# White Paper Conference:

# What - right now - is the legal position on the conferral of an economic advantage, including guarantees and not for profit enterprises?

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## Is there a legal duty to ***consider*** whether Financial Assistance ("FA") gives rise to an 'advantage'? (1)

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- Live issue in *Aubrey Weis v GMCA*, judgment currently pending from CAT
- March 2024 - GMCA decision to approve c. £120m loans. Evidence showed no consideration by decision-making body of whether loans at market rate or compliant with CMO
- Authority to sign delegated to Monitoring Officer and Chief Executive, subject to completion of satisfactory DD
- Late April 2024 – JR PAP letter received by R. Two days later junior officer prepared internal paper seeking to justify interest rates, but R accepted never shared with any decision-maker
- November 2024 – loans signed pursuant to delegation. Evidence showed no consideration by decision-makers (MO and CEO) of whether loans at market rate or compliant with CMO

## Is there a legal duty to ***consider*** whether FA gives rise to an 'advantage'? (2)

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- Important question:
  - If **yes**, then *pre-condition* to the lawfulness of any FA subsequently given
  - If issue has been considered by public authority then evaluative judgment likely to be afforded weight by CAT in event of challenge
  - If **no**, superficially helpful for PAs in sense that no 'procedural' obligation applies
  - However, in practice, likely to result in decisions being more susceptible to successful challenge (because there will be no reasoned decision of the PA for the CAT to defer to)
  - Starting point is that the Act does ***not*** impose any express duty to consider: cf. s. 12

## Is there a duty to ***consider*** whether FA gives rise to an 'advantage'? (3)

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- However, the SCA statutory guidance provides that lawful consideration ***must*** be undertaken, e.g. (emphasis added):

*"1.24 Public authorities **must establish** if financial assistance they are proposing to provide meets the definition of a subsidy under the Act…*

*2.1. … **it is therefore key** that public authorities **assess whether the proposed financial assistance falls under the definition of a subsidy** that is set out in the Act.*

*2.3. The second part of the chapter sets out what public authorities should consider **in determining whether** the subsidy control regime is engaged.*

*2.14. For some measures, this will be straightforward to determine…In other instances, it will be important to consider carefully **– for example, if there is a question as to whether the financial assistance is provided on commercial terms**…"*

## Is there a duty to ***consider*** whether FA gives rise to an advantage? (4)

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- s. 79(6) of the Act provides PAs **must *have regard*** to the statutory guidance
- *R (Munjaz) v Mersey NHS Trust AC [2006] 148* at [21] and [69]: public law obligation to:
  - have regard to statutory guidance,
  - comply with statutory guidance, absent good (or 'cogent') reason to depart from its terms, and
  - provide reasons for any departure.
- Consequence of failure lawfully to consider?

## Is there a duty to ***consider*** whether FA gives rise to an advantage? (5)

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- Separately from statutory guidance, is consideration of whether FA provides advantage a mandatory relevant consideration at common law?
- s. 12 duty to conduct SCP assessment and s. 33 duty to publish only arise if FA is a *"subsidy"*, therefore implicit duty to consider whether advantage conferred when providing FA?
- *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [65]-[65], [75]: Issue is a mandatory consideration where: (i) required by statutory purpose, or (ii) *"obviously material"*
- If correct, then failure to consider likely to mean decision should be quashed

## If there is a duty to consider, ***who*** need to give consideration?

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- *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [73]: Responsible body (in that case Minister) must be apprised of material facts. No concept of 'collective knowledge' or reliance on officials

- *Revenue and Customs Commissioners v Tooth [2021] 1WLR 2811,* [70] per Lord Mance JSC: No concept or principle of collective knowledge within public authorities

- *Kenyon v SSHCLG* [2020] EWCA Civ 302 at[27]-[30] per Coulson LJ: no reliance permitted on documents not before decision-maker, or created after decision made

## Substantive review – general principles (1)

- *R (British Gas Trading and E.ON) v Secretary of State for Energy Security and Net Zero [2025] EWCA Civ* 209: No proportionality review, instead reviewing on domestic JR/rationality grounds
- S. 72(6) of the Act provides CAT exercises JR jurisdiction
- §13.8 of statutory guidance provides:

  *"The Tribunal can also review these subsidy decisions on general public law grounds… A challenge may be brought on general public law grounds on the basis that the decision was, for example, not within the public authority's powers, irrational, biased or otherwise unlawful on any other general public law ground."*

## Substantive review – general principles (2)

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- Any role for objective determination/precdent fact?
- Potentially offers route to enable CAT to rescue procedurally flawed decision. However, in relation to 'advantage' terms of s. 3(2) make argument difficult:

  *"Financial assistance is not to be treated as conferring an economic advantage on an enterprise unless the benefit to the enterprise is provided on terms that are more favourable to the enterprise than the terms* ***that might reasonably have been expected*** *to have been available on the market to the enterprise."* (emphasis added)
- Seems difficult to contend that what *"might reasonably have been expected"* qualifies as precedent ***fact***: cf. *R(A) v Croydon LBC* [2009] 1 WLR 2557

## Substantive review – an illustration of difficulties (1)

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- In *Weis v GMCA,* R never considered interest rates available on market at date loans approved or signed
- No IRR or other financial analysis conducted establishing rate of return consistent with that required by CMO
- Nor any expert advice
- R's 'best evidence' supporting CMO compliance was a loan it made to same borrower on a 'club' basis with GMPF  c. 3-4 years earlier where GMPF financial advisor confirmed on market rates
- R also relied on other, older, loans which it had previously granted to the same borrower

## Substantive review – an illustration of difficulties (2)

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- However, A provided evidence of loan to same borrow from CMO lender (Maslow finance) from same period at c. **double** the rate of interest of the GMPF club loan
- The Maslow loan was never considered by R in decision-making proess because it never looked into market rates
- No expert evidence provided to the CAT: (i) A decided not to proceed with expert because considered too expensive, (ii) D never obtained any expert evidence
- How is the CAT to go about investigating/determining what constitutes the 'market rate' for lending c. £120 million for an SPV real estate development in Manchester as at November 2024?

## Substantive review – an illustration of difficulties (3)

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- CAT panel members included two distinguished former bankers
- Can CAT rely on *"objective"* review to rescue decision where R has never considered CMO principle?
- To what extent can CAT member rely on own professional knowledge of market rates in circumstances where not in evidence before the CAT?
- Forbidden substitutionary approach in JR? (*ex p Brind* [1991] 1 AC 696)
- Breach of procedural fairness to A?

# Substantive review – 2022 Regulations

- In pre-action correspondence, R relied on fact interest rates charged where higher than those produced by the Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022 ("**the 2022 Regulations**"):

  *"GMCA… has determined that they would not constitute subsidies within the meaning of section 2(1) of the Act. This is on the grounds that the loans would be made on a commercial market operator ("CMO") basis, which GMCA has confirmed by reference to the interest rates set out in the Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022 in order to ensure that zero financial assistance is provided"*

- But obviously a bad point: (i) 2022 Regulations are not for purpose of assessing whether or not a subsidy, (ii) statutory guidance makes expressly clear intended only to assist in 'low risk' loans, (iii) application of methodology produced an interest rate of c. 5%, even on R's case this was far below any reasonable view of 'market' rate
- Reliance on 2022 Regulations essentially abandoned by R before CAT
- Do **not** rely on 2022 Regulations methodology for this purpose

# Substantive review – Guarantees

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- "Unlimited" guarantees – either by time or amount – prohibited
- Normal analysis is whether fee/premium charged to beneficiary is consistent with 'market' rate
- If amount of liability being guaranteed is not precisely specified need to conduct rational analysis of potential liability (see, e.g. Central Government Green Book guidance)
- Evidence sources re. 'market' rate:
  - Direct evidence of specific comparator transactions
  - Published information on average fees
  - Use multiple sources and rationally consider whether each element of evidence is properly comparable
- If high risk/bespoke such that no reasonable comparator should value guarantee at full value of underlying liability: §18.81, statutory guidance
- 2022 Regulations provide methodology for 'lower risk enterprises' – similar limitations as noted above re. interest rates

## Substantive review – Not for profit entities

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- Status of body, i.e. whether profit-making, not determinative
- What matters is analysis of specific *activity* engaged in, essentially whether there is a market for that activity
- Fact some form of fees charged does not necessarily mean a market exists, in particular if fees are nominal/modest
- If assistance granted for non-economic activities and appropriately 'ring-fenced' then no subsidy

## Substantive review – Not for profit activity and 'enterprise' status

- If discharging public function and no market for services then activity not economic and Act does not apply, e.g. certain providers of NHS services: statutory guidance, §2.18
- Conversely, mere fact acting in public interest/public benefit does not mean not an enterprise: statutory guidance, §2.18
- If 'mixed' activity then only an enterprise in respect of activities that are market facing, e.g. charity market facing activities may be caught, but provided ring-fenced should not affect pure charitable activity: statutory guidance, §2.19
- Ancillary economic activity not caught if: (i) ancillary, rather than principal, purpose, and (ii) < 20% of total activity (statutory guidance, §2.19 and ftn 19)
- Is this really supported by the Act?

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