

SUBSIDY CONTROL: RELEVANCE OF STATE AID CONCEPTS

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STATE AID AND SUBSIDY CONTROL

COMPARATIVE TEXTS

Article 107(1) TFEU

Subsidy Control Act 2022

Trade and Cooperation Agreement

EU Foreign Subsidies Regulation 2022/2560

Definition of subsidy: TFEU, SCA

□ Article 107(1) TFEU: aid

- - granted by a Member State or through State resources
- - (implicit economic advantage criterion)
- - in favour of certain undertakings

□ SCA, s. 2(1): financial assistance

- - given, directly or indirectly, from public resources by a public authority
- - confers an economic advantage on one or more enterprises
- - specific

Definition of subsidy: TCA, SFR

TCA, Art. 363: financial assistance:

- arises from the resource of the Parties
- confers an economic advantage
- specific

FSR, Art. 3(1): financial contribution:

- provided by a third country
- directly or indirectly
- confers a benefit on an undertaking
- limited to one or more undertakings or industries

Common types of subsidy

- ❑ SCA, s. 2(2); TCA, Art. 363(1); FSR, Art. 3(2)
 - ❑ Direct or contingent transfer of funds
 - ❑ - direct grants, loans, loan guarantees
 - ❑ - capital injections
 - ❑ Foregoing of revenue that is otherwise due
 - ❑ - tax exemption
 - ❑ - by legislation
 - ❑ - by administrative measure
 - ❑ Provision or purchase of goods or services
 - ❑ - at non-commercial rate

Tax measures as subsidy

- ❑ SCA, s. 4(3)-(7); TCA, Art. 363(2)

- ❑ A tax measure is not specific unless
 - ❑ - one or more enterprises obtain a reduction in the tax liability otherwise borne under the normal tax regime
 - ❑ - treated more advantageously than enterprises in a comparable position under the normal taxation regime
 - ❑ - justification inherent to the design of the arrangements of which that financial system is part (general system)

Competition, trade and investment

Article 107(1) TFEU:

- distorts or threatens to distort competition
- in so far as affects trade between Member States

SCA, s. 2(1)(d):

Has, or is capable of having, an effect on:

- competition or investment within the United Kingdom
- trade between the United Kingdom and a country or territory outside the United Kingdom
- investment as between the United Kingdom and a country or territory outside the United Kingdom



Competition, trade and investment

TCA, Art. 363(1)(iv):

- Has, or could have, an effect on trade or investment between the Parties

FSR, Art. 4(1):

- distortion in the internal market
- liable to improve the competitive position of an undertaking in the internal market
- actually or potentially negatively affects competition in the internal market



Subsidy/State aid control

Article 108 TFEU

- mandatory standstill obligation
- examination by European Commission
- categories of aid within Article 107(3) TFEU
- guidelines and GBER
- decision approving/prohibiting aid

SCA, ss. 12-13, Schedules 1-2.

- self assessment of public authorities, CMA report
- subsidy principles; energy and environment principles
- streamlined subsidies



Subsidy/State aid control

TCA, Art. 366(1)

- effective system of subsidy control
- subsidy principles

FSR, Art. 6

Balancing test

- negative effects in terms of distortion in the internal market
- positive effects on development of the subsidised economic activity on the internal market
- broader positive effects in relation to relevant policy objectives, in particular those of the EU

GBER / Streamlined subsidies

Article 107 TFEU

- GBER, Article 109 TFEU
- exemption from standstill obligation
- deemed compliance with Article 107 TFEU

SCA, s. 10

- streamlined subsidy schemes
- BEIS statutory guidance, para 2.33
 - offer public authorities a way to award subsidies more quickly
 - promote confidence and legal certainty
 - deemed compliance with subsidy principles