Antitrust Alert

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The UK's New Subsidy Regime: Not a Return to the 1970s and the Government Picking Winners?

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The UK government introduced into Parliament a wholesale change to its State aid rules under the new Subsidy Control Bill on 30 June 2021 (the "Bill"). The regime, which is set to come into effect in H1 2022, subject to Parliamentary approval, will provide UK businesses with quicker, more flexible access to financial support following the UK's departure from the EU.

Key Takeaways and Implications

- The UK government has proposed a new subsidy control regime that aims to provide UK businesses with quicker, more flexible financial support, without having to face "burdensome red tape" or the "lengthy bureaucratic process" imposed by the EU state aid rules.
- The domestic regime is said to mark a clear departure from the EU state aid regime. It will be aligned to national post-Brexit economic interests and industrial policies, and will maintain the UK's competitive, free-market economy.
- Local authorities and the devolved administrations in Edinburgh, Cardiff and Belfast will be empowered, for the first time, to decide on awarding subsidies (including grants, loans and guarantees).
- The regime will start from the basis that public authorities can award a subsidy if it follows UK-wide principles.
- The rules also envision a streamlined route for subsidies that are at low risk of distorting markets and are considered compliant with the principles of the regime, and a more extensive analysis for categories of subsidies that pose a high risk of distorting markets.
- A new Subsidy Advice Unit will be established within the UK Competition and Markets Authority to provide advice, but it will not have formal powers to prevent subsidy awards.

Replacement of EU State Aid Rules

Labelled by some as "the most important bit of post-Brexit legislation yet", the new regime will replace the EU State aid rules that applied to the UK until the end of the

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transition period on 31 December 2020. The EU State aid rules require all subsidies (except those under a Block Exemption Regulation) to undergo a lengthy process of notification to, and prior approval by, the European Commission (the "Commission").

Under the EU regime, the Commission is required to conduct a preliminary examination of the subsidy, and to decide within two months of receiving a complete notification whether to clear the aid or initiate a more detailed enquiry. If the Commission decides to launch an in-depth investigation, there are no formal time limits within which it must complete its investigation. While the Commission aims to do so within six months, the process has lasted for well over a year in many cases, delaying the provision of vital funds to viable businesses. The Commission did speed up review processes and put temporary rules in place to accelerate the delivery of aid during the pandemic, however, as it did during the financial crisis.

The UK government now intends to use its "newfound freedoms" to empower public authorities across the UK to deliver quicker and more flexible financial support "without facing burdensome red tape".

Overview and Objectives of the Regime

The UK government's intention with the Bill is to create a new system for subsidies that is simple and agile, and can enable key domestic priorities, such as levelling up economic growth across the UK, driving the UK's green industrial revolution and increasing UK R&D investment. The new system will start from the basis that subsidies are permitted if they follow UK-wide principles, the aim being that these principles will allow public authorities to deliver subsidies where they are needed without facing excessive red tape.

The government has said that the system "will not be a return to the failed 1970s approach of government trying to run the economy, 'picking winners' or bailing out unsustainable companies". Every subsidy must deliver strong benefits for local communities and ensure good value for money for the British taxpayer.

Rules for Granting Subsidies Under the Bill

The Bill sets out the key elements of the new subsidy control regime in primary legislation, with further details on implementation and guidance to be published in due course.

The "baseline route" of the proposed regime allows public authorities to award subsidies if they follow UK-wide principles. Such principles include, amongst other things: (i) that the subsidy pursues a specific policy objective in order to remedy an identified market failure or address an equity rationale (such as social difficulties or distributional concerns); (ii) proportionality; (iii) that the policy objective of the subsidy cannot be achieved through other, less distortive means; and (iv) that the subsidy's beneficial effects outweigh any negative effects (including negative effects to competition and investment in the UK, and international trade and investment).

The government will also create a "streamlined route" for subsidies at low risk of distorting competition, trade and investment; that promote the government's strategic objectives and which the government considers compliant with the principles of the regime. Under this route, public authorities will only need to demonstrate that the subsidy is within the scope of the streamlined route, and can then award the subsidy without further assessment.

Subsidies that are more likely to cause negative effects will be categorised as “Subsidies of Interest” or “Subsidies of Particular Interest”. The Secretary of State will set out the criteria for these subsidies in secondary legislation (although, the government anticipates that there will only be a very small number of subsidies in each of these categories). The Secretary of State may also call in subsidies that are at greater risk of having distortive effects. Public authorities may undertake a more extensive analysis of these subsidies and, for Subsidies of Particular Interest and called-in subsidies, will be required to seek advice from the Subsidy Advice Unit on their assessment before awarding the subsidy. The Competition Appeal Tribunal will have jurisdiction to hear applications to review a subsidy decision.

The new regime includes certain prohibitions on awarding subsidies to prevent public authorities from granting subsidies with distortive or harmful economic effects. Prohibited subsidies include those conditional upon the relocation of jobs and economic activity from one part of the UK to another, unlimited government guarantees and subsidies granted to ailing or insolvent enterprises where there is no credible plan to restructure the relevant business.

To streamline the regime further, the Bill includes a number of exemptions from the subsidy control requirements, such as subsidies required for safeguarding national security and subsidies granted to address natural disasters or national or global economic emergencies.

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