

# UK SUBSIDY CONTROL LAW: LEGAL CERTAINTY

*Why are there so few challenges, and how can the new regime provide legal certainty without case law, particularly if EU state aid law is to be departed from increasingly?*

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# LEGAL CERTAINTY UNDER THE UK SUBSIDY CONTROL REGIME

- s70 Subsidy Control Act 2022 provides for judicial review (JR) by the Competition Appeal Tribunal (CAT) of subsidy decisions to ensure they are consistent with subsidy control requirements in Pt 2 SCA22.
- *The Durham Co (t/a Max Recycle) v Durham CC* [2023] CAT 50.
- Robertson and Howell [2024] ECLR 47 *The first subsidy control challenge in the Competition Appeal Tribunal*.
- Other decisions subject to JR by the Administrative Court of the High Court, on normal JR principles.
- *R (British Sugar) v SoS for International Trade* [2022] EWHC 393 (Admin), Foxton J (State aid, Northern Ireland Protocol, subsidy control, UK/EU Trade and Cooperation Agreement).
- *R (British Gas Trading) v SoS Energy (Bulb Energy)* [2023] EWHC 737 (Admin) (subsidy control, TCA), appeal pending.

# FEW CHALLENGES?

- Few by what measure?
- EU State aid challenges in the domestic UK courts were uncommon and not always reliable.
- Robertson, Lester and Love [2007] ECLR 585 *Judicial Review in the United Kingdom of State Aid Decisions*.
- C-308/01 *GIL Insurance v Customs & Excise* [2004] ECR I-4777 casting doubt on reasoning of both Court of Appeal and Divisional Court in *R v Customs & Excise ex p Lunn Poly* [1999] STC 350, on appeal from [1998] STC 649.
- Some later domestic State Aid cases – e.g. *Credit Suisse v HMRC* [2019] EWHC 1922 (Ch), Falk J – but not very many.
- Domestic challenges never really a primary source of legal certainty.

# EU LEGAL CERTAINTY?

- EU legal certainty generated by a combination of Commission decision-making, rule-making, and European Court judicial review.
- The extent of EU legal certainty can be overstated.
- Any novel issue can generate a long drawn out notification and scrutiny process, followed by lengthy judicial review proceedings.
- E.g. Hinkley Point C nuclear power station financial aid measures.
  - Formally notified 22.10.13.
  - Approval decision 08.10.14.
  - GC appeal by Austria – T-356/15 judgment 12.07.18.
  - CJEU appeal – C-594/18 judgment 22.09.20.
  - CJEU hearing on 28.01.20 was UK's last as a current Member State.

# EU LEGAL CERTAINTY?

- A lot of the EU learning remains relevant to analysing equivalent provisions under SCA.
- EU State aid law authoritatively analysed in leading textbooks:
  - Bellamy and Child *EU Law of Competition* (OUP, 8<sup>th</sup> ed, 2018), ch 17 *State Aids*.
  - Bacon *EU Law of State Aid* (OUP, 3<sup>rd</sup> ed, 2017);
  - Hancher, Ottervanger and Slot *EU State Aids* (Sweet & Maxwell, 6<sup>th</sup> ed, 2021);
  - Quigley *EU State Aid Law and Policy (and UK Subsidy Control)* (Bloomsbury, 4<sup>th</sup> ed, 2022)
- Nothing equivalent yet on UK Subsidy Control law, save for Quigley.

# HOW TO CREATE MORE CERTAINTY?

- More litigation?
- Maslow’s law of the hammer: “*I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.*”
- Litigation is time-consuming and expensive.
- The CAT is quick by modern European standards – *Durham* application made on 3<sup>rd</sup> February 2023, hearing 3<sup>rd</sup> & 4<sup>th</sup> July, judgment 27<sup>th</sup> July – but the CAT is also very busy with an expanding jurisdiction.
- The CAT’s *ad hoc* imposition of very low costs capping in *Durham* rejected by CA [2023] EWCA Civ 729; [2023] Costs LR 1177.
- JRs in the CAT and Administrative Court will likely only be cost-effective to establish major points of principle for the parties – as in *British Sugar*, *Durham* and *British Gas/Bulb Energy*.

# HOW TO CREATE MORE CERTAINTY?

- More reasoned and transparent decision making?
- That is an important element of the EU system, with publication of decisions addressed to Member States.
- The EU system's centralisation of decision making is both a strength and a weakness.
- The UK system is very decentralised and relatively opaque when it comes to substantive reasons.
- The only centralised body, the Subsidy Advice Unit, issues guidance principally on process rather than substance.