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Subsidy control lessons to be learnt from Bulb

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The Bulb judgment on 31 March 2023, is one of only two subsidy control cases which have been brought before the UK Courts since the UK left the European Union. Whilst the case related to alleged non-compliance with the subsidy control principles in the Trade and Co-operation Agreement (TCA) implemented in domestic law by the European Union (Future Relationship) Act 2020 Pt 3 s.29(1), it highlights important principles that are likely to carry over to the Competition and Appeals Tribunal's application of the Subsidy Control Act 2022 (the SCA).

The facts of Bulb

In conjoined claims, the Claimant energy suppliers applied for permission to seek judicial review of decisions made by the defendant secretary of state in connection with the transfer of the business one retail energy supplier (Bulb) to another (Octopus).

In 2021, Bulb ran into severe financial difficult and as a result of this an administration order was made and joint energy administrators (JEAs) were appointed under the Energy Act 2004 to oversee the sale of Bulb's business.

By the initial deadline set, only two bids were received for the purchase of Bulb's business, with Octopus not submitting a bid at this stage. There were then communications with Octopus about why they did not submit a bid for Phase 1 of the process and, at this point, Octopus did submit a bid which involved the Government funding the purchase and providing funding for the costs of complying with any ringfenced protections imposed by the regulator in respect of customer credit balances and renewables obligations. The joint energy administrators recommended to the Government that the bid be accepted and this is what later occurred, following an independent review and a report which indicated that the subsidy control principles within the Trade and Co-operation Agreement were complied with.

The Government subsequently made two decisions in relation to the transaction:

- **The Funding Decision**: This was the decision which approved the sale to Octopus and that the Government would provide the funding. This transaction concluded on the 28 October 2022 and a press release was issued on the 29 October 2022.
- **The Approval Decision**: This decision related to the Government approving the energy transfer scheme (the scheme moving Bulb customers across to Octopus). This decision was made on the 7 November 2022.

Together these are referred to as the "Decisions" in this article.

On the effective date of the energy transfer scheme, the majority of Bulb's assets were transferred to "HiveCo", and the shares in HiveCo were transferred to Octopus.

The grounds of challenge

The Claimants essentially brought two different sets of challenge grounds, referred to in the judgment as the "Public Law Grounds" and the "Subsidy Control Grounds". For the purposes of this article we look more specifically at the Subsidy Control Grounds, which were outlined as:

- **Ground 1**: The Funding Decision failed to meet the requirements of the subsidy control principles set out in Article 366(1) of the Trade and Co-operation Agreement, advancing the following arguments:
  1. The SoS wrongly proceeded on the basis that the M&A process was open, non-discriminatory and competitive
  2. The Defendant's reasoning on the application of Article 366(1) Trade and Co-operation Agreement to the subsidy took into account

irrelevant considerations and/or failed to have regard to relevant considerations
3. For the purposes of Articles 366(1)(b) and (c), the regulatory change protection that has been provided to HiveCo/Octopus was not linked to any of the Defendant's objectives and/or was disproportionate.
4. For the purposes of Article 366(1)(f), the Funding Decision failed properly to take into account the potential scale of distortions to competition and to trade and investment caused by the subsidy
5. For the purposes of Article 366(1) the Defendant erred in law in identifying, as objectives of the subsidy, the need to remedy a perceived "market failure", the avoidance of social hardship from a "hard close insolvency" and/or allowing a "key challenger" to remain in the market.

- **Ground 2**: The Funding Decision was unlawful on the basis that the subsidy included an unlimited guarantee prohibited by Article 367(2) Trade and Co-operation Agreement.
- **Ground 3**: The Funding Decision was unlawful under Article 367(3)-(4) Trade and Co-operation Agreement (which deal with subsidies given in relation to national or global economic emergencies or restructuring subsidies respectively).

The outcome: Undue delay

The first notable outcome is that the Court dismissed all of the public law grounds and subsidy control grounds on the basis of “undue delay”, applying S31(6) of the Senior Courts Act 1981.

In general, the time limit for bringing a judicial review claim is three months after the event which gave grounds to a claim arose, but the Court emphasised that claims can still be out of time even if issued within the three-month period, depending on the facts of the case.

In this case, British Gas did not actually issue its claim form until the 28 November 2022 and the other Claimants did not issue until the 29 November 2022, approximately one month after the Funding Decision was made, and three weeks from the date of the Approval Decision. The Court ruled that this was sufficient to constitute “undue delay” and gave the following reasons:

- The Court felt it was incumbent on the Claimants to move very quicky following a hearing on the 11 November 2022 where the joint energy administrators were applying to fix an effective date for the energy transfer scheme. Those proceedings were specifically adjourned so the Claimants could consider a JR claim and seek further information. The Court felt that the Claimants would have had sufficient information at this point to outline the essential substance of their claims
- The Claimants tried to argue that they had to write pre-action protocol letters, but the Court pointed to the Administrative Court’s judicial review guide which makes clear no such letters are necessary in very urgent cases.
- The Court also dealt with an argument brought under Article 373(2) of the Trade and Co-operation Agreement. This sets out that a “recovery order” may be made by the Courts if a challenge is brought within 1) one month of the date a notice is uploaded on the BEIS database for subsidies; or 2) one month from the date the interested party is given the requisite information following an information request under Article 369(5). The Claimants looked to argue that so long as the claim was brought within these time limits, no issue of delay can arise. This was rejected by the Court which emphasised that the Trade and Co-operation Agreement wording only stated that recovery “may” be ordered. It was only an option and did not prevent the Court refusing the remedy on discretionary grounds, such as for delay.

Subsidy Control Grounds

Ground 1

The Court held that when reviewing assessments of the subsidy principles outlined in Article 366 the domestic law public principles of rationality and proportionality are relevant. However, the standard of that review of proportionality by Courts should allow quite a wide range of discretion to the decision maker, with the Court drawing parallels to how it reviews Human Rights cases and the enhanced margin of appreciation it gives when reviewing the decisions of the executive in scientific, technical and predictive assessment contexts. It placed a degree of weight on the case of Lumsdon and the notion that a Court will only interfere if a measure is “manifestly inappropriate” when reviewing a measure involving critical economic or social choices and where complex assessment is required. Taking this approach, it then took each sub-ground in turn:

- It held that the Government was reasonably entitled to conclude that the bid process had been conducted as an "open, non-discriminatory and competitive" bidding process such that they could treat the only bid which had emerged from the process as a fair reflection of the value which the market placed on Bulb's business. In particular, it pointed to the following factors supporting this conclusion:

1. The process was conducted with the involvement of expert advisors and the joint energy administrators.
2. The work done by those expert advisors during the process assured the Government that the process was comprehensive, competitive and they also did work analysing counterfactuals.
3. BEIS had played an active role in engaging with those advisors and the joint energy administrators throughout the process.
4. The bid process was also further supported by counterfactual and benchmarking analysis, which are both established methods of working out whether a transaction is on market terms.

- The Government's assessment against the principles did not take account of irrelevant considerations or failure to have regard to relevant considerations. Again, the focus of the Court's reasoning for this conclusion is that the Government was acting reasonably and taking advice from relevant experts as to the different types of analysis and scenarios that should be considered.
- In relation to the policy objectives identified in the assessment, the Court concluded the desire to avoid a hard close insolvency was a rational one because if this occurred Bulb customers would lose credit balances, any form of customer services etc. The fact there were other options available to the Government which may have achieved the same objective did not preclude the Government from relying on this route. Interestingly, the Court did state that it had difficulty seeing how the Government could rationally have concluded that the unwillingness of the loan market to provide funding to Bulb in the financial difficulties it was in before it went into the administration regime demonstrated evidence of a market failure of the loan market. However, the fact this was identified as a secondary objective to the primary one of protecting Bulb Customers meant the Court did not see this as fatal on the facts.

Ground 2

The argument here was that, as part of the Funding Decision, an agreement was entered into under which there was an exchange of cashflows for the period ending on the 31 March 2023 (referred to as the WAMA). The Claimants argued that this constituted an unlimited guarantee. Under the WAMA the Government agreed to pay the actual wholesale cost of HiveCo's acquisition of energy in return for payment for the same amount of energy at the Ofgem wholesale price cap. The Court did not accept that this transaction constituted an unlimited guarantee and furthermore was of the view that the value of the transaction could be reasonably ascertained at the point it was entered into.

Ground 3

The assessment conducted against the subsidy principles stated that the severe economic disruption and volatility caused by the "Russian invasion of Ukraine in February 2022" constitutes a national or global economic emergency, and that the subsidies provided to HiveCo constitute a "targeted, proportionate and effective" response in order to remedy that emergency. The Court was satisfied that that this was an assessment reasonably open to the Government. It was clear the economic consequences of the invasion had a very significant impact on the support required for Bulb to exit the Special Administration Regime that it had been placed into.

Ground 4

The Trade and Co-operation Agreement provisions in relation to restructuring subsidies specifically set out that owners or new investors in an economic actor receiving a subsidy shall "contribute significant funds to the cost of any restructuring" unless the economic actor is an SME. The Claimants contended that Octopus had not made a sufficient contribution. However, the Court dismissed this argument pointing to the fact Octopus' contribution had been taken into account in the principles assessment, their bid had emerged from an open and competitive bid process so could be concluded as being competitive, and that Octopus was taking on operational and reputational risks.

Key lessons

The Bulb judgment is complex factually and legally. It should also be noted that the judgment refers to the interpretation of the Trade and Co-operation Agreement and so the principles outlined will not automatically apply to future judgments that the CAT makes in relation to the Subsidy Control Act 2022, although it is likely to be persuasive in those situations. Nevertheless, it does raise some very salient points which are likely to apply in cases brought under the Subsidy Control Act 2022 moving forwards.

1. **Challengers will need to be careful not to fall foul of "undue delay".** It appears that simply bringing your claim within the time limits prescribed by Part 5A 95A of the Competition and Appeals Tribunal Rules 2015 may not be sufficient to ensure challengers have access to the fall array of judicial review remedies which would be available to the CAT. Whilst the CAT does not have a permission stage like judicial review claims, the question of undue delay is likely to play a major role in determining whether any remedy should be awarded. This is reinforced by S72(8) of the Subsidy Control Act 2022 which states that the CAT may refuse to grant any relief if it considers there has been undue delay in making the application.
2. **It confirms the standard of review the Court will take in relation to subsidy principle assessments.** This is perhaps the most

important point from the judgment, as it has been made clear that the CAT will apply judicial review principles when hearing subsidy control cases. *Bulb* has made it clear that, when it comes to reviewing a public authority's principles assessment, the grounds of both rationality and proportionality shall apply. However, given the technical nature of subsidy principle assessments, the Courts will apply an enhanced margin of appreciation to public authorities' decisions and only interfere where the assessment appears to be "manifestly inappropriate".

This can be contrasted to the British Sugar case where the Court made a determination as to whether the Government was right to consider that a measure was not a subsidy. It appears therefore there will be a distinction drawn between different elements of the Subsidy Control Act 2022, with questions of law being determined by the Courts, but areas of the Subsidy Control Act 2022 where an element of discretion is imposed on the public authority being subject to a much lighter level of scrutiny.

It will be interesting to see how closely the CAT scrutinises authorities' decisions on whether a subsidy arises in the first place. A decision as to whether the commercial market operator principle applies is more subjective than a decision on whether a measure benefits an enterprise so we may find different levels of scrutiny apply to different elements of the question 'is there a subsidy'?

The position will become clearer as more cases are brought before the CAT, but this judgment provides some very useful indicators on how subsidy control will be managed by the CAT and Courts.

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