

The transparency regime under the Subsidy Control Act - how it could be improved

17 May 2024

In December 2023, the Department for Business and Trade (DBT) published its research report 'Establishing baseline for monitoring and evaluation of the subsidy control regime' (Report). Although the report looks at subsidies granted between 1 January 2021 and 4 January 2023 whilst the UK-EU Trade and Co-operation Agreement (TCA) was in force (Interim Period), it is illustrative of the issues that the transparency regime under the Subsidy Control Act 2022 (SCA) faces.

What are the transparency requirements?

Chapter 3 of Part 2 of the SCA sets out the requirements in relation to Transparency. An entry on the transparency database (Database) which is maintained by DBT must be made in relation to all subsidies and subsidy schemes (regardless of value). This does not apply where the subsidy itself was granted under a scheme, a streamlined route, or under the rules on Minimal Financial Assistance or SPEI Assistance, where a threshold of £100,000 applies before an entry must be made. Database entries must be made within three months of confirmation of the decision to give the subsidy or make the subsidy scheme in most cases. Additionally, the database entry must be maintained for six years starting from the date on which the entry is made or for the duration of the subsidy or scheme if longer. If the subsidy is modified, then in many cases an entry must be made on the database in respect of the modification – the time limit for this is within three months of the modification in most cases.

The exact details that must be uploaded are set out in the Subsidy Control (Subsidy Database Information Requirements) Regulations 2022. These include:

- the legal basis for making the subsidy;
- the specific policy objective that the subsidy is aimed at;
- the details of the awarding public authority and the recipient, as well as the value of the subsidy; and
- the date on which the decision to award the subsidy was made.

The impact of non-compliance with transparency obligations

The Report considers the experiences of public authorities making subsidies during the Interim Period, with the aim of establishing a baseline against which public authorities' experience of the SCA can be compared in the future. The requirement to upload information to the Database was similar during the Interim Period to under the SCA, albeit with a higher threshold for making database entries. Analysis of entries made on the Database was carried out as part of the research for the Report.

The Report acknowledges that due to the value thresholds for reporting, there is no definitive picture of the total number of subsidy awards made during the Interim Period. However, we consider that there is also a strong likelihood that many subsidies awarded were not uploaded on the Database, regardless of the reporting threshold.

In our experience, subsidies are often not uploaded because of a lack of awareness of the requirement to upload information to the Database in the first place, or because the public authority is not aware that they have granted a subsidy at all. In many cases the

increased scope of what amounts to a subsidy under the SCA means that what would once have been considered not to give rise to State aid, because of the higher threshold for a measure having a relevant effect on competition, is now a subsidy, and some public authorities have not yet understood that or its consequences. This is particularly an issue with smaller local authorities and sub-central government bodies. The Database itself shows that central government bodies are making regular entries on the database, but many other bodies have never made an entry or only made a single entry, which is not reflective of our experience of the range and nature of subsidies which come across our desks.

The Database is a crucial element of the enforcement of the UK's subsidy control framework. Adding correct and accurate details of subsidy schemes and awards to the Database enables interested parties to examine subsidies and determine whether they wish to contest a subsidy before the Competition Appeal Tribunal. Failing to make an entry on the Database means that those who may be negatively affected by a subsidy may be unable to challenge it, because they may never become aware of the public sector intervention which is affecting their business. Conversely, public authorities do not benefit from the security of knowing that the limitation period has expired in relation to their subsidy award, because it is publication of the entry on the transparency database which triggers the 30-day limitation period for challenges. If entries are not made:

- challengers do not necessarily know that there is a subsidy to challenge;
- public authorities are not encouraged to comply with best practice in their awards; and
- while challenges are never welcome, they can result in judgments which help to clarify and develop the regime.

Over time, this could lead to public authorities taking a 'risk-based approach' to their subsidy awards, which could negatively impact the aims and objectives of the regime – preventing public authorities from giving financial advantages to enterprises in a way that could create excessive distortions of competition. The statutory guidance on the SCA (Statutory Guidance) recognises that:

...over time, the ineffective use of subsidies can lead to inefficient and unproductive industries, preventing the emergence of new and more innovative enterprises that could deliver better products more cheaply, damaging the UK's long term prosperity. Preventing wasteful or harmful subsidies also mean that taxpayers' money can be used in better ways.

Likewise, having an effective regime for controlling subsidies is one of the commitments made by the UK to the EU in the TCA, which requires each party to have in place and maintain 'an effective system of subsidy control that ensures that the granting of a subsidy respects the (subsidy control principles set out in the TCA which are expanded upon in the SCA)'. Accordingly, failures to notify subsidy awards on the Database may mean that the system cannot be effectively enforced, leading to negative consequences not only for individual businesses but for the UK as a whole.

According to the Report, 25% of public authorities who said that they had a poor experience of awarding subsidies during the Interim Period experienced difficulty uploading information to the Database. It may be that the process for uploading information could be simpler. The difficulties of enforceability of the regime are also compounded by the fact that the database itself is difficult to search. This means that even where entries are made, those wishing to identify potentially harmful subsidies may struggle to do so, which could also potentially lead to criticism from the European Commission. The TCA has transparency requirements which are technically met, but if interested parties have difficulty finding the information, the 'spirit' of the requirements may not be met. In addition, under the TCA the UK must have in place an effective mechanism of recovery in respect of subsidies. If potential interested parties do not know they are affected by a subsidy, then the first stage of a challenge will not happen and there is, arguably, not an effective mechanism of recovery in place.

Likewise, the nature of the information contained within the database, and the level of detail, varies from entry to entry. For example, in some descriptions there is very little detail about the nature of the subsidy itself, and its purpose and objectives. The database itself may not include all of the information required to be uploaded on the database in accordance with the Subsidy Control (Subsidy Database Information Requirements) Regulations 2022 (for example, the policy objective and legal basis for subsidies is not published). This means that those wishing to challenge may be unable to identify relevant subsidies easily. Even if they can identify a subsidy, there is very little information on the database which would enable them to understand the extent to which the public authority had followed its obligations to grant the subsidy compliantly. This would require the potential challenger to make a request for information from the public authority.

Additionally, a failure to record subsidies on the Database means that the information collected by the government on the number of subsidies awarded and the functioning of the regime will be incorrect. Many practitioners and public authorities have noted that the subsidy control regime appears to be focused towards subsidies awarded by central government bodies. For example, extending the scope of the regime to require consideration of the impact of competition and investment within the UK is unlikely to have any effect on the larger subsidies granted by central government. However, it would mean that many small measures are now subsidies when they wouldn't have been under the TCA. This is likely to result in an increased burden for smaller authorities which would not be felt by those

granting larger subsidies. Likewise, the requirement to carry out an assessment of the subsidy principles is proportionate to larger subsidies but may be less proportionate where smaller subsidies are granted. Indeed, the Statutory Guidance has (until very recently) provided detailed guidance on carrying out assessments of the subsidy principles for the very largest subsidies, but not the smaller subsidies more generally granted by sub-central authorities. If smaller public authorities are less rigorous in their use of the Database, the subsidies granted by them will not be considered when the regime is monitored. This may mean that helpful developments, such as additional streamlined routes, and changes to the Statutory Guidance to provide additional support for smaller public authorities are not provided, because there is a lower level of awareness of the scale and nature of the subsidies being provided by such authorities.

What can be done to improve the transparency of subsidies?

Public authorities are (fairly obviously) aware of the need to comply with statutory obligations in general. Therefore, it is likely that where the Database is not being used, this is to do with a lack of awareness rather than an unwillingness to comply. A lack of resources is also likely to be a factor. In many cases, smaller public authorities will not have subsidy control expertise in house and may not have the budget to access external support. This means that all the subsidies granted by such authorities may not be recognised, and that where they are, there can be gaps in the institutional understanding of the process which may lead to the database entry being missed, whether or not earlier steps are taken to comply with the SCA. We also see in many cases that subsidy control is not factored into public authorities' internal governance processes and therefore the additional 'step' of updating the transparency database may be missed. Greater awareness of the impact of the change of the regime, and the steps required for compliance is therefore likely to be a significant factor in improving compliance. As noted above, the Statutory Guidance has recently been updated to provide specific guidance on carrying out subsidy control assessments for smaller subsidies, but a wider campaign of awareness raising and education would be helpful.

There is no specific penalty for failing to comply with the transparency rules, although this would be a breach of public authorities' statutory duties. It may be that the introduction of such a penalty would increase compliance, however, as discussed above, non-compliance at this stage is unlikely to be as a result of an unwillingness to comply. Therefore, the introduction of a penalty for failing to comply would not only be heavy handed but would simply result in funds being shuffled around the system. Nevertheless, this has to be balanced against the risk that if compliance with the transparency obligations continues to be disregarded, the aims of the regime are undermined and the enforcement of the regime is ineffective, as those harmed by unlawful subsidies are less likely to get redress.

Ensuring the database is easily searchable and contains relevant information for potential challengers to understand whether the public authority has complied with its obligations regarding subsidies is vital for the following reasons: (i) to ensure the system is transparent and (ii) to give those who may have been harmed by unlawful subsidies the information they need about those subsidies.

On a "visibility" level, it would be sensible, for example, to have a rolling one-month table on the Database setting out the latest awards. This would mean that the awards made within the time for an information request by a potential challenger are immediately visible.

Another example would be to include a summary of the principles assessment carried out by the public authority, which would aid understanding. This is a sensible halfway house between nothing and a full (or possibly) redacted assessment, which might well deter authorities. It would give a potential challenger a better understanding of whether there may be grounds for challenge. It would also allow the government to have an understanding of the extent to which authorities are carrying out assessments which comply with the guidance and support the development of additional guidance if necessary.

Conclusion

Ultimately, without redesigning the regime, a focus on ensuring that public authorities understand their obligations and that the database is easily searchable and provides relevant information, is key to balancing the needs of potential challengers with those awarding subsidies.

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