

EU, COMPETITION & PROCUREMENT

The Subsidy Control Act and the future of State aid in Northern Ireland

The Subsidy Control Act (**SCA**) has recently received Royal Assent. This clears the way for the UK's new post-Brexit alternative to State aid to commence from the autumn of this year.

Since leaving the EU the UK has been operating under the transitional arrangements provided in the Trade and Cooperation Agreement (**TCA**). Whilst a new regime has been ushered in for Great Britain, the position in Northern Ireland is more complex. This alert will highlight features of the new subsidy control regime and detail the position of Northern Ireland.

5 MIN READ

Is subsidy control different to State aid?

On the face of it there limited difference in the language used by both sets of rules as to what constitutes State aid compared to a subsidy.

Article 107(1)	Subsidy Control Act
State resources	Public resources
Confers a “selective advantage”	Confers an “economic advantage”
One or more “undertakings”	One or more “enterprises”
That distorts or threatens to distort competition and is liable to affect trade between EU Member States	That has, or could have and effect on: <div><div>i. competition or investment within the United Kingdom,</div><div>ii. trade between the United Kingdom and a country or territory outside the United Kingdom, or</div><div>iii. investment as between the United Kingdom and a country or territory outside the United Kingdom.</div></div>

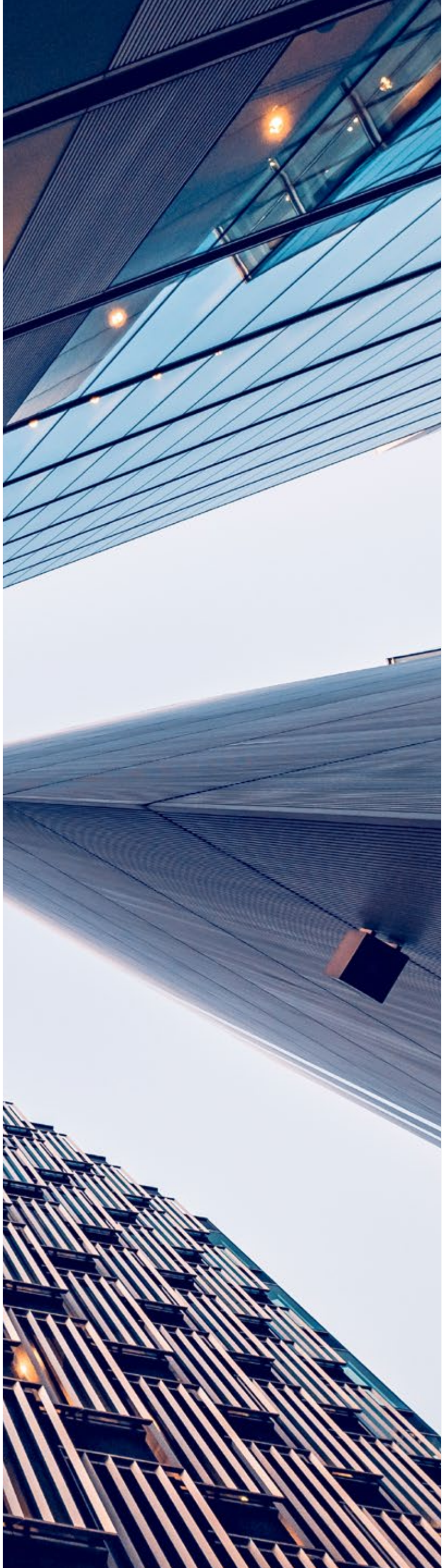
It is only this last limb which that is substantially different. Interestingly, through the government’s use of language, it has noted an intention to regulate subsidies which not only impact on a domestic level, but also internationally.

Various bodies designed to encourage business development have used grants which fall under the EU’s De Minimis levels – this stands at €200,000. This allows funding to be granted which does

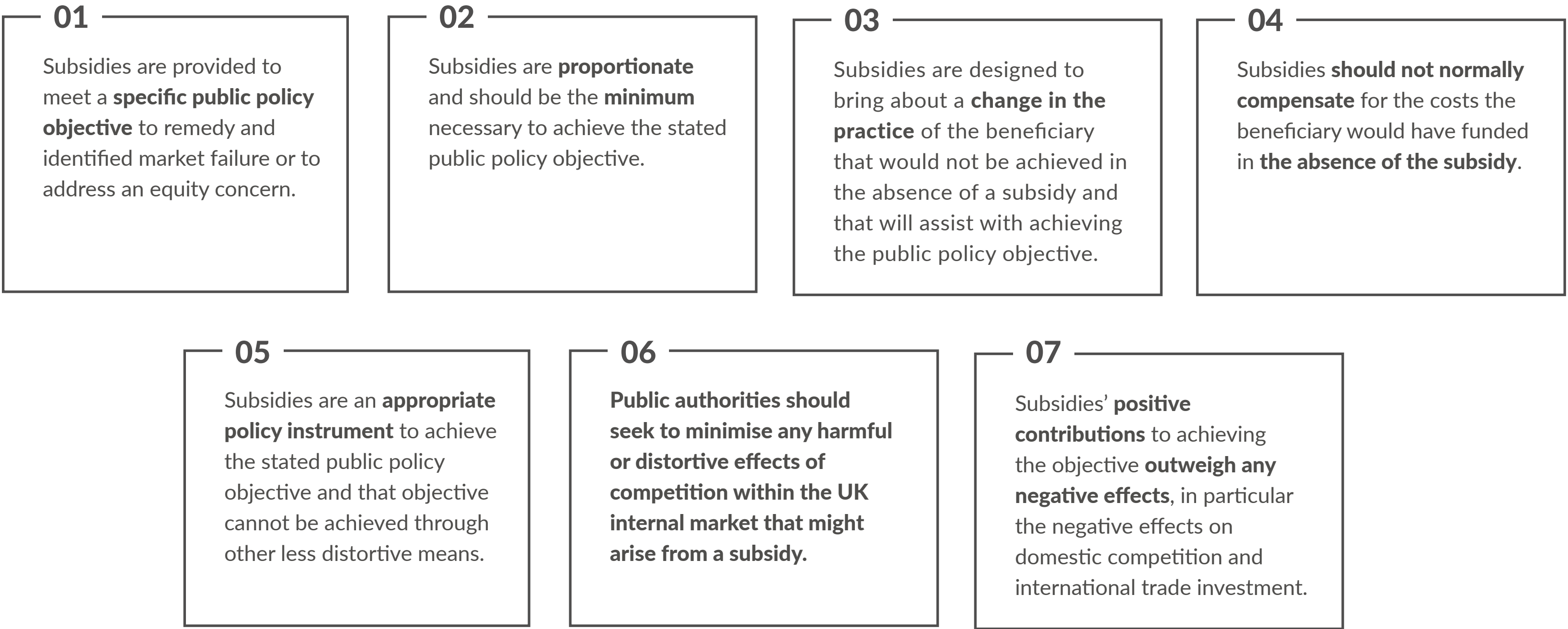
not need to be reviewed for State aid compliance. Under the subsidy control rules an exemption is provided that allows up to £315,000 of subsidies to be awarded to an enterprise within a three year period.

Despite the similarities in approach, the government clearly has a vision for how it wishes to see the new regime operate in the post-Brexit world. It has described the legislation as enabling:

...public authorities, including devolved administrations and local authorities, to deliver subsidies that are tailored and bespoke for local needs to deliver government priorities such as levelling up and achieving net zero carbon, as well as supporting the economy’s recovery from COVID-19.



To assist public authorities in providing subsidies the government has provided a set of principles to be applied.



In addition to the government’s guidance for granting subsidies, public authorities will be able to seek the assistance of the Subsidy Advice Unit which is part of the Competition and Markets Authority (**CMA**). Under the SCA it will be tasked with reviewing Subsidies of Interest (**SoI**) which are notified to it for an individual opinion prior to award, and Subsidies of Particular Interest (**SoPI**) must be notified to it prior to award.

The precise detail of what will constitute a SOI and SOPI is yet to be determined with the public consultation on the definition closing at the start of May. Presently the government intends that all subsidies to individual enterprises of a value in excess of £10m will become SoPIs subject to this additional requirement. In addition, smaller value subsidies in certain pre-defined sensitive sectors such as automotive production are to be similarly affected. Once notified the CMA will be responsible for issuing an advisory report which takes account of the effects of the proposed subsidy or scheme on UK competition and investment, and may include recommendations for alteration or further enquiry.

Who is responsible for enforcing the new subsidy control rules?

Whilst the CMA will have a role in providing advice on subsidies, it will not be responsible for investigating or enforcing the new rules. This stands in contrast to the position of the European Commission in respect of illegally granted State aid. Instead, it will be for “interested parties” to bring a challenge by way of Judicial Review to the Competition Appeal Tribunal (**CAT**) (rather than the High Court).

An interested party under the SCA is any person whose interests may be affected by the giving of the subsidy or the making of the subsidy scheme.

Are the new rules ‘better’?

The simplification of language and associated tests for granting subsidies is to be welcomed. It is clearly the intention of government that public authorities should be able to grant subsidies much more quickly than when schemes required approval by the European Commission. This should allow public authorities to respond to the needs of businesses and put in place schemes which drive the economy.

As would be expected with a new system, there are uncertainties. The present figure of £10m for a subsidy needing to be assessed by the CMA seems too high. Major projects will quickly meet this threshold. In addition, whilst the CAT has proven itself capable of hearing complex competition law actions, it remains to be seen as to how it will perform in its new role.

The greatest uncertainties, however, arguably lie in its application to Northern Ireland.

How will the new rules apply to Northern Ireland?

Under Article 10 of the NI Protocol the EU’s State aid rules continue to apply to the trade in goods and the wholesale electricity market. Therefore, any other form of grant would fall under the new subsidy control regime. Whilst this division seems relatively clear, upon inspection it causes some concerns.

A significant proportion of the NI economy is driven by both the trade in goods and the energy sector. This would appear to place a lot of potential grants in the realm of requiring State aid approval. In theory, this could be achieved by the UK government seeking approval from the European Commission.

Depending on the outcome of ongoing NI Protocol discussion (and how relations are left) may determine how readily the government would be prepared to do so.

The NI Assembly recently brought in legislation committing the province to Net Zero by 2050. Whilst this target is laudable, to be achieved there will need to be significant investment in the energy sector. A question remains as to whether Northern Ireland will receive the same level of investment as other UK regions in meeting this target. Recent actions by the European Commission may make the government hesitate in supporting local schemes.

The [EU](#) has requested consultations with the [UK at the World Trade Organization \(WTO\)](#) regarding allegedly discriminatory practices in the fourth allocation round of the UK's Contracts for Difference (**CFDs**), under which the government provides support for low-carbon electricity generation.

In its request for consultations, the EU alleges that the fourth round of allocation of CFDs (which was the first to be opened since the UK left the EU):

- Makes UK local content a criterion for the eligibility of applicants to participate in the allocation of CFDs.

- Makes attainment of the level of UK content as committed in the applicants' initial eligibility application a criterion for effective payment of the subsidy.

The EU argues that these alleged requirements are inconsistent with the UK's WTO obligations, and in particular with Article III:4 of the General Agreement on Tariffs and Trade 1994, which provides that WTO members must accord no less favourable treatment to imported products than to products of national origin.

The output of these consultations is yet to be determined and may simply be expected "teething" issues from the new UK/EU post-Brexit relationship. Unless these issues are resolved, it is suggested, however, that they could serve to have a chilling effect on UK government support for energy schemes in Northern Ireland. Not only is there the likelihood that such schemes could be caught by Article 10 of the NI Protocol, there is the prospect that any scheme which benefit NI energy companies could be the subject of complaint by their ROI counterparts.

Use of Article 10 as a means to challenge the validity of financial support has recently come before the Courts. In the case brought by [British Sugar](#), the Court had to consider a measure taken by the UK Taxation (Cross-border) Trade Act 2018 to provide for an

autonomous tariff quota (**ATQ**) for raw sugar cane. British Sugar contended that the ATQ (which is saw as providing an unfair advantage to its competitor Tate & Lyle) amounted to unlawful State aid under Article 109 of the Treaty on the Functioning of the European Union as applied by the NI Protocol.

The Court had to determine whether the effects on NI-EU trade caused by the ATQ were sufficient to trigger the application of Article 107 under the NI Protocol. The Court noted, that the effect was, "*indirect, involves at best very small volumes and is premised on the unproven assertion that the ATQ is liable for the displacement of EU refined sugar from Northern Ireland*".

This ruling is to be welcomed. It is a clear indication that unless a scheme is designed to specifically benefit NI and NI businesses, then the application of State aid rules will not come into consideration by the courts. It would be hoped that case law develops and further government guidance is produced – NI businesses will be able to take full advantage of either State aid or subsidy control schemes open to them.

Should you wish for further guidance on how State aid and subsidy control rules can benefit your business, please contact [Micaela Diver](#) and [Stephen Abram](#) within our Public & Regulatory team.

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