



Law Society
of Scotland

Second Reading Briefing

Subsidy Control Bill

September 2021



Introduction

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.

The Subsidy Control Bill was introduced into the House of Commons on 30 June 2021 by the Secretary of State for Business, Energy and Industrial Strategy. This follows a [consultation](#) published by the Department for Business Energy and Industrial Strategy, entitled *Subsidy Control: designing a new approach for the UK* to which we submitted comments¹.

The Society's Competition Law sub-committee welcomes the opportunity to comment on the Subsidy Control Bill and have the following comments to make. If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General Comments

We are of the view that a well-functioning subsidy control regime must be based on clear rules that provide legal certainty to businesses and granting authorities. The interim regime that has been in place since the UK's exit from the EU has not provided the level of clarity required. As such, many advisers have continued to apply EU state aid rules in an attempt to avoid any unlawful subsidies. We therefore stress the importance of ensuring that this bill and its accompanying guidance implements a regime that is clear, proportionate and gives businesses and local authorities (and their advisers), the tools to operate confidently within it.

As subsidy control has now been substantially returned to the UK and is a reserved matter², much of the autonomy that the Scottish government had when the UK was under the EU state aid regime has been transferred to the UK government. The UK Internal Market Act recognised the importance of consulting with the devolved administrations on its proposals for subsidy control. We hope that the spirit of section 53 of that Act will continue throughout the development of the regime, and that that the UK government will take the opportunity to consult fully with the devolved legislatures and administrations and other interests based in each of the UK jurisdictions (see comments on Part 6 of the Bill).

¹ <https://www.lawscot.org.uk/media/371335/21-03-31-comp-uk-subsidy-approach.pdf>

² [UK Internal Market Act 2020, Part 7, section 52](#)

Specific Comments

Part 1: Overview and key interpretations

We broadly agree with the concepts and definitions contained in this part, however we are of the view they will need to be supplemented with sufficiently detailed practical guidelines, which as noted above should be consulted upon prior to introduction.

Part 2: subsidy control requirements

Part 2 sets out the principles that underpin the subsidy control regime and control requirements.

We broadly agree with the objectives (subject to comments below about the potential problems caused by introducing an overly centralised regime without building in scope for taking account of regional differences) but as noted above, in order to be meaningful they will require to be supported by detailed guidance.

Clause 18 includes an additional principle on top of the prohibitions contained in the EU-UK Trade and Cooperation Agreement (TCA) to the effect that subsidies which have relocation within the UK as a condition are also prohibited. We are of the view that this provision as drafted could be side-stepped as it expressly states that the prohibition is only applicable where the relocation factor is a *condition* for the subsidy award. Its practical application would therefore be limited as granting authorities could choose not to make such a requirement as an express condition of the grant offer – but instead require the location of production to be in the local area.

If it is thought that the potential for subsidy races within the UK could have a damaging effect on local economies, then consideration needs to be given to alternative wording. By comparison, the EU state aid rules focus on the *effect* of displacement on the market in practice as opposed to technical wording of the condition and therefore have wider application.

Part 3: Exemptions

Part 3 sets out which subsidies are exempt from the subsidy control requirements.

Agricultural, fisheries and audio-visual subsidies are exempt from subsidy control requirements in the TCA whereas they are all covered by this Bill. Agricultural subsidies are subject to a specific WTO agreement on agriculture while fisheries subsidies are subject to WTO rules on subsidy and countervailing measures.

Further clarification is required on how the provisions of the Bill will interact with these rules. We do however welcome the inclusion of audio-visual as it will create a level playing field.

Part 4: CMA referrals and functions

Part 4 provides for functions of the Competition and Markets Authority (CMA) and procedures of referrals.

In our response to the consultation preceding this bill, we cautioned against implementing an overly centralised system. We contended that centralised control of subsidies would potentially bring inefficiencies of its own and would not have the intended effect of discouraging "bidding wars", which could equally have taken place under previous regional assistance systems to encourage and maintain investment.

We consider it important to recognise different local, regional and national markets within the UK and the impact on and interaction with the formal UK Internal Market structures. Provided ceilings and guidelines are being followed we are of the view that local authorities should still have the flexibility to be able to address their own priorities, while respecting the relevant subsidy rules and principles.

The role of the CMA

The CMA will have a role in monitoring and reporting on the general functioning of the regime. The government's own response to its subsidy control consultation provides that it will also "*have a role offering expertise and challenge to UK public authorities*"³.

In that regard, it is vital that the CMA (and the Subsidy Advice Unit established within it by clause 68) builds up knowledge of the nature and profile of each of the jurisdictions within the UK and is able to monitor and review individual decisions with regard to the specific nature and profile of the area in which they take place. This could be facilitated by implementing a framework to enable regular dialogue between the CMA and the devolved administrations to expand this knowledge and also take account of any future regional developments.

Furthermore, we note that the [Joint Declaration on subsidy control](#)⁴ attached to the TCA provides for the development of '*disadvantaged and deprived areas or regions*' to be taken into account when awarding a subsidy and the relevant amount. However, no further information has been so far provided on what disadvantaged or deprived means either in the Joint Declaration, the Bill, or updated [BEIS guidance](#), although the government did say in its report on the preceding consultation that the statutory guidance produced to help local authorities will "*promote considerations intrinsic to the levelling up agenda and set out the criteria for promoting economic development of relatively disadvantaged areas*"⁵. It is vital this is addressed in a comprehensive and contextual manner, given that a disadvantaged intercity area in one part of the UK may not be comparable to a disadvantaged rural area in another.

Finally it is noted that the Bill does not provide for devolved governments to have any influence or involvement in the appointment of CMA panel members, which will be in charge of exercising the CMA's

³ [Consultation Response](#), p52

⁴ [Declarations annex](#), page 5

⁵ [Government response to subsidy control consultation](#), page 10

powers under the Bill (unlike the provisions applied to appointments for the Office of the Internal Market which require prior approval from the devolved governments).

Part 5: Enforcement

Part 5 contains provisions relating to the enforcement of the subsidy control requirements.

In our response to the preceding consultation, we expressed support for the proposal that the Competition Appeals Tribunal (CAT) hear challenges at first instance. Given the specialist, and potentially political, nature of decision-making, it is important for the CAT to be able to build up the relevant expertise. The CAT currently sits 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 amongst those tribunals for which responsibility is in the process of being transferred under the terms of the Scotland Act 2016.

We also made the point that if the CAT were to be given the power itself to determine recovery in ex post situations, this could be perceived as more political than if it were instead tasked with bringing proceedings in a court or tribunal and asking the judicial body to reach a particular determination.

What role will the Scottish Parliament have in relation to the enforcement provisions? Technical questions may need to be answered in terms of the interaction with the Scotland Act 1998.

Part 6: miscellaneous and general

Part 6 contains miscellaneous and general provisions.

This part of the Bill confers various powers on the Secretary of State, including quite wide regulation-making powers in clause 86. We are of the view that there should be a corresponding obligation to consult with the devolved legislatures and administrations before making such regulations (not least as Schedule 3 makes explicit that the power to make consequential provisions in clause 86 includes power to make provisions for time limits for proceedings in the Court of Session or High Court, as in clause 71 for proceedings in the CAT).

We note that clause 79 grants the Secretary of State a discretionary power to issue guidance (although also confers an obligation to publish any guidance issued). Given the general acknowledgement of the reliance on guidance for the effective operation of the regime, we are of the view that there should be an obligation to issue guidance. We note the obligation in clause 79 on the Secretary of State 'to consult with such persons as the Secretary of State considers appropriate', which given our comments above is welcomed although we are of the view that this should explicitly include the devolved administrations.

For further information, please contact:

Katie Hay
Head of International
Law Society of Scotland
DD: 0131 476 8351
katiehay@lawscot.org.uk