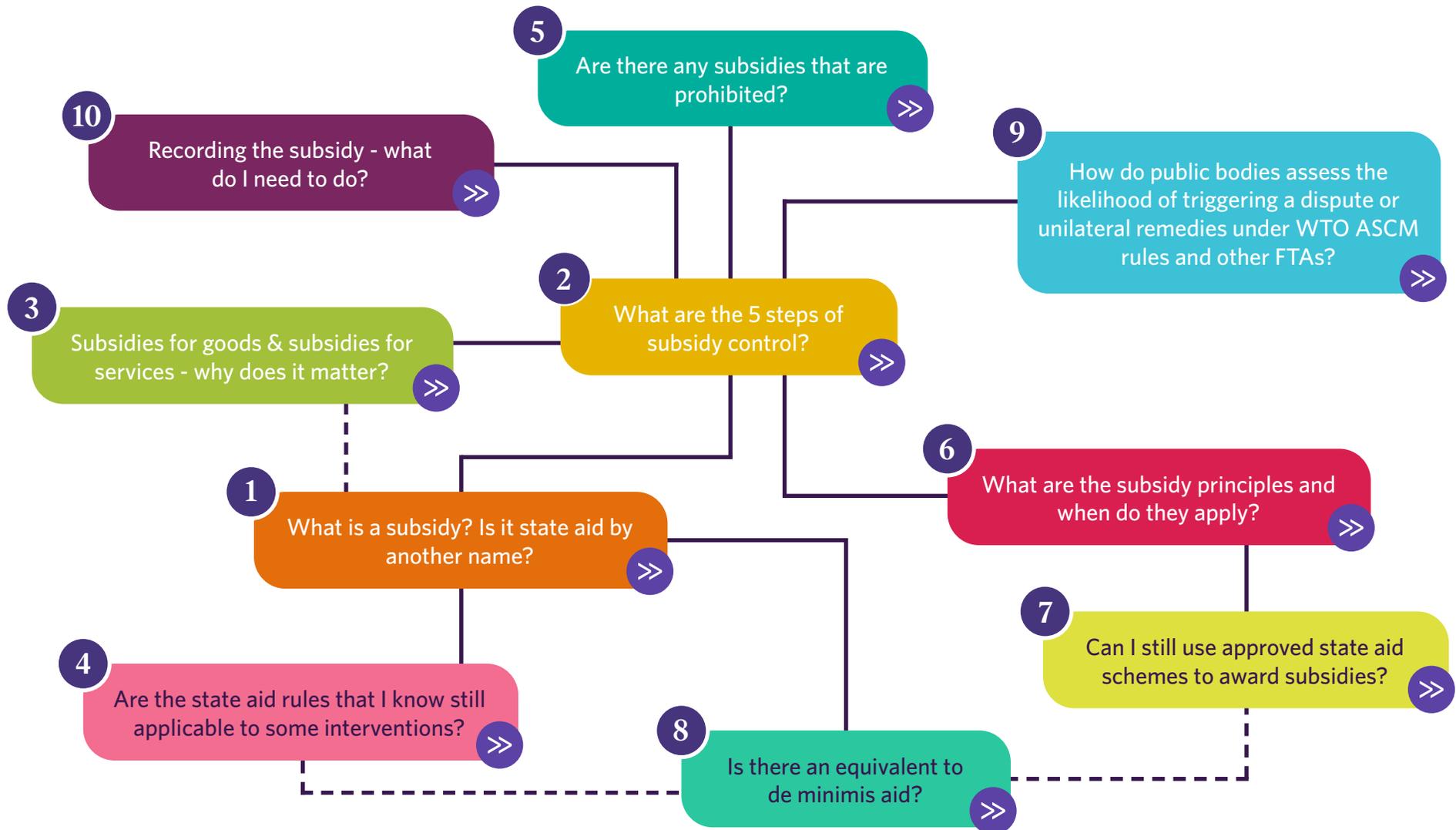


Subsidy Control: 10 QUESTIONS FOR BUSY PEOPLE





1. What is a “subsidy”? Is it State aid by another name?

On 1 January 2021, we said goodbye to State aid and hello to subsidy control.

The rules on State aid control, as set out in the Treaty on the Functioning of the European Union and European Commission regulations and guidance, no longer apply to most new forms of support given to business by public authorities in the UK.

Instead, the Trade and Cooperation Agreement (the “**TCA**”) – the Free Trade Agreement agreed with the EU on 30 December 2020 – requires the UK to establish its own subsidy control regime.

We should say that, in some specific circumstances, the EU State Aid rules will still apply. However, for the majority of other scenarios, public authorities should look to the World Trade Organisation’s (“**WTO**”) Agreement on Subsidies and Countervailing Measures (“**ACSM**”) and Agreement on Agriculture. But the fun doesn’t end there – the definition of “subsidy” and the rules on subsidy control in the ACSM should be read alongside the subsidy provisions of any relevant Free Trade Agreements (“**FTAs**”) that apply – including, in particular, the TCA.

On first glance, a “subsidy” looks very much like State aid by another name.

It is defined as financial assistance provided by a public authority to an economic actor, which gives that economic actor an economic advantage, and has or could have an effect on trade or investment between the UK and EU or an adverse effect on a relevant signatory state to the ASCM.

Financial assistance could be a contribution (such as a grant, subsidised loan or guarantee), provision or purchase of goods or services, or the foregoing of

revenue that is otherwise due to the public authority. A “public authority” spans a wide variety of organisations and is not limited to just central government. An “economic advantage” means that the contribution is on better than commercial terms – a concept with the hallmarks of the familiar “market economy operator principle”.

Both the State aid and subsidy control regimes look to regulate the provision of financial assistance by the public sector to private enterprise to ensure a level playing field for open and fair competition. The objective is therefore the same. The application of the rules on subsidy control, and therefore how they operate for public authorities and recipients, is, however, quite different.

Perhaps most notably, the UK’s subsidy control regime does not have to be based on an ‘ex ante’ system requiring measures which are considered to be a subsidy to meet the requirements of approved schemes or block exemption regulations or, indeed, be notified and approved prior to being granted. The Government is, however, consulting on the responsibilities and functions of a independent body within the UK subsidy control regime, which may well extend to providing advice on individual subsidy awards or schemes before they are awarded.

The UK government’s approach to subsidy control will likely provide public bodies with greater flexibility. The flip side of flexibility is, of course, uncertainty. Many public bodies will likely continue to use the parameters set out in existing schemes and exemptions to help them navigate the new world of subsidy control.





2. What are the 5 steps of subsidy control?

The UK Government Department for Business, Energy & Industrial Strategy has published guidance setting out the key steps public authorities should take when awarding subsidies. Here's a quick overview of those 5 steps:

Step 1:

Determine whether a measure is a subsidy and what international obligations are relevant.

First, you should determine if the proposed measure broadly falls within the general understanding of what a subsidy is. See [What is a "subsidy"? Is it State aid by another name?](#) Note that these characteristics are cumulative - much like the strands of the State aid test, they all must be present for a measure to be considered a subsidy.

If a measure is considered a subsidy you will then need to determine which international obligations apply. See [Subsidies for goods and subsidies for services - why does it matter?](#) for details.

Step 2:

Evaluate whether the measure is a prohibited subsidy. See [Are there any subsidies that are prohibited?](#)

Step 3:

If the subsidy falls within the scope of the TCA, it must be assessed against the principles. See [What are the subsidy principles and when do they apply?](#)

Step 4:

Assess the likelihood of triggering a dispute under the WTO ASCM rules and other FTAs. See [How do public bodies assess the likelihood of triggering a dispute or unilateral remedies under WTO ASCM rules and other FTAs?](#)

Step 5:

Record the award of the subsidy. See [Recording the subsidy - what do I need to do?](#)





3. Subsidies for goods and subsidies for services – why does it matter?

Step 1 of subsidy control requires a public authority to determine which international obligations apply. There are two key questions to ask regarding the subsidy to determine this:

1. Does the subsidy support a goods-based or a service-based activity?
2. Does the subsidy affect trade with another country, and is that other country an EU member state?

If the subsidy affects trade with another **EU member state** and the activity relates to **goods** then the full gamut of regulations will apply and this consists of:

1. the WTO's ASCM;
2. the TCA;
3. any other FTAs; and
4. the Northern Ireland Protocol.

If the subsidy relates to **services** only, the ASCM need not be considered. In some cases the FTAs extend the ASCM rules to services while carving out some exceptions but you will need to consult the relevant FTA to determine the specifics. For the purposes of this brief guidance, we focus on the TCA (which covers most goods and services) as this is the regime which the UK has implemented in law by virtue of the European Union (Future Relationship) Act 2020.





4. Are the State aid rules that I know still applicable to some interventions?

To avoid a hard border on the Island of Ireland, Northern Ireland remains in the EU's Single Market. Under Article 10 of the NI Protocol in the UK-EU Withdrawal Agreement, the EU's State aid regime continues to apply to the extent that any subsidies provided in the UK affect trade in goods or electricity between Northern Ireland and the EU.

This does not mean, however, that only State aid measures relating to the production of and/or trade in goods or electricity would have to be considered. Rather, the Commission has confirmed that any public support for any economic activity can fall within the scope of the Protocol, as long as it can be established that the public support is liable to affect the relevant trade between Northern Ireland and the Union.

The European Union has, however, clarified that an effect on trade between Northern Ireland and the Union which is subject to this Protocol cannot be "merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland". It must be established why the measure is liable to have such an effect on trade, based on the real foreseeable effects of the measure.

The European Commission, as well as the CJEU and the General Court, will remain competent as regards such aid.

Please also see [Can I still use approved State aid scheme to award subsidies?](#)





5. Are there any subsidies that are prohibited?

Generally, you will need to consult the relevant international agreements for an exhaustive list of prohibited subsidies. However, where the following subsidies concerned have or could have a material effect on trade or investment between the UK and EU (or, in the case of air carriers, effect on competition between air carriers in the provision of air transport services), they are prohibited:

- subsidies in the form of an unlimited guarantee of debts or liabilities (i.e. they are unlimited as to the amount or the duration);
- subsidies for rescue and restructuring unless they are based 'on a credible restructuring plan' and 'contribute to an objective of public interest by avoiding social hardship or preventing a severe market failure' (note that an economic actor can receive a subsidy of temporary liquidity support in the form of loans or guarantees for the period of preparation of the restructuring plan);
- subsidies to restructure banks, credit institutions and insurance companies unless inter alia based on 'a credible restructuring plan that restores long-term viability';
- subsidies contingent upon export performance – note that subsidies are not prohibited just because they are to be awarded to an economic actor which exports;
- subsidies contingent upon the use of domestic content over imported goods or services;

and

- subsidies to air carriers for the operation of a route unless: (i) they are for start-ups; (ii) where there is a public service obligation; or where (iii) the route provides other benefits to society.





6. What are the subsidy principles and when do they apply?

The TCA sets out principles which all subsidies of more than 325,000 Special Drawing Rights¹ (see [Is there an equivalent to de minimis aid?](#) for more on this) given to a single beneficiary over 3 fiscal years must meet.

The subsidy principles focus on the intention behind a subsidy and how it is implemented. In essence, subsidies must have a legitimate public policy objective; and must be necessary, proportionate and have as minimal a negative impact as possible. They are imposed broadly to ensure that subsidies do not or could not have a material effect on trade or investment between the UK and the EU.

The granting of a subsidy must respect the following principles:

- subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns ('the objective');
- subsidies are proportionate and limited to what is necessary to achieve the objective;
- subsidies are designed to bring about a change in the behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided;
- subsidies should not normally compensate for costs the beneficiary would have funded in the absence of any subsidy;

- subsidies are an appropriate public policy instrument to achieve a public policy objective that cannot be achieved through other less distortive means;
- subsidies' positive contributions to achieving the objective outweigh any negative effect, in particular the negative effects on trade or investment between the EU and the UK.
- BEIS is also consulting on introducing an additional principle, namely: that public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that might arise from a subsidy. Public authorities should assess the material competition effects which are likely to arise from providing the subsidy. This is a domestic test to ensure that a subsidy does not unduly favour one firm to the detriment of a competitor or new entrants to the UK market, or unduly reduce competition within the UK market.

Public authorities should keep a record of their deliberation of the principles, using the template provided by BEIS ([here](#)) and are obliged to report subsidies granted to BEIS.

There are some specific instances where public authorities do not need to apply the principles, for example, subsidies granted to compensate the damage caused by natural disasters or other exceptional non-economic occurrences.

¹see <https://www.xe.com/> for conversion to pounds Sterling





7. Can I still use approved State aid scheme to award subsidies?

Yes, in a manner of speaking. BEIS has indicated that public authorities can award subsidies in accordance with the rules of previously approved schemes - such as GBER schemes and the UK's Covid-19 Temporary Framework scheme - as these will align with the principles. Technically, the award will be made in accordance with the new subsidy control arrangements, but the previous state aid scheme would act as a 'safe harbour' for interpreting the principles and ensuring that the subsidy complies with the requirements of the TCA.





8. Is there an equivalent to de minimis aid?

The TCA provides that the rules on subsidy control “do not apply to subsidies where the total amount granted to a single economic actor is below 325,000 Special Drawing Rights over any period of three fiscal years”.

The BEIS guidance notes that “the UK-Japan FTA sets out that the transparency and consultation obligations of the chapter do not apply to subsidies that are valued at less the 450,000 Special Drawing Rights per beneficiary over a three-year period.”

On the face of it, these have many the features of the de minimis aid exemption: an exemption for subsidies in a given 3 year fiscal period which are regarded as unlikely to impact on competition due to their low value.

However, it is not at all clear whether the exemption works in the same way. For example, there is no definitive guidance on whether you can choose whether or not a subsidy falling under the applicable value threshold should be regarded as exempt in the same way as the de minimis regulation. Previously, a public authority may have chosen to route a low value aid measure through an appropriate article of the GBER, thus freeing up the beneficiary to benefit from its de minimis “pot” at another point in time.

The drafting of the low value subsidy exemption could be interpreted as saying that the first award(s) of subsidy up to the applicable threshold use up the pot automatically – more akin to a personal allowance – irrespective of whether those awards could have been given in accordance with the principles.

Having said that, indications from BEIS are that the exemption is likely to operate in the same way as de minimis.



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9. How do public bodies assess the likelihood of triggering a dispute or unilateral remedies under WTO ASCM rules and other FTAs?

The key factor that must be present for a subsidy to be challengeable under ASCM rules (and this is also generally the case for FTAs) is it must harm trade in another country.

The agreement itself talks about “actual adverse effects on [another nation’s] interests” or “cause injury to their domestic industry.” Government guidance suggests that there are some important issues that should be considered when determining if a subsidy risks triggering a WTO ASCM dispute, such as:

1. the value of the subsidy – higher value subsidies are more likely to impact international trade (and be worthwhile disputing);
2. if the subsidy is in a sector where the WTO has previously been particularly active - past examples include steel, automotive and aerospace;
3. if the subsidy targets a sector that has numerous international competitors, particularly when these competitors are key to their country’s economy; and
4. if the subsidy would have any other impact on international trade, such as sales volume, prices or profits of international producers of similar goods.

Another layer of complexity is added by the fact that the ASCM operates between the UK and the EU, alongside the TCA. Although, the provisions of the TCA are, for the most part, more onerous, there still may be occasions where a measure is not covered by the TCA (e.g. certain support to agriculture) and could still be challenged under the ASCM or Agreement on Agriculture.

The Guidance provides that funding bodies must assess any proposed subsidy against any UK FTAs (including the TCA), and the WTO ASCM rules. Any subsidy may be subject to challenge through the relevant mechanisms if the other country evidences that the subsidy causes actual adverse effects on their interests.

However, the higher risk to public authorities lies in the prospect of a domestic challenge to the subsidy. The TCA requires the UK to ensure that it has a court or tribunal system which allows for the competent:

- a. review of subsidy decisions taken by a granting authority or, where relevant, the independent authority or body for compliance with the principles;
- b. review any other relevant decisions of the independent authority or body and any relevant failure to act;
- c. imposition of remedies including suspension, prohibition or requirement of action by the granting authority, the award of damages, and recovery of subsidy from its beneficiary.

Unless and until the UK establishes a new court or tribunal system for subsidy control, a challenge to a subsidy award decision is most likely to take the form of a judicial review action through the UK courts.



10. Recording the subsidy – what do I need to do?

In terms of recording decisions granting subsidies, the TCA requires that within six months of any subsidy being granted (or rolled over if it is an existing subsidy) the following information will need to be placed on an official website or public database:

- The legal basis and policy objective or purpose of the subsidy;
- The name of the recipient;
- The date of the grant, the duration of the subsidy and any other time limits attached to it; and
- The amount of the subsidy or amount budgeted.

Within the next six months, BEIS is required to launch a database to which authorities will be able to submit details of their awards. BEIS says that instructions on how and when to record information on the database will be communicated when it is launched. Until then, authorities are advised to keep full and accurate records of awards made, their decision making and justifications.

BEIS is also consulting on the proposal to place a legal obligation on public authorities to submit information on any subsidies awarded above set values. It is proposing the following thresholds are as follows:

- All subsidy schemes should be uploaded and all individual awards over £500,000 within a scheme should be uploaded.

- All subsidies, of any amount, outside the above schemes should be uploaded to the transparency database unless it is below the value set for small amounts of financial assistance given to a single enterprise over a three-year period or is below the value set for transparency for SPEI.

