SECTION 70
SCA CAT REFERRALS

Lessons learnt from early UK subsidy control appeals

Economic Insight

INTRODUCTION AND EXECUTIVE SUMMARY

Under Section 70 (S. 70) of the UK Subsidy Control Act (SCA, 2022), any interested party 'aggrieved' by a subsidy decision may apply to the Competition Appeal Tribunal (CAT) to review said decision. Whilst the specifics of each case will vary, the CAT may typically need to consider whether it has jurisdiction and, if so, whether the financial assistance pertinent to the case meets the criteria for a subsidy. The CAT may subsequently need to determine whether the public authority awarding the alleged subsidy (or making of a subsidy scheme) has (i) considered the subsidy control principles, prior to giving the subsidy; and (ii) only given the subsidy if those principles are met. In reviewing decisions under S. 70, the CAT applies a judicial review standard, meaning there is a high bar for applicants to obtain favourable decisions.

There have been 8 subsidy control cases brought before the CAT under S. 70 to date. Drawing on our own experience of advising on these, in this note we reflect on: (a) what have we learnt so far from the CAT's approach?; and (b) what are the implications for organisations involved in making, potentially benefitting from, or being impacted by, subsidy decisions in the UK?

LESSONS LEARNT

There are three main lessons to take from the Tribunal's judgements under S.70 appeals to date.

Lesson 1: establishing eligibility for review by the CAT can itself be challenging

The importance of distinguishing between SCA and competition law. Under the first ever S. 70 case heard at the CAT, (The Durham Company - 'Max Recycle') versus Durham County Council (DCC)),[1] the Tribunal ruled that the matter in question (the Council cross-subsidising its commercial waste services, via its domestic waste collection), did not meet the definition of a subsidy.

This was because the 'giver' of the alleged assistance (DCC) was also the receiver. Thus, the arrangement did not 'move' a conferred subsidy from one person (a public authority) to another (an enterprise). Instead, The CAT characterised the issue as being one of *"common costs… being apportioned."*[2]

Under that characterisation, a more coherent framing by the applicant might have been one of predation or discriminatory pricing under CA98 (setting aside whether that would have been meritorious). In BEK Developments (and others) versus DCC, the claim morphed from one under CA98 (S. 47) to being *both* a competition and subsidy claim, with the Tribunal being critical of the unclear and changed framing.[3]

These rulings highlight the importance of applicants taking care to consider whether the issue in question strictly meets the relevant conditions under the SCA, and/or may be better suited to competition law (if supportable at all).

1. 'Case No: 1577/12/13/23: The Durham Company Ltd (trading as Max Recycle) versus Durham County Council.' 2. 'Case No: 1577/12/13/23: The Durham Company Ltd (trading as Max Recycle) versus Durham County Council - Judgment'. CAT (27 July 2023); para 43. 3. 'Case No: 1751/5/7/25: BEK Developments (and others) versus Durham Country Council - Judgement.' CAT (5 June 2026); paras 11-17.

Timing is everything. An alleged subsidy is eligible for review by the CAT, once a 'subsidy decision' has been taken. Relatedly, appeals under S. 70 must be lodged within one month of the 'relevant date' of the decision. Also under the above mentioned BEK Developments Ltd case, the CAT set out that a 'subsidy decision' cannot relate to *"only a provisional or in principle"* decision to provide the assistance,"[4] but occurs *"once the relevant authority has taken a formal, final decision to give a subsidy, or to provide assistance which the applicant considers to be a subsidy."*[5]

In Zenobē versus the Gas and Electricity Markets Authority (GEMA), the CAT characterised various publications by GEMA confirming its intention (and approach) to the alleged subsidy as merely being a *"step in the development of the Scheme,"*[6] occurring in the context of *"development work… with a view to the future establishment of the Scheme,"*[7] and so did not constitute a final decision. The implication is that applicants must strike a difficult balance between prematurely appealing (incurring additional costs), versus leaving insufficient time to develop a strong application within the permissible timelines.

Primary legislation as a means of protection. Also in the Zenobē case, the CAT ruled that it did not have jurisdiction to review the alleged subsidy. This was because: (i) in its view, the decision was taken under primary legislation (10P of the Electricity Act 1989); and (ii) the SCA exempts subsidies made under primary legislation from the right to review.[8]

This can be seen as somewhat contentious, because the applicant argued that the legislation merely required GEMA to *"establish and operate"* the policy in question (a cap and floor pricing regime relating to the procurement of long duration electricity storage – LDES), leaving GEMA discretion as to its detailed design. The applicant's position was that the impact of the policy (alleged subsidy) was dependent on various matters within GEMA's gift, including its eligibility criteria. One may take from the Tribunal's position that, in most instances in which primary legislation directs a public authority to enact a policy, *any* possible associated subsidy will be deemed to have been 'made' under legislation, so being ineligible for review.

Lesson 2: the JR standard makes any appeals based on evidence or analysis hard to sustain

Weight may be attached to the experience and expertise of the public body/advisors. Across some judgements, there is a sense that the CAT has given consideration (and perhaps attached weight to) the assumed competency of the awarding public authorities, and their advisors. In the case of Mr Aubrey Weis versus Greater Manchester Combined Authority (GMCA),[9] which revolved around two loans given by the latter to high-rise developers in the Manchester area, the CAT commented: "*the Investment Team of the GMCA is not a small inexperienced outfit. At the relevant time in 2024, it consisted of 25 persons and collectively had a great deal of experience in providing and pricing loans to developers.*"[10]

This characterisation of assumed competency may imply that meeting an irrationality test is especially hard, because it could suggest that any arguments relating to analysis undertaken, or conclusions reached, merely amount to differences in judgement between competent persons.

Put another way, so long as (at the time a decision is made) a public body has before it input on the matter from individuals (including external advisors) that may be said to be 'competent,' its decision is unlikely to be deemed irrational.

4. *'Case No: 1751/5/7/25: BEK Developments (and others) versus Durham Country Council - Judgement.' CAT (5 June 2026); para 89.* **5.** *'Case No: 1751/5/7/25: BEK Developments (and others) versus Durham Country Council - Judgement.' CAT (5 June 2026); para 99.* **6.** *'Case No: 1754/12/13/25: Zenobē Energy Ltd versus the Gas and Electricity Markets Authority - Judgement.' CAT (23 June 2026); para 78.* **7.** *'Case No: 1754/12/13/25: Zenobē Energy Ltd versus the Gas and Electricity Markets Authority - Judgement.' CAT (23 June 2026); para 80.* **8.** *'Case No: 1754/12/13/25: Zenobē Energy Ltd versus the Gas and Electricity Markets Authority - Judgement.' CAT (23 June 2026); paras 81-93.* **9.** *'Case No: 1642/12/13/24: Mr Aubrey Weis versus Greater Manchester Combined Authority – Judgment.' CAT (24 July 2025).* **10.** *'Case No: 1642/12/13/24: Mr Aubrey Weis versus Greater Manchester Combined Authority – Judgment.' CAT (24 July 2025); para 190.*

A high hurdle for admitting expert evidence. In the case of The New Lottery Company versus the Gambling Commission,[11] the gist of the CAT's ruling on admissibility was that, unless expert evidence highlighted: (i) an issue which the awarding body should have known about and taken into account, at the time of taking its decision; but (ii) did not, it would likely be inadmissible (as it would not be sufficient to demonstrate irrationality on behalf of the public authority).

One may take from this that new evidence specifically relating to the quality of analysis relied upon by the public authority is especially unlikely to be admitted.[12] The CAT ruled similarly in relation to the Bristol Airport case, where it found the evidence amounted to: *"a challenge to the merits of the subsidy decision"* in areas where their expert might have reached a different view to the Welsh Ministers.[13]

Lesson 3: EU state aid rules and precedent remain relevant to the UK

A role for reference rates. Another noteworthy feature of the GMCA case was the CAT's position on the EC's 'Reference Rates Communication'[14] for interest on loans (including under state aid matters). The CAT found that, although there was no *requirement* for this to be referred to (either by public authorities when making a subsidy decision, or by itself when reviewing them), it nonetheless remained *"a useful cross-check."*[15]

However, when reference rates are used as a cross check (as they were in this matter), the CAT's position may indicate it exercising discretion in favour of the public authority. One aspect of the GMCA case was that the loans in question were provided to entities that were SPVs. For said entities, the EC Communication indicates the base rate may need to be uplifted by at least 400 bps (including to reflect the absence of a credit history).

In this instance, the CAT ruled that the uplift factor was not automatic, but depended on the specifics of the case, including the extent of collateral (which the CAT considered to be material, meaning the uplift did not apply.).

11. 'Case No: 1730/12/13/24: New Lottery Company Limited (and others) versus the Gambling Commission – Ruling Expert Evidence.' CAT (24 September 2025). 12. For example, because even if the independent expert found (and the Tribunal agreed) that the analysis used was so poor that it could not inform the decision taken by the authority, and / or did not support the advice given or actual decision taken by the authority, so long as the authority knew there were limitations in the analysis at the time it took the decision, but still had some basis to consider the decision it took 'rational,' it may not be said to have acted irrationally. 13. 'Case No: 1740/12/13/25: Bristol Airport Limited versus Welsh Ministers – Order.' CAT (18 July 2025); para 8. 14. 'Communication from the Commission on the revision of the method for setting the reference and discount rates.' EU (2008). 15. 'Case No: 1642/12/13/24: Mr Aubrey Weis versus Greater Manchester Combined Authority – Judgment.' CAT (24 July 2025); para 198.

IMPLICATIONS

In our view, the implications that follow from the above are:

1. For public bodies making decisions that may fall within the bounds of the SCA, getting early expert input (both internally and externally) can materially mitigate the risk of those decisions being successfully appealed under S. 70. It is also important to be clear as to the process for making decisions; and the point at which they become 'final.'

2. For organisations concerned they may be adversely affected by subsidy decisions, it is vital to frame any arguments, and develop the related evidence, early on - and ideally put it before the public authority in question, so that it cannot subsequently (e.g. under an appeal at the CAT) be said to be 'new.'

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