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# Subsidy Control Update

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# Agenda

- Legislation regulating subsidy control
- Subsidy Advice Unit Reports
- Competition Appeal Tribunal judgment

# Legislation regulating subsidy control

- Subsidy Control Act 2022
- Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022
- Subsidy Control (Subsidy Database Information Requirements) Regulations 2022
- Subsidy Control (Information-Gathering Powers) (Modification) Regulations 2022
- Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022

# Subsidy Control Act 2022

- In force from 4 January 2023
- Subsidies allowed if compliant with requirements of the Act
- Establishment of Subsidy Advice Unit
- Provision for challenge in the Competition Appeal Tribunal

# Subsidy

- Financial assistance given directly or indirectly from public resources of a public authority
- Confers an economic advantage on an enterprise
- Is specific insofar as it benefits one or more enterprises over one or more enterprises with respect to production of goods or services
- Has or is capable of having an effect upon:
  - Competition and investment within UK
  - Trade between UK and another country or territory
  - Investment between UK and another country or territory

# Subsidy Control Principles

- Must consider subsidy control principles before deciding to give a subsidy
- Must not give a subsidy unless satisfied it is consistent with subsidy control principles
  - Section 12 Subsidy Control Act 2022
- Must also consider energy and environment principles before giving a subsidy relating to energy and environment
  - Section 13 Subsidy Control Act 2022

# Subsidy Control Principles

- A: Must pursue a specific public policy objective to remedy market failure or address an equity rationale
- B: Must be proportionate to policy objective and limited to what is necessary to achieve it
- C: Must be designed to bring about change of economic behaviour of beneficiary
- D: Must not compensate for costs the beneficiary would have funded in the absence of the subsidy

# Subsidy Control Principles

- E: Must be an appropriate policy instrument for achieving a policy objective and the objective could not be achieved through less distortive means
- F: Must be designed to achieve the policy objective whilst minimising negative effects on competition or investment within United Kingdom
- G: Beneficial effects must outweigh any negative effects



# Energy and Environment Principles

- A: Subsidy must aim to deliver a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or increase the level of environmental protection compared to the level that would be achieved in the absence of the subsidy
- B: Subsidy must not relieve the beneficiary from liability arising from its responsibility as a polluter

# Energy and Environment Principles

- C: Subsidies for electricity generation adequacy, renewable energy or cogeneration:
  - must not undermine the UK's ability to meet its obligations relating to wholesale electricity and gas markets under the Trade and Co-operation Agreement
  - must not affect the efficient use of electricity interconnectors
  - subject to specified exceptions must be determined by a transparent non-discriminatory and competitive process

# Energy and Environment Principles

- D: Subsidies for electricity generation adequacy may be limited to installations not exceeding specified CO2 emission limits.
- E: Subsidies for renewable energy or cogeneration must not affect beneficiaries' obligations or opportunities to participate in electricity markets.
- F: Subsidies in the form of tax or levy exemptions must not exceed the total amount of the tax or levy concerned.
- G: Subsidies in the form of compensation for electricity-intensive users given in the event of an increase in electricity costs resulting from climate policy instruments must be restricted to sectors at significant risk of carbon leakage due to the cost increase.

# Energy and Environment Principles

- H: Subsidies for the decarbonisation of emissions linked to UK industrial activities must reduce greenhouse gas emissions overall and reduce the emissions directly resulting from the industrial activities
- I: Subsidies to improve the energy efficiency of UK industrial activities must improve energy efficiency by reducing energy consumption

# Referrals to the Subsidy Advice Unit

- Mandatory referrals
  - Subsidies and subsidy schemes of particular interest
  - When directed by Secretary of State
- Cooling off period of five working days from the day after a report following a mandatory referral
- Voluntary referrals
  - Subsidies and subsidy schemes of interest

# Subsidies of particular interest

- Subsidies in sensitive sectors over £5 million
- Subsidies in sensitive sectors over £1 million and cumulatively over £5 million with other related subsidies over three financial years
- Subsidies in other sectors over £10 million
- Subsidies in other sectors over £1 million and cumulatively over £10 million with other related subsidies over three financial years

# Subsidies of Interest

- Subsidies over £5 million individually or with related subsidies over three financial years
- Subsidy for relocation of activities
- Subsidy for restructuring

# Seeking advice from and making referrals to the Subsidy Advice Unit

- All referrals have been mandatory referrals
- Feedback from public authorities to Subsidy Advice Unit:
  - Positive feedback on value of pre-referral discussions
  - Sometimes a referral has led to a public authority thinking more about subsidy control principles and how their subsidy complies
  - Some indications that public authorities feel more confident in the subsidy control assessment process following a referral
  - Reports have provided lessons that authorities can take forward for future subsidies



# Observations from Subsidy Advice Unit

- Public authorities must have regard to statutory guidance when producing subsidy control assessments
- Assessments need to address each of the subsidy control principles – SAU comments that referred assessments have not always made it clear that each principle has been fully addressed
- SAU recommends pre-referral discussions even if a referral is not certain or at an early stage

# Observations from Subsidy Advice Unit

- Some assessments set out general strategic objectives rather than focussing on specific policy objective of the subsidy, making it more challenging to complete the rest of the assessment
- There is not always a clear link between the policy objective and market failure or equity rationale that has been identified

# Observations from Subsidy Advice Unit

- Majority of SAU reports have recommended improvements to competition assessments
- Some balancing exercises focus on positive impacts. Some include positive and negative impacts but do not describe how these have been weighed against each other

# Recommendations from Subsidy Advice Unit

- Examples of recommendations of Subsidy Advice Unit
  - Policy objectives could be more clearly linked to market failure or equity rationale
  - Assessment of competition could be strengthened by providing more detail on markets and competitors
  - More up to date evidence needed
  - Assessment could be strengthened with more assessment of market position without the subsidy
  - Better evaluation needed of positive and negative effects of subsidy
  - More detail needed on how eligibility criteria help ensure the scheme does not subsidise costs that would have been funded anyway

# Challenge

- Anyone whose interests may be affected by a subsidy may apply to the Competition Appeal Tribunal for a review
- Application must be made within one month of a subsidy being uploaded to the database
- Competition Appeal Tribunal will review whether subsidy decision was lawful
- Competition Appeal Tribunal may grant relief as under judicial review
- Competition Appeal Tribunal may order recovery of a non-compliant subsidy.

# Challenge

- *The Durham Company Limited (trading as Max Recycle) v Durham County Council*
- Use of local authority assets for less than market price
- Applicant argued that the Council provided a subsidy and should have assessed it against subsidy control principles

# The Durham Company Limited (trading as Max Recycle) v Durham County Council

- Council was waste collection authority and waste disposal authority for its area
- Council could charge for collection of commercial waste
- Council used same vehicles to collect both household and commercial waste
- Commercial charges set annually by the Council – most recently 31 March 2023
- Applicant said 31 March 2023 decision was a subsidy decision

# Issues

- Was there a “decision” for the purposes of section 70 of the Subsidy Control Act 2022?
- Was there a “subsidy” for the purposes of section 70 of the Subsidy Control Act 2022?
- If there was a subsidy decision, were the subsidy control principles satisfied?



# Challenge

- Challenge failed
- Tribunal found that there was no economic advantage conferred on an enterprise
- There was a decision but no subsidy

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# Thank You

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