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The UK's first domestic subsidy control case

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We waited more than a year for it, but the wait is over – we finally have a domestic case on the new subsidy control regime. The judgement of Foxton J in R (**on the application of British Sugar Plc) v Secretary of State for International Trade and T&L Sugars Limited [2022]** is the first domestic consideration of the UK's current (albeit transitional) subsidy control regime. Although the judgment concerns a niche topic (autonomous tariff quotas (**ATQ's**) for sugar) and was handed down shortly before the Subsidy Control Bill is expected to pass into law, it provides clarification on how certain issues will be treated under the subsidy control regime which may have continuing relevance when the Bill passes.

The claim was brought by British Sugar who sought to challenge a recommendation by the Secretary of State that the Treasury should provide for an ATQ for raw cane sugar which meant that 260,000 metric tonnes of sugar could enter the UK tariff free.

British Sugar argued that the ATQ was a state subsidy for the benefit of the interested party, Tate and Lyle (T&L), a major importer of raw sugar cane for refining purposes. British Sugar has a fundamentally different business model, using primarily sugar beet produced within the UK.

British Sugar argued that the Secretary of State's decision to recommend the ATQ was unlawful on two grounds:

1. The ATQ constituted unlawful state aid to T&L, contrary to the Northern Ireland Protocol and State Aid rules; and
2. The ATQ constituted an unlawful subsidy to T&L, contrary to the TCA subsidy regime.

The High Court concluded that the ATQ neither breached the State aid rules, nor did it constitute a subsidy in accordance with the TCA, therefore the ATQ was not unlawful on either ground.

Selectivity under the State Aid Rules

In order for a measure to constitute state aid, it must, among other conditions, be regarded as selective, i.e. the measure must favour certain undertakings or the production of certain goods. A measure may be de jure selective (targeted at specific undertakings only) or de facto selective (selective in effect, even if on the face of it the measure applies on the basis of objective criteria). It was agreed that in this case the measure was not de jure selective. However, British Sugar argued that a measure would be selective if it could be shown that it had been intended to favour certain undertakings (which British Sugar argued that this one had), whereas the Secretary of State argued that the correct approach was applying the three-stage test established in Joined Cases C-20/15P and C-21/15P World Duty Free. The court agreed with the Secretary of State.

In applying the World Duty Free test, it is necessary to show that the relevant measure differentiates between undertakings who are in a comparable factual and legal situation. British Sugar was unable to show that it was in a position that was comparable to T&L. This is because it was not an importer of raw sugar for refining purposes, nor was it subject to the tariff regime that had been introduced for the importation of raw cane sugar. Further, anyone else looking to import raw sugar cane would be in the same position as that of T&L i.e. it would benefit from zero tariffs from ATQ on a first come, first served basis up to the amount of 260,000 metric tonnes.

Accordingly the court held that the measure was not selective within the meaning of the State aid rules.

Effect on Trade under Article 10 of the Northern Protocol

The effect of Article 10 of the Northern Ireland Protocol is to make the State aid rules applicable to the UK in relation to measures which affect the trade in goods or wholesale electricity between Northern Ireland and the European Union.

The challenge by British Sugar raised the question of whether tariff measures could fall within the scope of the Northern Ireland Protocol, and therefore trigger application of the State aid rules. The court held on this point that a tariff which constitutes State aid as a matter of EU law was capable of triggering the Northern Ireland Protocol.

The court then went on to consider where the bar is set for a measure to have an effect on trade between Northern Ireland and the EU.

The court took the view that the EU Unilateral Declaration (**Declaration**) was significant here. The Declaration states that "when applying Article 107 of the TFEU to situations referred to in Art.10(1) of the Protocol, the European Commission will have due regard to Northern Ireland's integral place in the United Kingdom's internal market. The European Union underlines that, in any event, 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 or direct link to Northern Ireland. It must be established why the measure is liable to have such an effect on trade between Northern Ireland and the Union, based on real foreseeable effects of the measure".

The court took the view that the Declaration modifies the general rules on the 'effect on trade' concept under EU law and requires something further than is usually required under EU law for a measure to have such an effect in the context of the Northern Ireland Protocol. On this reasoning, a measure which has an indirect or very limited effect on trade with Northern Ireland would not trigger the Northern Ireland Protocol. George Peretz QC in his recent article on the case argued that that position is not, in fact, a modification of the EU law concept of effect on trade, because the EU authorities would not seek to rely on a pretend or indirect effect on trade to justify a decision that a particular measure amounted to State aid. Ultimately, as George Peretz notes, the court was able to avoid explaining how, in practice, the test should be applied, and so there is likely to be some uncertainty about how the test should be applied until a body of case law and/or guidance is developed.

The court held that in this case that as there was no trade in raw sugar cane between Northern Ireland and the EU, no sugar production in Northern Ireland, and as the ATQ would have no impact of the price of refined sugar in Northern Ireland (amongst other considerations), there was no "genuine and direct link" established in order to invoke the Northern Protocol in any event.

Subsidy Control under the TCA

The Court considered whether the ATQ amounted to a subsidy under the TCA. The decision hinged on whether the measure was specific within the meaning of the TCA (a concept which has a very similar meaning to the concept of selectivity in the State aid rules). The Court came to the same conclusion on this point as it did on the question of selectivity under the State aid rules: as the ATQ applied in the same way to all importers of raw cane sugar, it was not specific and did not amount to a subsidy.

Interestingly, the court chose to consider WTO authorities in coming to its conclusions on this point, rather than considering State aid jurisprudence. One of the Court's reasons for relying on WTO authorities was that the language used in the TCA subsidy control provisions stems from the WTO rules in part, and Article 516 of the TCA provides that "the interpretation and application of the provisions of this Part shall take into account the relevant interpretations in reports of WTO panels and of the Appellate Body adopted by the Dispute Settlement Body of the WTO as well as in arbitration awards under the Dispute Settlement Understanding." The fact that this is the first case which considers whether the State aid rules can apply to an ATQ may also have been a factor, as there are plenty of WTO decisions considering the application of the WTO rules to tariffs.

But does that mean that the courts will apply WTO jurisprudence when they consider all subsidy cases under the TCA and the new regime?

In our view, both WTO and State aid cases and decisions are likely to have continued relevance. The WTO Agreement on Subsidies Countervailing measures controls only subsidies given in relation to goods, whereas the scope of the State aid rules is far broader and means that there are relevant judgments and decisions which address most of the contexts in which subsidies are given in the UK. It may be that where a concept has its origin in the WTO rules, or a context has been considered in the WTO authorities but not the State aid rules, the WTO authorities are preferred. However, it appears likely that in most cases concerning UK subsidies, particularly where they are given at the sub-central level, the State aid jurisprudence will continue to be relevant until a significant body of domestic judgments is developed.

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Related expertise

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