



Law Society  
of Scotland

# Consultation response

Subsidy control: designing a new approach for the  
UK

March 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Competition Law Sub-committee welcomes the opportunity to respond to the consultation on *Subsidy control: designing a new approach for the UK*.<sup>1</sup> We have the following comments to put forward for consideration.

## General remarks

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We note that the definition of subsidy in the proposed approach is essentially the same as that of state aid under EU law. It is in line with the requirements of the TCA. While we caution against diverging too far from EU law, we consider that there is scope within an independent UK scheme for greater simplification, in recognition of the fact that the assumptions around likely impact on the internal market will not apply in the same way. At the same time, we note the importance of recognising different local, regional and national markets within the UK and the impact on and interaction with the formal UK Internal Market structures.

## Response to questions

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### **Question 1: What type of subsidies are beneficial to the UK economy?**

Clearly, subsidies which support a balanced economy, which allow competitiveness across the UK, which can compensate for other inefficiencies inbuilt to our infrastructure (in terms of communications and transport) would be helpful to the UK economy. Subsidies which maximise entrepreneurship other than larger international actors are helpful. Subsidies allocated on a predictable, agreed set of criteria rather than political expediency or network factors are to be welcomed.

### **Question 2: What type of subsidies are potentially most harmful and distortive?**

Subsidies which are directed through political considerations or contacts are harmful in terms of economics

<sup>1</sup> <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>

and UK's reputation. Subsidies which do not contribute to longer term structural need or required change are undesirable. Subsidies which undermine small and medium sized businesses are counter-productive.

**Question 3: Do you agree with the Government's objectives for a future subsidy control regime? Are there any other objectives that the Government should consider?**

Strongly Agree	
Agree	X
Neither agree nor disagree	
Disagree	
Strongly disagree	

We broadly agree with the objectives but would be concerned by overly centralised control. This is particularly the case as regards reference to the UK internal market. Central control of subsidies would potentially bring inefficiencies of its own. "Bidding Wars" could equally have taken place under previous regional assistance systems to encourage and maintain investment. Provided ceilings and guidelines are being respected we would suggest that great care should be taken over any system to limit local authorities quite properly addressing their own priorities, always respecting the relevant subsidy rules and principles. It is self-evident that contravention of international commitments will damage UK reputation and credibility. This is less likely to arise from local subsidy arrangements.

**Question 4: We invite respondents' thoughts on further sources of evidence that would help to strengthen our analysis of policy impacts. In particular:**

- **Additional datasets (other than the European Commission's Transparency Award Module) on local or regional subsidy awards (e.g. by value, sector or category)**
- **Research and evaluation projects that have been conducted on the impacts of different types of subsidy awards on domestic competition and trade (e.g. by value, sector or category)**

The Government or perhaps the Independent Body should conduct analysis of the impact of public bodies' commercial activities on small and medium sized entities. Public sector activity and spending constitutes more than 50% of the economy yet competition analysis is largely lacking. A central objective should be to protect small and medium sized entities from distorting subsidy. This may occur at levels well below de minimis. The de minimis level is irrelevant as a measure of whether a subsidy distorts or harms competition in local markets. The regime should have a strong domestic rationale.

**Question 5: We invite respondents' views on whether our proposed subsidy control regime, including the way it functions, may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race,**

**religion or belief, sex (gender) or sexual orientation) in different ways from people who do not share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.**

We have no comment on this question.

**Question 6: Do you agree with the four key characteristics used to describe a support measure that would be considered a subsidy? If not, why?**

Strongly Agree	
Agree	X (subject to comments)
Neither agree nor disagree	
Disagree	
Strongly disagree	

We would generally agree with the four characteristics, subject to some key considerations including that the definitions should be of sufficient detail for clear and comprehensive application by all and supplemented with appropriately practical guidelines. It would be material to properly define what 'local effects' would mean within the context of the fourth principle.

**Question 7: Should there be a designated list of bodies that are subject to the new subsidy control regime? If so, how could that list be constructed to ensure that it covers all financial assistance originating from public resources?**

Yes	
No	X (subject to comments)

All bodies making any kind of award with public monies should be automatically caught by the regime, with the direct responsibility to comply with it. To rely on a list would run a significant risk of certain bodies not being identified or included (for instance if a body was not properly categorised, recognised, or making such awards). Any list would also need to be continually updated, which would not be easy to work with for anyone in terms of certainty/transparency.

**Question 8: Do you think agricultural subsidies in scope of the AoA and fisheries subsidies should be subject to the proposed domestic arrangements? If so, what obligations should apply?**

Yes	X
No	

Agricultural subsidies in scope of the WTO Agreement on Agriculture and fisheries subsidies should be directly subject to the proposed domestic subsidy arrangements, and should be entitled to benefit in the same way any other potential subsidy beneficiary would be under the same rules and principles.

**Question 9: Do you think audio-visual subsidies should be subject to the domestic regime?**

Audio-visual subsidies are exempt from the EU regime and are therefore carved out under the TCA. However, in a solely UK context, the requirement for exempting audio-visual subsidies is less clear, although ensuring cultural preservation is an important objective in its own right. Exempting the audio-visual sector or parts of it from the scope of the subsidies regime could also give rise to disputes over precisely which activities fall within the scope of the exemption. We also note that cultural policy, including audio-visual, is a devolved issue.

**Question 10: Do you agree with the inclusion of an additional principle focused on protecting the UK internal market by minimising the distortive effects on competition?**

Yes	X (subject to comments)
No	

**Provide further comments.**

Generally speaking, the addition of a principle focused on protecting the UK internal market is to be welcomed, subject to certain key considerations. Any such principle must be fully enforceable on the same footing as the TCA principles and would need to be clear and practical to apply – in that regard it would be recommended that the current text should be significantly clarified in terms of the principle itself and in any accompanying guidance.

In addition, full recognition of devolution should be recognised in this regard (including involvement in development). Notwithstanding this, it should not prevent disadvantaged areas in the UK from accessing an appropriate levelling up mechanism, with appropriate regard for local distinctiveness ie extreme rurality etc.

**Question 11: Do you think there should be any additional principles?**

Yes	
No	X

**If so, which principle(s)?**

No, but in the case this is considered, please refer to comments at Question 10.

**Question 12: What level of guidance or information would be helpful for public authorities to assist with their compliance with the principles?**

A clear, modern, transparent and practicable set of guidance would be helpful to assist public authorities with their compliance with the principles. This however should not only be limited to guidance but additionally to provide the same degree of legal certainty in a similar framework to a more workable and flexible subsidy version of the state aid GBER and de minimis framework. However, the accompanying guidance should provide a comprehensive set of worked examples, without being overly complex and burdensome to apply (stepping away from rigid and unworkable definitions from the state aid regime).

**Question 13: Should the threshold for the exemption for small amounts of financial assistance to a single recipient replicate the threshold in the UK-EU Trade and Cooperation Agreement at 325,000 Special Drawing Rights over a three-year period?**

Yes	X (subject to comments)
No	

**If not, what lower threshold would you suggest and why?**

Since the TCA has allowed for the exemption to be set at this level over a three-year period, the UK's subsidy framework should be allowed to benefit from it. However, provision should be made going forward in 5, 10, 15 years' time for periodic review of the amount in line with the level of inflation and appropriateness in the relevant future economic climate.

**Question 14: If you consider the small amounts of financial assistance threshold should replicate the UK-EU Trade and Cooperation Agreement, should it be fixed at an amount of pound sterling (GBP)?**

Yes	X (subject to comments)
No	

This would allow for legal certainty, application, and less work for all involved in the assessment process (and documenting the relevant exchange rate on a date an award is agreed, and then having to re-do it if postponed). However, it would be important to include a periodic review on a relatively frequent basis in line with exchange rate fluctuation, with an official announcement on the government website etc.

**Question 15: Do you agree that subsidies under the proposed small amounts of financial assistance threshold be exempt from all obligations under the domestic regime, except for the WTO prohibitions?**

Yes	X
No	

**If not, why?**

It is appropriate that subsidies under the proposed small amounts of financial assistance threshold should be exempt from all obligations under the domestic regime, with the clear exemption of the WTO provisions. However, in addition, minor reporting/confirmation requirements would embrace the principles and practicalities of transparency and certainty for the subsidy regime – i.e. reporting not necessarily on the subsidy register itself, but some public confirmation without being overly laborious, requiring only minimal detail; and a subsidy award declaration to be given to any beneficiary which would be required to be exhibited in the case of further subsidy applications.

**Question 16: Should relief for exceptional occurrences be exempted from obligations regarding principles, prohibitions and conditions in the subsidy control regime?**

Yes	X
No	

**Further comments?**

Such a relief has been very helpful under the state aid regime and is recognised in the TCA. However, the provisions should be carefully worked through with detailed guidance.

**Question 17: Should subsidies granted temporarily to address a national or global economic emergency be exempted from the rules on prohibited subsidies and any additional rules set out below?**

Yes	X
No	

**Further comments?**

Such subsidies have been very helpful during the current crisis and is recognised in the TCA. However, the provisions should be carefully worked through with detailed guidance.

**Question 18: Should the threshold for the exemptions for Services of Public Economic Interest replicate the relevant thresholds in the UK-EU Trade and Cooperation Agreement at 750,000 Special Drawing Rights over a three-year period, and for transparency obligations at 15 million Special Drawing Rights per task? If not, what lower threshold would you suggest and why?**

Yes	X (subject to comments)
No	

**If not, what lower threshold would you suggest and why?**

Since the TCA has allowed for the exemption to be set at this level over a three-year period, the UK's subsidy framework should be allowed to benefit from it. However, provision should be made going forward in 5, 10, 15 years' time for periodic review of the amount in line with the level of inflation and appropriateness in the relevant future economic climate.

In addition, it would be helpful to look at the detail of a definition for Services of Public Economic Interest under the subsidy regime.



**Question 19: If you consider the SPEI thresholds should replicate the UK-EU Trade and Cooperation Agreement, should they be fixed at an amount of pound sterling (GBP)?**

Yes	X
No	

**Further comments?**

This would allow for legal certainty, application, and less work for all involved in the assessment process (and documenting the relevant exchange rate on a date an award is agreed, and then having to re-do it if postponed). However, it would be important to include a periodic review on a relatively frequent basis in line with exchange rate fluctuation, with an official announcement on the government website etc.

**Question 20: Do you agree with the Government's approach to prohibitions and conditions?**

Strongly Agree	
Agree	X
Neither agree nor disagree	
Disagree	
Strongly disagree	

**Should any types of subsidy be added to either category?**

Yes	
No	X

**If so, why?**

The current approach to prohibitions and conditions is based on ensuring that the UK is in compliance with its obligations under WTO rules, the Trade and Cooperation Agreement, and existing and anticipated FTAs. This should provide a stable and consistent set of rules without overly limiting the freedom of action of public bodies.

**Question 21: Would more detailed definitions of any of the terms set out in this section, including the definition of “ailing or insolvent enterprises” be useful to ensure a consistent and proportionate approach to compliance?**

Yes	X
No	

**If so, what should these be?**

It would be helpful, from both a legal certainty standpoint and a practical one, if definitions could be set down in a more detailed way in primary legislation, and in particular if (where relevant) they were to be tied to existing UK legal concepts, for example by tying the definition of insolvent enterprises to the Insolvency Act. It should be possible for both a public body and a recipient to be able to understand the prohibitions and conditions, and key definitions, without the need for legal advice.

**Question 22: Should the Government consider any additional ways to protect the UK internal market, over and above the inclusion of a specific principle to minimise negative impacts? If so, what?**

It is not clear what sort of an issue is being anticipated by this question. In the context of the UK, it is difficult to see that any public body other than the UK government would have sufficient economic resources to distort the UK internal market to a significant degree. Moreover, the UK government would in any event retain the ability to apply distortive subsidies by means of primary legislation which would not be subject to control by the subsidy control regime. A degree of cooperation, communication and mutual trust, perhaps best established by better use of joint ministerial committees, would be a preferable way of avoiding distortion rather than an overly prohibitive legal regime.

**Question 23: Would an additional process for subsidies considered at high-risk of causing harmful distortion to the UK internal market add value to the proposed principles?**

Yes	X (subject to comments)
No	

**If so, how should it be designed and what criteria should be used to determine if the subsidy is at high-risk of causing distortion?**

An ex-ante mechanism would provide public authorities and recipients with a degree of comfort, particularly in cases where subsidies may be considered at "high risk" of being unlawful and recoverable. In practice a public body will base its degree of detailed review on the level and nature of the subsidy being proposed, and so the

highest risk subsidies are likely to be subject to detailed consideration in any event. An additional process could add most value, therefore, if the independent body was empowered to provide some form of approval before such a subsidy was granted.

**Question 24: Should public authorities be obliged to make competition impact reviews public?**

Yes	X
No	

**If not, why?**

In general terms, decision making by public bodies should be public unless there is a good justification for doing so in private. Subject therefore to redaction of commercially sensitive details concerning the recipient, making competition impact reviews public may result in public bodies affording more weight to the negative effects on the potential "losers" than might be the case if only the public authority was aware of those potential effects in advance.

**Question 25: Should public authorities be permitted to override competition impact review e.g. in the case of emergencies?**

Yes	
No	X

**If so, why?**

It is not clear what is meant by a public authority "overriding" a competition impact review. Such a review would simply be an assessment of the impact of a proposed subsidy, which would inform the assessment of the lawfulness of that subsidy. The question should simply be whether a proposed subsidy is lawful.

**Question 26: Should there be additional measures to prevent subsidies that encourage uneconomic migration of jobs between the four nations?**

It is not clear what is meant by "uneconomic" migration of jobs, however "levelling up" different parts of the country to address regional inequalities would seem to require a degree of intervention to what market forces would otherwise provide. Sometimes that will require government investment to provide critical skills in an otherwise buoyant economy to support the addressing of equalities in a broader area, for example the encouragement of financial services or advanced research jobs in Manchester as part of addressing regional inequalities between the wider northwest of England and the southeast. To the extent therefore that any prohibition on the encouragement of uneconomic migration of jobs would capture neither the economic

migration of jobs, nor the creation of new jobs, nor the uneconomic migration of jobs to help "level up" the country, it is not at all clear what the proposed measures *would* capture.

**Question 27: Could additional measures help ensure that lower risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy? What should be included within the definition of 'low-risk' subsidies?**

The best carve outs for the lowest risk subsidies are the de minimis threshold and those factors which determine whether a transfer of state resources is truly a subsidy at all, for example the market economy investor principle and services of general interest (each of which could be helpfully defined in primary legislation). Otherwise, both continuity and certainty would be given from a "low risk" regime that mirrors as closely as possible the general block exemption regulation under EU State aid law, primarily the clarity of the aid intensity provisions under that regulation. That would additionally have the benefit of continuing the exemptions which are useful for regional transport infrastructure including ports and airports.

**Question 28: What guidance or information would be helpful for public authorities to assist on lower risk subsidies?**

A form of block exemption regulation, exempting certain categories of subsidy entirely, would provide welcome certainty with regard to lower risk subsidies. Guidance setting out categories of spending that would not constitute subsidy, for example the EU "market economy investor principle" would also provide helpful clarity.

**Question 29: Should the specific rules on energy and environment subsidies apply only in so far as they are necessary to comply with trade agreements? Or should they apply under the domestic regime more generally?**

Unless there is a justification for applying the rules more generally, the domestic regime should only go so far as necessary to ensure that the UK can comply with its international legal obligations.

**Question 30: Which sectors or particular categories of subsidy (such as for disadvantaged areas, R&D, transport, skills etc) would benefit from tailored provisions or specific guidance on subsidy control? If so, why, and what should the nature, extent and form of the provisions be?**

The flexibility offered by the TCA for the UK to permit subsidies in specific circumstances should be fully utilised, however it would be better for this to be done in as permissive a way as possible rather than setting down too prescriptive a set of additional requirements. The priority should be to provide the greatest degree of clarity to public bodies regarding which categories of subsidy are permitted and under what conditions.

**Question 31: Do you agree with the proposed rules on transparency?**

Strongly Agree	
Agree	X

Neither agree nor disagree	
Disagree	
Strongly disagree	

**If not, why?**

Yes, although we assume that the information to be provided will be specified more conclusively in any legal obligation on authorities, rather than the "non exhaustive" list in the consultation.

**Question 32: Do you agree that the thresholds for the obligation on public authorities to submit information on the transparency database should replicate the thresholds set for small amounts of financial assistance given to a single enterprise over a three-year period and for transparency for SPEI?**

See answer to Q33 below.

**Question 33: If not, should the threshold be lowered to £175,000 over a three-year period to cover all reporting obligations for Free Trade Agreements, enabling all of the UK's international subsidy transparency obligations to be met through one database?**

Yes	
No	X

It would be preferable for all public bodies to be subject to a single set of reporting obligations to a single database. This would allow reporting to be automated to a greater degree than if there were different reporting obligations for different purposes.

**Question 34: Should there be a minimum threshold of £50,000 below which no subsidies have to be reported?**

Yes	X
No	

Yes, provided that it is very clear how that threshold is determined.

**Question 35: Do you agree that the obligation should be to upload information within six months of the commitment to award a subsidy?**

Strongly Agree	X
Agree	
Neither agree nor disagree	
Disagree	
Strongly disagree	

Yes, as this aligns with the requirements of the TCA.

**Question 36: What should the functions of the independent body be? Should it be responsible for any of the following:**

- **information and enquiries-** STRONGLY AGREE
- **review and evaluations-** STONGLY AGREE
- **subsidy development advice-** STRONGLY AGREE
- **post-award review-** NEITHER AGREE NOR DISAGREE
- **enforcement-** NEITHER AGREE NOR DISAGREE

The review body should have a role which is meaningful such that it is able constructively to contribute to an efficient, coherent regime which meets international obligations and achieves legitimate domestic objectives. Such a body should provide information and handle enquiries. It would be helpful for the public authorities if the independent body distilled the international subsidy obligations for public authorities as a guide. It should be in a position to offer advice to public authorities and technical assistance and analysis. To do that it would need to be informed of the decision making re subsidy in all public authorities. The latter should be required to notify ex post of their subsidy activities with the exception of major state or public authority investment or subsidy grants. It could usefully have a role in enforcement but that would have to tally with the rights of interested parties to seek review. Any impact on those rights could infringe the TCA. Any activity by the body would have to be swift.

**Question 37: Should any review of a subsidy by the independent body consider all the principles, and the interaction between them, or only some principles, and if so which ones?**

All principles	X
Only some principles	

It would make sense for the independent body to be able to review all the principles and their interaction.

**Question 38: What role, if any, should the independent body play in advising public authorities and reviewing subsidies before they have been awarded?**

We do not believe the Independent Body should have an *ex ante* role in all subsidy awards. Major subsidy schemes or major awards where legal certainty is in the interests of every stakeholder could usefully benefit from *ex ante* review. The body could adapt its priorities for review annually in the light of experience in the same manner as the CMA.

**Question 39: If the independent body is responsible for post-award review, what types of complaints should it be able to receive and from whom?**

The body should be able to receive complaints from any complainant but should not be obliged to investigate every one recovered broadly in the same way the CMA prioritises and sifts complaints

**Question 40: Which, if any, enforcement powers should the independent be given? In what circumstances could the body deploy them? What would be the routes of appeal and the interaction with judicial enforcement?**

The body should be able to intervene to bring illegal or "unprincipled" subsidy activity to an end. It is difficult to see how penalties would be of any value. Its orders should be enforceable in the courts. It should, of course, be entitled to pass information to the Police or Crown Office where criminal conduct is suspected. See also response to question 43.

**Question 41: How should the independent body be established in order to best guarantee its independence and impartiality when exercising its operational functions?**

The body should have a board and secretariat independent of Government and political appointments. The CMA could undertake this role avoiding the need to create a new body. However, the CMA does not have a track record of taking on the public sector with a few exceptions. It would need a refocus if it was to take on powerful Government interests or public authorities, especially where decisions on subsidies which are dubious legality have public support.

**Question 42: In addition to the application of time limits, are there any other considerations for implementation of the recovery power?**

The recovery power will be real concern for recipients of subsidy and legal certainty will be highly desirable. The time limits are very tight especially where information may not be easily digestible and the time limits should be extended where authorities have been tardy or incomplete in releasing information to interested parties. Courts should be able quickly to rule on whether information released is complete. That would discourage authorities from gaming the system.

**Question 43: Should a specialist judicial forum such as the Competition Appeals Tribunal hear challenges to subsidy schemes and awards?**

Yes	X
No	

**If not, why?**

We consider that it would be helpful for a specialist judicial forum to hear challenges at first instance. Given the specialist, and potentially political, nature of decision-making, it will be important for the body to be able to build up the relevant expertise. The CAT will currently sit as a Scottish tribunal for proceedings which are categorised as Scottish proceedings, with appeals from the CAT in such cases being to the Inner House of the Court of Session rather than to the Court of Appeal. Indeed, we note that the CAT is also amongst those tribunals for which responsibility is in the process of being transferred under the terms of the Scotland Act 2016. Whether subsidy cases are heard by the CAT or by another tribunal, it will be important to make provision for the appropriate appellate route depending on the UK jurisdiction to which the case relates, and to put clear rules in place to assist the tribunal in determining which jurisdiction the proceedings should be categorised as arising in.

We would welcome further information as to whether the Independent Body would have power itself to determine recovery in ex post situations or whether it should instead be tasked with bringing proceedings in a court or tribunal and asking the judicial body to reach a particular determination. We note that this latter approach could be perceived as less political.

Consideration also needs to be given to the role of the Scottish Parliament. Technical questions may also need to be answered in terms of the interaction with the Scotland Act 1998.

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