

Subsidy control - lessons learned in the first year

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In January 2023, a new regime controlling subsidies given by public authorities was brought in under the Subsidy Control Act 2022. Since then, public authorities have been tackling the steep learning curve by organising workshops and training, establishing processes and policies and registering their subsidies on the transparency database. Having supported all tiers of government on compliance with the new regime we have set out some key learning points for [local authorities](#) which have arisen in the last few months.

What are the most significant differences between the regime under the [subsidy control](#) and state aid regime for public authorities?

The new subsidy control regime is much broader in scope. Under the state aid regime, where a measure had a purely local impact then this would not impact trade between Member States so would not be subject to the state aid rules. Under the Act, the test is much wider. Now, a measure which has an impact on trade or investment within the UK or between the UK and a country or territory outside of the UK could be caught by the subsidy control regime.

The Statutory Guidance gives examples of subsidies occurring where a measure has an effect only within a very small area — for example, where two firms operate from the same business park or where two newsagents operate within the same remote rural village. The practical impact of this for public authorities is that a vast number of more localised measures which would have fallen outside the state aid regime are now caught by the new regime. The greater flexibility of the new regime means that there are generally routes to manage any subsidies, but the time required to identify and address a subsidy, including carrying out an assessment of the subsidy control principles, can be burdensome. Many of our clients have found it helpful to ensure that officers and lawyers are given training to raise awareness of the regime and to ensure that subsidies are spotted and managed appropriately. Checklists and processes for managing subsidies can also be useful in ensuring that legal teams have the facts they need to confirm that a subsidy is being granted and how to manage it. Having strong internal processes is vital to ensure that subsidies are effectively identified and granted compliantly.

Along with greater scope, the Act brings greater flexibility. This has been a significant benefit to some projects which would not have fitted within the scope of the General Block Exemption Regulation (GBER) and would therefore have had to have been notified to the European Commission for approval. Under the Act, a public authority can carry out its own analysis of the subsidy control principles. Subject to certain prohibitions and restrictions, provided that the public authority is satisfied that the principles are met, it can make the subsidy in compliance with the Act. This means that a public authority can decide for itself whether a subsidy is compliant. Carrying out an analysis of the subsidy principles is a task which some authorities are becoming more used to, although this is certainly something of a skill which takes time to develop. Getting together the right team is key and requires officers with detailed knowledge of the project as well as legal, financial and economic support in many cases.

What is the role of the Competition and Markets Authority (CMA)'s Subsidy Advice Unit

Public authorities must submit 'subsidies of particular interest' for the Subsidy Advice Unit for review before they are granted - these are the highest value and most distortive subsidies, which the Subsidy Advice Unit considers and comments on how the assessment could be made more robust. The Subsidy Advice Unit is not an enforcer or regulator. Instead, it provides feedback on the assessments conducted by public authorities which can support them in identifying areas of improvement. Although limited in scope, the feedback is helpful when undertaking principle assessments as it provides guidance on the areas that the Subsidy Advice Unit is going to be concerned about in similar cases. Key takeaways are around ensuring that the policy objective is clearly identified and ensuring that where a particular approach has not been considered or pursued, the reason for this is noted.

What isn't working so well?

Once granted, subsidies have to be uploaded to the UK's transparency database - this is how potential challengers can learn about a subsidy and take action. Importantly for public authorities, the limitation period for challenges only starts to run once an entry has been made on the database. Many authorities are still not complying with the requirement to put subsidies into the database though, which means that the enforcement of the regime cannot work effectively, and for those authorities which have made subsidies and not updated the database, time hasn't started running to challenge those subsidies which may leave them exposed

What can public authorities take away from the recent subsidy cases, **Bulb** and **Durham**?

There have been two important decisions this year in the subsidy arena. The first was the Bulb judgment. In that case two key points were made. Firstly, parties wishing to challenge a subsidy will need to act very quickly indeed. The time period to bring a challenge is a mere month from the relevant date. In the Bulb decision, the Divisional Court found that the claimants had unduly delayed in bringing their claim, despite being within the limitation period. Failing to bring a claim without 'undue delay' may result in the tribunal refusing to grant relief. The second point is that the Competition Appeals Tribunal will apply judicial review principles when hearing subsidy control cases, in accordance with the requirements of the Act.

In Durham the Court considered whether it was possible for a public authority to be both granting authority and recipient enterprise in relation to the same subsidy and concluded that it was not - two separate persons must be involved in the transaction. This means that if a public authority uses its own funds in a way which assists its commercial operations, this will not amount to a subsidy. This does not mean public authorities cannot receive subsidies in other circumstances - for example, where another public authority provides financial assistance such as Levelling Up Funding.

The Court also considered s.7(2) of the Act, providing that "*an activity is not to be regarded as an economic activity if or to the extent that it is carried out for a purpose that is not economic*". This is helpful in the local authority context but it is not expressly addressed in the Guidance. The judgment makes clear that where a public authority is acting under a statutory duty, its purpose will not be economic and therefore the authority would not be acting as an enterprise. However, it does not clarify whether the position is different where the activity undertaken by the public authority is undertaken subject to a power, rather than a duty, but nonetheless is not driven by commercial motives, or whether this can be used by other entities, such as charities.

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