

Will the New UK Subsidy Control Regime Help ‘Level Up’ the Economy?

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There is an emerging political consensus in the UK that greater devolution of spending powers will bring benefits in terms of reducing economic disparities between regions, enhancing social cohesion, and improving the economy’s prospects for productivity, growth and the transition to net zero. The Subsidy Control Act 2022 is thought to be key to achieving this by providing public authorities with greater flexibility in how they make spending decisions than was previously the case under EU State aid rules. This paper examines whether the new regime does indeed make it easier for awarding bodies to grant beneficial subsidies. It concludes that the regime risks placing obligations on public authorities that are considerably more onerous than EU State aid rules and there is a need to significantly increase the scope of streamlined routes which provide legal certainty to beneficial spending decisions.

INTRODUCTION

The two main UK political parties appear to have converged on the need for greater devolved public spending powers to deal with a number of the UK’s most pressing political and economic challenges. One of the Conservative Party’s key 2019 election manifesto promises (subsequently confirmed as a commitment by Rishi Sunak’s Government) was to ‘level up’ the UK economy and deal with growing inequality between regions of the country. The first Levelling Up Fund under the 2020 Spending Review committed £1.7 billion of projects in over 100 local areas across the UK, with a particular focus on investing in local infrastructure to encourage economic growth.¹ A key aspect of the government’s levelling up strategy was to provide every willing part of England with a funding devolution deal by 2030.² In December 2022, over £1bn was guaranteed to Norfolk and Suffolk in a landmark deal of this kind, followed soon after by similar deals for other regions.³ In the same month, the Labour party published its *Report of the Commission on the UK’s Future*, which

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1 See HM Treasury, *Levelling Up Fund: Prospectus* PU3098 (2021).

2 HM Government, *Levelling Up the United Kingdom* CP 604 (2022).

3 Department for Levelling Up, Housing and Communities, ‘Press release: Historic devolution deals transfer building, regeneration and skills powers to level up Suffolk and Norfolk’ (DLUHC, 8 December 2022) at <https://www.gov.uk/government/news/historic-devolution-deals-transfer-building-regeneration-and-skills-powers-to-level-up-suffolk-and-norfolk-2> (last visited 25 August 2023) and Department for Levelling Up, Housing and Communities, ‘Press release: Historic £1.4 billion devolution deal for North East’ (DLUHC, 29 December 2022)

pledged ‘a radical devolution of power to locally elected and locally accountable representatives’ best placed to ‘unleash the potential’ of the country.⁴ The report suggests that centrally controlled funding had caused an unequal economy and that Brexit had delivered control to Westminster and Whitehall, and not to the people as promised during the 2016 referendum campaign.⁵ A key recommendation by the report was to devolve spending powers to local government, to deal with the problem of competitively allocated central government funds disproportionately benefitting wealthier UK cities and regions.⁶ Centrally awarded schemes can also be very costly for local authorities to engage with, drawing resources away from other priorities.⁷

This broad convergence in policy coincided with the Subsidy Control Act 2022, which introduced the UK’s new subsidy control regime on 4 January 2023. This new regulatory system, introduced to meet a key obligation under the UK–EU Trade and Cooperation Agreement (TCA), was designed to, ‘enable public authorities to deliver subsidies that are tailored and bespoke for local needs to deliver government priorities such as levelling up and achieving net zero carbon, as well as supporting the economy’s recovery from coronavirus (COVID-19)’.⁸ Its aim is therefore to allow public authorities the freedom to award beneficial subsidies, while preventing wasteful and distortive public spending decisions that provide unjustifiable advantages to particular businesses or sectors. The idea is to use subsidies to encourage innovation, economic growth and environmental sustainability across the UK, and not a return to wasteful industrial policies seen in the 1970s.⁹ What is more, subsidy control (known as ‘State aid’ in EU law) is viewed as a policy area that can achieve real benefits following the UK’s withdrawal from the European Union.¹⁰ When the new system came into force, Business Minister Kevin Hollinrake said, ‘New rules mean UK authorities will be free to deliver money to businesses in a quicker, fairer, and simpler way, without longwinded and unnecessary approval

at <https://www.gov.uk/government/news/historic-14-billion-devolution-deal-for-north-east> (last visited 25 August 2023).

- 4 The Labour Party, *Renewing our Democracy and Rebuilding our Economy: Report of the Commission on the UK’s future* (2022) 7 at <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf> (last visited 7 July 2023) (*Report of the Commission on the UK’s Future*).
- 5 *ibid.*, 7; It has been claimed that the Shared Prosperity Fund that replaced EU regional development funding has failed to match the funding certain parts of the UK would have received had it remained a member of the EU. See Peter Foster and Jennifer Williams, ‘UK fund fails to match EU development money, say Scotland and Wales’ *Financial Times* 13 April 2022.
- 6 *Report of the Commission on the UK’s Future* n 4 above, 93.
- 7 See Aubrey Allegretti, ‘Councils spent £12.5m on bids for Liz Truss’ investment zones, data shows’ *The Guardian* 23 January 2023.
- 8 Department for Business, Energy & Industrial Strategy, ‘Policy Paper: Overview of the subsidy control regime – a flexible, principles-based approach for the UK Subsidy Control Bill 2021’ (DBIS, 30 June 2021) at <https://www.gov.uk/government/publications/subsidy-control-bill-policy-papers/overview-of-the-subsidy-control-regime-a-flexible-principles-based-approach-for-the-uk> (last visited 25 August 2023).
- 9 See generally Colin Wren, *Industrial Subsidies: The UK Experience* (London: Macmillan, 1996).
- 10 See for example: Peter Foster ‘One area where Brexit should deliver benefits’ *Financial Times* 3 November 2022; and HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* (January 2022) 34 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054643/benefits-of-brexif.pdf [<https://perma.cc/WL44-KYV2>].

processes to bog us down', citing the bureaucratic nature of the EU State aid regime that UK public authorities were bound by until the end of the Brexit transition period on 31 January 2020.¹¹

This paper critically examines whether the Subsidy Control Act 2022 is likely to deliver on the promise of providing greater flexibility to public authority spending decisions, while preventing harmful subsidy awards. It begins by setting out why subsidies can play a key role in achieving economic, social and environmental policy objectives and why some types of subsidies can be very harmful. The paper then examines the key features of the Subsidy Control Act 2022 that make it more flexible than the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). These include the lack of a pre-notification system and formal regulator, and the reliance on private enforcement on limited grounds to challenge spending decisions that are not compatible with the 2022 Act. This approach relies on authorities being transparent in their subsidy decisions, uploading details onto a public database. The paper then looks at three features of the new regime that could make it less flexible. These are: (i) the fact the UK has chosen to adopt a domestic subsidy control regime that goes beyond its international obligations; (ii) the way in which authorities are required to self-evaluate against the subsidy control principles contained in the Act, including an assessment of the potential impact of their spending decisions on competition and investment *within* the UK; and (iii) the limited use of so called 'Streamlined Routes' designed to enhance legal certainty, as compared to the EU's State aid General Block Exemption Regulation (GBER).¹² The paper concludes that the new regime may not provide the freedom and flexibility that was intended and that the scope of Streamlined Routes should be significantly expanded to provide greater legal certainty and respond to the emerging subsidy war between the US and EU in relation to green industry.

GOOD AND BAD SUBSIDIES

A subsidy arises where any public authority (whether central, devolved or local), provides support to an enterprise that gives them an economic advantage and which could not otherwise have been obtained on commercial terms.¹³ This includes a wide range of uses of public resources including: a grant; tax concession;

11 Department for Business, Energy & Industrial Strategy, 'Press release: UK regains control of business subsidy regime' (DBIS, 4 January 2023) at <https://www.gov.uk/government/news/uk-regains-control-of-business-subsidy-regime> (last visited 25 August 2023).

12 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market of Articles 107 and 108 of the Treaty, [2014] OJ L187/1.

13 An economic advantage in EU State aid law generally refers to anything that the business would not have received under normal market conditions. Under the Market Economy Operator principle a transaction carried out in line with normal market conditions does not confer an advantage. See Case T-244/08 *Konsum Nord ekonomisk förening v Commission* ECLI:EU:T:2011:732 at [62]; Cases T-80/06 and T-182/09 *Budapesti Erőmű zrt v Commission* ECLI:EU:T:2012:65 at [67]; Case T-468/08 *Tisza Erőmű left v Commission* ECLI:EU:T:2014:235 at [85]; Case T-179/09 *Dunamenti Erőmű zrt v Commission* ECLI:EU:T:2014:236 at [76], cited in Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (London: Bloomsbury Publishing, 2022) 12.

loan; guarantee or investment; the waiving of debt, charges or penalties; the purchase of goods or services; or the sale or use of publicly owned facilities or land, at below market price.¹⁴ What distinguishes a subsidy from other forms of government spending is that it is selective or specific, in that it benefits some businesses over others.¹⁵ So for example, a reduction in the corporate tax rate paid by all businesses in the UK, or a decision by the Bank of England to lower interest rates, do not amount to subsidies because they affect the entire economy.¹⁶ Also, an investment that is made by a public authority on commercial terms (ie a private investor operating in normal market conditions could have made the same investment) is not a subsidy because it is equivalent to what is available on the market and does not therefore confer an advantage.¹⁷ Equally, a decision by a local or devolved authority to lower a tax does not amount to a subsidy, so long as it does not favour some businesses within that locality over others.¹⁸

Subsidies can be a very important tool for achieving public and social policy goals, encouraging investment, creating jobs and dealing with regional inequalities. This is because, left unfettered, competition in the free market can produce undesirable outcomes generally referred to as *market failure*.¹⁹ This is where competitive markets fail to provide a good or service (whether at all, or at the right quantity, quality or price) even though the economic and social benefits outweigh the economic costs. State intervention is therefore needed to address the market failure and will be desirable so long as the benefits of the intervention outweigh the likely costs. More specifically, subsidies can help remedy four types of market failure, set out below.²⁰

Externalities – Subsidies can encourage businesses to move away from activities with negative externalities (such as production methods that are harmful to the environment) and incentivise them to engage in activities with positive

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- 14 Department for Business, Energy and Industrial Strategy, *Statutory Guidance for the United Kingdom Subsidy Control Regime: Subsidy Control Act 2022* (BEIS, 11 November 2022) para 1.23. The Subsidy Control Act 2022, chap 1 specifically requires a public authority to have regard to this guidance.
- 15 The requirement of specificity is part of Article 2 of the WTO Agreement on Subsidies and Countervailing Measures and is similar to the requirement of selectivity in the application of Article 107 TFEU.
- 16 The meaning of subsidy is defined in Article 363(b) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10 (EU-UK Trade and Cooperation Agreement).
- 17 In EU State aid law, this is known as the Market Economy Operator (MEO) Principle. See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946 [2016] OJ C262 at [4.2].
- 18 Case C-88/03 *Portugal v Commission* ECLI:EU:C:2006:511. In the context of WTO rules, see the WTO Agreement on Subsidies and Countervailing Measures.
- 19 For a discussion of the economics of subsidy control, see Hans W. Friederiszick and others, 'European state aid control: an economic framework' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (Cambridge, MA: MIT Press, 2008) 625–669. See also Justus Haucap and Ulrich Schwalbe, *Economic Principles of State Aid Control* Dusseldorf Institute for Competition Economics, Discussion Paper No 17 (April 2011) (Dusseldorf: DICE, 2011) 5, noting that the beneficial effects of subsidies were recognised as early as 1920 by Arthur Cecil Pigou, *The Economics of Welfare* (London: Macmillan, 1920).
- 20 There is a helpful discussion of market failures in BEIS Statutory Guidance, n 14 above, paras 3.22–70.

externalities (such as research and development investment or the training of staff, that have beneficial spill-over effects for the sector, region or wider economy).²¹

The provision of public goods – these are goods or services that are not provided to the desired level or which are difficult to make economically viable because it is hard to exclude those who are not paying for them (‘free-riding’). Examples include national security and services of public economic interest, such as the need to maintain transport and postal links with rural areas.

Information asymmetry – this is typically where a provider of a service does not have the same information as the buyer and therefore does not complete the transaction. An example of this might be banks who refuse credit to Small and Medium Size Enterprises (SMEs) looking to grow. This may happen because the SMEs have inadequate credit history or collateral to secure a loan and the banks are unwilling to engage in alternative methods for establishing their viability and creditworthiness.

Short-term economic shocks – these are temporary economic events that can cause otherwise viable businesses to close and vulnerable citizens to suffer. Examples include natural disasters, the 2007 financial crisis, the Covid-19 pandemic and Russia’s 2022 invasion of Ukraine.²²

The UK government believes subsidies aimed at addressing market failure will help deliver on strategically important policy objectives and in particular increase ‘economic productivity and wider non-economic prosperity’ in disadvantaged regions and cities, thereby ‘levelling up’ the UK economy.²³ This is also important to the further devolution of spending decisions planned by both main political parties. Well-designed subsidies can bring about a range of benefits, such as improving infrastructure, encouraging innovation, and accelerating the move to net-zero emissions. Subsidies can reduce social or economic disadvantage, promote employment opportunities, and help rescue and restructure large employers at risk of failure, to prevent the serious social difficulties and unemployment that can result in particular geographical regions.²⁴ They can also bring significant regional benefits by incentivising businesses to invest in their workforce. Training them with new skills and knowledge will benefit the employer but can also attract new jobs to the locality or allow employees to start businesses of their own.²⁵

Subsidies can play a key role in encouraging important breakthroughs in research and development. There are certain forms of theoretical or experimental research that businesses typically underinvest in because it is unlikely to result immediately in a practical application or the creation of intellectual

21 See for example Decision 2008/710/EC *Vauxhall Motors* [2008] OJ L236/50, compared with Decision 2007/493/EC *Sicilian regional aid scheme* [2007] OJ L183/41.

22 See Margrethe Vestager, ‘State Aid for the Really Big Challenges’ Keynote speech at EStALI Conference, Brussels, 22 September 2022.

23 See BEIS Statutory Guidance, n 14 above, paras 1.26 and 3.7.

24 *ibid*, para 3.35

25 *ibid*, n 14 above, para 3.25. For a discussion on the link between subsidies and productivity growth see: Nicholas Crafts, ‘Brexit and control of subsidies’ (2022) 38 *Oxford Review of Economic Policy* 154.

property rights.²⁶ Such research has the potential to make the wider economy better off, but the commercial incentive to undertake it is weak. Subsidies can also spur innovation by alleviating the difficulty small businesses (and especially new start-ups) often face in raising the capital they need to grow or successfully launch an innovative new product or service. This can be due to the information asymmetry problem described above.²⁷

While subsidies can play a key role in realising these important policy goals and benefits, they also have the potential to cause very significant and harmful distortions to competition, trade, investment, and the wider economy, if designed poorly. Subsidies can be harmful in the following three main respects.

Picking winners – Subsidies have been used in the past to protect inefficient and unproductive businesses and industries (sometimes referred to as ‘national champions’), thereby making it less likely that new and more innovative entrants will emerge that provide better quality products and services at a lower price. In extreme cases, this might protect large concentrations of economic power (known as *dominance* in competition law).²⁸ This also hinders existing competitors who are more efficient and reduces the incentive to innovate and invest for both the beneficiary of the subsidy and its competitors. It is notable that EU State aid rules helped move Member State governments away from these forms of sectoral subsidies towards aid that is more targeted at promoting specific aims, such as R&D investment and environmental protection.²⁹

Subsidy wars – This can occur between public authorities in different regions of the same country or between national governments and is typically spurred on by lobbying from the beneficiary businesses. For example, rival local authorities might provide increasingly generous subsidies to entice businesses to move their operations into a locality and effectively ‘bid’ for the jobs associated with those operations.³⁰ This represents a waste of public money that could have been put to better use (especially where businesses relocate without good reason),³¹ and achieves very little because any beneficial effect of the competing subsidies is cancelled out.³²

Protectionism – In the context of international trade, subsidies can be used to protect domestic industries from international competition, thereby damaging the benefits of liberalised trade and discouraging foreign investment. For example, subsidies contingent on the recipient only buying domestically produced goods and services are very damaging to international trade. Similarly,

26 BEIS Statutory Guidance, *ibid*, para 3.28.

27 *ibid*, para 3.31.

28 See Steve Suranovic, *International Economics: Theory and Policy* (Saylor Foundation, 2012) ch 7.

29 Kelyn Bacon, *European Community Law of State Aid* (Oxford: OUP, 3rd ed, 2017) at [1.18].

30 See discussion later in this paper in relation to the US Inflation Reduction Act 2022 and the EU’s response.

31 See Leo Sleuwaegen and others, *Public aid and relocation within the European Community* Report to the European Commission, Directorate General III, Brussels (2000), cited and discussed in Friederiszick and others, n 19 above, 626.

32 See generally Friederiszick and others, n 19 above; James A. Brander and Barbara J. Spencer, ‘Export subsidies and international market share rivalry’ (1985) 18 *Journal of International Economics* 83; Stefan Lehner and Roderick Meiklejohn, *Fair competition in the internal market: Community State aid policy* European Economy, No 48 (Brussels: Commission of the European Communities Directorate-General for Economic and Financial Affairs, 1991).

export subsidies both provide exporters with an unfair competitive advantage and make it harder for foreign companies to sell and invest in the awarding country.³³

These harmful effects are the reason why subsidies that affect international trade are governed by rules under the World Trade Organisation (WTO) and why the European Union has State aid rules to prevent distortions in trade between Member States.

APPROACHES TO SUBSIDY CONTROL

In order to evaluate the relative strengths and weakness of the UK's new regime, it is necessary to first consider the different approaches that exist to subsidy control. This section provides an overview of these, including the rules of the WTO, EU State aid rules and the UK's obligations under the EU-UK Trade and Cooperation Agreement.

The WTO adopted an Agreement on Subsidies and Countervailing Measures (SCM), which came into force in January 1995 to protect global trade from the distortive effect of harmful subsidies.³⁴ The SCM prohibits export subsidies and subsidies contingent on the use of domestic over imported goods. It also contains a list of 'actionable subsidies', which may be challenged where they are specific in nature (ie they favour certain enterprises or sectors over others) and either: (i) cause an injury to the domestic industry of another WTO member; or (ii) cause an impairment of the benefits of a tariff concession; or (iii) represent serious prejudice to the interests of another member (loss of exports to domestic market of Member granting the subsidy). These WTO rules (like the subsidy provisions of many bilateral trade agreements) rely on a system of reporting. WTO members can take action through its dispute settlement process, but the rules apply to trade in goods and not services, and their enforcement relies crucially on a member's ability to impose countervailing measures.³⁵ Indeed the threshold for bringing a complaint under WTO rules is significantly higher than under EU State aid.³⁶

By contrast, EU State aid rules constitute a far more comprehensive system of subsidy regulation. Article 107 TFEU has the effect of prohibiting aid (save the three limited categories listed in paragraph 2) 'which distorts or threatens to distort competition by favouring certain undertakings or the production of certain

33 Friederiszick and others, *ibid.*

34 Annex 1A of the 1994 GATT Agreement. For a discussion of the interplay between competition and trade policy (including subsidies), see Rambod Behboodi, 'Competition Law and Trade Policy: "Never the Twain Shall Meet"?' (2021) 84 *Antitrust Law Journal* 127.

35 See for example, Michel Cartland, Gérard Depayre and Jan Woznowski, 'Is Something Wrong in the WTO Dispute Settlement?' (2012) 46 *Journal of World Trade* 979, 992, who note that there is little consensus among WTO members on precisely what the objectives of the SCM ought to be. On why the WTO system of subsidy control is ineffective, see Luca Rubini, 'Transcending territoriality: Expanding EU State aid control through consensus and coercion' RSC Working Paper 2022/33 (2022).

36 See discussion of written evidence in House of Lords European Union Committee, *Brexit: competition and state aid* 12th Report of Session 2017–19 HL 67 (2018) paras 184–188.

goods ... in so far as it affects trade between Member States'. Article 108(3) creates an obligation for Member States to notify the European Commission of any plans to grant and alter aid (whether taking the form of an individual award or a subsidy scheme³⁷ that applies to multiple awards) and await a final decision from the Commission as to its compatibility with the internal market, in accordance with Article 107(3) and the Commission's detailed published guidelines. The main exceptions are *de minimis* aid below €200,000,³⁸ the three types of aid listed in Article 107(2)³⁹ and aid that meets the requirements of the State aid General Block Exemption Regulation (discussed later in this paper). The ex-ante approach of EU State aid reflects the considerable difficulty of reversing any adverse market effects caused by an incompatible subsidy once it has been awarded. As mentioned previously, harmful subsidies can make it harder for more efficient competitors to grow and invest, and the unfair advantage conferred by them can even drive those competitors out of business altogether.

The Commission acts as the regulator of aid (subsidies), enjoying considerable discretion in undertaking a balancing exercise to determine whether an award or scheme is compatible and can go ahead.⁴⁰ In contrast to most other competition law provisions, which are focused on the economic notions of *efficiency* and *consumer welfare*,⁴¹ this balancing exercise takes into consideration a mixture of additional economic and social factors, some of which are listed in Article 107(3).⁴² These include regional cohesion, helping economically disadvantaged areas, promoting culture or heritage conservation, environmental protection, assisting SMEs, promoting research and development, and other forms of market failure. This test essentially asks whether the measure is aimed at a well-defined objective of common interest, whether it is well designed (it is necessary, there is an incentive effect,⁴³ and it is proportionate to the problem being tackled), and whether the overall balance is positive once taking into account distortions of competition and effect on trade.⁴⁴ Importantly, where a subsidy has been awarded that should have been notified to the Commission,

37 'A subsidy scheme is a set of rules that describes the eligibility, terms and conditions for any number of possible subsidies to be given under the scheme', BEIS Statutory Guidance, n 14 above, para 2.23.

38 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L252/1.

39 These are (i) aid of a social character awarded to individual consumers; (ii) natural disasters or exceptional circumstances; and (iii) aid granted in relation to German reunification.

40 A previous Chief Economist at the European Commission claimed it was essentially a cost-benefit analysis, see Friederiszick and others, n 19 above.

41 Consumer welfare refers to the benefits that an individual consumer or citizen derives from the consumption of goods or services. The rivalry inherent in the competitive process usually results in outcomes where the quantity supplied is higher, and the price lower, than would be the case under monopoly. See generally Richard Whish and David Bailey, *Competition Law* (Oxford: OUP, 10th ed, 2021) ch 1.

42 For a discussion of this see Bacon, n 29 above, at [1.18].

43 This means it must change the behaviour of the enterprise that receives it and not simply subsidise activities it would have undertaken anyway.

44 See Commission's Draft Communication, 'Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC' (2009) at https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf [<https://perma.cc/MRX6-TA7R>].

or is deemed incompatible with Article 107, the Commission has the power to order Member States to recover the subsidy. In addition, those adversely affected by the unlawful State aid can be awarded damages.⁴⁵ This general approach is the product of a programme for State aid modernisation undertaken by the European Union, that aimed to ensure compatibility assessments were underpinned by robust economic evidence and not driven purely by political and social considerations.⁴⁶ This culminated in the streamlining of procedures following the launch of the 2005 State aid Action Plan, and the adoption of the first General Block Exemption Regulation in 2008. Competition was very much at the heart of the State Aid Action Plan, which aimed to further move Member States away from wasteful forms of subsidies.⁴⁷

This was the regime the UK was subject to until the end of the Brexit transition period on 31 December 2020. Historically, the UK was one of the most compliant Member States and a net beneficiary of the rules, in terms of action taken against other Member States whose subsidies might adversely affect UK businesses.⁴⁸ It was also a Member State who some argue chronically underutilised lawful subsidies to invest in infrastructure and encourage research and development.⁴⁹ For example, between 2009 and 2015, the UK spent only around €100 per capita on State aid, compared with €266 by Germany and €224 by France.⁵⁰ Indeed the government of Margaret Thatcher and subsequent governments appear to have made a deliberate decision to try and stimulate regional growth and productivity through means other than subsidies, to avoid a repeat of the failed industrial policies of the late 1960s and 1970s.⁵¹

Subsidy control proved to be one of the major sticking points in the negotiations that led to the EU-UK Trade and Cooperation Agreement (TCA).⁵² The UK government originally pushed for a system of subsidy reporting based on WTO rules and this was reflected in their draft text published on 27 February 2020.⁵³ The EU feared the UK might use Brexit as an opportunity to unleash significant subsidy spending that would undermine the 'level playing field for

45 See Quigley, n 13 above, 795–799.

46 See Commission Staff Working Document, 'Common methodology for State aid evaluation' SWD(2014) 179 final (Brussels: European Commission, 28 May 2014).

47 State Aid Action Plan: Less and better targeted state aid: a roadmap for State aid reform 2005–2009, COM(2005) 107 final (Brussels: European Commission, 7 June 2005) paras 5 and 6.

48 The UK was only subject to one adverse State aid ruling between 2000–2010. By contrast, Germany had 32, Italy 26, Spain 11, France 10 and the remaining Member States 43. See Barry Rodger and Andreas Stephan, *Brexit and Competition Law* (London: Routledge, 2021) 84–85, citing Department for Business Innovation & Skills, *State Aid: Frequently Asked Questions* (London: DBIS, May 2012).

49 See for example Crafts, n 25 above.

50 Written evidence from Oxera (CMP 0012), based on data from the European Commission's *State Aid Scoreboard*, as reported in House of Lords European Union Committee, *Brexit: Competition and State Aid* n 36 above, para 174.

51 For an early discussion of this, see Ron Martin, 'The Political Economy of Britain's North-South Divide' (1988) 13 *Transactions of the Institute of British Geographers* 389, 411.

52 EU-UK Trade and Cooperation Agreement, n 16 above.

53 See HM Government, DRAFT UK-EU Comprehensive Free Trade Agreement (CFTA) 27 February 2020 at <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu> (last visited 7 July 2023); Peter Foster and Jim Pickard, 'Cummings leads push for light-touch UK state-aid regime after Brexit' *Financial Times* 27 July 2020. For a more detailed discussion of State Aid and the Brexit negotiations see Rodger and Stephan, n 48

open and fair competition' that was to underpin the TCA agreement. Their draft text required the UK to remain aligned with EU State aid, in terms of compliance with the decisional practice of the European Commission, and with the possibility of UK courts requesting a preliminary ruling from the Court of Justice of the European Union (CJEU).⁵⁴ Continued alignment with EU Law or oversight by EU institutions was politically unacceptable to the UK, and so a series of compromises were made on the subsidy provisions of the agreement.

The TCA essentially required the UK to adopt a subsidy control regime that followed the same core principles as EU State aid rules, but without being tied to EU law or the oversight by EU courts. The one notable exception was trade in goods and electricity between Northern Ireland and the EU under the Northern Ireland Protocol, as amended by the 2023 Windsor Framework.⁵⁵ The TCA ensures that subsidies are not granted by either party that may have a material effect on trade or investment between the UK and the EU, by ensuring that six principles (which became seven under the 2022 Act, as will be discussed) are respected by the parties:

- (a) 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').
- (b) subsidies are proportionate and limited to what is necessary to achieve the objective.
- (c) 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.
- (d) subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.
- (e) subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means.
- (f) subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.⁵⁶

above, ch 5. It is notable that the Opposition Leader, Jeremy Corbyn was also opposed to the UK being subject to subsidy control. See Jennifer Rankin and Patrick Wintour, 'Corbyn reignites Labour debate over EU rules on state aid and socialist manifesto' *The Guardian* 29 September 2017. For discussion of why Corbyn's concerns were ill-founded, see Marley Morris and Tom Kibasi, *State Aid Rules and Brexit* (London: Institute for Public Policy Research, 2019).

⁵⁴ European Commission, Draft Text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020 at https://commission.europa.eu/publications/draft-text-agreement-new-partnership-united-kingdom_en [<https://perma.cc/GD3C-4HW5>]; See generally Rodger and Stephan, *ibid*, ch 5.

⁵⁵ Northern Ireland Protocol, Art 10. The Protocol was annexed to the: Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7; HM Government, *The Windsor Framework: a new way forward* CP806 (February 2023).

⁵⁶ EU-UK Trade and Cooperation Agreement, n 16 above, Art 366.

The six principles reflect the decisional practice of the European Commission in applying Article 107 TFEU, and in particular the ‘balancing test’ that is central to its analysis of the compatibility of State aid. Alongside ensuring consistency with them, the UK must safeguard transparency through comprehensive reporting requirements on an official website or public database. The TCA requires subsidy control to be effective, for there to be an independent authority with ‘an appropriate role’, and for subsidies to be subject to review by a court or tribunal with the power to order recovery of incompatible subsidy awards.⁵⁷ Disputes relating to subsidies are subject to a consultation and binding arbitration process between the EU and the UK and can involve countervailing measures. However, the TCA did not require the UK to have an ex-ante notification and approval system equivalent to Article 108(3) TFEU. Also, the principles were set out in general terms only and no definition was given to the term ‘appropriate role’ for the independent authority. The UK was therefore free to take a different approach to subsidy control, albeit consistent with the six principles.

Transparency is central to any effective system of subsidy control because it is easy for a government or public authority to award a benefit that confers an economic advantage to one business over others, in a manner that is hidden and hard to observe. WTO members and parties to bilateral trade agreements rely almost entirely on voluntary reporting to identify harmful subsidies. In addition to relying on a system of notification and ex-ante regulatory approval, EU State aid rules also include important transparency obligations. Aid must be awarded in a transparent manner to benefit from the General Block Exemption Regulation and the Commission publishes information about notified aid. Also, Member States are required to maintain comprehensive State aid websites for all awards of €500,000 or more.⁵⁸ As will be discussed in the next section of this paper, transparency and the duty of public authorities to publish details of subsidy awards is of particular importance to the UK subsidy control regime because it relies on private enforcement by interested parties. We now turn to the question of whether the Subsidy Control Act 2022 achieves its aim of greater flexibility. The paper will now set out the key features of the new subsidy control regime that appear to make it simpler than the system of EU State aid rules and will then explore reasons why the new regime may prove to be significantly more burdensome.

‘QUICKER, FAIRER, SIMPLER?’

The UK’s new subsidy control regime was clearly intended to provide a system of regulation that was less onerous and more streamlined than the EU State aid rules that UK public authorities were used to. This was both politically important, to show the UK was not simply mirroring the EU regulatory model, and was also of practical importance because of levelling up and the devolution

⁵⁷ *ibid*, Arts 269–373.

⁵⁸ See Quigley, n 13 above, 348–349; Commission communication on State aid and transparency, OJ 2014 C198/30.

of spending powers, coupled with the UK's historic underutilisation of subsidy spending, as discussed earlier.

The starting point in EU State aid law is that most subsidies are, *prima facie*, prohibited under Article 107. To overcome this wide prohibition, the subsidy or subsidy scheme must either be notified to the European Commission for approval under Article 108 or must benefit from the General Block Exemption Regulation (GBER), the *de minimis* notice or some other carve-out. As will be discussed later, recent events such as the Covid-19 pandemic and the Ukraine war have resulted in a significant, albeit limited, softening in State aid rules. However, prior to these, the focus for individual awarding authorities within the EU tended to be on how a measure could fall within the GBER. This ostensibly restrictive approach was criticised by some Member States, who felt the subsidy regime should be less rigid and more generous if EU industries were to remain internationally competitive.⁵⁹ The United States and China, for example, have no equivalent domestic controls on subsidies that affect inter-state trade. One of the key reasons EU State aid rules are considered necessary, is to restrain Member States with deep fiscal pockets who have a greater capacity to award subsidies than those facing comparatively constrained abilities to borrow and spend.⁶⁰ For example, in March 2022 the European Commission adopted a Temporary Crisis Framework that relaxed certain State aid rules to help Member States provide assistance within their economies in light of Russia's invasion of Ukraine. It is estimated that Germany and France accounted for 77 per cent of the €672 million in programmes approved by January 2023, despite only accounting for 55 per cent of production in the EU.⁶¹ Such significant disparities in subsidy levels risk distorting competition within the internal market and further increasing the gap in economic development and opportunities between different regions of the Union. The European Commission have also upset some Member States through their attempts to apply State aid rules to alleged 'sweetheart' tax deals negotiated between Member State governments and individual businesses.⁶²

The Subsidy Control Act 2022 created a regime that might be described as the inverse of EU State aid, at least procedurally, in that there is no general prohibition and no requirement for *ex ante* notification and approval by a regulator.

59 See for example Oliver Noyan and Jonathan Packroff, 'Germany under fire for push to revamp EU-subsidy rules' (EURACTIV, 16 January 2023) at <https://www.euractiv.com/section/politics/news/germany-under-fire-for-push-to-revamp-eu-subsidy-rules/> [<https://perma.cc/QYZ7-9NYG>].

60 See OECD Global Forum on Competition, 'SUBSIDIES, COMPETITION AND TRADE – Contribution from the European Union' (5 December 2022) DAF/COMP/GF/WD(2022)40 (5 December 2022) 2.

61 Jorge Liboreiro, 'Germany & France account for most EU subsidies. Here's why it's a concern' *Euronews* 19 January 2023; Sam Fleming and others, 'EU to relax curbs on tax credits in response to US green subsidies' *Financial Times* 30 January 2023; European Commission, 'State aid: Commission adopts Temporary Crisis Framework to support the economy in context of Russia's invasion of Ukraine' STATEMENT/22/1949 (23 March 2022).

62 See in particular Cases C-885/19 P and C-898/19 P *Fiat Chrysler Finance Europe v Commission* ECLI:EU:C:2022:859 and Cases T-778/16 *Ireland v Commission* and T-892/16 *Apple Sales International and Apple Operations Europe v Commission* ECLI:EU:T:2020:338, rejecting the Commission's novel arms' length analysis of transfer pricing.

Whereas the starting point in EU State aid law is a broad prohibition that must be overcome by exception, UK subsidies are assumed to be lawful so long as the awarding authority has considered the subsidy principles set out in the Act (discussed in detail later in this paper) which are based on the principles set out in the TCA.⁶³ The system is therefore one of self-assessment, allowing public authorities the freedom to design and innovate subsidies that best meet the needs of the UK and its constituent nations, cities and regions. For supporters of this approach, it was preferable to what they viewed as the overly prescriptive nature of EU State aid and in particular the tendency to design subsidy decisions around the conditions of the GBER.⁶⁴ There were also concerns about the regulatory burdens of a notification system, time delays, and the danger it might discourage public authorities from making some beneficial spending decisions.

In addition to being less prescriptive and not requiring *ex ante* approval, the UK system has no formal regulator with the power to investigate and block unlawful subsidy decisions.⁶⁵ The independent authority required by the TCA is the new Subsidy Advice Unit (SAU) formed within the Competition and Markets Authority (CMA), but its role is purely advisory. Its purpose is to ‘evaluate the public authority’s assessment of compliance with the regime and publish a report of their findings’, which is made publicly available.⁶⁶ Referrals to the SAU are mandatory only for ‘subsidies or subsidy schemes of particular interest’ (those in excess of £10 million per beneficiary, or £5 million in certain sensitive sectors) and voluntary for ‘subsidies or schemes of interest’ (those between £5–10 million). The Secretary of State also has the power to take a ‘call-in-direction’, which requires a public authority to request a report from the SAU where the Secretary of State considers there is a risk that the proposed subsidy or scheme would fail to comply with the subsidy control requirements.⁶⁷ Where a referral is made, a public authority must not give a subsidy or make a subsidy scheme until a ‘cooling off period’ of five working days after the SAU publishes its report.⁶⁸ However, the report does not amount to a binding decision, as the SAU has no formal investigative powers,⁶⁹ or ability to block a subsidy award (or order the recovery of an award already made) that is incompatible with the subsidy principles.⁷⁰ Rather their work amounts to ‘marking’ the public authority’s own assessment of compliance with the subsidy control principles.⁷¹ It takes the form of ‘an evaluation of the referring public authorities’ Assessment

63 Subsidy Control Act 2022, s 12.

64 See for example House of Commons Business, Energy and Industrial Strategy Committee, *Post-pandemic economic growth: state aid and post-Brexit competition policy* Fourth Report of Session 2022–23 HC 759 (11 October 2022) 77.

65 Subsidy Control Act 2022, s 52.

66 BEIS Statutory Guidance, n 14 above, para 1.44.

67 See *ibid*, paras 11.24–11.29; Subsidy Control Act 2022, s 55.

68 Subsidy Control Act 2022, s 31.

69 The SAU has information-gathering and enforcement powers and powers to issue penalties in relation to its general monitoring function, but not in carrying out its main advisory function under the Act. Subsidy Control Act 2022, s 67.

70 Crafts, n 25 above.

71 Comment by Alexander Rose, ‘Webinar recording: The Subsidy Control Act 2022’ (DWF, 4 January 2023) at <https://dwfgroup.com/en/news-and-insights/insights/2023/1/webinar-recording-the-subsidy-control-act-2022> [<https://perma.cc/CHP4-XEF5>].

of Compliance' and does not take a position as to whether the subsidy complies with the subsidy control requirements of the Act.⁷² This contrasts with the Commission's role, which involves an evaluation of the proposed aid and a binding decision.⁷³ In addition to the role of the SAU, the CMA is required to monitor and report on the effectiveness of the operation of the Act.⁷⁴

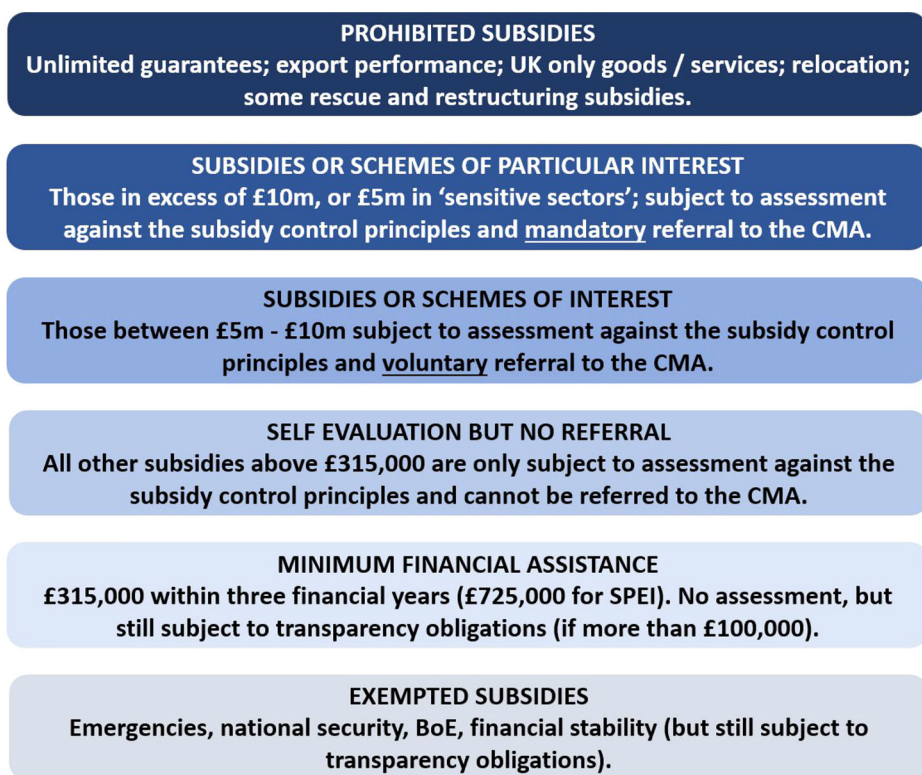


Figure 1: Categories under the UK Subsidy Control Regime⁷⁵ [Colour figure can be viewed at wileyonlinelibrary.com]

The UK regime also has a higher equivalent to the EU *de minimis* notice (known as Minimum Financial Assistance) which means that subsidy awards below £315,000 awarded within three financial years, do not need to be subject to an assessment against the principles. This is higher than the €200,000 within three years available under *de minimis* in EU State aid, but still within the maximum agreed under the TCA. Figure 1 provides a summary of the key categories contained within the Subsidy Control Act.

72 See Subsidy Advice Unit (Part of the Competition and Markets Authority), *Guidance on the operation of the subsidy control functions of the Subsidy Advice unit SAU1* (2022) (SAU Guidance) paras 2.2–3.

73 See Commission's Draft Communication, n 44 above.

74 Subsidy Control Act 2022, s 65.

75 SPEI refers to Services of Public Economic Interest. These are subsidies for essential services provided to the public that would not otherwise be supplied to the right level or at all by the market. Examples include postal services, social housing and certain transport links. See BEIS Statutory Guidance, n 14 above, para 1.36.

The lack of a formal regulator means enforcement of the subsidy control principles relies entirely on the self-assessment exercise undertaken by the awarding authority and challenges brought by ‘interested parties’ before the Competition Appeal Tribunal (CAT), as set out in Part 5 of the Act. An interested party is anyone who may be affected by the giving of the subsidy, or the Secretary of State.⁷⁶ Challenges are facilitated by transparency provisions that require all subsidy decisions above £100,000 to be published on a public subsidy database.⁷⁷ Section 33 of the Act creates a duty for authorities to upload information about a subsidy or scheme onto the database within three months of their decision to make the subsidy or scheme.⁷⁸ The Act does not set out any specific penalties or consequences of failing to do so, although the one month window for bringing a challenge before the CAT (discussed below) will not apply to unreported subsidies. The database can be monitored by interested parties to identify subsidies that may affect them.⁷⁹ However, the information included on the subsidy database is limited. Entries include only the name of the subsidy scheme, the identity of the awarding public authority, the amount budgeted for the scheme, the form(s) the subsidy might take, and a description of the subsidy scheme. The description must include the terms and conditions for eligibility, the basis for calculating the subsidy, the policy objective and purpose of the scheme, and whether it falls within the voluntary or mandatory referral requirements. For subsidy awards, the identity of the award beneficiary must be included, as well as its size (in terms of numbers of employees); whether the subsidy is for goods, services or both; the location of the economic activity being subsidised; and the sector to which the award is given.⁸⁰ These reporting requirements are reduced to a narrower set of requirements for Minimum Financial Assistance, Services of Public Economic Interest Assistance and all awards made under a Streamlined Route (discussed below).⁸¹

Crucially, the information that must be published on the transparency database does not include a report of the public authority’s assessment of the subsidy against the subsidy control principles.⁸² Also, a notice of appeal must be sent to the tribunal within one month of when the interested party first knew (or ought to have known) about the subsidy decision or the date of entry onto the subsidy database.⁸³ While there is provision for interested parties to request more information from the awarding authority and for extensions to the deadline, this is nevertheless a short window in which to challenge a subsidy decision. It also relies on an interested party actively monitoring the transparency database and being willing to bring an action in the first place.⁸⁴

76 On standing in judicial review see: *R v Somerset CC ex p Dixon* [1998] Env LR 111, 121 per Sedley J.

77 The subsidy database can be accessed at <https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government> (last visited 7 July 2023).

78 Subsidy Control Act 2022, ss 33–41; BEIS Statutory Guidance, n 14 above, para 12.4.

79 Subsidy Control Act 2022, ss 32–33.

80 BEIS Statutory Guidance, n 14 above, para 12.35.

81 *ibid*, para 12.38–12.41 and 12.45.

82 *ibid*, para 12.32; Subsidy Control Act 2022, s 34.

83 *ibid*, BEIS Statutory Guidance, para 13.30. See also para 13.28.

84 A public authority must reply to a request for further information within 28 days. The reply ‘must provide such information as would enable or assist in, the making of a determination as to

Interested parties may be reluctant to do so because of the cost, or other factors such as not wanting to damage relations with the public authority or with other enterprises in a particular sector or locality.

Even where an action is brought, subsidy decisions are subject only to a judicial review by the CAT. Their job is to review ‘whether the public authority carried out its duties’ under the 2022 Act and most importantly their duty to consider the relevant subsidy control principles and be of a view that the subsidy was consistent with those principles.⁸⁵ Crucially, this means the CAT will not review the merits of the effectiveness of the subsidy itself, and therefore not engage in the question of whether the benefits outweigh the risks of a distortion to competition and investment.⁸⁶ Beal suggests judicial review ‘significantly limits the CAT’s latitude to interfere significantly with public authority decisions’.⁸⁷ He notes how the subsidy control principles are ‘broad and open ended in nature’ meaning the CAT is ‘unlikely to want to second-guess macro-political choices which often lie behind subsidy decisions’.⁸⁸

In practice, this means that subsidy decisions can only be reversed by the CAT on general public law grounds (where the public authority has acted illegally, irrationally, or procedurally improperly – that is with bias or not offering a fair hearing) or where it failed to carry out its duties under the Act to meet its transparency obligations and consider whether the subsidy was consistent with the subsidy control principles.⁸⁹ For example, a successful challenge could be brought where the public authority made a spending decision that it wrongly determined fell outside the meaning of a subsidy for the purposes of the 2022 Act.⁹⁰ An authority might be found to have made improper use of a discretionary power, where they failed to take account of one or more of the subsidy control principles.⁹¹ It is also likely the CAT would reverse a subsidy decision by a public authority that clearly ignored the advice of the SAU.⁹² Indeed, the SAU’s report is publicly available and is therefore very likely to be used to assist a challenge by an interested party.⁹³ However, as noted earlier, the SAU’s reports do not take a position as to whether the proposed subsidy or scheme complies with the Act, as this lies outside its remit as a purely advisory body. Rather they contain advice on how the public authority might improve the assessment or modify the subsidy.⁹⁴ Finally, it is worth noting that Acts of Parliament (pri-

whether the subsidy was given, or the scheme made, in accordance with ... the public authority’s duty to consider the principles, to only give the subsidy or make the scheme if it is of the view that this will be consistent with the principles’ *ibid*, para 13.37.

85 *ibid*, para 13.6.

86 *ibid*, para 13.15.

87 Kieron Beal KC, “More Flexible and Less Bureaucratic” or cartel blanche? The enforcement of subsidy control post-Brexit’ *The European Advocate* 14 July 2022.

88 *ibid*.

89 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

90 *O’Reilly v Mackman* [1983] 2 AC 237, 278.

91 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1.

92 *R (Balajigari) v SSHD* [2019] EWCA Civ 673; [2019] 1 WLR 4647; *R (The Law Society) v Lord Chancellor* [2018] EWHC 2094 Admin; [2019] 1 WLR 1649.

93 BEIS Statutory Guidance, n 14 above, para 11.43.

94 See SAU Guidance, n 72 above, paras 2.2–3 and also Subsidy Control Unit (Part of the Competition and Markets Authority), *Summary of responses to the draft Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit* CMA166resp (2022) 12–13.

mary legislation made by the UK parliament in Westminster) are exempt from most of the requirements of the Act, whereas subsidies and schemes made in devolved primary legislation must comply with the subsidy control rules.⁹⁵

Taken together, these features appear to create a regulatory regime for subsidy control that is light-touch and comparatively weaker than EU State aid. It avoids the perceived bureaucracy and time delays of the EU system, while also freeing up public authorities to imagine subsidy awards outside the prescriptive nature of the State aid block exemption. Compliance with the subsidy control principles relies on the public authority's self-assessment, on the system of referrals to the SAU for expert advice (in relation to the largest and therefore potentially most distortive subsidies) and limited grounds for review before the CAT on the back of timely applications from interested parties.

WHY THE NEW REGIME MAY BE LESS FLEXIBLE

In principle, this light-touch regulatory regime should mean public authorities are freer to make beneficial subsidy decisions that are connected to a range of local and national strategic objectives, and in particular levelling up. However, the regime may also increase the regulatory burden on public authorities in three important respects: (i) the domestic focus of the regime; (ii) the requirement to consider the impact on competition and investment; and (iii) the limited role of 'Streamlined Routes' in comparison to the GBER.

The domestic focus of the new regime

While the 2022 Act appears to create a flexible and non-prescriptive system of subsidy regulation, it makes the UK one of the only countries in the world to have a domestic system of subsidy control that goes beyond its international obligations. This forms part of a wider post-Brexit conceptualisation of the UK's internal market, which includes a separate regime focused on mutual recognition and non-discrimination to preserve unhindered trade between England, Wales, Scotland and Northern Ireland.⁹⁶ The UK had no domestic regulation of subsidies when it was an EU Member State and EU State aid rules were not retained under the European Union (Withdrawal Act) 2018, because they apply only to awards that affect trade between Member States. Indeed, the Impact Assessment published as part of the Subsidy Control Bill noted how, 'Globally, very few countries beyond the EU and EEA/Switzerland have an independent body with oversight of domestic subsidy control regulations'.⁹⁷ It goes on to

⁹⁵ These are Acts of the Scottish Parliament, Acts or Measures of the Welsh Assembly (the Senedd Cymru), or Northern Ireland legislation. Challenges relating to devolved primary legislation are not made to the CAT. They are made to the High Court (in England and Wales), the Court of Session (in Scotland) and the High Court in Northern Ireland. See BEIS Statutory Guidance, n 14 above, para 14.13.

⁹⁶ See generally United Kingdom Internal Market Act 2020.

⁹⁷ *Subsidy Control: Designing a new approach for the UK Impact Assessment* RPC-BEIS-5049(2) (DBIS, 14 March 2022) para 346 at <https://assets.publishing.service.gov.uk/government/uploads/>

note that where further controls exist (for example in Canada and Australia), they include only limited targeted measures, such as to mitigate the impact of ‘poaching’ on their internal markets.⁹⁸ By contrast the principles set out in the Subsidy Control Act (which, as will be discussed later, are based on those of the TCA) must be applied to all subsidies that have or are capable of having an effect on ‘competition or investment within the United Kingdom’, as well as on trade or investment between the UK and another country or territory (section 2). This means the UK has deliberately chosen to go beyond its international obligations under the WTO and TCA. It also means that UK public authorities must have regard to the subsidy control principles when designing all subsidy awards and schemes above £315,000 within three financial years, whereas previously they only had regard to EU State aid rules where there might be an effect on trade between Member States. So, in this respect the regulatory burden has increased, although in practice most pre-Brexit subsidy awards were designed to comply with EU State aid rules because Article 107 is drawn so widely. However, by virtue of Article 10 of the Northern Ireland Protocol, public authorities must ensure their subsidy awards comply with EU State aid rules, where they may impact the trade of goods or electricity between Northern Ireland and the EU. While section 48(3) of the 2022 Act provides that EU State aid rules will apply instead of the UK regime in such situations, awarding bodies may nevertheless need to be prepared to comply with both where there is uncertainty as to which will apply, thereby further widening the regulatory burden.⁹⁹

The impact on competition and investment

In addition to being unique in its domestic focus and going beyond the UK’s international obligations, the new regime also has a more onerous list of seven subsidy control principles as compared to the six required by the TCA. These seven principles are set out in Schedule 1 of the Act:

Common interest

Principle A: Subsidies should pursue a specific policy objective in order to remedy an identified market failure, or address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns).

system/uploads/attachment_data/file/961140/uk-subsidy-control-consultation-ia.pdf [https://perma.cc/3APU-A4U4].

⁹⁸ *ibid.*

⁹⁹ See Beal, n 87 above, discussing *R (British Sugar plc) v Secretary of State for International Trade* [2022] EWHC 393 (Admin); [2022] 2 WLUK 319.

Proportionate and necessary

Principle B: Subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.

Design to change economic behaviour of beneficiary

Principle C: Subsidies should be designed to bring about a change of economic behaviour of the beneficiary. That change, in relation to a subsidy, should be conducive to achieving its specific policy objective, and something that would not happen without the subsidy.

Costs that would be funded anyway

Principle D: Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.

Least distortive means of achieving policy objective

Principle E: Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means.

Competition and investment within the UK

Principle F: Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition and investment within the United Kingdom.

Principle G: Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on competition and investment within the United Kingdom, and international trade and investment.

Subsidy control principles A-E essentially mirror the first five of the six principles of the TCA, set out earlier in this paper. However, Principles F and G significantly expand TCA principle (f) by creating a specific requirement to ensure negative effects on competition and investment within the UK are minimised, in addition to effects on international trade or investment, as required by the TCA.

Poorly designed subsidies risk distorting competition by protecting inefficient businesses and discouraging others from investing and innovating new and improved products and services. Where there is no market failure, the process of rivalry inherent in free and fair competition is generally considered the best way to promote efficiency, a good level of output, low prices and incentives to innovate.¹⁰⁰ Even a well-intentioned subsidy aimed at addressing a market

100 George J. Stigler, 'The cost of monopoly power' (1958) 72 *The Journal of Political Economy* 175; Jean Tirole, *The Theory of Industrial Organisation* (Cambridge, MA: MIT Press, 1988). See also the outcome of the UK Government's 2022 consultation on competition policy: Department for

failure or achieving an important policy goal, may create a wider distortion to competition, the consequences of which outweigh any benefit.

Negative effects on competition are governed primarily by the Competition Act 1998 and the Enterprise Act 2002. As the principal regulator, the CMA enjoys significant investigative powers, as well as the ability to impose fines of up to 10 per cent of worldwide turnover on businesses who breach Chapters I and II of the 1998 Act. These concern anti-competitive agreements that have the object or effect of restricting competition (such those that result in higher prices and lower output), and also abuse by businesses that enjoy a dominant position (such as predatory behaviour and refusal to supply an essential facility, so as to drive a competitor out of the market).¹⁰¹ The CMA also reviews and can block proposed mergers and acquisitions that may result in a substantial lessening of competition. All these areas of regulation can involve an analysis of the effects on competition, but this exercise can be complicated and highly reliant on economic evidence. It is therefore undertaken by the CMA as the UK's competition regulator, with appeals heard before the specialist CAT. Where the case involves predicting the impact of competition on an event that has not yet happened (for example, a proposed merger), the analysis can be even more burdensome.¹⁰²

The key issue is what level of rigour is expected in undertaking this analysis under the Subsidy Control Act. The question of whether financial assistance is *capable* of having an effect on competition or investment in the UK is part of a four-limb test to determine whether a measure amounts to a subsidy in the first place. However, the BEIS Guidance, at paragraph 2.20, states that financial assistance must be capable of having a genuine, adverse effect that is more than incidental or hypothetical on competition or investment. As with the definition of State aid, this is likely to have a very wide meaning, as the selective nature of a subsidy and the fact it offers something that is not otherwise available on commercial terms, will usually mean there is some potential for a distortive effect.¹⁰³ The more pressing question relates to the analysis expected of public authorities for the purposes of determining whether the likely benefits outweigh the risks to competition and investment, as part of the duty to self-assess against Principles F and G. The statutory guidance published alongside the Act suggests that public authorities document the evidence, analysis and conclusions formed as part of their assessment, in the event of any pre-action request for information from an interested party.¹⁰⁴ This will include details of the balancing exercise, where the authority lists the subsidy's expected benefits and negative effects, 'considering their expected

Business, Energy & Industrial Strategy, *Consultation outcome: Reforming competition and consumer policy: government response* CP 656 (2022), noting 'When competition and consumer policies work well, markets deliver more innovation and greater productivity', *ibid*, Executive Summary.

101 See Whish and Bailey, n 41 above, ch 2.

102 See for example: European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* [2004] OJ C031.

103 Bacon, n 29 above, at [1.20]; Case T298/97 *Alzetta Mauro and others v Commission* ECLI:EU:T:2000.

104 BEIS Statutory Guidance, n 14 above, 3.13.

size and their likelihood of occurring' and coming to a decision based on the evidence available, whether the subsidy should proceed.¹⁰⁵

The guidance also suggests the level of rigour depends on the size of the subsidy: 'The depth of the analysis conducted under the assessment needs to be commensurate to the size and potential distortive impact of the subsidy or scheme in question. In most cases, assessing compliance with principles ... should be done alongside the business case study for the subsidy, using similar evidence sources and analysis.'¹⁰⁶

Thus, in relation to subsidies and schemes in excess of £5 million the guidance suggests that public authorities should identify which market(s) may be affected by the subsidy and gain an understanding of 'market characteristics' and the extent of 'market concentration'.¹⁰⁷ This involves defining the market – typically the starting point for competition law cases concerned with a proposed merger or an alleged abuse of dominance. Defining the market is of great importance because the larger the market in terms of size and turnover, the lower the potential distortion to competition caused by the subsidy.¹⁰⁸ What is also important is how concentrated the market is and whether there are barriers to entry.¹⁰⁹ This is because the distortive effects of a proposed subsidy will be greater if the potential recipients control large market shares and have few actual or potential competitors. If there are low barriers to entry and expansion, then there is likely to be stronger competitive constraints on the recipients of the subsidy. In relation to subsidies of interest (those subject to voluntary referrals to the SAU), the authority is encouraged to make a voluntary referral where the recipient of the subsidy 'has a degree of market power or the subsidy relates to a concentrated market'.¹¹⁰

To understand the potential complexity of this analysis, let us focus on the task of defining the relevant market. Market definition essentially determines which set of products or services form the relevant market for the purposes of examining the effects on competition. The starting point is to consider a set of products sold within a certain geographical area and ask whether a hypothetical monopolist controlling the sale of all of them would increase their profits by raising prices. If the price increases are profitable, then the relevant market is defined. If instead the price increases are not profitable because consumers either switch to other substitute products and services or to another geographical location, then the definition of the market is widened accordingly and the 'hypothetical monopolist test', as it is known, is repeated. The process continues until the hypothetical price increases are profitable and the relevant market has been defined. When defining a market, particular care needs to be taken where the market is very concentrated or includes a dominant firm, as

105 This is confirmed by the 'Subsidy Control Principles Assessment Template' published alongside the statutory guidance. See Subsidy Control Principles Assessment Template, Step 4 at <https://www.gov.uk/government/publications/subsidy-control-principles-assessment-template> (last visited 29 August 2023).

106 BEIS Statutory Guidance, n 14 above, para 3.11.

107 *ibid*, para 16.30.

108 *ibid*, para 16.8.

109 *ibid*, para 10.33 and 16.55.

110 *ibid*, para 10.34.

this might suggest prices are already very high and therefore the hypothetical monopoly test may not be appropriate. There can also be markets where there is a chain or hierarchy of competition between businesses – for example, a medium-priced restaurant chain might compete with both a fish and chip shop and a fine dining restaurant, but these two might not be said to apply any competitive pressure directly on each other. It may also be necessary to look beyond the perspective of the consumer and consider whether the producers of other products and services are able to easily switch to providing the products in question.¹¹¹ This would amount to a significant competitive constraint and might also be included in the definition of the market.

When hearing competition cases, the CAT has said there is no hierarchy or exhaustive list of evidence on issues like market definition.¹¹² Relevant information might include: the identity of the competitors; their customers and the products or services they sell; customer preferences and past substitution behaviour; and the costs and barriers associated with customers switching products and of new competitors entering the market.¹¹³ The statutory guidance to the Subsidy Control Act lists many of these features as being important to the assessment of higher value subsidies.¹¹⁴ It even suggests that, '[p]ublic authorities may also borrow from decisions in the field of antitrust and merger control that have considered the products or services in question'.¹¹⁵ However, where such analysis has not already been subject to a competition law case, the public authority must gather the information themselves, relying on responses to requests for information from businesses; surveys and interviews conducted with businesses and groups of consumers; and fact finding exercises that rely on publicly available information such as annual reports, public data and economic studies.

The process of market definition can get extremely complicated depending on the characteristics of the industry in question and even experienced competition authorities like the CMA or the European Commission can get it wrong.¹¹⁶ In relation to larger, potentially more distortive subsidies, public authorities can rely on the advice of the SAU. However, the public authority must still have undertaken its own analysis as part of the self-assessment duty that is then reviewed by the SAU. That amounts to a significant initial hurdle that must be overcome by the authority – especially as the SAU's report does not amount to a replacement for the self-evaluation exercise and may suggest the public authority go back and undertake a more detailed examination of the market.

111 *Generics (UK) v CMA* Case C-307/18 ECLI:EU:C:2020:52; Case 1009/1/1/02 [2003] CAT 11, discussed in Whish and Bailey, n 41 above, 31.

112 *Aberdeen Journals v OFT* [2003] CAT 11.

113 For a fuller list and explanation of relevant evidence in market definition, see Draft Commission Notice on the definition of the relevant market for the purposes of Union competition law (2022) para 3.2; and Office of Fair Trading, *Market Definition* OFT 403 (December 2004) para 3.7.

114 BEIS Statutory Guidance, n 14 above, paras 16.29–16.63 and 16.52.

115 *ibid*, para 16.40.

116 See for example Case T-691/14 *Servier and Others v Commission* ECLI:EU:T:2018:922 and *BGL (Holdings) Limited & Others v Competition and Markets Authority* [2022] CAT 36.

The way in which the statutory guidance on market definition and concentration is focused on subsidies of £5 million or over implies that those falling below the voluntary referral threshold (and above the £315,000 minimum financial assistance threshold) can be subject to simpler analysis. However, public authorities will still be mindful of the need to evidence that Principles F and G have been given proper consideration, to limit the prospects of a successful challenge under judicial review. Indeed, the CAT are unlikely to be satisfied without evidence that the definition of the market was given some thought. This is because a partial or fragmented view of the relevant market can easily result in a flawed view of the likely effects of the subsidy on competition. Public authorities of all sizes who are not confident in evaluating subsidy awards against Principles F and G may need to seek expert advice, for fear their decisions might otherwise be reversed by the CAT. This could discourage them from awarding medium sized subsidies.

Whatever the appropriate level of rigour turns out to be, the Subsidy Control Act requires public authorities to undertake some competition analysis, where previously they undertook none. This is in addition to applying other complex assessments that are required by the principles, such as the existence of an incentive effect that brings about a change in the beneficiary's behaviour. Under EU State aid, the vast majority of subsidy awards benefit from the GBER (as discussed below). Where a subsidy or subsidy scheme requires notification and approval, it is the Member State government who typically prepares the application (not a local authority) and the analysis and balancing test is undertaken by the European Commission as the specialist regulator. Therefore, arguably, the task for UK public authorities is now more complex and less certain.

The limited role of 'Streamlined Routes'

The 'quicker, fairer and simpler' approach based on public authorities self-assessing against the subsidy control principles, was intended to avoid the need for an equivalent of the EU State aid Block Exemption Regulation (GBER). As explained earlier in this paper, the idea was to give public authorities freedom to design subsidies in the form and amount that best suits the desired outcome and avoid the tendency to design them around the specific categories of a block exemption regulation.¹¹⁷ By 2017, around 97 per cent of State aid measures awarded in the EU fell within the GBER.¹¹⁸

Nevertheless, section 10 of the Subsidy Control Act allows a Secretary of State to create and lay before parliament a Streamlined Subsidy Scheme (also known as a 'Streamlined Route'). This is described as 'a type of subsidy scheme

117 See for example the Forward to Departments for Business and Trade, and Business, Energy & Industrial Strategy, *Research, Development and Innovation Streamlined Route Guidance* (December 2022) (RDI Route Guidance).

118 Nick Wright, 'The UK Experience of State Aid Evaluation' (2018) 17 *European State Aid Law Quarterly* 525, 527, citing European Commission, 2017 State Aid Scoreboard.

made by the UK government that offer a pre-assessed option'.¹¹⁹ Whereas the GBER has the effect of deeming aid compatible with Article 107 TFEU and exempting it from the notification requirement of Article 108(3), the UK Streamlined Routes allow public authorities to grant certain categories of subsidy without having to undertake their own assessment against the subsidy control principles, thereby enhancing legal certainty. In essence a Streamlined Route has already been assessed by the UK government to be compliant with the principles set out in the Act (and therefore by extension, the principles set out in the TCA). They do not require assessment by the public authority against those principles or referral to the SAU.¹²⁰ An individual subsidy or subsidy scheme under a Route is not subject to review by the CAT, so long as it genuinely falls within the terms of the Streamlined Route. However, Streamlined Routes do not relieve public authorities of their transparency requirements and so details of any subsidy in excess of £100,000 granted under a Route must still be published on the transparency database.¹²¹ The scope to challenge a Streamlined Route itself is limited – interested parties can apply to the CAT for a review of the UK's decision to make a Streamlined Route, within one month of the Route being uploaded to the subsidy database. After this time, it is safe from challenge on subsidy control grounds (but can still be challenged on general public law grounds).¹²²

The government made three Streamlined Routes to coincide with the start of the new subsidy control regime: (1) Research, Development and Innovation; (2) Energy Usage; and (3) Local Growth. These cover areas 'where historic subsidy-giving practice coincides with strategic objectives of the UK government' and were developed through close engagement with public authorities and devolved administrations around the UK.¹²³ The strategic objectives are increasing investment in research development and innovation, supporting the transition to net zero carbon emissions, and promoting growth around the UK. The third of these is closely aligned with the UK government's levelling up agenda, to reduce economic disparities between different regions and cities of the UK.¹²⁴

The Forward to the three Streamlined Routes makes very clear that these should not be treated as block exemptions:

Although there are topical similarities, the Streamlined Routes do not function as and are not intended to be replacements for the General Block Exemption Regulation under the EU State aid system. Streamlined Routes are intended to help with the award of the lowest-risk and most frequently awarded subsidies. The UK regime has far fewer barriers to giving financial assistance outside the scope of Streamlined

119 See UK subsidy control regime, Guidance and information on the UK subsidy control regime at <https://www.gov.uk/government/collections/subsidy-control-regime> (last visited 7 July 2023).

120 A judicial review can still be brought for failure to comply with other breaches of public law. See BEIS Statutory Guidance, n 14 above, para 1.15–1.16.

121 RDI Route Guidance, n 117 above, para 6.33.

122 *ibid*, para 3.5–6.

123 See *ibid*, Forward and para 2.2.

124 See HM Government, *Levelling Up the United Kingdom* n 2 above.

Routes than there were to giving aid outside the block exemptions under the EU system.¹²⁵

Despite the ostensibly distinct role of the Streamlined Routes and differences between State aid and the Subsidy Control Act, their overall approach is very similar to the GBER. In particular they employ identical or very similar definitions; set out very similar eligibility criteria and categories of eligible cost; make equivalent adjustments for small and medium sized enterprises, and both set maximum subsidy amounts and maximum subsidy ratios (known as ‘aid intensity’ under the GBER).

For example, one of the most important provisions is Category 2 of the Research, Development and Innovation Streamlined Route, which covers subsidies for industrial research and experimental development projects. Both this and the equivalent provision of the GBER (Article 25) aim to overcome a key market failure, in that many enterprises view the cost and significant uncertainty of industrial and experimental research as prohibitively high. Both the Streamlined Route and the GBER have identical definitions of ‘industrial research’ and ‘experimental research’, drawn from internationally recognised standards. Essentially, the former relates mainly to critical investigation aimed at acquiring new knowledge and skills for the development of new products, processes and services, while the latter is about using existing knowledge and skills to design new products or improve existing ones.¹²⁶ Both the Streamlined Route and GBER cover broadly the same eligible costs (personnel costs, costs of instruments and equipment, buildings and land, external consultancy, project and overhead costs), and contain similar limitations and conditions (for example in relation to depreciation costs of equipment). They both set maximum subsidy ratios of 50 per cent for industrial research and 25 per cent for experimental development, with upward adjustments in these maximums of 10 per cent for medium-sized enterprises and 20 per cent for small enterprises.¹²⁷

However, there are two notable and significant differences between the Streamlined Routes and the GBER. The first is that the maximum subsidy amounts are significantly lower under the Streamlined Routes. The GBER was more generous to begin with, but the difference in maximum amounts has become even more stark due to an unfolding subsidy war between the EU and the US in relation to green industries. The European Commission had already introduced Temporary Crisis Frameworks to create further carve-outs, with the purpose of allowing Member States to use subsidies to help deal with the impact of the Covid-19 pandemic and later the Ukraine war.

In 2022, the United States passed the Inflation Reduction Act which aimed to roll out some \$369 billion in green subsidies that strongly incentivise related manufacturing to occur in North America.¹²⁸ Combined with high energy prices in Europe and reports of significant hidden subsidies in China, there

125 RDI Route Guidance, n 177 above.

126 *ibid*, paras 13.8-13.9 and GBER, Art 2(85).

127 Compare *ibid*, para 5.1 with GBER, Art 25(3).

128 See for example Sam Fleming and others, ‘Can the EU keep up with the US on green subsidies?’ *Financial Times* 1 February 2023.

was a fear that green manufacturing industries would leave Europe.¹²⁹ On 1 February 2023, the European Commission announced a plan to ‘enhance the competitiveness of Europe’s net-zero industry and support fast transition to climate neutrality’.¹³⁰ The plan signals a greater willingness to provide support for the EU’s net-zero technologies manufacturing capacity.¹³¹ One of the key priorities of the plan is to give Member States greater flexibility when it comes to support measures in key sectors, such as energy performance of buildings, investment aid for recharging and refuelling infrastructures and facilitating an expansion in training aid for relevant skills.¹³² On 9 March 2023, the Commission endorsed a targeted amendment of the State aid GBER to significantly increase the flexibility enjoyed by Member States to design and implement support measures in sectors considered key to the transition to net-zero.¹³³ While the focus is on green industries, the amendments make significant upward adjustments to the maximum subsidy amounts across the parts of the GBER that have equivalents in the UK Streamlined Routes.

Table 1 below summarises the maximum subsidy amounts allowed by the three UK Streamlined Routes and the equivalent maximums under the GBER, including the proposed increases under the EU’s Green Deal Industrial Plan.

There are some small differences in the conditions attached to these maximum amounts and precisely how they apply. For example, the GBER maximum for Support of Process and Innovation Organisation applies to enterprises of all sizes, not just SMEs. Nevertheless, it is apparent that the UK Streamlined Routes create a much smaller safe harbour for low-risk subsidies than the equivalent provisions of the GBER, especially if we consider the planned increases announced in response to the US Inflation Reduction Act. In March 2023 the UK government published its much-awaited green strategy document and announced it would not participate in a subsidy race with

129 See for example Sam Fleming and others, ‘EU vows to counter China over “massive” subsidies to its industries’ *Financial Times* 10 February 2023.

130 European Commission, ‘The Green Deal Industrial Plan: putting Europe’s net-zero industry in the lead’ Press Release IP/23/510, 1 February 2023.

131 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A Green Deal Industrial Plan for the Net-Zero Age’ 1 February 2023, COM(2023) 62 final. 132 *ibid.*, 9.

133 Annex to the Communication to the Commission: Approval of the content of a draft for a Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty C(2023) 1712 final.

Table 1. Comparison of UK Streamlined Routes and EU GBER Maximum Subsidy Amounts

	UK Streamlined Route Maximum Subsidy Amount	Equivalent EU GBER Maximum Subsidy Amount (New Green Deal Maximum)
Research, Development and Innovation Streamlined Route¹³⁴		
Feasibility studies ¹³⁵	GBP 3 million	EUR 7.5 million (EUR 8.25 million)
Industrial research and experimental development projects	GBP 3 million	Industrial: EUR 20 million (EUR 35 million) Experimental: EUR 15 million (EUR 25 million)
SME innovation services	GBP 500,000.	EUR 5 million ¹³⁶ (EUR 10 million)
SME Process and Organisation Innovation	GBP 500,000.	EUR 7.5 million (EUR 8.25 million)
SME Equipment and Instruments	GBP 500,000.	EUR 20 million (EUR 35 million)
Energy Usage Streamlined Route¹³⁷		
Energy demand reduction	GBP 3 million	EUR 15 million ¹³⁸ (EUR 30 million)
Green heat networks	GBP 15 million	EUR 15 million (EUR 50 million)
Related skills training development	GBP 1 million	EUR 2 million (EUR 3 million)
Local Growth Streamlined Route¹³⁹		
SME business development projects	GBP 400,000 (grants) GBP 600,000 (debt finance)	EUR 7.5 million (EUR 8.25 million)
Employment of workers with disabilities	GBP 5 million	EUR 10 million ¹⁴⁰ (EUR 11 million)
Employment of disadvantaged workers	GBP 5 million ¹⁴¹	EUR 5 million (EUR 5.5 million)

the EU and the US by making significant expansions to subsidies for green industries.¹⁴²

The second notable difference between the Streamlined Routes and the GBER concerns scope. In comparison to the 11 categories contained in the three UK Streamlined Routes, the GBER contains 16 sections that cover around 58 categories of aid (some overlapping and others closely related).¹⁴³ Some of these are specific to EU schemes (such as aid for European territorial

134 Equivalent EU provisions are GBER, Arts 25–26 and 28–29.

135 The GBER maximum applies per study, whereas the Streamlined Route is per enterprise, per study.

136 The EU maximum for this and for process and organisation innovation is per enterprise, per project.

137 Equivalent EU provisions are GBER, Arts 31, 38 and 46.

138 EUR 30 million where combined investments under GBER, Art 39(2a).

139 Equivalent EU provisions are GBER, Arts 17 and 32–35.

140 In relation to wage subsidies or additional costs of employing workers with disabilities.

141 There is also a maximum of GBP 500,000 to a single enterprise for the operational costs of access programmes.

142 HM Government, *Powering Up Britain* March 2023, 10 at <https://www.gov.uk/government/publications/powering-up-britain> [<https://perma.cc/XQ48-NJAW>].

143 The full list of GBER Sections is (1) Regional aid; (2) Aid to SMEs; (2a) Aid for European Territorial Cooperation; (3) Aid for access to finance for SMEs; (4) Aid for research and development and innovation; (5) Training aid; (6) Aid for disadvantaged workers and for workers with disabilities; (7) Aid for environmental protection; (8) Aid to make good the damage caused by certain natural disasters; (9) Social aid for transport for residents of remote regions; (10) Aid for broadband infrastructures; (11) Aid for culture and heritage conservation; (12) Aid for sport

cooperation) and others cover the national provision of spending on initiatives such as telecommunications infrastructure. However, compared to the Streamlined Routes, the GBER contains wider provisions relating to RD&I, SMEs, training, and aid for environmental protection. It also covers areas such as culture and heritage conservation, that are not covered by a Streamlined Route at all.

While the Streamlined Routes are meant to serve a distinct function to the GBER, from the perspective of public authorities the two will be viewed as a source of continuity between their pre-Brexit EU State aid obligations and the UK's new subsidy control regime. This is important because of the high level of reliance on the GBER as a guarantor of lawful subsidy awards. Some 82.2 per cent of the total volume of new subsidy schemes granted by the UK in 2018 fell within the GBER.¹⁴⁴ The fact the Streamlined Routes are less generous and cover fewer categories, mean that many subsidy awards in the UK that previously benefited from the protection of the GBER, will now have to be self-assessed and may be subject to referral to the SAU or challenge before the CAT. This combined with the requirement to consider distortions of competition and investment within the UK arguably means public authorities face greater uncertainty than was the case under EU State aid rules.

CONCLUSION

Subsidies have the potential to help the UK achieve a range of important economic goals by addressing historic market failures. The devolution of spending power could reduce regional inequality if public authorities have the freedom and confidence to award beneficial subsidies that best serve their cities and regions. The Subsidy Control Act 2022 introduced a new UK regime that promised to help facilitate this by creating a system that was quick, flexible and non-prescriptive. While the focus on self-regulation and reliance on transparency and private enforcement appear consistent with this approach, there are key aspects of the new regime's design and operation that could make it far more onerous than the system of EU State aid it ultimately replaced. As the system is based on self-assessment and not ex-ante regulatory approval, a public authority is vulnerable to challenge where any mistake or significant omission has been made in its analysis of whether a subsidy is consistent with the principles set out in the Act. This paper has shown the complexities of undertaking just one aspect of this assessment (market definition for the purposes of considering the potential negative effects on competition) and it is notable that the early reports published by the SAU appear to call for more

and multifunctional recreational infrastructures; (13) Aid for local infrastructures; (14) Aid for regional airports; (15) Aid for ports; and (16) Aid involved in financial products supported by the InvestEU Fund.

144 Department for Business, Energy & Industrial Strategy, *Subsidy Control: Designing a new approach for the UK impact Assessment* 14 March 2022, para 54 at <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk> [<https://perma.cc/6B6J-6M3Q>].

effort in the self-assessment process.¹⁴⁵ While the statutory guidance suggests the level of rigour should be proportionate to the size of the subsidy, the exercise of defining the market is likely to be necessary for smaller awards, to respond to requests for information from interested parties and defend against potential judicial review. A similar level of complexity and rigour is also likely to be necessary in relation to other subsidy principles set out in the Act.

In addition, expecting public authorities to undertake the sort of balancing exercise that in EU State aid is reserved for the European Commission, risks significant inconsistencies in approach and rigour. For example, the devolved administrations and larger bodies will have better resources and expertise to carry out the self-assessment exercise, as compared to smaller local authorities. This is especially so given that the exercise involves balancing the possible distortions to competition against a range of far less tangible economic, social and political considerations inherent in subsidy awards. There is also scope for the system to be abused by public authorities who are unwilling or unable to undertake the exercise properly. Enforcement of the regime by interested parties depends crucially on transparency arising from public authorities' duty to upload details of subsidies onto the public database. Where they choose not to (for example by treating it as spending that does not amount to a subsidy for the purposes of the Act), it may be very unlikely interested parties will identify a harmful subsidy and attempt to challenge it. The authority may be emboldened by the fact the Act does not set out any specific sanction or consequence for failing to do so. Alternatively, they may choose to publish the details and simply wait to see if there are any requests for information or challenges within the one month window, choosing to only award the subsidy once the window has closed. In the absence of a formal regulator, many smaller awards that are incompatible with the Act could go undetected. These sorts of transgressions, delays or any chilling effect caused by uncertainty regarding the self-assessment exercise will hinder the award of subsidies needed to stimulate economic activity and address the sorts of market failures that are contributing to inequality between regions.

Taken together, these factors heighten the need for the sort of legal certainty provided by the safe harbour of the Streamlined Routes. They operate in a very similar way to the GBER under EU State aid, in that any subsidy award or scheme that meets the criteria, conditions and thresholds of a Streamlined Route, does not need to be assessed against the subsidy control principles or referred to the SAU, and cannot be challenged before the CAT. However, the maximum award amounts allowed by the Streamlined Routes and their scope are significantly smaller than under the equivalent provisions of the GBER and this gap in generosity has become even more stark in light of the unfolding subsidy war between the EU and US on green industries. The fact is many subsidy decisions that previously benefitted from the GBER when the UK was a Member State, must now engage in the uncertain process of self-assessing against the subsidy control principles. If a possible chilling effect is to be avoided, then the generosity and scope of the Streamlined Routes need to be

145 As of 7 July 2023, there were 12 SAU referrals with eight published reports, and one case pending before the CAT.

significantly expanded. This may go against the flexible approach underpinning the new subsidy control regime, but if flexibility results in uncertainty and a lack of confidence, then an enhanced role for the Routes will be essential to successfully devolving spending powers.