

UK Subsidy Control

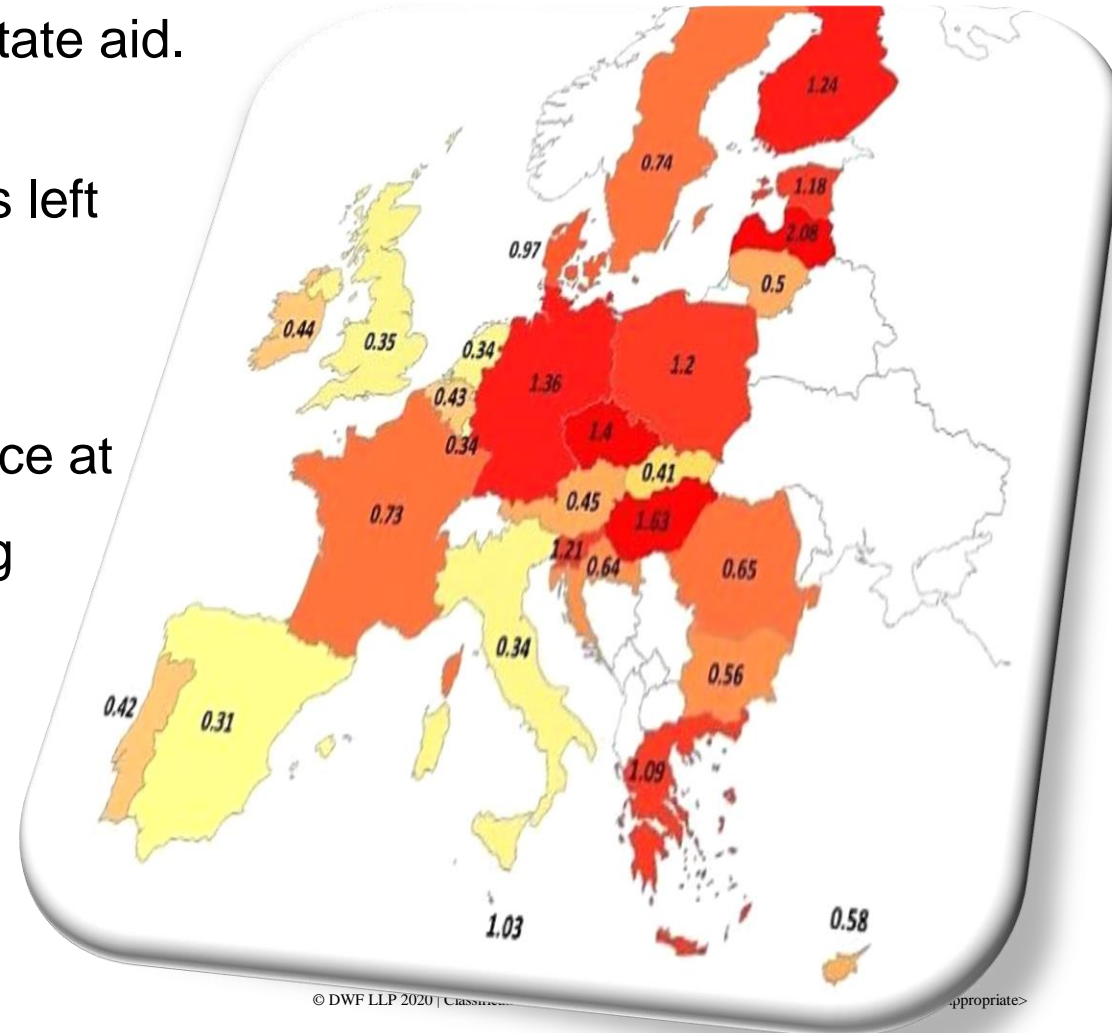
The Danish State Aid Law Association

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Introduction

- The UK has traditionally awarded a low volume of State aid.
- Respecting the EU Referendum of 2016, the UK has left the EU after triggering Article 50 of the TFEU.
- The UK's new Subsidy Control regime came into force at 11pm 31 December 2020 (GMT) largely dis-applying State aid law.
- The Government is introducing the 'Subsidy Control Bill' this Parliamentary session.



UK Subsidy Control: the five tests

Under the new Subsidy Control regime, the 500+ public bodies in the UK have to check every award against commitments in the:

- UK-EU Trade and Cooperation Agreement (“TCA”);
- Withdrawal Agreement;
- Northern Ireland Protocol;
- As well as whether there is an “*appreciable risk*” of creating a dispute under the:
 - WTO rules (including the Agreement on Subsidies and Countervailing Measures); and
 - other international Trade Agreements the UK has with non-EU countries.

The Brexit Timeline

23 June 2016	UK holds EU Referendum (51.9% leave / 48.1% remain)
29 March 2017	UK Government serves notice under Article 50 to leave EU
17 October 2019	EU and UK agree the Withdrawal Agreement and Northern Ireland Protocol
23 January 2020	European Union (Withdrawal Agreement) Act 2020 receives Royal Assent
11pm 31 January 2020	UK leaves EU / Transitional Period Starts
Early March 2020	Negotiations for UK-EU trade agreement commence
29 October 2020	The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 laid before Parliament
24 December 2020	EU - UK Trade & Cooperation Agreement agreed
2pm 31 December 2020	BEIS publish guidance on new Subsidy Control regime
11pm 31 December 2020	New Subsidy Control rules come into force



Negotiations

Final issues left on the table were:

- Level Playing Field
- Fishing Rights
- State aid

Importantly, the EU and UK had different priorities when it came to negotiating State aid commitments.



Chapter 3 of the TCA

UK-EU Trade and Cooperation Agreement (“TCA”) concluded Christmas Eve 2020.

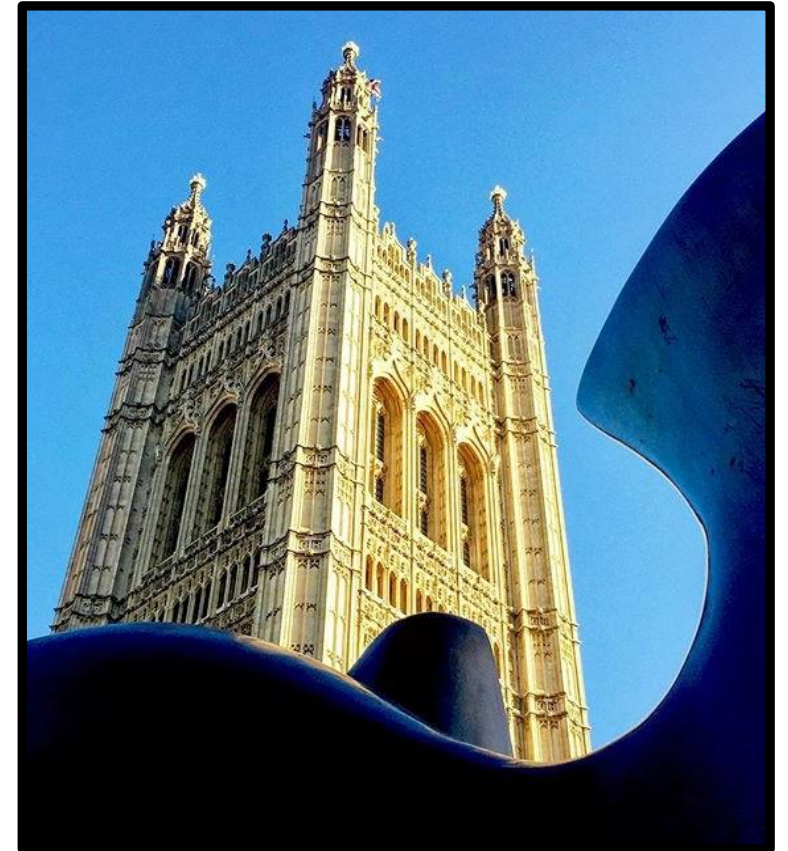
Chapter 3 (Subsidy Control) allows each party to have their own regime, subject to agreed common principles and commitments.

This includes:

- a common understanding of what is a ‘subsidy’.
- Six Common Principles which subsidies must respect.
- Light touch transparency requirements
- Opportunity for challenge.

Putting the new regime into law

- The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020
- European Union (Future Relationship) Act 2020
 - TCA
 - Withdrawal Agreement
 - Northern Ireland Protocol
- Pre-existing international trade commitments, eg. WTO rules



Definition of a 'Subsidy' in the TCA

arises from the resources of either Party, including:

- Direct transfer of funds such as direct grants, loans or loan guarantees;
- The forgoing of revenue that is otherwise due; or
- The provision of goods or services, or the purchase of goods or services.

confers an economic advantage on one or more economic actors (entities offering goods or services on a market).

is specific insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services.

has, or could have an effect on trade or investment between the Parties.



Subsidy

Business as usual?

The commonality of subsidy and State aid definitions leads to a presumption of continuity in findings for what is not a State aid under EU law, eg:

- General public infrastructure and public realm;
- Buying and selling land at open market value;
- *German Land Development Scheme* precedent; and
- *Market Economy Operator Principle* (MEOP).

Prohibited Subsidies

Certain types of subsidy are *prohibited* under Article 3.5, including:

- Unlimited state guarantees;
- Rescue and restructuring aid (to ***ailing or insolvent economic actors***) unless compliant with specific requirements;
- Banks, credit institutions and insurance companies, unless compliant with specific requirements;
- Export subsidies other than limited credit insurance; and
- Subsidies contingent on use of domestic origin products over imported goods.

Aid to airlines for operation of routes is subject to a different State aid test (“*effect on trade*” is replaced by “*effect on competition between air carriers*”).

Specific exceptions



Under Article 3.2, no requirement to apply Common Principles to measures:

- to compensate the damage caused by natural disasters or other exceptional non-economic occurrences;
- subsidies of a social character targeted at final consumers;
- Agriculture / Audiovisual; and
- 325,000 Special Drawing Rights (c.£335,000) over 3 year period.

Subsidies to respond to national or global economic emergency can be awarded, provided these can be shown to be targeted, proportionate and effective to remedy the emergency, support only temporary and subject to the Common Principles.

The Common Principles

Each party shall have in place and maintain an effective system of subsidy control that ensures that the drafting of a subsidy respects the following principles:

1) subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns (“the objective”)

2) subsidies are proportionate and limited to what is necessary to achieve the objective;

3) subsidies are 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

The Common Principles

Each party shall have in place and maintain an effective system of subsidy control that ensures that the drafting of a subsidy respects the following principles:

4) subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy;

5) subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means;

6) subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.



Services of Public Economic Interest



- New PEI regime (Article 3.3 TCA) covers subsidies to economic actors assigned with tasks in the public interest including public service obligations.
- SGEI equivalent (no reason to think not applicable for social housing)
- Tasks shall be assigned in a transparent manner. Compensation limited to what is necessary to cover costs incurred, taking into account relevant receipts and a reasonable profit.
- Transparency requirements of Article 3.7.1 do not apply when compensation under 15m SDR. De Minimis of 750,000 SDR (c.£800,000) - no need for Common Principles or Transparency

Transparency Requirements

Under Article 3.7.1 there is an obligation to post following information on individual awards within **six months** onto official website or public database:

- the legal basis, policy objective and purpose of the subsidy;
- name of the recipient;
- date of grant of the subsidy, duration and any other time limits; and
- amount of the subsidy / budget.

Any interested party may request information, using the database or by any other means, on the application of the Common Principles. Such requests are to be answered by the grant authority within 28 days (NB. certification as complete).

Article 3.9: Independent authority or body and cooperation

“Each Party shall establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime. That independent authority or body shall have the necessary guarantees of independence in exercising its operational functions and shall act impartially.”

Forms of challenge: - Commission
- Consultations
- Courts (JR) – one month from publication or from certified complete answer to transparency request on Common Principles

Legislation expected in due course to appoint independent authority.

The Northern Ireland Protocol

17 October 2019

Article 10

State aid

The provisions of Union law listed in Annex 5 to this Protocol shall apply to the United Kingdom, including with regard to measures supporting the production of and trade in agricultural products in Northern Ireland, in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.

Article 12(4)

Implementation, application, supervision and enforcement

As regards...Articles 7 to 10... the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.

The Northern Ireland Protocol

10 December 2020

UNILATERAL DECLARATION BY THE EUROPEAN UNION IN THE JOINT COMMITTEE

When applying Art. 107 TFEU to situations referred to in Art. 10(1) of the Protocol, the European Commission will have due regard to Northern Ireland's integral place in the United Kingdom's internal market. The European Union underlines that, in any event, an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on the real foreseeable effects of the measure.

UNILATERAL DECLARATION BY THE UNITED KINGDOM IN THE JOINT COMMITTEE

The United Kingdom takes note of the European Union's declaration on its application of Art. 107 TFEU to situations referred to in Art. 10(1) of the Protocol.

Article 138 of the Withdrawal Agreement

Article 138

Union law applicable after 31 December 2020 in relation to the United Kingdom's participation in the implementation of the Union programmes and activities committed under the MFF 2014-2020 or previous financial perspectives

1. In respect of the implementation of the Union programmes and activities committed under the MFF 2014-2020 or previous financial perspectives, applicable Union law, including the rules on financial corrections and on clearance of accounts, shall continue to apply to the United Kingdom after 31 December 2020 until the closure of those Union programmes and activities.

WTO rules & other trade agreements

Subsidy Control guidance note published by BEIS on 31 December 2020:

*“From 1 January 2021 public authorities will need to determine whether their subsidy carries any **appreciable risk** of triggering a dispute with a trade partner under the terms of the WTO ASCM rules or the UK’s FTAs”.*

WTO rules include the:

- Agreement on Subsidies and Countervailing Measures;
- Agreement on Trade Related Investment Measures;
- General Agreement on Trade in Services; and
- Agreement on Agriculture.

Full list of trade deals can be found on gov.uk (there is also a useful summary within BEIS guidance)

In almost all cases, UK commitment is very similar to WTO rules (and therefore unlikely to increase risk profile).

What level of consideration needs to be shown and what constitutes “appreciable risk”?

Adapting to the new regime

Greater flexibility to intervene vs legal uncertainty

EU not amending its regime, is this the right course of action?

UK still needs to create independent authority

Transparency

Government Plans



Consultation - 43 Questions (3rd February – 31st March 2021)

- Additional Common Principle
- Freezing SDR rates
- Independent Authority

Queen's Speech, 11 May 2021: *"We will make the most of our new found Brexit freedoms, launching at least eight Freeports, including in Teesside, modernising the planning system, reforming procurement rules and regulations and designing a new subsidy system to accelerate our recovery"*.

Draft legislation expected in coming weeks

Creating a better system



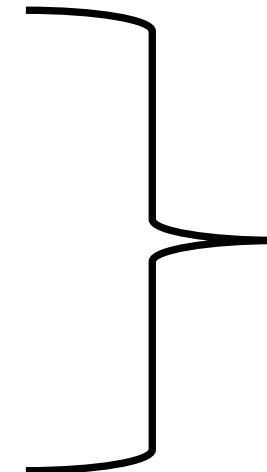
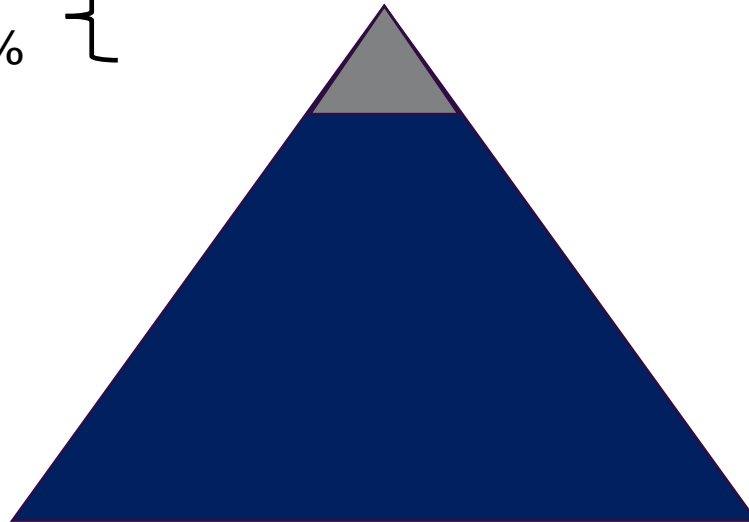
New independent regulator, acting primarily as an *amicus curiae* to public sector

Enforcement through the Courts

Additional Common Principle focussed on the environment

Safe Harbours for small awards, more detailed Common Principles for larger awards.

Common Principles
Assessment for 10% {



90% of subsidies
under Safe
Harbours



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