How to spend (our) money wisely: the Subsidy Control Act and control of public tax and spend in a post Brexit United Kingdom

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Introduction.

The UK Government has recently announced that on 4 January 2023, the new regime regulating the granting of subsidies as provided for by the Subsidy Control Act 2022, will enter into full force.[1] This new system will provide the framework for a UK-wide, subsidy control so – according to the UK Government - as to enable public authorities, including devolved administrations and local authorities, to "*deliver subsidies tailored to local needs; to support government priorities such as driving economic growth and to reach net zero".* [2] All extremely laudable aims but the Government is actually even too modest as the new Subsidy Control Act is much more: the new legislation is – together with the UK Internal Market Act[3] – one of the most comprehensive post Brexit regulatory settlements raising all manner of possible implications and complications; it also represents one of the most extensive domestic legislative regimes in terms of control of public spending – and not to forget the role of tax ; because of the model adopted it is bound to have serious repercussions on the UK's public law system, especially as far as the role of public authorities and judicial control are concerned. Finally, it raises crucial questions in terms of solidarity between devolved regions and central government. In short, a whole stable of Professor Birkinshaw's hobby horses.

1. The Subsidy Control Act.

The Subsidy Control Act 2022 ("SCA" hereafter) received Royal Assent on 28 April 2022 and as mentioned it is expected to enter in full force by the beginning of 2023.[4] At 92 articles and 3 schedules, such an extremely comprehensively detailed regulatory framework was not exactly based on independent political choice. The

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[1] Subsidy Control Act 2022 (c. 23).
[2] https://www.gov.uk/government/collections/subsidy-control-regime (accessed 26 October 2022)
[3] UK Internal Market 2022 (c. 27).
[4] Subsidy Control Act 2022 (c. 23).

Subsidy Control Act has been drafted and approved so as to directly comply with specific obligations imposed by the Trade and Cooperation Agreement (TCA hereafter) concluded between the EU and the UK which, as is well known, sets out preferential arrangements in various trade and economic sectors.[5] Article 371 of the EU-UK TCA specifically requires both parties to set an "*effective domestic regime of subsidies control"*.[6] The effectiveness of such a system would have to be measured against its compliance with the very detailed and lengthy articles of Chapter 3 of the TCA, one of the most extensive examples of subsidies regulation in any kind of international trade agreement. The SCA generally tends to replicate the TCA structure and it strictly adheres to the requirements imposed by the EU-UK TCA in terms of its scope. The SCA is roughly divided into the three broad areas regulated by the TCA: the definition of what constitutes a subsidy; the monitoring of subsidies; and enforcement and remedies in case unlawful subsidies have been granted.[7]

2. A "made in the UK" subsidy.

2.1 The four limb test.

The definition of what constitute a subsidy, contained in Section 2 SCA, faithfully replicates that of Article 363(1)(b) of the TCA and comprises four limbs. "Subsidy" means financial assistance which: (a) is given, directly or indirectly, from public resources by a public authority; (b) confers an economic advantage on one or more enterprises; (c) is specific, that is, it is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services; and (d) it has, or is capable of having, an effect on competition or investment within the United Kingdom, and on international trade. The four limbs of the test are cumulative and they all need to be satisfied for a measure to be classified as a subsidy. In terms of scope, these four limbs are very resonant of

[5] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part OJ L 149, 30.4.2021, p. 10–2539.

[6] For a fuller discussion see Andrea Biondi and Anneli Howard KC, *Levelling up a level playing field: competition and subsidies in post-Brexit Britain*, in Adam Lazowski & Adam Cygan (editors), *Research Handbook on Legal Aspects of Brexit* Edward Elgar, 2022, ch 15.

[7] The SCA does not of course cover the questions of possible controversies that could arise by possible violations of Chapter 13 TCA. The complex system of arbitration/ retaliation measures is contained in the TCA itself as the Agreement provides for several State-to-State remedies in case of a serious risk of negative effect on trade, subject to a possible arbitration procedure.

concepts developed in the context of EU state aid law and WTO regulation on subsidies.[8] However, a few comments more related to the likely impact on the perimeter of UK Public Law may be more pertinent here. For instance, the SCA refers to "*public resources*" given by "*a public authority*". Curiously, the Section 6 definition of "public authority" is a negative one. It defines which entities are *not* public authorities, such as the Houses of Parliament, leaving the legal as well as the practical responsibility for making decisions on the granting of subsidies to a very broad range of local and devolved authorities and many central government bodies, due to the breadth and negatively worded definition. What constitutes a public authority within the EU context is very much shaped by the imperative of guaranteeing the uniform and effective application of supranational norms and its impact has radically shaped and influenced UK public law as well. [9] This is demonstrable in the well known formula, that any body or an organisation, even one governed by private law "*to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals"* [10] will be considered public.

If we stick to the domestic arena, perhaps appropriately in a post Brexit scenario, the emphasis is still placed on functionality, therefore, for example, the UK Data Protection Act defines a Public Authority as any body *"performing a task carried out in the public interest or in the exercise of official authority vested in it"*. [11] Furthermore, as the UK system has strongly been characterized by a process of progressive "privatization" of public functions, questions concerning so called hybrid authorities are likely to arise in the context of funding and subsidization of certain activities. In this context, analogies may be drawn from the extensive case law on the interpretation of Section 6(3) of the Human Rights Act 1998, which defines a 'public authority' as including s6 (3)*(b) any person certain of whose functions are functions of a public nature"* and from principles developed in claims for judicial review. Whilst the latter may be more pertinent, as the later section of this chapter considers,

[8] Biondi and Howard KC, *cit. above*.
[9] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*. ECLI: EU: C: 1986:206. See further Patrick Birkinshaw "English Public Law Under European Influence." *Bestand und Perspektiven des Europäischen Verwaltungsrechts*. Nomos Verlagsgesellschaft mbH & Co. KG, 2008.
[10] Case C-413/15 *Elaine Farrell v Alan Whitty* ECLI: EU: C: 2017:745.
[11] UK Data Protection Act 2018 (DPA 2018) section 7(2), Part 2, Chapter 2.

in both the human rights and the judicial review context English courts seem to concur that it is the presence of certain factors which reveal the public nature of the body in question, such as: being publicly funded; exercising statutory powers; taking the place of local authorities or the Government and providing a public service.[12] However, the question to be asked in the context of the SCA should not be whether a certain body carries out a public function or not but the crucial factor will very much depend on the definition of "*public resources*". This is entirely logical because if the definition of subsidy is left entirely to the nature of the body making that grant, the risk would be that government resources could be channeled to entities which do not constitute "public authorities" so that they are then made available, at the direction of a public authority, to a beneficiary providing goods or services on the market. Interestingly, the UK Government guidance on the application of the SCA suggests that the notion of public resources should include *public funds that are administered by the UK government, the devolved administrations or local authorities, whether they are given directly, through other public bodies, or through private bodies".* [13] This leaves open the possibility that even where the entity granting the subsidy does not constitute a public authority under the more traditional Public Law approach, if a transfer of resources is taking place anyway, the measure could be classified as a subsidy. This does not mean that an enquiry on the Imputability of the measure should not be carried out. In EU state aid law, it is a well established principle that the mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the State but it needs to be demonstrated by a "*set of indicators arising from the circumstances of the case and the context in which the measure was taken*" such as for instance the presence of factors of an organic nature which link the public undertaking to the State, or the fact that the body could not take the contested decision without taking account of directives coming from the Government. [14] As held by the Court of Appeal in a pre-Brexit state aid case, for the criteria of public resources to be established there should be "*a clear and direct nexus of a relatively formal character between the advantage and the foregoing of revenue*". The link between allowing

[12] See for example *R v Panel on Takeovers and Mergers ex parte Datafin Plc* [1987] QB 815 and *Aston Cantlow v Wallbank* [2003] UKHL 37. On this possible analogy see Patrick Birkinshaw *European Public Law: The Achievement and the Brexit Challenge*, Third Edition (Kluwer Law International 2021), pp.449 and ss.

[13] Draft Statutory Guidance on the SCA at https://www.gov.uk/government/consultations/statutory-guidance-on-the-subsidy-control-act-2022 (consulted 8 Nov. 2022) pp. 21 and ss.

[14] C-482/99, *France v Commission (Stardust)* ECLI: EU: C: 2002:294, paragraph 55.

private use and the possible engagement of State resources cannot be merely "*hypothetical, remote and indirect*" and the corresponding alleged aid has to be "*more than an estimation of a diffuse advantage spread across a wide class with no clear share or definition or formality to it*". [15] This is one of the areas where the implementation of the SCA regime can have an impact, perhaps unanticipated, on the development of UK Public Law.

2.2. The Lawfulness of a Subsidy and the integrity of the UK Market.

The most significant innovation in terms of definition is contained in Schedule 1 of the SCA. Schedule 1 lists several principles that need to be verified in order to establish whether a certain measure constitutes a subsidy. These principles need to be replicated *verbatim* here: subsidies should pursue a specific policy objective in order to remedy an identified market failure or address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns); subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it; subsidies should be designed to bring about a change of economic behaviour of the beneficiary; subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy; and subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means. These are exactly the principles listed in Article 366 EU-UK TCA. The SCA introduces a further principle: subsidies should be designed to achieve their specific policy objective while minimising any negative effects *on competition or investment within the United Kingdom*. This provision echos the fourth limb of Section 2 on the definition of a subsidy which requires that a measure being classified as a subsidy must, or must be capable of having, an effect on competition or investment either on *international trade* or within *the United Kingdom*. This extra focus on the possible "internal" distorsions of competition and level paying field is extremely welcome because in theory it should work as a guarantee to ensure solidarity between the different parts of the UK. It also fits in with the aspiration of the UK Internal Market Act that aspires to guarantee a free market access on goods and services by removing

[15] *British Academy of Songwriters, Composers and Authors (BASCA) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin).

or preventing any potentially harmful trade barriers within the UK. In this respect, it is also worth noting that the SCA introduces an anti-delocalisation provision in requiring that subsidies should not be '*given to an enterprise subject to a condition that the enterprise relocates all or part of its existing economic activities'* and where '*the relocation of those activities would not occur but for the giving of the subsidy'*. Relocation subsidies, a very controversial issue within the EU internal market, are therefore prohibited in order to maintain the integrity of the UK internal market. Interestingly again, in the Draft Guidance on the application of the SCA, the Government has introduced a kind of *de facto* map of regional spending. According to the Government, relocation would be only allowed taking into account certain specificities of a given area. If the subsidies are granted to move within the same local authority area, they should not be prohibited, as movement within the same area and under the responsibility of the same authority would not cause any distortion or a subsidies race. Conversely, any relocation subsidy where a public authority is moving outside its area and trespasses into another, may trigger the application of the SCA. It remains to be seen how those cases will develop, especially where several authorities - perhaps including a local authority, a devolved administration or the UK Government – may all exercise their responsibilities at the same time and how a local authority may be able "calculate" exactly the extent and the effect of its granting of a subsidy.[16]

3. A new role for all UK Public Authorities?

The application of the "seven subsidies principles" is delegated entirely to public authorities. Consequently, each and every public body in the UK granting a subsidy will have the power to decide whether that subsidy is consistent with those principles. All public authorities will therefore be in charge of deciding whether or not a certain measure would be considered a subsidy and unlawful.

On its face, the SCA seems to attempt to introduce a form of "localism", a bottom up model. For those old enough to remember, UK governments introduced many reforms attempting to decentralize powers. The Localism Act 2011 was, for example,

[16] The SCA has also introduced an exception to this rule as it allows the granting of state susbsidies if the effect of the subsidy is to "*reduce the social or economic disadvantages of the area that would benefit from the giving of the subsidy"* (section 18 (5)(7) allowing a certain degree of positive regional solidarity.

introduced with great fanfare heralding a new era as it was based on a '*general power of competence'* idea. Local Councils were given the legal capacity to do anything that an individual can do that is not specifically prohibited. This should have consequently allowed councils additional freedom in promoting the local economy by offering business rate discounts - to help attract firms, investment and jobs and so on. In reality, most of these projects have not been successful and local authorities are still very much under central supervision. [17] Similarly, the SCA, far from being a delocalization reform, could in reality place public authorities under considerable stress. There are legitimate questions as to whether the overwhelming majority of UK public authorities would, in fact, have access to the necessary resources to carry out a subsidy control principles compatibility assessment. In order to fulfil this duty, resources and expertise are a necessity. Compliance with the principles will have to be discharged through a complex legal and economic analysis. Concepts such as market failure or equity rationale are not easy to determine and may require strict counterfactual analysis. Take, for example, the final step of analysis which a public authority needs to undertake when giving the green light to a subsidy: it will be incumbent on the public authority to establish that the benefits of the subsidy that are supposedly linked to a previously identified public policy objective, and that they outweigh the negative effects. Such a delicate balancing exercise would surely require both quantitative and qualitative elements, introducing a discretionary evaluation, as a simple mathematical calculation of costs will not suffice. Furthermore, it may be questionable as to what considerations a public authority should take into account. Take, for instance, the harm side of the balancing scale. It seems plausible that the public authority should look at all the possible negative impacts of granting a subsidy on investment in a particular region, or even on the whole UK, but also – as required by the SCA - the same public authority must evaluate how the disbursement of public funding may impact international trade or investments. This is not easy without relevant expertise. Additionally, the SCA, in line with the TCA provisions, carves out an exception for those subsidies that are granted in order to perform a public service obligation. In the new TCA language, these are defined as Services of Public Ecomomic Interests (SPEI) and the SCA in Section 29 requires the public authority to

[17] John Stanton "*Rebalancing the central-local relationship: achieving a bottom-up approach to localism in England*" in Legal Studies Vol 38 (3) 2018, 429.

decide whether a service can be classified as such. Again not an easy task as it will require public authorities to: a) define themselves what an SPEI is; and b) entrust an undertaking to carry out its assigned tasks, provided the compensation from state resources does not exceed what is necessary for the discharge of those tasks. These principles are borrowed from the EU Commission's practice and case law, where SPEI has developed over fifty years and is one of the most complex areas of EU law.[18] The combination of all these obligations provides a rather daunting prospect that public authorities will have to deal with mostly on their own. In the old days, the Department for Business, Energy & Industrial Strategy (BEIS hereafter) operated as a "consultant" for any state aid related matters and as a counterpart to the European Commission. Under the SCA, the new considerable burden on public authorities is only partially alleviated for certain kinds of subsidy where it would be possible to seek an opinion from the Competition and Markets Authority (CMA hereafter). When granting a subsidy, a public authority would then have the choice as to whether to ask the CMA to prepare a report on the public authority's subsidy control compliance assessment. Only in cases of what the SCA defines as "a subsidy of particular interest", would a public authority have an obligation to ask the CMA to prepare such a report.[19]

Some relief can come from the application of Section 10 of the SCA. The UK Government (but not any other UK public authority) can define 'streamlined subsidy schemes' with a view to allowing "lower-risk subsidies to be given by public authorities more quickly and easily, without their needing to assess compliance with the principles or other subsidy control requirements."[20] The scope and extent of these streamlined subsidy schemes has yet to be determined but there are potential negative repercussions to assisting public authorities because a resulting excessive extension of

[18] See for instance Commission Decision of 20 December on the application of Article 106(2) of the TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3. In general Daniele Gallo, *Public Services and EU Competition Law (*Springer) 2021, Ch VI.

[19]The Government has proposed that the dividing line between a subsidy of interest and a subsidy of particular interest should be based mainly on financial thresholds: a general threshold of £10 million for subsidies of particular interest (SOPI) and of £5 million for subsidies of interest (SOI). Subsidies in excess of £10 million would be subject to mandatory referral to the CMA, while subsidies between £5 million and £10 million would be subject to voluntary referral. "Consultation on subsidies and schemes of interest and of particular interest" at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063355/ssopi-and-ssoi-consultation.pdf accessed Nov 2022.

[20] Subsidy Control Bill, Explanatory Notes, para. 46.

such schemes could be perceived as an attempt to shelter certain economic activities from subsidy control.

There is yet another "constitutional" issue for all public authorities to reflect upon: in the EU, the balancing test on whether the benefits of an aid outweigh the negative effects is carried out by the European Commission. For good or for bad, the Commission acts as a supranational referee between the different Member States and has gradually developed the 'common European interest' as a benchmark over sixty years of applying state aid law. All UK authorities involved will have to undertake the same process as they would need to gradually identify a UK-wide 'common interest'. Aside from the very real and significant burden imposed on public authorities, it is the very same SCA that reaffirms the centralised character of the UK public law system, because control of distortive and harmful subsidies have actually been made a reserved matter. Consequently, devolved regions and devolved Parliaments are not part of the process in any way. The devolved Parliaments are mentioned in Section 6 only as entities that should not be considered public authorities, but nowhere else in the SCA. The UK Government is instead provided with many prerogatives as it may intervene in relation to a proposed subsidy or scheme where the Secretary of State considers that there is a risk of non-compliance or of 'negative effects' on competition or investment within UK. The Secretary of State can also require the public authority in question to submit their decision to the Competition and Markets Authority.[21] Once again devolved regions are not in any way part of the process.

3.1 The Northern Ireland question

In relation to devolved regions, at least the SCA may be seen as part of the solution to one of the most controversial and sensitive Brexit related issues: Northern Ireland and in particular the application of state aid control to Northern Ireland. As is well known, the EU and the UK agreed within the Northern Ireland Protocol Article 10, and Annexes 5 and 6, which provide that state aid provisions continue to apply to the United Kingdom '*in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol'*. This provision is there to ensure the integrity of the customs rules applicable to Northern Ireland and to avoid

[21] Clauses 55 and 58.

granting aid / subsidies that could advantage goods suppliers in Northern Ireland, who are free to export to the EU without being subject to tariffs. Article 10 and its related Annexes have proven to be extremely controversial and have created sharp disagreements between the UK Government and the European Commission. There has been indeed a general consensus that Article 10 of the Northern Ireland Protocol may have the effect of expanding the application of EU state aid law to virtually any UK Government measure that may affect Northern Ireland, given the low threshold equivalent "effect on trade" concept which is applied in EU state aid law.[22] Those concerns fail to fully understand how 'effect on trade' operates in EU state aid law. Despite the apparent width of such criteria, the 'effect on trade' is based on a presumption that can, as is the case with any presumption, be rebutted if it is clear that a certain measure does not have actual effects on market actors. [23] It is also well-accepted practice in EU law that if a certain measure has a purely local impact it consequently has no effect on trade between Member States. In those cases the measure would have no more than a marginal effect on the conditions of cross-border investments or establishment.[24] It should also be remembered that effect on trade is just one of the criteria that needs to be satisfied for a measure to be qualified as aid. First, it needs to be shown that a certain measure imposes a financial burden on the state and that it confers a selective advantage for a specific undertaking; a rather arduous test that also excludes horizontal economic policies from the scope of EU State aid law. There will be no advantage and therefore no aid if the economic benefits are merely indirect or secondary effects of the measure at stake. [25] The European Commission itself explained in clear terms in a Notice to Stakeholders on the application of the Northern Ireland Protocol that '*an effect on trade cannot be merely hypothetical or presumed, but has to be demonstrated*.' [26] The possible

[22] See George Peretz KC and Alfred Artley, '*State Aid in the North Ireland Protocol'* (2020) Tax Journal, 11 and George Peretz KC and James Webber "*The UK's Proposed Revisions to Article 10 of the Northern Ireland Protocol: a Sensible Basis for Negotiation*" post at https://uksala.org/the-uks-proposed-revisions-to-article-10-of-the-northern-ireland-protocol-a-sensible-basis-for-negotiation/ (accessed Nov 2022).

[23] Case C-518/13 *Eventech* ECLI: EU: C: 2015:9, para.65.

[24] See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] OJ C262/1, para 6 .3 and See European Commission Decisions Czech Republic - Hradec Králové public hospitals (SA.37432) and Germany – Landgrafen-Klinik (SA.38035).

[25] Case T-607/17 *Volotea, SA v European Commission* ECLI: EU: T: 2020:180; T-716/17 *Germanwings GmbH v European Commission* ECLI: EU: T: 2020:181; T-8/*18 easyJet Airline Co. Ltd v European Commission* ECLI: EU: T: 2020:182.

[26] European Commission, 'Notice to Stakeholders: Withdrawal of the UK and EU rules in the field of state aid' <https://ec.europa.eu/info/sites/default/files/notice-stakeholders-brexit-state-aid_en.pdf>. Not

implications of the application of Article 10 of the NI Protocol were tested before English courts in *R (British Sugar) v Secretary of State for International Trade*.[27] The case concerned the imposition of an autonomous tariff quota (ATQ) applicable to imports of raw cane sugar into the UK. The Court found that no violation of Article 10 of the NI Protocol occurred as there was no evidence that the measure was specifically designed as to apply selectively. Consequently, the measure did not constitute state aid. The court commented on the issue of whether the measure did have an effect on trade. It relied both on the European Commission's practice and especially on the EU Notice where it mentions the need for there to be a "*genuine and direct*" link between the measure at issue and an effect on trade in goods between Northern Ireland and the EU, and interpreted it as a qualification of Article 107(1) TFEU. The court then found such a "genuine and direct" link was not proven as the measure had very indirect effect, because it involved "*at best very small volumes and is premised on the unproven assertion that the ATQ is liable to lead to the displacement of EU refined sugar from Northern Ireland*".

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so differently the UK Government explained that 'in practical terms, subsidies granted in Great Britain are only in scope of Article 10 where there is a clear benefit from and a genuine, direct link between the subsidy and companies in Northern Ireland." at https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments.

[27] *R (British Sugar) v Secretary of State for International Trade*[2022] EWHC 393 (Admin).

Recently the UK government has proposed a Bill [28] that would confer the power to the UK to unilaterally amend some of the provisions of the NI Protocol, a move that caused consternation in the EU with the Commission indicating the possibility of bringing infringement proceedings against the UK. In particular, Clause 12 of the Bill removes the effect of Article 10 of the Protocol on state aid, and gives ministers the power to make provision in relation to subsides in Northern Ireland going much further than previous proposals made by the UK Government. [29] This approach featured in the Bill, although apparently radical, does not however create a legal vacuum because of the application of the terms of the UK –EU TCA in conjunction with the regime of the SCA due to come into full force in January 2023. There are of course many elements of the SCA that could be then used to "replace" or improve the guarantee of the preservation of a level playing field both within the UK market and also towards the EU. However, the consequences for public authorities and the impact on UK Public Law so far and continuingly as observed in this chapter still stand in the event that the Northern Ireland Protocol Bill does remove the entirety of Article 10 and its associated annexes.

4. Tax as an afterthought? Problems – and solutions – for Public Authorities

One of the main instruments to promote certain public objectives is taxation. Whilst the UK was usually a very compliant Member State in terms of State aid control, it has often been embroiled in cases dealing with taxation. For instance, the European Commission found that the UK controlled foreign company (CFC) finance company (FinCo) regime constituted illegal state aid as its central objective was to protect the UK tax base by taxing profits arising from UK activities and assets that have been artificially diverted from the UK to a controlled foreign company.[30] Brexit has not

[28] NI Bill 2022 HL Bill 52 (as brought from the Commons)

[29] For instance in the Command Paper of 21 of July 2021 it was proposed to promote a (albeit very vague) enhanced form of consultation or referral power in case of susbsidies of *a significant scale relating directly to Northern Ireland as "to enable EU concerns to be properly and swiftly addressed."*"*(Northern Ireland Protocol: the way forward, CP502, 21 July 2021, paragraph 65).*

[30] Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p. 1) now uphold in Cases T-363/19 and T-456/19, *UK, ITV and others v Commission*, ECLI: EU: T: 2022:349.

halted this trend because very recently the Commission has decided, on the basis of the Withdrawal Agreement, to bring the UK before the CJEU for falling to implement a Commission decision taken before the end of the transition period ordering the recovery of fiscal aid granted by Gibraltar in the form of an exemption for passive interest and royalties.[31]

Within the SCA, there are actually a multitude of opportunities which are available to public authorities to use fiscal measures in a way that grants public resources in a manner that meets the definition of subsidy in Section 2. From start-up grants to tax breaks or amnesties, to tax benefits, payment holidays and tax reductions or deductions, the amount of public money at stake is not inconsiderable.[32]

Taxation does not however feature specifically at length in the SCA, but it does feature. However, it is considered almost as an afterthought because unfortunately the SCA appears to equate subsidies in the form of taxation with other subsidies and does not treat taxation sufficiently as a discrete element of the subsidy control regime. As a result, it is not apparently viewed as needing the specific expert advice that is actually required to help support public authorities when undertaking their legal obligations under the SCA. It is instead amalgamated with other areas. This is quite a perplexing choice because the TCA contrastingly provides for detailed regulation when a certain tax, by being specific, violates the provisions on subsidies control. It creates another problem to befall public authorities when taking decisions specifically on tax measures. Whilst turmoil caused by the 2022 'mini-budget' isn't too likely a consequence, at least to that extent, there are possibilities for spill over effects from one public authority decision on tax subsidies to another.

The CMA is the body, which has the remit to consider the application of the SCA. However this is inappropriate, not because the CMA is not expert, but because it is not expert in taxation. It would instead be rather reasonable to bring in at least an informal dialogue with the true expert that is the Treasury on matters of tax potentially falling within the subsidy control regime. The statutory scheme of the SCA does not prohibit the possibility for informal dialogue with the Treasury. The need for such dialogue is clear and persuasive: to assist public authorities with their task.

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[31] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1266.

[32] See further Neil Crafts, *Brexit and State aid*, (2017) 33 *Oxf. Rev. Econ, Policy* 105 and Kevin Farnsworth, '*Public policies for private corporations: the British corporate welfare state'*, in *Renewal*, vol.21, (2013) 51.

There are potential problems which can arise from the current SCA regime, which this proposal for informal dialogue with the Treasury could help to address in the tax context. To name but a few, as discussed above, the role of public authorities in administering the principles contained in the SCA is not an enviable one. This is not alleviated by the subsumation of tax subsidies into general subsidies and therefore specific advice and comment on tax matters, even within the scope of the general control regime, could assist. Sections 52 and 53 of the SCA consider mandatory referral to the CMA, and to all intents and purposes this would include referral on tax issues. If so, the CMA will find itself pronouncing on fiscal matters which are not and should not be part of its remit. The potential for a three way dialogue between the relevant public authority, the CMA and Treasury where and to the extent that taxation becomes part of the intended grant of a subsidy could respond to this issue. Furthermore, HM Revenue and Customs (HMRC) would surely be categorised as a public authority under the Act,[33] consequently capable of granting subsidies itself. However, as one of the most significant bodies in the UK for deciding on and administering matters of taxation, including enforcement, it is expert and could therefore be useful to provide guidance to other "public authorities" when considering the granting or conversely considering avoiding a grant of a subsidy. Effectively, the hybridity of HMRC is not acknowledged let alone addressed in the SCA. This could foreseeably exacerbate the issues already outlined in this chapter regarding the relationship between the levels of devolved government, delocalisation and the paradoxical centralization provisions. Voluntary referrals to the CMA are permitted under Section 56 of the SCA in order to obtain a report, although the CMA can refuse to provide a report in response to the request. The report would evaluate the public authority's assessment of the lawfulness of the proposed subsidy, or subsidy scheme, according to Section 59 of the SCA. As the evaluation in the referral report must take into account any effects of the proposed subsidy, or subsidy scheme, on investment, under Section 59 (2), which in relation to a fiscal subsidy, or subsidy scheme would certainly fall within the Treasury's remit, it is hard to see how the CMA can reasonably be asked in isolation to evaluate the lawfulness of a fiscal subsidy on investment without reference to the Treasury's opinion. It is also preferable in those

[33] SCA, Section 6.

instances where the public authority in question is HMRC, that there is a possibility for informal involvement of the Treasury, because both HMRC and the Treasury will already have a developed relationship in relation to fiscal matters, which it is hardly more efficient to replace with the CMA, whose remit on competition problems and issues does not extend to tax. In fact, it would be rather peculiar to expect HMRC especially, to make a referral to the CMA for an assessment of the lawfulness of a proposed subsidy which may have been prompted by the Treasury's fiscal policy, only for the CMA to assess the lawfulness of the fiscal measure in isolation and outside its competition expertise. Whilst there is opportunity under Sections 52 and 56 of the SCA for the referring public authority to provide explanatory information, there is every likelihood that this would not answer all of the CMA's questions because its remit does not include taxation and it would be unreasonable to expect it to make an assessment without reference to details of the greater contextual policy and practice of the Treasury and indeed the Treasury's relationship with HMRC. In addition, the Secretary of State, who is given various powers under the SCA, would not be the Chancellor of the Exchequer but rather the Secretary of State for BEIS. The Secretary of State for BEIS is empowered by the SCA to call-in or make post award referrals[34] to the CMA but this is again not the most appropriate manner in which to treat fiscal subsidies. As the CMA has reporting obligations under Section 65 of the SCA, it makes more sense for there to be a facility for informal dialogue and even consultation between the CMA, the relevant public authority and the Treasury, not least because the report is not just to be published, but also under Section 65 (8) it has to be laid before Parliament. The potential scope and opportunity in the SCA for consultation – which falls short of what is being recommended here but also demonstrates that an informal consultation mechanism would not be prohibited or contradict the SCA – is Section 79. This provides the Secretary of State for BEIS with the option to issue guidance on the practical application of specific elements of the subsidy control regime.[35] This option to issue guidance is coupled with a duty under Section 79(5) to consult "*such persons as the Secretary of State considers appropriate"* and it goes without saying that the Treasury would be unlikely to be inappropriate. Whether HMRC as a public authority itself under the Act would be an appropriate consultee under this section would probably depend on the tax issue upon

[34] For example Section 60 SCA.
[35] Section 79(10) of the SCA.

which the Secretary of State for BEIS was seeking to issue guidance. Interestingly, on timing, Section 79(7) permits consultation carried out before the section comes into force to be sufficient to comply with the obligation contained in Section 79(5). From the perspective of the public authority, according to Section 79(6) they must have regard to guidance issued under Section 79 when giving a subsidy or making a subsidy scheme, although the obligation applies "*so far as applicable to the authority and the circumstances of the case"*.[36] The opportunities authorised by Section 79 do not replace or remove the need for continuing and prospective consultation but they open the door, albeit slightly, for the development of informal dialogue to aid public authority decision making to be in accordance with the spirit of the SCA. Finally, in compliance with Article 373(5) EU-UK TCA, the SCA excludes from the obligation of recovery of unlawful subsidies, Acts of the UK Parliament, therefore conferring to some extent protection for tax schemes included in UK primary legislation. However, individual tax rulings or tax assessments and specific taxes administered outside of a legislative scheme or under the discretion of a public authority may be considered as individual subsidies and therefore become subject to a recovery action. The breadth of the SCA therefore has the potential to encompass many forms of taxation, including tax rulings, which does not appear to have been given the necessary forethought in the consultation and enforcement mechanisms contained within the SCA. As stated above, HMRC would potentially be categorized as a public authority under the Act,[37] consequently capable of granting subsidies itself. A remarkable feature of the SCA in light of this, which also demonstrates the apparent relegation of taxation to an afterthought, is found in Part 5, which effectively provides for appeals to be reviewed by the Competition Appeal Tribunal (CAT). This is extraordinary because there is nothing in the SCA to potentially stop a tax ruling given by HMRC being reviewed by the CAT as being an unlawful subsidy contrary to the principles of Schedule 1 of the SCA. Furthermore, as it is the Tax Tribunal and not the CAT which is the most appropriate tribunal in the UK (although see the section of this chapter below on judicial review) it is extraordinary to think that a Tribunal which is not the most appropriate should have jurisdiction of assessing the lawfulness of compliance with the regime in a claim for judicial review. Whilst tax rulings have become a prominent feature of the European Commission's state aid enforcement in the EU, the integrity

[36] Section 79(6) of the SCA.
[37] SCA, Section 6.

of the UK internal market may mitigate against an identical approach being adopted. This strengthens the need for at least some informal involvement from the Treasury to assist in navigating the issues of tax in the context of subsidies.

5. What kind of control? Judicial Review

If it is a given that the growth of judicial review of government action and public administration has been " *the most notable development of British Law over the past 50 years*"[38] well, the SCA certainly seems to confirm that. Actually, Article 372 EU-UK TCA somehow confers a sort of direct effect to the Subsidies Chapter, as it requires the Parties to that agreement to confer on their courts and tribunals the power to review any public authority decisions. Under the SCA interpretation, this would include the public authority in charge of controlling subsidies, being the CMA and then the CAT, and any granting public authority, including their assessments of compliance with the principles in Schedule 1 of the SCA. Courts and tribunals are also given jurisdiction to grant remedies including the suspension, prohibition or requirement of action, the award of damages, and the recovery of a subsidy from its beneficiary. The UK has therefore introduced a private enforcement action whereby interested parties can bring a judicial review claim to challenge the lawfulness of decisions to grant subsidy measures. Such actions will have to be brought before the Competition Appeal Tribunal. As this new action is substantially a judicial review, the CAT will not have to assess whether the decision is correct, but whether it is lawful. The CAT will need to verify whether public authorities have complied with SCA provisions and have respected the subsidy control principles. This may seem like merits review,[39] although limited to lawfulness, and appears inappropriate in the context of taxation, as discussed above. Similarly, remedies would be those available to Claimants in the Administrative Division of the High Court and the Scottish remedies available before the Court of Sessions.[40] However, the CAT will be competent to award an order for recovery, which is not a typical public law remedy. It would arguably be for the CAT to try and imaginatively utilise the usual remedies

[38] Birkinshaw, *European Public Law*, cit. above, at pag 363.
[39] See Carol Harlow and Richard Rawlings, *Law and Administration* 2nd edition (CUP) 1997 and 4th edition (CUP) 2021.
[40] William Wade, Christopher Forsyth, and Julian Ghosh, '*Wade & Forsyth's Administrative Law'* 12th edn (Oxford University Press) 2022.

available in deciding the timeframe for the recovery and also if recovery may apply to some or the entire amount of a subsidy. This is again quite remarkable when considering tax payment holidays or tax rulings. Arguably "ordinary" public law Judicial Review grounds of illegality, irrationality and procedural impropriety can still presumably be brought before the High Court of England and Wales or the Court of Session in Scotland.[41] As to whether proportionality would apply as a ground for review, as proportionality similar language features in the Schedule 1 principles of the SCA, there is therefore the potential for a proportionality assessment to be undertaken by the CAT also.[42] Finally, a decision of the CAT may be appealed on a point of law, providing for reassessment by the Court of Appeal or the Court of Session on appeal. Two further points are worth noting here. First, the SCA speaks of the right of "an interested party" to ask the CAT to review the decision to grant a subsidy. An interested party according to Section 70(7) would be "*anyone whose interests may be affected by the giving of the subsidy or making of the scheme*" therefore including competitors and trade associations but also local authorities and devolved administrations. The Government will also have automatic standing. It would be interesting to monitor how the standing requirements will be dealt with by the CAT, as it may not be automatic that the test will be as generous as the one usually adopted under Judicial Review proceedings. Second, despite the proven efficiency and expertise usually displayed by the CAT, a challenge needs to be brought within a very short deadline, being one month from the 'relevant date' with only very specific exemptions available. This is shorter than the usual challenging three months granted to typical Judicial Review claims.[43] In most cases, the relevant date from which this timescale would be calculated would be the date on which the database entry was made or the date on which, following a written request, the granting public authority provided additional information about the grant of the subsidy or making of a subsidy scheme. Such a very short period of time may be a cause of concern as potentially distortive subsidies may go unchallenged. It is of course too early to assess how the CAT will deal with its new jurisdiction and to what extent in its case law it will adhere to concepts mostly derived by EU law and the case law of the CJEU that have

[41] See Harlow and Rawlings, *Law and Administration* cit. above.
[42] Ibid.
[43] Civil Procedure Rules, Rule 54.5

been fully and faithfully applied by the UK in the last forty years, or whether it will develop a divergent interpretation.

Conclusion

Public spending comes from many different sources and money is spent for many and varied reasons. The existence of rules on the transparency and accountability of spending decisions has the potential to contribute to ensuring geographic solidarity between the different areas of the UK. Furthermore, a modern economic and industrial model requires not just efficiency and technological advances, but equality and fairness. This chapter has highlighted many issues with the SCA. It is hoped that public authorities find a way of administering the rules in a way, which ensures the fairness and equality expected in public spending in the United Kingdom. However, in applying public law concepts in combination with provisions inspired by EU state aid law there is the potential for an interesting future debate which would – we believe - be of interest to Professor Birkinshaw as the original European Public lawyer.