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THE NEW UK "SUBSIDY" REGIME: WHY IT MATTERS AND WHAT TO DO ABOUT IT…

When the Brexit implementation period ended on 31 December 2020, EU state aid rules ceased to apply in the United Kingdom (other than in relation to Northern Ireland). On 11 May 2021, at the State Opening of Parliament, it was announced that a Subsidy Control Bill (**Subsidy Control Bill**) would be introduced during the 2021-2022 parliamentary session.

Until the Subsidy Control Bill becomes law, the "level playing field" provisions of the UK-EU Trade and Co-operation Agreement (TCA) have effect, as a matter of UK domestic law, by a single provision of the European Union (Future Relationship) Act 2020. Currently, that provision represents the sum total of UK law relating to subsidies (other than in respect of Northern Ireland).

Early in 2020 the UK government began consulting (**Consultation**) on its plans for the new, bespoke, UK subsidy regime that will be established when the Subsidy Control Bill becomes law. A cross-disciplinary team from Gide's London and Brussels offices submitted, on 31 March 2021, a formal response to the Consultation. Gide intends to continue to actively engage with the UK government's outreach as the new subsidy regime evolves.

This note is intended to highlight some fundamental ways in which the new UK subsidy control regime is likely to differ from the EU state aid regime and to suggest what this is likely to mean in practice.

How will the UK's new domestic subsidy control regime differ from the EU state aid regime?

The proposed UK regime is likely to differ from the EU model in the following key respects:

1. **The new UK domestic law concept of what constitutes a "subsidy" will be closely based on, but not identical to, the six Principles set out in the TCA.**

   The UK "subsidy" regime (other than in Northern Ireland, where a Northern Ireland protocol applies) will rest on trade law/the TCA and will be "principles" based.

   A determination under the TCA as to whether there is a level playing field with EU member states will not be made under EU rules, but will be a matter of the interpretation and application of the TCA. This is an area for potential EU/UK disputes and the arbitration provisions in the EU-UK TCA look like they are intended to be used as an ongoing tool.

2. **It is proposed that an additional Principle, for which there is no precedent in the TCA, will require a public authority to "minimise any harmful or distortive effects on competition within the UK internal market". Under this additional principle, a "competition impact review" may be required.**

   This is a significant divergence from the existing EU construct that is equivalent, by way of example, to different regions of France having their own state aid regimes. It remains to be seen how the "UK internal market" element will be used to justify divergence from the level playing field as understood by EU entities or in furtherance of a UK industrial policy.

3. **The UK system is likely to be "risk based" in a way which looks likely to be structured very differently from the EU block exemptions.**

   The UK system will seek to regulate (or place "controls") on certain activity (particularly "high risk" activity), rather than prohibit (or exempt, with some exceptions) that activity.

   It is likely that, in line with UK administrative law practice, decisions will be open to judicial review to parties with standing and that, absent a challenge with merit to the "controls" themselves, the UK stance in any arbitration will be that activity in compliance is de facto an allowable subsidy.

4. **Compliance is likely to be presumed in relation to "low risk" subsidies.**

   A "low risk" subsidy has yet to be defined but appears to be intended to reduce the administrative burden of challenge for minor cases. It may also play a role in the UK government allowing more freedom to local authorities to determine how to fund their increasingly devolved spending obligations. This may emerge as an area of interest in relation to procurement activity; a Procurement Bill will be introduced during the 2021-2022 session of parliament to replace EU procurement rules with a new UK statutory framework for government procurement of goods and services from the private sector.

5. **Rules relating to the provision of a subsidy to an unprofitable or loss-making business are likely to apply a much narrower concept of strategic or national interest than that which applies under the EU model.**

   Historically, the UK government has been loath to subsidise private business, with the state sector dramatically reduced in size by comparison to many EU member states. State intervention in takeovers on national security grounds has historically been restricted to defence industries, critical resources and nuclear assets. This would therefore appear to be in line with UK investment policy and the UK definition may be more narrowly applied than in the EU.

6. **The role of the new independent UK Authority (or, possibly, Authorities) will differ very significantly from that of the EU Commission.**

   For example:

   (i) Parliament or public authorities (public authorities, by reference to a decision template) will decide whether a subsidy is outside the scope of the rules, exempt or permissible.

   There will be no equivalent to seeking permission from the EU Commission and no need for prior-notification.

   Furthermore, it could be open for each of the UK's devolved assemblies to grant a subsidy to an industry (such as fishing) independently of any subsidy granted by the Westminster Parliament.

   (ii) anyone who is dissatisfied with a subsidy, which is below the level for state-to-state remedies under the TCA, will have to seek redress through the courts by means of judicial review (if a person has standing) or (possibly) a new judicial tribunal. It has not been decided whether the Authority will have any enforcement powers and, if it does, what those powers might be.

   (iii) the Authority's main functions (apart from an education remit) are likely to be (i) an oversight role on how the subsidy control system is operating, (ii) offering advice on subsidy development, and (iii) retrospective review function in response to complaints.

(iv) the Authority's retrospective review function (in (iii) above) will be focused on protecting the UK's internal market.

In principle, therefore, it is envisaged that regional arbitrage (e.g. different subsidy regimes for the same industry in Wales and Scotland) may hinder the functioning of the UK's internal market. If this occurs, remedial measures may be applied (and lead to disputes).

What are likely to be practical implications for business?

The TCA includes extensive provisions to resolve disputes in relation to the "level playing field" - the clear implication is that it is not a question of whether disputes will arise between the UK and EU, but how to deal with disputes when they do arise.

Very little imagination is needed to see the scope for disputes relating to subsidy and, for example, the TCA rules of origin in relation to electric batteries or carbon pricing mechanisms.

The interaction between the TCA and the UK's new domestic regime is also likely to give rise to contentious issues which business will have to navigate indirectly through interaction with the UK Government and the EU Commission on the level of the TCA and using the remedies available under UK law in relation to the UK's new domestic subsidy regime.

By way of example of the type of complex questions which may arise:

- could payment terms be sufficiently "generous" to unfairly distort the UK's internal market (i.e. because similar contracts are not available in theory to Welsh or Northern Irish businesses - even where such businesses might not exist)?

- could a challenge to a subsidy to a Scottish business that competes in the UK with an English business owned by an EU entity be unsuccessful on the basis Scottish consumers ought to have access to the same service in the UK internal market?

  The UK could justify this apparent deviation from the UK-EU TCA "level playing field" by the need to uphold the UK internal market principle (and on the basis that although such a decision could adversely impact the equity value of the EU entity's investment in the English business the subsidiary did not represent a material distortion in trade and investment between the UK and EU).

- could an offshore wind project situated in Scottish waters, feeding an electrolyser in English waters with a power export cable to Northern Ireland benefit from subsidised power in Scotland, subsidised hydrogen production in England and feed power through a subsidised power cable to the single electricity market in Ireland (i.e. to the Republic as well as the Province of Northern Ireland)?

What should I do?

The Consultation started a process that will lead to the introduction of a new UK legislative framework which will be established when the Subsidy Control Bill completes its passage through parliament and receives the royal assent.

There will be scope over the coming months to influence that process. As the regime develops, the best strategic approach to new challenges and opportunities will come into sharper focus.

The immediate priority, both for individual businesses and for trade associations, is to engage with their members on the development of the new UK regime with a view to being as well positioned as possible.

Gide's subsidy control team will be delighted to assist you, whether you are contemplating seeking a subsidy for a project or are concerned that a subsidy benefiting a competitor might put you at an unfair disadvantage.

If, therefore, you would like to discuss these issues further, please do not hesitate to reach out to us.

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