"?

The CAT held that the "clear - unequivocal" meaning of SCA, s 2(1)(a)-(b) is that a "subsidy" must involve financial assistance given by a public authority so as to confer an economic advantage on one or more enterprises. It was not possible to identify any person, other than Durham Council itself - so, the giver of any financial assistance was the same person as the recipient of that assistance. The CAT was in "no doubt"⁶ that the Council could not confer a "subsidy" on itself, because it was the "very essence" of a subsidy that that subsidy "moves" from one person (a public authority) to another person (an "enterprise"). The circulation of a benefit within a single entity does not, the CAT held, involve subsidisation⁷.

Interestingly, while the CAT noted that EU state aid law could not be "anything other than of persuasive effect", the CAT considered that the "differences" between EU law and UK law were "instructive". In particular, the CAT observed that the SCA eschews reference to "undertaking", referring instead to "person", and therefore sidesteps the ECJ's functional jurisprudence (by virtue of which a single entity may pursue economic activity in more than one capacity and can, therefore, be both the giver and recipient of state aid⁸).

Conversely, the SCA did leave room for a functional, purposive, approach in determining whether an "economic activity" takes place and, given that the Council had a statutory duty to collect waste from both residential and commercial customers within the area for which the Council had responsibility, the CAT did not have "any difficulty" agreeing with the Council that the Council was not carrying out an "economic activity".

The CAT also found it "very difficult" to see how an "economic advantage" could be said to be conferred on the Council by passing on reduced costs to the Council's commercial customers (it would only be if the savings were not passed on that an advantage could be said to be conferred) - passing on cost savings, far from representing a distortion of the market, would "normally be regarded as the outcome of a properly functioning market"⁹.

SAU report

On 15 September 2023, at the request of the Highlands and Islands Enterprise (HIE), the SAU published a report in relation to a proposed grant of a £24.5 million subsidy to Sumitomo Electric Industries Limited (SEI) to support investment of £350 million in building a cable manufacturing factory. The SAU's report is advisory only and, unsurprisingly very fact specific. However, the SAU's observations are likely to be helpful to public authorities (and those assisting them) - and it is noteworthy that, although the SAU made a number of recommendations as to how HIE's subsidy assessment could be "improved", the SAU did not find it necessary to make any recommendations as to how the proposed subsidy could be modified.

⁶ Albeit, that the CAT conceded that "the language of the [SCA], whilst not conclusive, supports the conclusion we have reached": [2023] CAT 50, paras 31(3) and 32.

⁷ [2023] CAT 50, paras 28-31.

⁸ [2023] CAT 50, para 37.

⁹ [2023] CAT 50, para 42(2)-(3).

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