

SUBSIDY CONTROL CHALLENGES: -

WHAT COUNTS AND WHAT MAY SWAY
THE COMPETITION APPEAL TRIBUNAL?

REVIEW STANDARD AND KEY LESSONS
FROM *BRITISH SUGAR* AND *BULB*.

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REVIEW STANDARD CHOSEN

- Uses the judicial review standard—Subsidy Control Act 2022 (“the SCA”) s. 70(5).
- Focus in present talk on challenges on the application of the Subsidy Control Principles—SCA ss. 1(2)(a), 9(1), 12(1), (3) 89(1), Sch. 1.

FEATURES OF THE STATUTORY TEST

- Application of JR principles – context-dependent.
- Novel, potentially significant features include: -
 - Private enforcement.
 - Review of public authority's self-assessment.
 - Proportionality- role?

THE JUDICIAL REVIEW PRINCIPLES

- Judicial review principles challenge areas: -
 - Rationality
 - Acting outside the scope of powers and duties (errors of law).
 - Procedural errors.
 - Mistakes of fact leading to unfairness.

APPEAL ROUTE

- Appeals are to the CAT—One month time limit, generally from the date in which an entry is made on the subsidy database-SCA ss. 70(1), 71 (but check correct date in specific cases).

WHAT COUNTS AND MAY SWAY THE CAT?

- Starting point likely to be passages frequently relied on in reviews in similar contexts –

E.g. *Stagecoach* in the CAT [45].

FACTORS LIKELY TO GIVE RISE TO A WIDE MARGIN OF APPRECIATION

- Expertise of decision-maker and/or external advisers.
- Commercial / policy freedom – complex economic and social assessments and issues requiring exercise of judgment.
- Predictions of future impacts.

PRINCIPLES AND PASSAGES THAT MAY ASSIST IN CHALLENGES.

- Irrationality not a ridiculously high hurdle. *Inclusion Housing* [88]
- Thorough review – not cursory or perfunctory (in a different context – looking at manifestly inappropriate in an EU context and future effects) *Lumsdon* Supreme Ct [44].
- Where public authority fails to acquaint itself properly with all of the material. *JD Sports* [140-144].

AREAS WHERE GREATER SCOPE FOR SUCCESSFUL CHALLENGE (1)?

- Objectives that do not qualify or “do not add up” – see *Bulb* [266].
- Going on instinct/guessing – see comments in *Mott CA* in relation to the judge’s approach on review. [76].
- Analyzing incorrectly/coming to the wrong conclusions on the material – see, e.g.
 - EU anti-dumping case: *eurocylinder*, and
 - EU State aid case: *Frucona*.

AREAS WHERE IT POSSIBLE GREATER SCOPE FOR SUCCESSFUL CHALLENGE (2)?

- Supreme Ct proportionality case – *Bank Mellat* [27].
- Failure to follow: -
 - the Guidance (see esp. SCA ss. 79(1)(a), 79(6)).
 - the advice of external experts.
 - the non-binding views of the Subsidy Advice Unit (“SAU”).

LESSONS FROM *BRITISH SUGAR*

- Concerned Trade and Cooperation Agreement (“TCA”), as incorporated into UK law – pre-dates SCA start date.
- Treated as a precedent fact case – standard of review not discussed.
- Issue - whether a subsidy at all – specific, economic advantage, comparable factual and legal position, taxes, logic of the system.
- Judgment of continuing relevance for these issues.

LESSONS FROM *BULB* (1)

- Also a TCA case – discussion of Guidance.
- Specific comments on standard of review in particular context of subsidy control principles (albeit under Article 366(1) TCA, which is slightly different from SCA Sch. 1).
- Are comments on proportionality transferable?

LESSONS FROM *BULB* (2)

- Issues: -
 - Identified market failure/ social objectives.
 - Proportionality of method chosen.
 - Secretary of State's conclusions on: -
 - effects of no action;
 - whether minimized negative effects on competition (N.b. not the same as Principle G).
 - which considerations were relevant/irrelevant to take into account.

LESSONS FROM *BULB* (3)

- Role played by standard of review, proportionality and justification of light-touch review.
- References to Blue Sky and to British Sugar.
- Relevance/impact (or non-impact) of: -
 - external advisers' conduct of process and reports.
 - Alleged flaws in the procedure
 - Position taken by Ofgem and CMA in not calling in the transaction.

LESSON SUMMARY

- To mount a successful challenge likely to need something material that has been ignored or a flaw in the logic.
- Likely to help a challenge if there has been: -
 - an adverse SAU report,
 - mixed or adverse professional advice,
 - failure to follow guidance,
 - failure to gather material – going on instinct.

EFFECTS ON INVESTMENT AND INTERNATIONAL TRADE: PRINCIPLE G (1).

- Interplay with investment and international trade
 - not relevant in *Bulb* (because under pre-SCA legislative framework).
 - c.f. UK's trade remedies legislation in relation to *overseas* subsidization of goods imported into UK - these matters considered in detail there in an Economic Interest Test (EIT).

EFFECTS ON INVESTMENT AND INTERNATIONAL TRADE: PRINCIPLE G (2).

- What depth of analysis needed by decision maker under Principle G?
- For CMA to look at, if referred to the SAU?
- Potential for tension if a relevant government department disagrees?
- No scope in the rules for a public interest test- c.f. trade remedies - and only possibility may be to intervene on irrationality grounds?

APPENDIX – MAIN MATERIALS (1)

- Subsidy Control Act 2022 s.70(5)

In determining the application, the Tribunal must apply the same principles as would be applied—

(a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review;

(b) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court.

- The Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, 2019 No 910 (as amended) Reg 18.

In determining an appeal made under regulation 16...or 17..., the Upper Tribunal must apply the same principles as would be applied by a court on an application for judicial review.

APPENDIX – MAIN MATERIALS (2)

SCA, Sch. 1 Principle G

Requiring subsidies' beneficial effects (in terms of achieving their specific policy objective) to outweigh any negative effects, including in particular negative effects on –

- (a) competition or investment within the United Kingdom;*
- (b) international trade or investment.*

English Cases.

Stagecoach v Competition Commission [2010] CAT 14.

Bank Mellat v HM Treasury [2014] UKSC 39.

R (ota Lumsdon) v Legal Services Board [2015] UKSC 41.

R (ota Mott) v Environment Agency [2016] EWCA 564.

JD Sports Fashion v CMA [2020] CAT 24.

APPENDIX – MAIN MATERIALS (3)

Inclusion Housing Community Interest Co v Regulator of Social Housing [2020] EWHC (Admin).

EU cases

C-324/19 *eurocylinder systems*: ECLI:EU:C:2021:94.

C-73/11 P *Frucona Košice v Commission*: EU:C:2013:32.

APPENDIX – MAIN MATERIALS (4)

- *British Sugar – R (ota) British Sugar Plc v (1) Secretary of State for International Trade (2) T&L Sugars Limited* [2022] EWHC 393 (Admin), 24 February 2022 (Foxton J).
- *Bulb - R (ota) British Gas Trading limited v (1) Secretary of State for Energy Security and Net Zero and (2) others* [2023] EWHC 737 (Admin) (Div. Court), 31 March 2023 (Singh LJ, Foxton J).

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