

DWF – Supplementary Written evidence FUU0022

We advise on a daily basis on the new Subsidy Control regime¹ and therefore our comments relate to level playing field commitments set out within Part Two, Title XI, Chapter 3 of the EU - UK Trade & Cooperation Agreement² ("TCA").

1. What is your assessment of the relevant provisions in the TCA and their impact on your business or policy area?

Our headline view is that the UK negotiating team did well to secure the freedom for the UK to set up its own subsidy control regime, however the new, interim regime does not yet make the most of the opportunities available.

We therefore welcome the consultation and hope the government will quickly make the improvements needed to set up an efficient UK Subsidy Control system, one which prevents unnecessary and damaging subsidies being awarded, whilst directing healthy subsidies towards the UK's economic priorities. Awards of subsidies should be able to be made quickly, with a no more than proportionate burden of administration, and preferably with a high level of legal certainty for all involved, including the providers of grant funding and the recipients.

The two main complaints about the new, interim system are focussed upon the significant burden it creates for public bodies and the uncertainty it creates as to whether compliance has necessarily been achieved.

In terms of the administrative burden, the government guidance published on 31 December 2020, states that before making awards public bodies should assess:

- the provisions of Chapter 3 of the TCA;
- the effect of Article 10 of the Northern Ireland Protocol;
- the effect of Article 138 of the Withdrawal Agreement;
- whether there is an appreciable risk of creating a dispute under the WTO rules³; and
- whether there is an appreciable risk of creating a dispute under non-EU trade deals⁴.

Such requirements apply even to low value awards⁵, so creates a disproportionate amount of work for public sector bodies.

The new UK Subsidy Control regime also lacks certainty. Under the previous EU State aid regime around 99% of awards of State aid proceeded under the cover of block exemptions (conditional approvals for smaller, more regularly encountered

¹ This includes Government Departments, Councils, Mayoral Combined Authorities and private companies bidding for public funding.

² 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, which was incorporated into law within the UK by the European Union (Future Relationship) Act 2020.

³ Including the Agreement on Subsidies and Countervailing Measures, the Agreement on Trade Related Investment Measures, the General Agreement on Trade in Services and the Agreement on Agriculture.

⁴ The guidance refers to Canada, Japan, Israel, Jordan, Kosovo, Morocco, Palestine, Tunisia, Ukraine and Georgia

⁵ There is a Small Amounts of Compatible Aid provision which reduces the administration under the TCA, but such awards must also be assessed against these other provisions.

or "routine" forms of aid)⁶. Provided all relevant terms were met the funder and the recipient knew the award was lawful.

There are no block exemptions under the UK regime. Instead public bodies are required to assess measures against six Common Principles listed at Article 3.4 of the TCA. By way of example, the second Common Principle requires that "subsidies are proportionate and limited to what is necessary to achieve the objective".

The terms are not defined nor, at this time, are there any Court decisions to assist with the interpretation of these requirements. Therefore a risk assessment has to be carried out. This creates uncertainty, which could be easily resolved in 99% of cases by setting up safe harbours for lower value, more regularly encountered awards of aid.

There are advantages to the new system. Whereas EU State aid law was prescriptive and some block exemptions overly bureaucratic, the new system allows more opportunities for funding to proceed. Indeed, we welcome the deregulation for awards which would previously have been outside block exemptions.

Most significantly however, we believe that putting in place some form of UK "safe harbours" instrument need not compromise the new-found flexibility to move faster and with less prescription than the EU system for larger awards that sit outside the block exemptions.

In the previous regime the time and administration burden of having to notify a project individually to the European Commission for approval was so great that in many cases the pragmatic judgement came down to "fit it into the block exemptions or don't do it". We see no reason in the new UK regime why all the benefits of a safe harbour cannot be drawn for certain low value awards, while anything which does not fit the relevant limitations can proceed under the new Common Principles and via self-assessment in much the same way as the new regime provides for now. Put simply, we do not see why having safe harbour instruments needs to compromise the freedom to go outside them whenever appropriate.

2. What do those provisions achieve?

The TCA gives the right for the UK and the EU to set up their own subsidy control systems, subject to common commitments. These include that subsidies should take account of the same Common Principles and information should be published in the public domain.

The aim is to create a system whereby both parties exercise sovereignty over the award of subsidies, but also do not unduly undermine their respective markets.

⁶ 96% of these came under one block exemption, the General Block Exemption 2014 (as amended in 2017 and 2020).

3. What, if any, challenges arise because of those provisions? How should these challenges be addressed and what support is needed, if any?

As set out above, the UK regime can be improved. In particular, the following steps would assist public bodies by reducing the administrative burden and uncertainty of the new regime and facilitating certain policy agendas:

- set up "safe harbours" which would allow almost all subsidies to be granted quickly and with the minimum of fuss with immediate effect. These could be based on the current EU block exemptions or the UK could take a different path drawing upon what will work best for each sector (NB. if there was sufficient appetite then officials could liaise with senior practitioners in Subsidy Control to adjust / remove some of the less user friendly elements (such as changing the rules on undertakings in difficulty);
- the TCA includes a 'Small Amounts of Subsidy' provision at Article 3.2.4 which allows awards of up to 325,000 Special Drawing Rights (a currency conversion unit) to an economic actor in a 3 year period with minimal administration. However the 325,000 Special Drawing Rights currently varies at the time of the award. We recommend freezing the thresholds for one or two years;
- the UK has an obligation to establish an independent authority to oversee the regime at 3.9 of the TCA. This organisation should be properly resourced and equipped to support the public sector in making assessments outside the safe harbours, providing an amicus curiae role of asking questions which are likely to be raised in the event of a challenge and, potentially, reporting on the effectiveness of the system. Noting the importance of the levelling up agenda, there is an opportunity to base this new organisation outside London;
- again noting the levelling up agenda, there is a clear opportunity to harness Subsidy Control to encourage investment in disadvantaged areas. This need not mirror exactly the regional investment
- aid regime of the EU nor the drawing up a regional aid map that it is based on, but this can be a policy tool used to combat regional disparities and positively incentivise investment in those areas where it is least likely to occur without such assistance;
- set out clear guidance as to the situations where there may be an appreciable risk of an issue arising under the WTO rules or non-EU trade deals. Where a public body has a concern about this, set up a system where an answer will be provided within a week; and
- as we have previously said to the House of Lords EU Internal Market Sub-Committee⁷ there is an excellent opportunity to design the rules to complement major public programmes such as the UK Shared Prosperity

⁷ Alexander Rose evidence: The level playing field and state aid inquiry, 12 March 2020, Q32

Fund and the Levelling Up Fund, but also to take account of economic changes such as the importance of R&D, data and intellectual property in the economy of the future.

4. What do you identify as the most important issues that the TCA leaves for further negotiation? What would represent a best-case resolution of these issues?

The importance of subsidies means that Chapter 3 of the TCA is likely to be the subject of disputes in the coming years. One would hope that the parties would work together before such disputes arise to articulate a clearer common understanding, which can then be referred to when disagreements occur.

The Joint Declaration on Subsidy Control Policies, which was agreed alongside the TCA, represents an opportunity for the EU and UK to identify and agree certain types of intervention where the parties can agree not to challenge each other's awards. We would hope that this could be used to cement any new safe harbours, for example excluding public infrastructure projects from the regime.

It is disappointing that under the Northern Ireland Protocol that part of the UK remains subject to EU State aid law, potentially in perpetuity. We would suggest that at the four year review, provided the UK has set up a meaningful Subsidy Control regime that the parties seek to enact Article 13(8) to lift this requirement. There is also an apparent disparity in interpretation of the reach of the Northern Ireland Protocol as between the European Commission and UK Government guidance publications on this point. This suggests that in due course a disagreement will arise as to the application of EU State aid rules to subsidies awarded in England, Scotland or Wales but with an accusation that their effects reach into Ireland sufficiently to grant the EU jurisdiction.

5. Within the parameters of the TCA, what should the UK seek to accomplish with the EU in relation to your industry or policy area in the short, medium and long term?

The UK can set up an efficient Subsidy Control system which prevents unnecessary and damaging subsidies being awarded, whilst directing healthy subsidies towards the UK's economic priorities. We believe that the first steps to create this have been taken but that these can be quickly enhanced and with improvements made in the coming years.