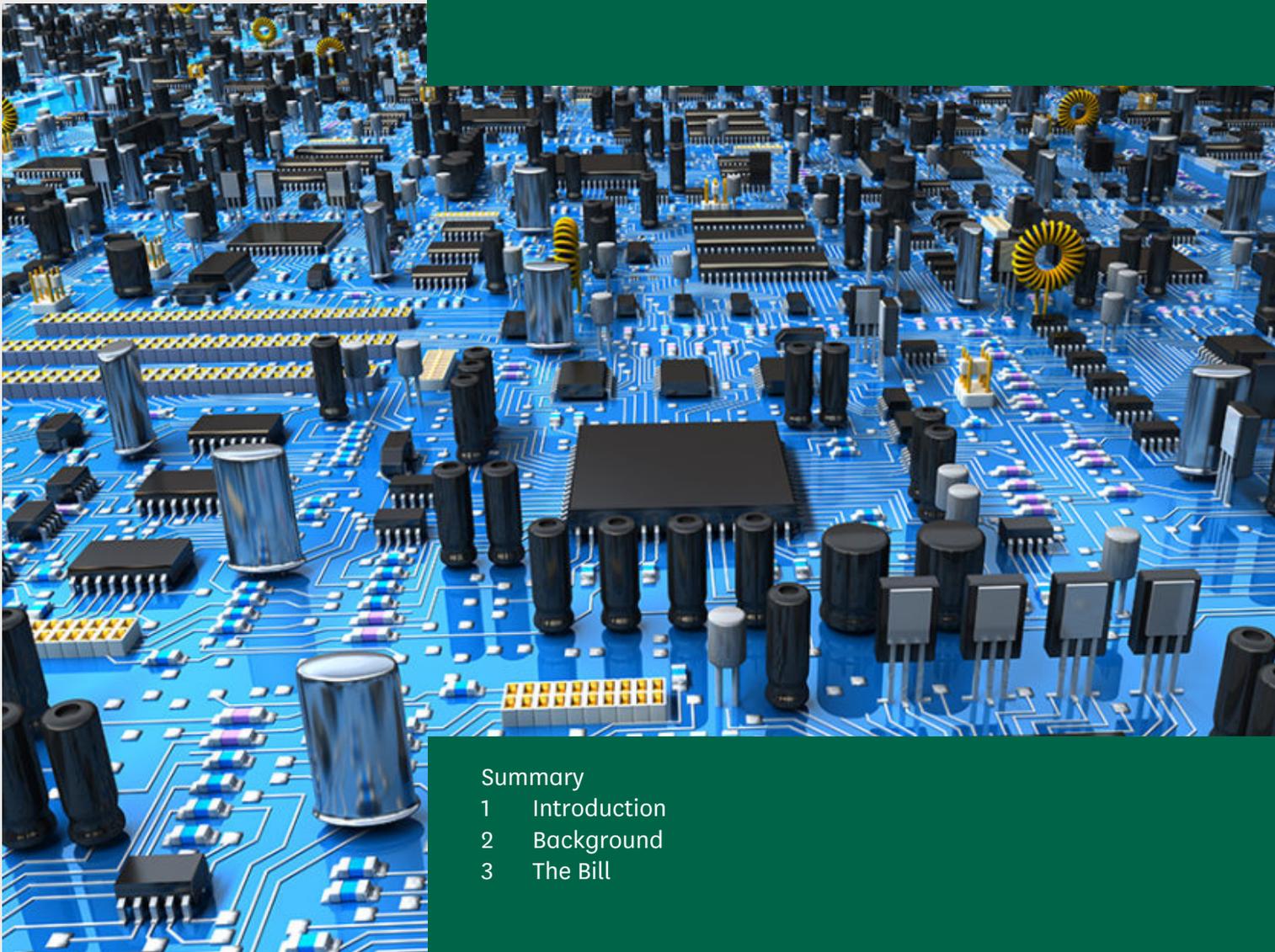


By Ilze Jozepa,
Lorna Booth,
Ali Shalchi

17 September 2021

Subsidy Control Bill 2021-22



Summary

- 1 Introduction
- 2 Background
- 3 The Bill

Image credit

Electronic board. Licenced under Creative Commons CC0 – no copyright required / image cropped

Disclaimer

The Commons Library does not intend the information in our research publications and briefings to address the specific circumstances of any particular individual. We have published it to support the work of MPs. You should not rely upon it as legal or professional advice, or as a substitute for it. We do not accept any liability whatsoever for any errors, omissions or misstatements contained herein. You should consult a suitably qualified professional if you require specific advice or information. Read our briefing [Legal help: where to go and how to pay](#) about sources of legal advice and help. This information is provided subject to the conditions of the Open Parliament Licence.

Feedback

Every effort is made to ensure that the information contained in these publicly available briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Please note that authors are not always able to engage in discussions with members of the public who express opinions about the content of our research, although we will carefully consider and correct any factual errors.

You can read our feedback and complaints policy and our editorial policy at commonslibrary.parliament.uk. If you have general questions about the work of the House of Commons email hcenquiries@parliament.uk.

Contents

1	Introduction	8
1.1	Territorial application	9
1.2	The purpose and functions of the Bill	9
2	Background	11
2.1	The road towards domestic subsidy control	11
	Negotiations with the EU	11
	Commitments in the TCA	12
	Interim period	13
2.2	Flexibility and legal certainty	13
	For or against a light-touch regime	13
	Legal certainty	14
	Less bureaucracy	15
	Supporting strategic priorities	16
	Will there be more business support?	17
2.3	Devolution	19
	Subsidy control as a reserved power	19
	Subsidy competition	20
	Commentary	21
2.4	Ireland/Northern Ireland Protocol	22
	Reach-back	22
	Can the two regimes co-exist?	23
	Legal challenge	24
3	The Bill	25
3.1	Part 1: Definition of a subsidy	25
	Categories of subsidies	26

3.2 Part 2: Principles and requirements	28
General principles of subsidy control	29
Energy and environment principles	30
Prohibited subsidies	31
Conditional subsidies	33
Services of public economic interest	35
Subsidy database	35
3.3 Part 3: Exemptions	37
Minimal assistance thresholds	38
Emergencies	39
‘Legacy subsidies’ and other exemptions	39
3.4 Part 4: The role of the CMA	40
Subsidy Advice Unit	41
Subsidy referrals system	41
Other CMA functions	44
Commentary	45
3.5 Part 5: Enforcement	46
Background	46
The Bill	47
Impact of using the CAT	48
3.6 Part 6: Miscellaneous and general	49
Subsidies and schemes in primary legislation	49
Power to issue guidance	50
Other provisions	50

Summary

On 30 June 2021, the Government presented the Subsidy Control Bill to Parliament. The second reading of the Bill has not yet been announced.

The Subsidy Control Bill creates a legal framework and sets out conditions for public authorities that provide subsidies to businesses.

A subsidy refers to a grant, a tax break, a loan, or other form of financial assistance paid from public resources. The new subsidy control regime will replace EU state aid rules, which applied in the UK until the end of the transition period in December 2020.

This briefing provides background to Government's approach and outlines the steps taken towards an independent subsidy control regime in the UK. It also explains the contents of the Bill and includes expert commentary in relation to Government's proposals.

The Bill's objectives

According to the Government, the Subsidy Control Bill “[enables strategic interventions](#)” to support its priorities, including economic recovery, its ‘levelling-up’ and net zero agendas, and investment in research and development. The Bill also aims to provide certainty for business investment and support fair competition in the UK market, by preventing subsidies that may be “harmful and distortive”.

The Bill contributes to fulfilling the UK's obligations under international agreements, such as the World Trade Organization Agreement on Subsidies and Countervailing Measures (SCM) and the UK-EU Trade and Cooperation Agreement (TCA).

Replacing EU state aid rules

The EU state aid rules prohibit government financial support to businesses that would distort trade.

Now that these no longer apply to the UK, the Government said it aims to create a subsidy control system that is more flexible and less bureaucratic, that would allow public authorities to grant financial support suited to their specific needs.

Subsidy control principles

The Bill places an important obligation on public authorities to consider **seven** broad subsidy control principles before granting a subsidy.

Six principles are derived from the Trade and Cooperation Agreement and broadly require that subsidies benefit wider society and contribute to public policy objectives.

The Bill says that subsidies must be proportionate and necessary, must stimulate change in behaviour of the beneficiary, and be the right means to achieve the objectives. The benefits of a subsidy must outweigh any negative impact on competition and investment in the UK and internationally.

The Bill adds a UK-specific principle that authorities must design subsidies in a way that minimises any negative effect on competition and investment within the UK. Additional principles apply to subsidies related to energy and environment.

The Bill says that public authorities should not grant a subsidy unless they believe the principles are complied with. Information about subsidies must be included on a public subsidy database.

The Government plans to publish further guidance about the practical application of subsidy control principles and other requirements of the Bill.

Independent authority

To implement the UK's commitments in the TCA, the Bill creates, the independent Subsidy Control Unit within the Competition and Markets Authority (CMA). This body will advise public authorities on applying the subsidy control principles. Its advice will be non-binding and the ultimate decision to grant a subsidy will rest with a granting authority.

The CMA will also monitor and report on the general functioning of the regime.

Exempted subsidies

The Government is seeking to ensure that public authorities can give the lowest risk and most time-critical subsidies "[with minimum bureaucracy and maximum certainty.](#)"

The Bill exempts low risk subsidies with minimal effect on competition and trade from the main subsidy control requirements. These include subsidies with a value under a threshold of £315,000 over a three-year period, called "minimal financial assistance". The Government will also create "streamlined subsidy schemes". These will be made when it judges that certain categories are compliant with the principles of the regime. Such schemes could cover different sectors and categories of subsidies, including research and development, skills, disadvantaged areas and culture.

Additional scrutiny

Subsidies of "particular interest" are those deemed potentially more distortive. They will be scrutinised in greater detail and must be referred to the CMA.

Granting authorities can also voluntarily refer “subsidies of interest” to the CMA for a report, but this will not be mandatory.

The relevant Secretary of State will have powers to refer some subsidies to the CMA when they are concerned about them being harmful or trade-distorting. The Government will define these categories of subsidies in secondary legislation and envisages that they will cover a small number of particularly high-risk subsidies. These could, for example, include financial incentives to relocate businesses, or restructuring subsidies to ailing companies.

Enforcing the regime

The UK regime will be enforced through the Competition Appeal Tribunal, which will effectively hear judicial reviews against subsidy decisions made by a public authority.

An interested party, such as a competitor of a beneficiary, will be able to bring the challenge. The Tribunal will have the power to make recovery orders which require the public authority to recoup the subsidy from the beneficiary, if the Tribunal finds that the subsidy has been given against the subsidy control requirements.

Issues

Since this Government announced that the UK will break with EU rules on state aid, law and policy experts have debated the benefits and issues of an independent UK subsidy control policy.

They have discussed the benefits of a lightly regulated, less burdensome system versus the need to have clear guidance and procedures that give legal certainty to granting authorities and businesses that benefit from subsidies. They agree that this is an opportunity to shape policy to support the UK’s own strategic priorities. There remains uncertainty over whether a more flexible system could lead to less scrutiny and more wasteful subsidies.

Experts emphasize that a well-functioning regime requires full buy-in from devolved administrations, which contest subsidy control being a reserved power.

The UK new regime will also exist besides the state aid provisions of the Withdrawal Agreement Protocol on Ireland and Northern Ireland, which continue to apply to [certain trade between Northern Ireland and the EU](#).

1 Introduction

The Subsidy Control Bill (Bill 135) was [introduced to the House of Commons](#) on 30 June 2021. At the time of publication of this briefing the date of the Bill's second reading has not been set.

The Subsidy Control Bill has six parts and three schedules:

- Part 1 sets out the definitions
- Part 2 sets out the principles that underpin the subsidy control regime and control requirements
- Part 3 sets out which subsidies are exempt from the subsidy control requirements
- Part 4 provides for functions of the Competition and Markets Authority (CMA) and procedures of referrals
- Part 5 contains provisions relating to the enforcement of the subsidy control requirements
- Part 6 contains miscellaneous and general provisions
- Schedule 1 describes the subsidy control principles
- Schedule 2 sets out the energy and environment principles
- Schedule 3 sets out which provisions of the Bill apply to subsidies provided by primary legislation, including by devolved legislatures.

The [Bill](#), with its [explanatory notes](#), [impact assessment](#), and [delegated powers memorandum](#) is published on [the Bill's page on Parliament.uk](#), which also gives details of its parliamentary progress to date.¹ The Bill is accompanied by a Government [written statement](#).²

A [consultation on the Government's approach to UK subsidy controls](#) ran between 3 February and 31 March 2021. The [Government's response to the consultation](#) was published on 30 June 2021.

The Department for Business, Energy & Industrial Strategy has published [policy papers](#) providing information about the proposed subsidy control regime.

¹ [Subsidy Control Bill, Explanatory Notes \(EN\), Bill 135](#), June 2021; [Subsidy Control Bill: impact assessment](#), 25 June 2021

² HCWS134, 30 June 2021

1.1 Territorial application

The Bill extends to the whole of the UK, except for clause 48(3), which amends the retained EU law on certain aspects of public passenger transport services by rail and by road for England, Scotland and Wales, but not for Northern Ireland.³ See section 2.3 below.

Subsidies which are subject to Article 10 [state aid] of the [Withdrawal Agreement Ireland and Northern Ireland Protocol](#) are exempt from the requirements of the Bill. See section 2.4 below.

1.2 The purpose and functions of the Bill

The Bill implements a subsidy control regime for the UK and sets out how central government, devolved administrations, local authorities, and other types of public authority, should make decisions to award subsidies.

A subsidy refers to public support to business activities and can take the form of “a grant, a tax break, a loan or guarantee on favourable terms, or the use of facilities below market price”.⁴

The Government states that objectives of the subsidy control regime are to:

- Empower local authorities, public bodies, and central and devolved governments to design subsidies that deliver strong benefits for the UK taxpayer.
- Enable public authorities to deliver subsidies that are tailored and bespoke for local needs to support the UK’s economic recovery and deliver UK Government priorities such as levelling up, achieving net zero and increasing UK R&D investment.
- Provide certainty and confidence to businesses investing in the UK, by protecting against subsidies that risk causing distortive or harmful economic impacts, including to the UK domestic market.
- Contribute to meeting the UK’s international commitments on subsidy control, including its international commitments at

³ Regulation (EC) No [1370/2007](#), Article 9 on Public service compensation for the operation of public passenger transport

⁴ [Explanatory Notes](#), paras 1-6

the World Trade Organisation, in Free Trade Agreements and the Northern Ireland Protocol.⁵

The regime will replace the EU state aid rules which applied in the UK until the end of the transition period on 31 December 2020, and the interim provisions set out in the Government [guidance on the UK's international subsidy control commitments](#).

The Bill has the following key functions:

- It sets out subsidy control principles which granting authorities must observe
- It exempts certain low risk subsidies from the Bill's requirements
- It prohibits certain subsidies which are generally not compliant with the UK's international obligations, and places requirements on other subsidies
- It sets out additional administrative requirements, such as a requirement to publish information on a subsidy database
- It introduces a more detailed assessment for high risk subsidies.

The Bill establishes a Subsidy Advice Unit (SAU) in the CMA which will have an advisory role in relation to certain subsidies given by public authorities, including devolved Scottish, Welsh and Northern Ireland administrations and local authorities. Its advice will be non-binding and the ultimate decision to go ahead with a subsidy will rest with a granting authority. The Subsidy Advice Unit will also monitor and oversee the working of the regime.

The enforcement of the UK regime will be through the Competition Appeal Tribunal who will effectively hear judicial reviews against subsidy decisions of a public authority.

The Bill's provisions are neutral about which sectors of industry or policy priorities would benefit from more subsidies. Decisions about the level of subsidies remain the competence of granting authorities. However, the Bill gives the Government power to publish detailed guidance, where it could address such priorities.

⁵ HCWS134, 30 June 2021

2 Background

2.1 The road towards domestic subsidy control

Negotiations with the EU

As an EU Member State, the UK was part of the EU state aid regime that limits trade-distorting public financial support to businesses. See Box 1.

1 EU state aid rules

The EU state aid controls are specifically aimed at creating a level playing field for businesses in the Single Market. Under Article 107 of the [Treaty on the Functioning of the European Union](#), state aid is prohibited, if it threatens to distort competition and trade between EU Member States.⁶

State aid refers to national and sub-national public authorities offering grants, tax reliefs and various other forms of support, which favour specific business activities or industries. Member States are required to get European Commission clearance before making state aid available to businesses (ex-ante assessment). In practice, [about 95% of EU state aid](#) measures have been exempted from this procedure. The Commission or courts can order recovery of state aid that is unlawful or deemed incompatible with the internal market.

See Commons Library briefing 6775, [EU State Aid Rules and WTO Subsidies Agreement](#).

Theresa May's Government planned to maintain a rigorous domestic state aid system after leaving the EU. Prime Minister Boris Johnson however has rejected any alignment with EU state aid rules. The Prime Minister said in a pre-election [speech on 29 November 2019](#), that the UK would have its own subsidy system which would be more clear, permissive, speedy and consistent.⁷ As lawyer James Webber explains, a permissive system in the sense of the common law means that "governments and citizens ought to be permitted to act, with legal restriction only so far as necessary to prevent undue harm to others."⁸ That would contrast with the EU approach where, in

⁶ [Consolidated version of the Treaty on the Functioning of the European Union](#) [2012] OJ C326, Art. 107-108 (TCA)

⁷ BBC, [General election 2019: PM pledges help for struggling firms after Brexit](#), 29 November 2019

⁸ Consequently, a permissive subsidy system would focus on limiting the most harmful subsidies.

principle, all state aid is prohibited unless it can be justified and approved.⁹ Our briefing [UK subsidy policy: first steps](#), has more on this in section 1.3.

State aid, or subsidy control – the term now used by the UK Government – became one of the most controversial areas during the negotiations over the UK’s future relationship with the EU and one of the last issues to be resolved. Both the EU and UK have a mutual interest in robust controls of state support to businesses, which ensures fair competition and trade with the other party. Despite this, the sides adopted different approaches to future cooperation on state aid/subsidies.¹⁰ The UK sought to protect its regulatory autonomy and avoid provisions in this area that would go further than free trade agreements “normally” do. The EU saw alignment on state aid rules as essential to prevent UK subsidies to industries from threatening to undercut EU businesses in the future.¹¹

An agreement on subsidy control was reached and included in the UK-EU Trade and Cooperation Agreement (TCA). From 1 January 2021, EU state aid rules no longer apply to the UK. The TCA provisions on subsidies do not amend the state aid provisions of the Withdrawal Agreement [Protocol on Ireland and Northern Ireland](#). This means that EU state aid rules continue to apply to subsidies affecting trade in goods and wholesale electricity between Northern Ireland and the EU.

Commitments in the TCA

Under the TCA both the UK and EU are required to have an effective system of subsidy control and an independent body to oversee it from 1 January 2021.

The TCA states that mutually agreed principles of subsidy control (Article 366) should be applied to determine the legality of an individual subsidy, where this could have a material effect on trade or investment between the UK and EU. The principles broadly require that subsidies benefit wider society and contribute to public policy objectives. Subsidies must be proportionate and necessary, must stimulate change in behaviour of the beneficiary, and be the right instrument to achieve the objectives. The benefits of a subsidy must outweigh any negative impact on competition and investment in the UK and internationally.¹²

The Agreement does not require the UK Government to set up a control mechanism for public support, before subsidies are given, as is required under the EU regime. The UK can itself determine the precise nature of its

⁹ In practice, over 95% of state aid measures in Europe is approved via exemption regulation rather than notifications to the Commission. See J. Webber, [All Change? UK State Aid after Brexit What Law? Whose Courts?](#), Politeia, February 2020

¹⁰ HL European Union Committee, [Internal Market Sub-Committee, Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q8

¹¹ Commons Library briefing, [The UK-EU Trade and Cooperation Agreement: Level Playing Field](#), 20 May 2021, section 3.1

¹² TCA, [Chapter 3, Articles 363 to 375](#)

domestic subsidy control regime and the role of any independent body, within the principles and rules agreed in the TCA.¹³

A distinct feature of the TCA is that one of the parties can take unilateral remedial measures such as raising tariffs, if there is evidence that a subsidy of the other party risks having a “significant negative effect” on UK-EU trade and investment.

For details of the negotiations and the subsidy provisions in the TCA see our briefing, [The UK-EU Trade and Cooperation Agreement: Level Playing Field](#).

Interim period

The UK repealed the EU state aid regime without a system ready to replace it. The Government [announced on 20 September 2020](#) that the features of the UK regime would be set out following a consultation which would be held at a later date. On 31 December 2020, it published technical [guidance on the UK’s international subsidy control commitments](#), which implements the UK’s international obligations under the WTO Agreement on Subsidies and Countervailing Measures, the TCA, and other agreements.

This guidance sets out the main steps that UK public authorities must follow when awarding subsidies, in advance of the new regime, which is being established by the Subsidy Control Bill. The interim regime is based on self-assessment of subsidies by government and public authorities, and there is no regulator.

The Subsidy Control Bill will not have a retroactive effect and will not place additional requirements on subsidies granted under schemes which have been made in compliance with the interim rules.¹⁴

2.2

Flexibility and legal certainty

For or against a light-touch regime

Up until the end of 2020, when the UK-EU agreement was reached, it was uncertain whether the Government would choose a light-touch control regime, based on general principles, or a more stringent oversight of subsidies.

Paul Scully, [Minister for Small Business, Consumers and Labour Markets](#), [wrote in May 2020](#) that the new subsidy regime might not necessarily require a domestic regulator.¹⁵ The Financial Times reported in July 2020 that there

¹³ TCA, [Chapter 3, Articles 363 to 375](#)

¹⁴ Clause 48(1)

¹⁵ Paul Scully, Minister for Small Business, Consumers & Labour Markets, [Government response to the House of Lords EU Internal Market Sub-Committee](#) – ‘Inquiry into UK-EU negotiations on the level playing field and state aid’, 15 May 2020

was pressure within the Government for a minimal, light-touch, non-statutory regime for state aid in the UK based on certain administrative principles. It said there was opposition to having an independent regulator. Instead, a watchdog-type body could provide “persuasive force” in the event of blatant breaches.¹⁶ This approach would give the UK flexibility to support its strategic priorities.

Various state aid experts have argued that a light-touch system, or one with only an advisory role for a regulator, would be insufficient for domestic policy purposes. It would be less able to cope with subsidy competition between authorities and ensure transparency of public authority spending on subsidies. The Institute for Government’s, Thomas Pope and Alex Stojanovic, have argued that a more robust system would still be able to support the UK’s strategic priorities.¹⁷ The interim regime, which is based on government and public authority self-assessment and functions without a regulator, has been described in another Institute for Government piece as ‘[ineffective](#)’.¹⁸

The Bill’s [impact assessment](#) reports that the Government discounted the “do-minimum option” which would satisfy the terms of the UK-EU Trade and Cooperation Agreement and establish a body with a restricted role. Instead, the Government now proposes to give the body a more profound oversight and advisory role, seen in this Bill (see section 3.4 below). The impact assessment sets out the Government’s rationale.¹⁹

Legal certainty

Subsidy practitioners and experts have argued that a well-functioning subsidy control regime must be based on clear rules that provide legal certainty to businesses and granting authorities. The Institute for Government sets out the risks of a lack of clear rules and legal certainty:

First, a system that gives governments too much latitude when designing subsidies risks leading to an inconsistent approach across the country and possibly permitting subsidies that are excessive or wasteful, and therefore damaging. Second, a system that fails to deliver legal certainty may have a ‘chilling’ effect, deterring governments and public bodies from offering subsidies or businesses from receiving them to avoid the risk of legal challenge.²⁰

As Anton Spisak of the Tony Blair Institute for Global Change, says in his commentary, [Five questions to ask about Britain’s post-Brexit subsidy policy](#),

¹⁶ Peter Foster and Jim Pickard, Financial Times, [Cumplings leads push for light-touch UK state-aid regime after Brexit](#), 27 July 2020

¹⁷ Thomas Pope, Alex Stojanovic, [Beyond state aid](#), Institute for Government, September 2020, p6

¹⁸ Institute for Government, [Taking back control of subsidies](#), 27 May 2021

¹⁹ Impact Assessment, paras 305-334

²⁰ Institute for Government, [Taking back control of subsidies](#), 27 May 2021

there is a risk that in the absence of clear and predictable rules, subsidy decisions might end up being litigated in courts.²¹

In the interim period, according to lawyers Alex Kynoch and Angelica Hymers, the authorities bear “a responsibility to ensure that they are compliant” with the UK’s international obligations. Although they can [consult departmental and devolved subsidy control teams](#), there is no formal regulator.²²

The interim regime has been described as lacking clarity and causing concerns, especially for bodies outside central government, including local authorities. To avoid the risk of a subsidy being given unlawfully and having to be recouped, practitioners and lawyers across the UK have since continued to apply EU state aid rules, which are familiar to them and offer detailed guidance for allowable aid. Kynoch and Hymers conclude that a more permissive approach to regulating subsidies would only work if public authorities are given the tools and guidance to apply the new regime with confidence.²³

Some practitioners have asked for safe harbours, meaning templates or rules for lower risk subsidies that can be granted “safe in the knowledge that it will definitely be acceptable.” Such guidance, they say, could be designed for infrastructure subsidies or to support regional development.²⁴

Less bureaucracy

One of the criticisms of the EU state aid regime has been its sluggish and complex state aid approval process.²⁵ For example, the 2018 the House of Lords EU Internal Market Sub-Committee’s report, [Brexit: competition and state aid](#), recommended that “the government should take into account calls from local authorities for a less complex and burdensome approval process than under the current EU regime.”²⁶ Therefore it’s been argued that the UK regime should avoid creating unnecessary bureaucratic burden.

In response to the Government consultation, some respondents have noted that copying the EU’s approach of detailed regulations and guidance for low

²¹ Anton Spisak, Tony Blair Institute for Global Change, [Five questions to ask about Britain’s post-Brexit subsidy policy](#), 2 July 2021

²² Alex Kynoch and Angelica Hymers, law firm Browne Jacobson, [Subsidy Control after Brexit – a practitioner’s perspective](#), [Loyalgovernmentlawyer.co.uk](#), 14 June 2021 (accessed via UKSALA.org on 8 July 2021)

²³ Ibid.

²⁴ Jonathan Branton and Alexander Rose, [UK Subsidy Control: how will public funding change now the UK has taken back control of State aid regulation?](#), DWF Law, 30 December 2021

²⁵ Under EU state aid rules, Member States must notify the European Commission and get its authorisation before state aid is paid out. In practice, since 2015 more than 95% of public support measures have been exempt from this requirement, with some checks taking place afterwards.

²⁶ HL EU Committee, Internal Market Sub-Committee, [Brexit: competition and State aid](#), 2 February 2018, HL 67 2017-19, paras 37-42, paras 89-193, para 219

risk subsidies would “remove much of the hard-won innovation potential and flexibility the UK has achieved in the UK-EU TCA”.²⁷

The Subsidy Control Bill introduces provisions designed to ensure that certain categories of subsidies, which are low risk and aligned with government priorities, can proceed with [minimum administrative burden](#) and maximum legal certainty. Public authorities will be able to voluntarily refer other ‘subsidies of interest’ to the CMA for advice.

Supporting strategic priorities

For the past 20 years EU state aid rules have tended to favour policies which support better environmental protection, investment in innovation, small businesses or catching up by less developed regions. They do that for example by permitting higher subsidy ceilings to support particular economic activities, SMEs, or allowing more types of financial support in poorer areas.

Now, able to set its own rules on subsidies, the UK can direct public support towards its own policy priorities. Experts and politicians have called the Government to use this opportunity.²⁸ See our briefing [UK subsidy policy: first steps](#), section 2.1.

The Government [consultation document states](#) that the Government wants a subsidy system that “facilitates interventions to deliver on the UK’s strategic interests”. It mentions more investment in research and development, helping regions that have been left behind, and achieving net zero carbon among the strategic priorities.²⁹

The Subsidy Control Bill does little to identify specific sectors for different treatment. There are limited provisions in relation to, for example, air carriers and credit institutions. Broader general provisions support subsidies related to energy and environment. But details on tools that could be used to support levelling up, net zero or innovation are not included in the Bill.

Subsidy law experts Jonathan Branton and Alexander Rose note that the Bill, as presented, does not propose a preferential system that would lead targeted support to disadvantaged regions. Such rules exist under the EU regional aid system, where higher aid ceilings are available in less developed areas. They argue that current proposals could even lead to larger support in wealthier areas where investment costs might be higher. Also, to protect competition in the UK market, the Bill explicitly bans relocation subsidies, which may hamper the levelling-up agenda. They said:

... an additional prohibition on relocation subsidies is likely to cause serious problems for any so-called "North-Shoring" projects (or indeed anything moving to a new freeport area) [...] This seems at

²⁷ BEIS, [Consultation Response](#), June 2021, p41

²⁸ [Letter](#) of Baroness Donaghy, Chair of the House of Lords EU Internal Market Sub-Committee wrote to Minister for Small Business, Consumers and Labour Markets, BEIS, Paul Scully, 3 April 2020, para 72

²⁹ Consultation, p14

first difficult to reconcile with the levelling-up agenda and so may be particularly unpopular with former "red wall" areas.³⁰

The Bill provides for the Government to work out the details later. Under Clause 79, the Secretary of State will have power to issue guidance. The explanatory notes say that the guidance could, for example, set out:

... how subsidies might be given to support disadvantaged areas in a way that is consistent with the principles, by indicating characteristics or criteria for an area to be considered disadvantaged and how that might be used to justify more ambitious or extensive subsidy interventions consistent with the principles.³¹

Thomas Pope of the Institute for Government says that the Bill sets out building blocks for a successful system. But as the details will need to be filled in and some crucial aspects are left out at this point, he argues that the Government needs to set out a transparent process for filling in these gaps.³²

Will there be more business support?

A wider policy question is the extent to which the Government would help businesses.

Successive UK governments have spent less on state aid than most other EU countries. As shown in chart 1, over the 2010-2019 period, UK state aid as a percentage of GDP remained well below the percentage of EU GDP as a whole. Based on data from the European Commission [state aid Scoreboard](#), in 2019 the UK spent 0.51% of GDP on state aid (excluding agriculture, fisheries, and railways), while France spent 0.85% and Germany 1.54%. In total, 28 Member States' state aid was worth 0.81% of EU GDP in 2019.³³

Commentators are asking whether the Government intends to break this trend and spend more on subsidising particular industries.³⁴

In a statement of 9 September 2020 on [future subsidy control](#), the Government said that "it does not intend to return to the 1970s approach of trying to run the economy or bailing out unsustainable companies." In its February 2021 consultation document, the Government reiterated this and

³⁰ Jonathan Branton, Alexander Rose, DWF LLP, [The Subsidy Control Bill – a missed opportunity to improve the current regime?](#) 1 July 2021

³¹ [Explanatory Notes](#), paras 227-8

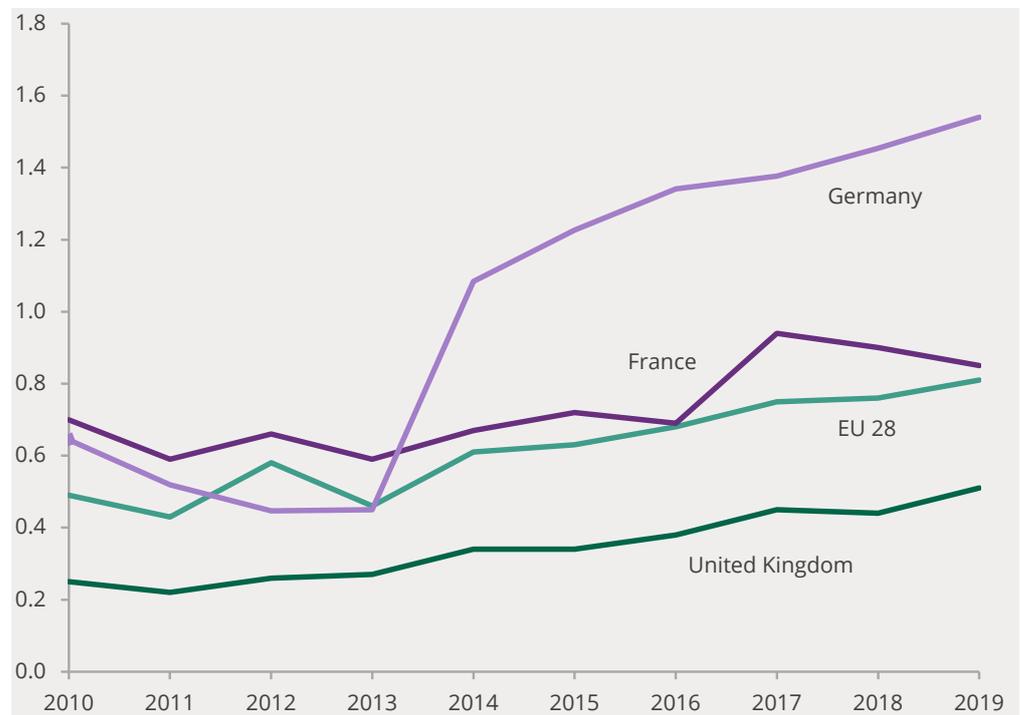
³² Thomas Pope, Institute for Government, [The subsidy control bill does not guarantee post-Brexit state aid success](#), 1 July 2021

³³ European Commission, [State aid Scoreboard 2019](#); data from DG Competition, [Aid by main objectives in current prices](#)

³⁴ See Tim Shipman, [PM threatens no-deal Brexit over EU's state aid rules](#), The Times, 30 August 2020; Simon Nixon, The Times, [Brexit opens door to more subsidies for businesses, but at what cost?](#) 1 July 2021; Financial Times editorial, [The UK carves a risky new path on state aid](#), 1 July 2021

said that it did not intend “to run the economy or to pick winners through selective interventions.”³⁵

Chart 1



Source: European Commission, [State Aid Scoreboard 2020](#), Aid by main objectives in current prices

Others have specifically cautioned that competition-distorting subsidies must be avoided. For example, John Penrose - a Conservative MP commissioned to lead an independent review into the UK’s competition regime after Brexit – [has written in his February report](#) that the UK should not seek to subsidise industries now that it has “regained full sovereign control” of its state aid regime.³⁶

Stephen Booth of Policy Exchange think tank proposed in March 2021 that with more freedom it has under the TCA, the UK Government might want to intervene more actively than its predecessors in order to:

- support a loss-making enterprise whose demise would have a serious effect on employment or exports, giving the Port Talbot steelworks as an example;
- support a science-based or high-technology firm (such as ARM), to maintain its independence and to encourage faster growth;
- invest in projects deemed of national importance such as giga-factories to supply batteries for electric cars, where they lack private investment;

³⁵ Consultation, para 31

³⁶ John Penrose MP, independent report [Power to the People. Stronger consumer choice and competition so markets work for people, not the other way around](#), February 2021

- make some changes to the structure of the taxation of venture capital and start-ups and the taxation of savings and investment that may involve an element of tax expenditure.³⁷

The Subsidy Control Bill provides a framework for consistent subsidy provision across the UK, whereas the decisions about how much subsidies should be given, to whom, and for what purpose, remain the responsibility of public authorities.³⁸

A Financial Times editorial has noted that a system of nimbler subsidy decisions also means less scrutiny.³⁹

2.3

Devolution

Subsidy control as a reserved power

The UK Government has repeatedly asserted that the regulation of state aid/subsidies is a reserved matter.⁴⁰ This means that the UK Parliament has exclusive competence to pass laws and the devolved legislatures cannot legislate in this area.

The Scottish and Welsh Government have contested this and argued that subsidies should fall within devolved competence after the EU state aid framework has ceased to apply and devolved ministers should at least be involved in the design of the new regime, not only consulted.⁴¹ The Welsh Government proposed to participate in a UK-wide regime on a voluntary, rather than a mandatory, basis.⁴² For more detail on the position of the devolved administrations see our briefing [UK subsidy policy: first steps](#), section 2.2.

The UK Parliament legislated in [the UK Internal Market Act 2020](#) that “regulation of the provision of subsidies which are or may be distortive or harmful” is a reserved matter (or ‘excepted matter’ in Northern Ireland), putting this beyond legal doubt.⁴³

³⁷ Stephen Booth, Policy Exchange, [Post-Brexit freedoms and opportunities for the UK](#), 9 March 2021, para 3.1.2

³⁸ Consultation, para 44

³⁹ Financial Times editorial, [The UK carves a risky new path on state aid](#), 1 July 2021

⁴⁰ In 2019, the UK Government published draft [State Aid \(EU Exit\) Regulations 2019](#) (secondary legislation) which would have empowered the CMA to regulate, monitor and enforce activities currently carried out by the European Commission, but these did not take effect.

⁴¹ Scottish Parliament Official Report, [Culture, Tourism, Europe and External Affairs Committee](#), 25 April 2019; Welsh Government Analysis, [The UK Government’s White Paper on a UK Internal Market](#), 14 August 2020.

⁴² Jess Sargeant, Alex Stojanovic, Institute for Government, [The United Kingdom Internal Market Act 2020](#), February 2021, p25

⁴³ [UKIM Act 2020](#), Section 52

The Government consultation document on the future of subsidy control said that the Government recognises the importance of a constructive and collaborative relationship with the devolved administrations in its efforts to design the UK regime. It noted that the devolved administrations will remain responsible for their own spending decisions within the subsidy control framework.⁴⁴

As required under Section 53 of the UKIM Act, the Government shared its response to the consultation with the devolved administrations before publishing it on 30 June.

The [Government statement](#) said that the new subsidy control framework will “empower” all public bodies, including devolved governments to “design subsidies that deliver strong benefits for the UK taxpayer”.⁴⁵

Legislative consent

The Government is seeking legislative consent for various provisions of the Bill, which “alter the competence of the devolved administrations”. Annex A of the [explanatory notes](#) has an overview of the relevant provisions.⁴⁶

The Welsh Government has raised concerns about certain provisions of the Bill and has recommended that the Senedd withholds consent unless the Bill is amended to address these concerns.⁴⁷

Subsidy competition

One of the key arguments in favour of a centralised subsidy control framework is preventing subsidy competition (“subsidy races”) between different parts of the UK. Without a common system to keep local, or devolved, public spending under control, authorities could freely bid against each other trying to attract foreign investment to their territory or help firms relocate from other parts of the country. Experience in other countries shows that large firms may play different authorities against each other in order to get the most benefit.

Thomas Pope and Alex Stojanovic of the Institute for Government say that the UK would be particularly vulnerable to subsidy competition. This is because of the combination of the spending powers of Scottish, Welsh and Northern Ireland governments and the highly integrated markets among the four nations of the UK. They say that the UK’s quasi-federal structure needs additional mechanisms to counter the “beggar-thy-neighbour problem”.⁴⁸

To address this risk, the Bill proposes a new subsidy control principle that protects competition and investment within the UK market. It requires that

⁴⁴ BEIS, Consultation. [Subsidy control: designing a new approach for the UK](#), February 2021, p41

⁴⁵ [HCWS134, 30 June 2021](#)

⁴⁶ Explanatory Notes, paras 24-25

⁴⁷ Welsh Government, Legislative Consent Memorandum, 13 July 2021

⁴⁸ Thomas Pope, Alex Stojanovic, [Beyond state aid](#), Institute for Government, September 2020, pp26-27

granting authorities design a subsidy or a subsidy scheme in a way that minimises its impact on competition and investment in other areas in the UK. The Government consultation response says that:

[t]he combination of additional principle and guidance will seek to reduce the risk of “subsidy races” between authorities by setting out how authorities should consider impacts on other areas in the UK (including the impact of new investment not going to those other areas).⁴⁹

Commentary

There are some [indications](#) that devolved administrations have concerns about the Bill’s effect on devolved powers.⁵⁰

The [Welsh Government has said in an official statement](#) accompanying its [legislative consent memorandum](#) of 14 July, that despite the Welsh Government’s proactive efforts to engage, the Bill appears to reflect only the UK Government’s position rather than the wider needs of the whole of the UK.⁵¹ It’s concerns include:

- The lack of a defined pathway in the Bill to allow disadvantaged regions to compete on a level playing field with more prosperous regions of the UK.
- New powers for the Secretary of State to “call-in” subsidies provided by granting authorities in Wales for independent review by the Competitions and Markets authority.⁵² This is seen as “an unacceptable imposition upon areas of devolved policy”.
- Bringing agricultural and fisheries subsidies within scope of the UK subsidy regime despite repeated concerns expressed by devolved partners.⁵³

So far, the administrations of Scotland and Northern Ireland have not made any statements about the Bill.

Anton Spisak of the Tony Blair Institute for Global Change comments that it is reasonable for the government to try to prevent the zero-sum game of devolved authorities seeking to attract economic opportunities from other parts of the country, but for the system to be effective, buy-in of all devolved

⁴⁹ [Consultation Response](#), p37

⁵⁰ Russel Lynch, The Telegraph, [New rules on state subsidies to reignite row with Sturgeon](#), 30 June 2021; BusinessLive, [Welsh Government raise concerns over new state aid rule regime](#), 1 July 2021

⁵¹ Welsh Government, [Written Statement: The Subsidy Control Bill 2021](#), 14 July 2021

⁵² See section 3.4 below

⁵³ Welsh Government, [Written Statement: The Subsidy Control Bill 2021](#), 14 July 2021

administrations is required. He says that without it, subsidy decisions will only “add to the long list of grievances in devolved nations.”⁵⁴

For commentary on issues which the bill raises for the devolution settlement see George Peretz, [The subsidy control bill and devolution: a balanced regime?](#) 15 July 2021.

2.4

Ireland/Northern Ireland Protocol

The Protocol on Ireland/Northern Ireland (the Protocol) - part of the [Withdrawal Agreement](#) - sets out the relationship of Northern Ireland with both the EU and Great Britain (the rest of the UK).

Under Article 10 of the Protocol, EU state aid rules continue to apply to subsidies related to trade in goods and the wholesale electricity market, insofar as these can affect trade between Northern Ireland and the EU. Agricultural subsidies in Northern Ireland are exempted from state aid controls, up to a certain agreed maximum. State aid regulations under the Protocol are enforced by the European Commission. See our briefing [UK subsidy policy: first steps](#), section 2.3 for further detail on state aid provisions in the Protocol.

Reach-back

Experts generally agree that the application of Article 10 of the Protocol alongside the UK domestic subsidy control rules could create legal and practical issues in the future. Article 10 could potentially apply EU state aid rules to certain subsidies in Great Britain, not just those in Northern Ireland. For example, a UK-wide tax measure, that benefits a Northern Ireland business, could be caught by the EU state aid enforcement regime as it could potentially affect trade between Northern Ireland and the EU.⁵⁵ This is often referred to as “reach-back” of EU state aid rules. As George Peretz QC & Alfred Artley have explained:

EU state aid rules do not simply bite upon acts of the devolved and local government bodies in Northern Ireland, and those measures adopted by the UK government that are Northern Ireland-specific; rather they also catch all-UK measures (or measures affecting only

⁵⁴ Anton Spisak, Tony Blair Institute for Global Change, [Five questions to ask about Britain’s post-Brexit subsidy policy](#), 2 July 2021; See also Russel Lynch, The Telegraph, [New rules on state subsidies to reignite row with Sturgeon](#), 30 June 2021

⁵⁵ [EU powers to review UK state aid under Irish Border Protocol to be assessed ‘case by case’](#), MLex, 24 January 2020; G.Peretz QC in [“Boris Johnson’s efforts to escape EU state aid rules ‘mistaken’](#)”, Financial Times, 9 February 2020

part of the UK), whatever UK authority takes those measures, as long as they meet the [EU state aid] test.⁵⁶

The passage of [the UK Internal Market Bill](#) through Parliament underlined the sensitivity of state aid provisions of the Protocol. As originally presented in September 2020, the Bill would have empowered Ministers to unilaterally reinterpret and disapply provisions on state aid in the Protocol on Ireland/Northern Ireland. It appeared that these controversial provisions could break the UK's legal obligations under the Withdrawal Agreement and international law to enact the Protocol. In response, the European Commission launched [infringement proceedings](#) against the UK. The provisions were eventually not included in the [UK Internal Market Act 2020](#). See for background our briefings, [United Kingdom Internal Market Bill 2019-21](#), 14 September 2020, Sections 6.5 and 6.8., and [Joint Committee decisions on the Northern Ireland Protocol](#), 23 December 2020, Section 2.2.

After discussions in the EU-UK Withdrawal Agreement Joint Committee, the EU sought to address UK concerns about the “reach-back” of the Protocol's state aid provisions, by giving a clarification of Article 10's application in a [unilateral declaration](#). However, [legal commentators](#) have said they don't believe this unilateral declaration will have much effect on the “reach back” issue and note that the Court of Justice of the European Union retains its jurisdiction over State Aid matters under the Protocol.

The UK and EU views of the extent of “reach-back” appear to be different. The UK Government's interim [guidance on the UK's international subsidy control commitments](#) (paragraph 7.1) points out that the “reach-back” situation could arise in certain, limited circumstances. But European Commission's [Notice to Stakeholders on state aid after the departure of the UK from the EU](#), which was issued in January 2021, has a wide interpretation of which measures can “affect trade” between Northern Ireland and the EU.⁵⁷

Can the two regimes co-exist?

Various experts have argued that the co-existence of the two subsidy regimes – the EU state aid regime for NI trade and the UK domestic regime – may cause confusion and uncertainty for UK public authorities and businesses. They say that granting authorities may become reluctant to give subsidies in fear of non-compliance with EU state aid rules.⁵⁸

Some experts called for the Protocol's state aid provisions to be replaced by the Trade and Cooperation Agreement regime during the negotiations last

⁵⁶ George Peretz QC, Alfred Artley, [State aid under the Northern Ireland Protocol](#), Tax Journal, 15 May 2020

⁵⁷ European Commission Notice to stakeholders, [Withdrawal of the United Kingdom and EU rules in the field of state aid](#), 18 January 2021

⁵⁸ See for example George Peretz, [The UK's new subsidy regime: a marsh of uncertainty](#), Monckton Chambers, 1 January 2021; Thomas Pope, Eleanor Shearer, Institute for Government, [Taking back control. Replacing EU state aid rules in the UK](#), May 2021, p42

year, and this argument is still being made.⁵⁹ Thomas Pope and Eleanor Shearer argue in the Institute for Government May 2021 report, [Taking back control of subsidies](#), that the new UK subsidy control system has to be so effective and robust as to demonstrate that it prevents UK subsidies from affecting the EU and so Article 10 of the Protocol is no longer necessary. Over time, “the UK government should look to negotiate a limit to the scope of Article 10 or complete removal.”⁶⁰

The Government set out proposals for dealing with the problems arising from the Ireland/Northern Ireland Protocol in a Command Paper, [Northern Ireland Protocol: The way forward](#) on 21 July 2021. Regarding the subsidy control regime of the Protocol it said that commitments on subsidies in the TCA, together with the proposed Subsidy Control Bill, make Article 10 of the Protocol redundant in its current form. To give the EU extra certainty that trade would not be distorted, the Government would be prepared to “establish enhanced processes for any subsidies on a significant scale relating directly to Northern Ireland”, such as enhanced referral powers or consultation procedures.⁶¹

Several prominent UK subsidy lawyers have [described the Government’s proposal](#) as a “sensible basis for negotiation” and deserving serious consideration.⁶² The European Commission’s position remains that it [will not agree to a renegotiation](#) of the Protocol.

Legal challenge

Further clarity on the application of Article 10 to the UK’s subsidy regime may emerge from a legal challenge by the company British Sugar launched in early July 2021. British Sugar lodged the claim in response to a decision by the Trade Secretary Liz Truss, last December to unilaterally allow 260,000 tonnes of “raw cane sugar” to enter the UK tariff-free for 12 months from January 1 as part of the UK’s post-Brexit global tariff schedule. The company argues that this was in effect a “subsidy” by the UK Government to its competitor, US-owned Tate & Lyle Sugars. It also says that this “subsidy” unfairly undercuts EU sugar producers and is in breach of both Article 10 of the Protocol and the EU-UK Trade and Cooperation Agreement (TCA).⁶³

⁵⁹ James Webber, International Trade Committee, [Oral evidence: UK-EU trading relationship](#), HC 1206, 22 April 2021, Q119

⁶⁰ Thomas Pope, Eleanor Shearer, Institute for Government, [Taking back control. Replacing EU state aid rules in the UK](#), May 2021, p43

⁶¹ HM Government, [Northern Ireland Protocol: the way forward](#), CP 502, July 2021, paras 63-65

⁶² George Peretz, James Webber, [The UK’s Proposed Revisions to Article 10 of the Northern Ireland Protocol: a Sensible Basis for Negotiation](#), 2 September 2021

⁶³ Peter Foster, Financial Times, [Boris Johnson’s post-Brexit trade policy faces first High Court test](#), 1 July 2021

3 The Bill

3.1 Part 1: Definition of a subsidy

Part 1 of the Bill sets out the definitions of a “subsidy”, “public authority”, “enterprise”, and other key terms.

Under the broad definition of **Clause 2**, a “subsidy” can take the form of a grant, a loan or a guarantee on more favourable terms than available on the market, forgone revenues, the provision of goods or services, or others.

A subsidy is confirmed with a four part test:

- A subsidy is “given, directly or indirectly, **from public resources by a public authority**”;
- It confers an **economic advantage** on one or more enterprises;
- It is specific, meaning that it benefits some enterprises over others with respect to the production of goods or the provision of services;
- It has or **can have an effect on competition or investment in the UK, or on trade or investment between the UK and its trading partners.**⁶⁴

Where each condition is met, a financial assistance of a public authority given to an enterprise is considered a subsidy.

Clause 3 defines an “economic advantage”. Generally, there is no economic advantage if the benefit is provided on terms which would have been available on the market. For example, a loan would not be considered giving an economic advantage if a bank might have provided it to a company on the same terms.⁶⁵

Clause 4 defines what is “specific” financial assistance. The explanatory notes (paragraphs 34 to 36) give further examples of situations which would fall outside the scope of the definition of a “subsidy” because of it not being specific.

Subsection 2 of Clause 4 says that financial assistance is not considered specific if the different treatment of certain businesses can be justified by “principles inherent to the design of the arrangements of which that financial

⁶⁴ Clause 2(1)

⁶⁵ Explanatory Notes, para 33

assistance is part”. Subsections (3) to (7) set out considerations that help determine whether a taxation measure or a levy is “specific”.

Clause 4(4)(a) sets out for example, that a general tax measure is not ‘specific’ unless certain businesses obtain a tax reduction that they would not have born under the normal taxation regime. Explanatory notes illustrate this with an example of a tax relief measure by a local authority. If the measure gives an advantage to one or more enterprises over another in its area, it is likely to be specific. If all enterprises in its area benefit and the local authority is acting autonomously in relation to that measure, it is unlikely to be specific.⁶⁶ Clause 4(6) clarifies that a non-discriminatory “levy with a non-economic public policy objective” such as a special levy for environmental purposes, would not be deemed specific. George Peretz QC notes that the definition of tax measures “essentially carries over from the TCA (and ultimately from EU law) the test as to when a tax measure counts as a subsidy.”⁶⁷

The definition of a “public authority” in **Clause 6** is broad and includes persons exercising a public function, such as central, devolved, regional or local government or a public body. The definition does not include either House of Parliament, or the three devolved legislatures – Senedd Cymru, the Scottish Parliament and the Northern Ireland Assembly. Schedule 3 has provisions that cover subsidies provided by means of primary legislation, including by devolved legislatures.

Clause 8 defines an “enterprise” as “a person, or group of persons under common control, engaged in an economic activity,” that is, offering goods or services on the market.⁶⁸

The key concepts in this part closely follow the provisions of Article 363(1)(b) of the TCA, implementing international obligations. There is also the added test relating to the effect of a subsidy on competition within the UK, aiming to protect fair competition in the domestic market and investment against harmful subsidies.⁶⁹ For a comparison see the EU law definition of state aid in our briefing [EU State Aid Rules and WTO Subsidies Agreement](#), section 1.1.

Categories of subsidies

The Bill makes a distinction between several categories of subsidies, with varying depth of assessment being applied:

- Subsidies and subsidy schemes
- Streamlined subsidy schemes⁷⁰

⁶⁶ Explanatory Notes, para 36

⁶⁷ George Peretz Q.C., Ben Rayment, Monckton Chambers, [UK Subsidy Control Bill – a brief summary](#), 5 July 2021; George Peretz, [Tax implications of the Subsidy Control Bill](#), Tax Journal, 10 September 2021

⁶⁸ Explanatory Notes, para 39

⁶⁹ George Peretz Q.C., Ben Rayment, Monckton Chambers, [UK Subsidy Control Bill – a brief summary](#), 5 July 2021

⁷⁰ Government policy documents refer to these as “streamlined routes”

- Subsidies or subsidy schemes of interest
- Subsidies or subsidy schemes of particular interest

Subsidy schemes⁷¹

There is a distinction in the Bill between subsidies awarded to individual enterprises on a case-by-case basis and “subsidy schemes”, as defined in **Clause 10**, subsections (1) to (3). In a subsidy scheme, public authorities set out eligibility criteria that allow businesses to qualify for support. Examples are the Covid Financing Scheme and the Retail Grant Scheme.⁷²

Public authorities, when designing subsidy schemes, are expected to consider the subsidy control principles at the scheme level. It is the scheme that must be referred to the Competition and Markets Authority (**Clause 63**). If a scheme provides both for a prohibited subsidy (for example an export subsidy) or does not meet other requirements of the Bill, its non-compliant part is prohibited. The compliant parts of the scheme may continue (**Clause 30**).

The Explanatory Notes clarify that public authorities can design schemes for their own use. “Primary public authorities” can also design schemes to support other authorities in granting of subsidies. Primary public authorities are the UK Government, a devolved administration, or any other public authority that is entitled to make subsidy schemes for the use of other authorities.⁷³

Streamlined subsidy schemes

Clause 10(4) makes a further distinction between subsidy schemes, and streamlined subsidy schemes. The latter can only be made by the UK Government and must be laid before Parliament after they have been made or modified.

These streamlined schemes are intended to facilitate the awards of low-risk subsidies, in a way that is quicker and easier, without having to assess them separately against the subsidy control principles and requirements.⁷⁴

The Secretary of State for Business, Energy and Industrial Strategy, Kwasi Kwarteng, has stated that such schemes will be made for subsidies “at low risk of causing market distortion”, where the Government judges them to be compliant with the principles of the regime. They will promote the Government’s strategic policy objectives and “will ensure that these authorities are able to deliver these subsidies with minimum bureaucracy and maximum certainty.”⁷⁵ The Government response to the consultation says that the “[streamlined routes](#)” will cover different sectors and categories of subsidies, including transport, research and development, skills,

⁷¹ In this briefing, a reference to a subsidy also includes a subsidy scheme, unless noted otherwise.

⁷² Explanatory Notes, para 45

⁷³ Explanatory Notes, para 45

⁷⁴ Explanatory Notes, para 46

⁷⁵ [HCWS134](#), 30 June 2021

disadvantaged areas and culture and heritage subsidies.⁷⁶ The majority of respondents to the consultation agree that additional measures would be helpful to process low-risk subsidies quickly and with legal certainty.⁷⁷

The approach of “streamlined subsidy schemes” could create safe harbours, or an equivalent to the approach of [block exemptions](#), which is part of the EU state aid regime.⁷⁸ The EU General Block exemption regulation includes simpler rules for regional aid, SMEs, research, development and innovation, training, certain broadband infrastructure, environmental measures, and others. The regulation defines eligible beneficiaries, maximum aid intensities (that is, the proportion of the eligible costs of a project that can benefit from state aid) and eligible expenses. Compliance with the rules of the block exemptions ensures that the subsidy is legal. However, the UK Government has emphasized in its response to the consultation that it is not replicating this EU regulation and will have its own bespoke approach.⁷⁹

Clause 64(1)(a) says that, as opposed to an ‘ordinary’ scheme, a streamlined subsidy scheme cannot be the subject of a referral to the CMA (see section 3.4 below).

Subsidies and schemes of interest and particular interest

Clause 11 contains provisions on “subsidies or subsidy schemes of interest” and “subsidies or subsidy schemes of particular interest”. Chapter 1 of part 4 on the functions of the Competition and Markets Authority (CMA) says that subsidies or schemes of particular interest have to be referred to the CMA before they may be given or made. Authorities may voluntarily refer schemes of interest to the CMA for a report, but it is not mandatory to do so (see section 3.4 below).

The Secretary of State is granted power to make regulations which define these categories, setting out the value of the subsidies and the sectors covered. These regulations are subject to the affirmative procedure. The government envisages that this category will include a small number of schemes which are “more likely to be inconsistent with the subsidy control requirements, or have distortive effects on competition and investment within the UK”.⁸⁰

3.2

Part 2: Principles and requirements

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

⁷⁶ [Consultation response](#), p43

⁷⁷ Consultation response, p41

⁷⁸ Some experts have called for “safe harbours”. See Jonathan Branton, Alexander Rose, [UK Subsidy Control: how will public funding change now the UK has taken back control of State aid regulation?](#) DWF Law, 30 December 2020

⁷⁹ Consultation response, p42

⁸⁰ Explanatory Notes, para 48

- Seven general principles apply to all subsidies.
- Nine additional principles apply to subsidies related to energy and environment.

Public authorities have a duty under **Clause 12** to consider these principles before deciding to award an individual subsidy or before making a subsidy scheme. They must refrain from giving a subsidy if they are of a view that the principles cannot be complied with.

The Secretary of State has powers to issue guidance that clarifies the principles and how public authorities should apply them. See section 3.6 below.

General principles of subsidy control

Clause 12 sets out the duty on public authorities to consider seven principles set out in Schedule 1 (and in the box below), before deciding to grant a subsidy.

Mutually agreed principles of subsidy control are covered by Article 366 of the Trade and Cooperation Agreement, and must be applied to determine the legality of an individual subsidy where this could have a material effect on trade or investment between the UK and EU. Government's interim guidance explains that authorities should do a self-assessment of their subsidies against these principles.⁸¹ A UK-specific principle, included in the Bill, mandates that authorities design subsidies in a way that minimises any negative effect on competition and investment within the UK.

2 Effects of subsidy control principles

The explanatory notes to the Bill describe the effects of the subsidy control principles:

Principle A: Public authorities will need to consider, explain and assess the policy objective behind the subsidy to ensure there is a benefit to wider society in providing the subsidy.

Principle B: Subsidies should be both proportionate and limited to what is necessary to achieve the policy objective.

Principle C: Subsidies must incentivise and lead to a change in the behaviour of the beneficiary. They must help to address the public policy objective being pursued.

Principle D: Subsidies should be targeted to bring about an effect that is additional to any that would occur in the absence of the subsidy. They should not normally cover everyday business expenses.

⁸¹ [Government guidance](#), 31 December 2020, updated on 24 June 2021

Principle E: Alternative policy levers, that are likely to cause less distortion to competition and investment in the UK, or trade and investment internationally, should be considered before turning to subsidies.

Principle F: Public authorities should design the subsidy in a way that minimises the impact on competition and investment within the UK's internal market. This will require them to assess the 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.

Principle G: Public authorities should assess the material effects on competition and investment in the UK, and international trade and investment, and decide whether the benefits of the subsidy are greater than the harmful impacts of providing the subsidy.⁸²

Energy and environment principles

In addition to the main principles, **Clause 13** says that subsidies in relation to energy and environmental have to be assessed against the nine principles set out in Schedule 2. These principles reflect the UK's international commitments, that is, the obligations it took under the TCA ([Annex 27](#) in particular). Article 136(14) of the TCA contains an agreement that:

subsidies in relation to energy and environment shall be aimed at, and incentivise the beneficiary in, delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or increasing the level of environmental protection compared to the level that would be achieved in absence of the subsidy. Such subsidies shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of the relevant Party.

The energy and environment principles do not apply to subsidies related to nuclear energy (**Clause 51**). Box 3 sets out the principles in some detail:

3 Energy and environment principles

As the explanatory notes clarify, public authorities must assess subsidies for energy and environment against principles set out in Schedule 2 of the Bill and ensure that:

⁸² Explanatory Notes, para 54

- (A) Subsidies increase the level of environmental protection as compared to a base-line situation.
- (B) Subsidies do not relieve polluters from their liabilities.
- (C) Subsidies for “electricity generation adequacy, renewable energy or cogeneration” must generally be awarded in a fair and competitive process. Alternatively, a non-competitive process may be used under certain conditions; authorities have to avoid overcompensation and make sure that the subsidy does not distort trade and investment in the UK and between the UK and its trading partners.
- (D) Subsidies for electricity generation adequacy may be limited to installations not exceeding specified CO2 emission limits
- (E) Subsidies for renewable energy and cogeneration shall not affect beneficiaries’ participation in electricity markets
- (F) Subsidies in the form of partial exemptions from energy-related taxes and levies in favour of energy-intensive users shall not exceed the total amount of the tax or levy concerned.
- (G) Subsidies that compensate energy-intensive users for increased electricity costs due to climate policy instruments, must be limited to sectors at significant risk of carbon leakage⁸³ due to the increased costs.
- (H) Subsidies for the decarbonisation of emissions linked to industrial activities in the UK shall achieve an overall reduction in greenhouse gas emissions, and reduce the emissions from these activities.
- (I) Subsidies for improvements of the energy efficiency of industrial activities in the UK shall improve energy efficiency by reducing energy consumption, either directly or per unit of production.⁸⁴

Prohibited subsidies

Three types of subsidies are prohibited in all circumstances, in line with the prohibitions under the WTO Agreement on Subsidies and Countervailing Measures (SCM) (see box 4), and UK’s commitments in its trade agreements:

- Unlimited guarantees (**Clause 15**)

This type of a subsidy would guarantee an unlimited amount of liabilities or debts or cover a debt over an indefinite period.

- Subsidies contingent upon export performance (**Clause 16**)

⁸³ Carbon leakage is the potential loss of competitiveness and transfer of operations from countries with high costs of carbon for businesses to countries with less stringent emissions targets, and less carbon costs to businesses.

⁸⁴ Explanatory Notes, para 57

Examples are subsidies that compensate for a price difference between goods or services sold on the export or domestic market. However, the prohibition does not apply to certain short-term export credit support, for example if it is provided in the form of insurance against risks that are not marketable or concerns export support permitted under the WTO SCM Agreement.⁸⁶ In addition, insurers providing export credit insurance may receive subsidies under certain conditions set out in **Clause 27**.

4 WTO Agreement on Subsidies and Countervailing Measures (SCM)

The UK is party to the [WTO Agreement on Subsidies and Countervailing Measures](#) (SCM). This agreement sets out rules on the use of subsidies in international trade in goods and actions countries can take to protect their economies from the effects of another country's subsidies. Some subsidies, such as export subsidies, are prohibited outright but other subsidies can be challenged if a country can prove that these subsidies have caused adverse effects to its industry, for example by harming its exports to the subsidising country or other markets. In retaliation a country can tax imports of the subsidised good – this is known as imposing a 'countervailing duty'.

Although the definition of a 'subsidy' under the SCM Agreement is broadly similar to 'state aid' in EU law, the WTO rules are considered less prescriptive than the EU rules. The SCM Agreement has been criticised due to the weaknesses of its enforcement mechanism.⁸⁵

See our briefing [EU State Aid Rules and WTO Subsidies Agreement](#).

- Subsidies that are contingent on the use of domestically produced goods or services (local content) (**Clause 17**)

Such subsidies are prohibited, however, subsidies to support local content are allowed in the audio-visual sector. This sector is excluded from the provisions of the subsidies chapter of the TCA, in line with EU practice in trade agreements.⁸⁷ Subsection (3) sets out that certain other local-content subsidies are allowed in line with TCA Articles 132 and 133.

⁸⁵ Bernard Hoekman, Douglas Nelson, [Rethinking International Subsidy Rules](#), Global Economic Dynamics, Bertelsmann Stiftung, Working paper, 28 February 2020 Chad P. Brouwn, J. Hillman, [WTO'ing a Resolution to the China Subsidy Problem](#), Peterson Institute for International Economics, October 2019, section 4

⁸⁶ "Marketable risks" means risks relating to payment obligations of customers in marketable risk countries. These countries have higher levels of private insurance market capacity and include the US, EU Member states, Canada, Australia, Japan and several others (Clause 16(3)).

⁸⁷ Consultation, [Subsidy control: designing a new approach for the UK](#), para 55

- The fourth outright prohibition applies to subsidies that explicitly require companies to relocate their economic activities from one part of the UK to another (**Clause 18**).

The Government has proposed this UK-specific measure in order to protect the UK internal market. It said in the February 2021 consultation document that this could prevent uneconomic relocation of activities between England, Scotland, Wales and Northern Ireland.⁸⁸ Some other countries specifically recognise and regulate the risk of subsidy races within their country. For example, Canada has made provisions in its intra-provincial free trade agreement.⁸⁹

Conditional subsidies

Ailing and insolvent enterprises

The Government states that subsidies to businesses in financial difficulty and “without a clear restructuring plan”, can seriously distort competition in the market.⁹⁰ Such subsidies are prohibited under the WTO SCM Agreement. Also EU state aid rules place strict conditions on [rescue and restructuring aid](#). Similar restrictions are included in the TCA.⁹¹

While implementing the UK’s international commitments, Clauses 19 to 26 set out definitions which are adjusted to UK’s circumstances. The Government consultation document noted that the EU’s “undertakings in difficulty” test, which no longer applies to the UK, “has been a particular source of concern for stakeholders who judge that they have been unfairly caught within scope” and missed out on subsidies.⁹²

Clause 24 defines an “ailing or insolvent enterprise” as one that would “almost certainly go out of business” in the short or medium term if no subsidy is granted, or the company is unable to pay its debts, or the value of its assets is less than its liabilities. Later regulations may clarify the meaning of “almost certainly go out of business”.

Clauses 19 and 20 set out conditions under which subsidies to ailing and insolvent enterprises are permitted. Subsection 2 of Clause 19 establishes that subsidies to rescue ailing or insolvent enterprises should in principle only be granted in order to prevent “social hardship and severe market failure”. This includes job losses or a severe disruption to an important service. Short-term

⁸⁸ Consultation, [Subsidy control: designing a new approach for the UK](#), para 84

⁸⁹ Thomas Pope, Alex Stojanovic, [Beyond state aid](#), Institute for Government, September 2020, p26

⁹⁰ Consultation, [Subsidy control: designing a new approach for the UK](#), para 84

⁹¹ TCA, Article 367(3) to (6)

⁹² Consultation, para 75; The Government and industry was lobbying the European Commission to relax the “definition of an undertaking in difficulty” for the purpose of Covid-related business support. See HM Treasury, BEIS, [CBILS: EU State Aid Rules and “undertakings in difficulty”](#), 30 July 2020

assistance, in the form of loans and guarantees, should only be given while a restructuring plan is being developed.

Clause 20 sets out that in order to qualify for restructuring aid, businesses must have a credible plan on how to return the business to long-term viability. With the exception of SMEs, businesses also have to provide significant assets towards the costs of their own restructuring.

Government consultation document explains further that if a return to long-term viability of a firm is not possible, then support should be limited to the minimum required to facilitate the firm's orderly exit from the market. Liquidity provisions within scope of subsidy control rules must be temporary, charging a competitive rate of interest and should not be used as loss-absorbing capital.⁹³

Commentary

Subsidy experts Jonathan Branton and Alexander Rose have noted regarding the proposed conditions for the support to ailing or insolvent enterprise that they appear to require more rigid checks and go beyond the definition included in the TCA. Branton and Rose argue that this could become a barrier for technology and R&D start-ups in their early years of activity. They say that it is unclear why more onerous rules have been included, as additional provisions:

... complicate and render more rigid that assessment beyond the simpler definition set out in the TCA which was merely one of likely to go out of business in the short to medium term absent the subsidy. The new rule will require particular solvency checks to be done for every subsidy award to root out companies for whom liabilities exceed assets.⁹⁴

Banks and insurers, air carriers

Clauses 21 to 23 contain specific provisions for rescue and restructuring subsidies to ailing banks, other deposit takers, or insurance companies. The TCA permits such subsidies when they are necessary to ensure the stability of the financial system.⁹⁵ The consultation document notes that in considering how to assess such subsidies for financial institutions, the Government will take account of the existing framework for recovery and resolution as set out in the Banking Act 2009.⁹⁶

Specific conditions apply to subsidies for **air carriers** for the operation of routes (**Clause 28**).

⁹³ [Consultation](#), para 76

⁹⁴ Jonathan Branton, Alexander Rose, DWF LLP, [The Subsidy Control Bill – a missed opportunity to improve the current regime?](#) 1 July 2021

⁹⁵ TCA, Article 367 (6), (7)

⁹⁶ Consultation, para 76

Services of public economic interest

Like EU provisions on public support to “[services of general economic interest](#)”, the Subsidy Control Bill introduces provisions for services of public economic interest (SPEI). SPEI are public services that would not be supplied (or would not be supplied under the required conditions) without public intervention, and which are particularly important to society.⁹⁷ Examples are the Post Office network, social housing or public transport to remote areas.

Clause 29 requires that a subsidy to deliver a SPEI is provided in a transparent manner. It must be restricted to the amount necessary to deliver the service, considering both the cost of service delivery and what would be a reasonable profit. Public authorities are required to review a SPEI subsidy every three years and recoup excessive profits.

The subsidy control principles of the Bill apply to subsidies for a SPEI insofar as they do not obstruct the delivery of a SPEI.

Further provisions in Part 3, **Clause 38**, exempt smaller amounts of SPEI financial assistance with a value below £725,000 over a period of three financial years from subsidy control requirements.

Clause 41 provides that when the total SPEI assistance is less than £14.5 million per task, information about this assistance does not have to be included on the subsidy database. Assistance to other specified public services, such as hospital care is exempt from the transparency requirements altogether, as set out in the section below.⁹⁸

Subsidy database

Chapter 3 sets out a requirement for a publicly accessible database of subsidies.

Clause 32 says that the Secretary of State must make arrangement for a database of subsidies and subsidy schemes, which must be accessible to the public free of charge. The bill gives the Secretary of State the power to direct the CMA to provide this database.

The Government have already set up the [beta version of a database for subsidies](#).

Purpose

The Government says that having a database of subsidies will:

- Allow for greater scrutiny of subsidies that have been awarded
- Allow new analysis of subsidies and their effectiveness

⁹⁷ Explanatory Notes, para 101

⁹⁸ Explanatory Notes, paras 140-142

- Help comply with reporting requirements for subsidies in international agreements, including the Trade and Cooperation Agreement with the EU.⁹⁹

Subsidies to be included

Clause 33 says that public authorities must make entries in the database for:

- Subsidy schemes, and
- Individual subsidies, unless they are under subsidy schemes that are already in the database and are for an amount of no more than £500,000¹⁰⁰

The Secretary of State can alter this £500,000 threshold for particular sets of subsidies or sectors, by regulations under the negative procedure:

This is particularly important for agriculture and fisheries sector subsidies where smaller subsidies may be considered to be distortive whereas industrial subsidies of a similar value would not. Changes to the ‘in scheme’ transparency threshold may be required to reflect changes to the exemption thresholds for Minimal Financial Assistance and SPEI assistance made under the powers in clause 42 subsection (1) ...¹⁰¹

Part 3 of the Bill sets out exemptions from the subsidy control requirements, some of which include exemptions from the requirements to put entries in the database. Subsidies of the following types do not have to be added to the database:

- Subsidies under the minimal financial assistance threshold (Clause 36)
- SPEI assistance (subsidies for services of public economic interest) of under £14.5 million¹⁰² (Clause 41)
- SPEI assistance for: hospital care, including research; the provision of long-term care, childcare, access to the labour market, social housing and the social inclusion of vulnerable groups; and air or maritime links to islands / airports / ports each used by less than given numbers of people (Clause 41)
- Subsidies for the purpose of safeguarding national security (Clause 45)
- Subsidies by or on behalf of the Bank of England in pursuit of monetary policy (Clause 46)
- Subsidies provided for by a financial stability direction (Clause 47)

⁹⁹ [Consultation](#), February 2021

¹⁰⁰ Gross cash amount for subsidies provided in cash or the gross cash equivalent otherwise. The Secretary of State can make regulations under clause 82 setting out how these are to be defined.

¹⁰¹ Department for Business, Energy and Industrial Strategy, [Delegated Powers Memorandum for the Subsidy Control Bill](#) for the Delegated Powers and Regulatory Reform Committee.

¹⁰² This threshold can be changed for all or some types of subsidy by regulations made under the powers in clause 42 – these are subject to the affirmative procedure.

- Legacy and withdrawal agreement subsidies (as listed in Clause 48)
- Tax measures allowed by virtue of Article 413 (Taxation) of the Trade and Cooperation Agreement (Clause 49)

Information to be included about subsidies

Clause 34 allows the Secretary of State to make regulations to set out what information must be included in entries in the subsidies database – these regulations are under the negative procedure.

The clause gives a list of things that could be included, for example the name of the beneficiary of the subsidy, its duration and the amount of the subsidy.

The Trade and Cooperation Agreement with the EU requires that the following be published online or in a public database:

- (a) the legal basis and policy objective or purpose of the subsidy;
- (b) the name of the recipient of the subsidy when available;
- (c) the date of the grant of the subsidy, the duration of the subsidy and any other time limits attached to the subsidy; and
- (d) the amount of the subsidy or the amount budgeted for the subsidy.¹⁰³

3.3

Part 3: Exemptions

In line with the Government's approach proposed in the consultation, the new regime exempts several categories of subsidies from the subsidy control requirements. Some types are fully exempt, but others partially and conditions may apply, such as a requirement to publish information about the subsidy in the subsidy database.

Fully exempt from compliance with the subsidy control requirements are subsidies with a value below defined 'minimal financial assistance' thresholds.¹⁰⁴ Further, exempt are:

- subsidies given to safeguard national security (**Clause 45**)
- the Bank of England monetary policy activities (**Clause 46**)
- financial stability directions given by the Treasury for prudential reasons, such as the protection of investors, depositors, policy holders and others,

¹⁰³ TCA, Article 369. Note that the amount of the subsidy can be a range for tax measures.

¹⁰⁴ Some administrative requirements apply.

or to ensure the integrity and stability of the financial system

(**Clause 47**)¹⁰⁵

- certain tax measures (**Clause 49**), and some other measures.

Minimal assistance thresholds

Clause 36 sets out that subsidy control requirements do not apply if the total amount of minimal and SPEI financial assistance received by an enterprise is less than £315.000 over a three financial year period. Public authorities are required to notify the beneficiary when a subsidy they provide qualifies as a ‘minimal financial assistance’ subsidy. **Clause 37** sets out procedural requirements such as notification of the beneficiary and record-keeping.

Both “ordinary” subsidies and SPEI financial assistance are counted towards the threshold.

Under **Clause 38**, financial assistance to an enterprise that delivers a public service is exempted from subsidy control when the total amount of minimal and SPEI financial assistance combined is less than £725.000 over a three financial year period. **Clause 39** sets out procedural requirements, such as notification of the beneficiary and record-keeping. Under Clause 41 assistance of less than £14.5 million per task is exempt from transparency requirements (see section 3.2).

Authorities may not make minimal and SPEI financial assistance conditional on export performance and the use of domestic goods, as such support is prohibited under Clauses 16 and 17 respectively.

The minimal assistance exemptions of the Bill are largely similar to EU [de minimis exemptions](#), albeit with higher value thresholds. The new UK thresholds are linked to the thresholds included in the TCA and expressed in Special Drawing Rights (SDR).¹⁰⁶ The Secretary of State may by regulation – subject to the affirmative procedure – adjust the amounts of minimal and SPEI financial assistance. An increase is allowed only to account for currency fluctuation between SDR and pound sterling (**Clause 42**).

Subsection 6 of **Clause 42** clarifies what categories of subsidies cumulate towards the thresholds of minimal and SPEI Financial Assistance. This includes

- subsidies given as minimal financial assistance

¹⁰⁵ Prudential carve-outs are a standard feature of international financial services agreements. They ensure that countries can react quickly to stabilise their financial systems in response to crises. Article 184 includes a prudential carve-out and Clause 47 implements it in UK law. See [Delegated powers memorandum](#), p33

¹⁰⁶ For example, the EU [de minimis aid](#) threshold is €200.000 per undertaking over a three year period, as set by EC Regulation No 1407/2013, 18 December 2013; TCA, Articles 364 (4) and 365 (3) express the value thresholds for exempted subsidies in Special Drawing Rights (SDR) - supplementary international reserve assets defined and maintained by the International Monetary Fund (IMF).

- as SPEI assistance
- state aid provided under EU de minimis regulations before the end of the transition period
- state aid provided under Article 10 of the Protocol on Ireland and Northern Ireland after the end of the transition period
- subsidies provided under the Small Amounts of Funding Exemption of the Trade and Cooperation Agreement (TCA) during the interim period¹⁰⁷

Emergencies

Under **Clause 43**, subsidies that compensate for a damage caused by natural disasters or other exceptional circumstances, are exempt from subsidy control.

Clause 44 partially exempts temporary subsidies given in response to a national or global economic emergency, such as the Covid-19 pandemic. These subsidies do not need to comply with the exemptions and prohibitions of Clauses 15 to 29 of Part 2 (such as limitations on rescue aid). Article 364(3) of the TCA requires that this type of temporary subsidies is “targeted, proportionate and effective”.

Both exemptions can only be used when the Secretary of State has published a notice stating that a particular emergency has occurred.¹⁰⁸ Emergency subsidies must also comply with transparency requirements, that is, information about them must be published in the subsidy database.

‘Legacy subsidies’ and other exemptions

Clause 48 (1) fully exempts legacy and withdrawal agreement subsidies from the subsidy control requirements. Legacy subsidies refer to subsidies given under schemes which have been made before the day this Bill comes into effect. This includes:

- schemes which were made under EU state aid rules before the end of the transition period and
- schemes made under the [UK’s interim arrangements](#), in force from 1 January 2021 till the date the Subsidy Control Bill comes into force

Subsection (2) of Clause 48 exempts:

- the subsidies covered by Article 10 of the Ireland/Northern Ireland Protocol

¹⁰⁷ TCA, Articles 364(4) and 365(3)

¹⁰⁸ Explanatory Notes, paras 146-150

- subsidies already committed in relation to the UK's participation in the EU programmes and the Multiannual Financial Framework 2014-2020.¹⁰⁹

George Peretz QC has commented regarding subsection (2)(a) of clause 48 of the Bill that its exemption of any subsidies covered by Article 10 of the Protocol appears to remove the objective of protecting the UK market, because such subsidies might still distort competition within Great Britain. The European Commission, which assesses subsidies under the Protocol, would not be interested in this aspect.¹¹⁰

Clause 50 says that subsidies granted in the context of large cross-border or international cooperation projects are subject to additional conditions. In accordance with the TCA, these projects generally need to demonstrate wider societal benefit in another country, beyond the UK.¹¹¹ Such projects could include certain transport, energy, the environment, research and development, and first demonstration projects for new technologies.

The TCA also exempts subsidies for agriculture and fisheries and subsidies for audio-visual goods and services.¹¹² But there is no blanket exemption for these sectors in the Bill. Considering the consultation responses, the Government has chosen to maintain “a consistent approach” and a broad sectoral scope, including subsidies in these three sectors.¹¹³

3.4

Part 4: The role of the CMA

Part 4 of the Bill sets out the functions of the Competition and Markets Authority (CMA) in subsidy control and the process of subsidy referrals.

The CMA will have a role in monitoring and reporting on the general functioning of the regime. It will also have a limited advisory role, publishing non-binding reports on individual cases that are potentially the most harmful or distortive. As the Government response to the consultation clarifies, the “independent body will have a role offering expertise and challenge to UK public authorities”. But ultimately it will be the granting authorities which decide, “on balance, whether the potential risk of providing a subsidy or scheme is outweighed by the public policy benefits”.¹¹⁴

Enforcement will be by the Competition Appeal Tribunal using the principles applied in judicial review (see section 3.6 below). The CMA will not have a role

¹⁰⁹ Explanatory Notes, para 160

¹¹⁰ George Peretz QC, Ben Rayment, Monckton Chambers, [UK Subsidy Control Bill – a brief summary](#), 5 July 2021

¹¹¹ TCA, Article 367 (13)

¹¹² TCA, Article 364 (5) and (6)

¹¹³ [Consultation Response](#), p13

¹¹⁴ Consultation Response, p52

in handling complaints by interested parties about unlawful subsidies, comparable to the [role of the European Commission](#).¹¹⁵

Subsidy Advice Unit

Clause 68 of the Bill establishes an independent body: the Subsidy Advice Unit (SAU) in the CMA, to which the CMA may delegate its powers under the Bill. The Subsidy Advice Unit will formally be a new committee of the CMA Board.

Clause 69 enables the Subsidy Advice Unit to refer some of its functions or specific cases to a CMA panel group, to be set up by the CMA Chair under Enterprise and Regulatory Reform Act 2013. The expert panel may be asked to carry out certain subsidy control functions or work on specific subsidy cases. See box 5 below for information on CMA panels.

Subsidy referrals system

Clauses 52 to 64 set out the architecture of the referrals function for subsidies and subsidy schemes. The Government's stated objective is to create a subsidy control regime that does not place "undue bureaucracy and cost on public authorities".¹¹⁶ In line with the aim to allow low-risk subsidies pass with minimum bureaucracy and maximum legal certainty, the CMA does not have to assess such subsidies as these are presumed compliant. This includes subsidies of a value below the minimal financial assistance thresholds (Clause 36) and streamlined subsidy schemes developed by the Government (Clause 10). All exemptions are set out in **Clause 64** and further include subsidies and subsidy schemes in relation to:

- SPEI assistance (Clause 38)
- natural disasters and other exceptional circumstances (Clause 43)
- national or global economic emergencies (Clause 44)
- national security (Clause 45)
- Bank of England monetary policy (Clause 46)
- legacy and withdrawal agreement subsidies (Clause section 48)
- tax measures (Clause 49)
- large cross-border or international cooperation projects (Clause 50)
- nuclear energy (Clause 51)

Mandatory referral (Clauses 52 to 55)

Subsidies and schemes of **particular interest**, considered to present the highest risk of causing harmful distortion, are subject to a mandatory referral to the CMA. A public authority must submit a request for a referral to the CMA before giving a subsidy. In the request it must set out its arguments and evidence as to why the subsidy or a scheme complies with the subsidy control

¹¹⁵ [Impact Assessment](#), paras 327-334

¹¹⁶ Consultation, [Subsidy control: designing a new approach for the UK](#), para 85

principles and, if applicable, energy and environment principles. The CMA will produce a report which must include an evaluation of the public authority's assessment of the subsidy or scheme and may include advice on how to improve the authority's assessment or modify the proposal. Requirements to the CMA report following a referral are set out in **Clause 59**.

Clause 55 [Call-in direction] gives the Secretary of State (SoS) a power¹¹⁷ to issue a direction asking a public authority to refer a subsidy or scheme to the CMA, before it is given or made.¹¹⁸ The direction may be given in relation to a subsidy or a scheme **of interest**, or any other subsidy or scheme which the SoS considers posing a risk that it does not comply with the subsidy control principles, prohibitions or other requirements of Chapters 1 and 2 of Part 2 of the Bill.¹¹⁹

Under **Clause 54**, a public authority may not give a subsidy or make a scheme before the end of a five day cooling-off period which starts after the day the CMA has provided its report.¹²⁰ The cooling-off period ensures that the public authority has a short time period during which "it may wish to reflect on the CMA's findings before deciding whether to give the subsidy or make the subsidy scheme."¹²¹ The final decision on whether to proceed with a subsidy following a negative report is with the granting authority.

Clause 31 of Part 2 specifies that subsidies or schemes covered by the mandatory referral obligation, which have not been correctly referred to the CMA, are prohibited.

Voluntary referral (Clauses 56 to 59)

Clause 56 allows public authorities to submit a subsidy or a scheme **of interest** for a referral voluntarily. The request must include similar information as to what is required in relation to a mandatory referral. However, the CMA may decide whether it will produce a report or not. When the CMA decides that it will publish a report, the report must evaluate the public authority's assessment. It may further advise on how to improve the assessment or amend the subsidy proposal. The public authority may withdraw its request at any time and may proceed with the subsidy or a scheme before the report is produced.¹²²

Post-award referral (Clauses 60 to 62)

Under **Clause 60**, the Secretary of State may refer a subsidy to the CMA after it has been awarded or a subsidy scheme has been made. This is in cases where an awarded subsidy does not comply with the subsidy control

¹¹⁷ Explanatory Notes, paragraph 173, refer to this power as a "reserve power".

¹¹⁸ George Peretz QC [notes that the call-in](#) direction may also be given to granting authorities outside England. See George Peretz Q.C., Ben Rayment, Monckton Chambers, [UK Subsidy Control Bill – a brief summary](#), 5 July 2021

¹¹⁹ Explanatory Notes, para 173

¹²⁰ Clause 54

¹²¹ Explanatory Notes, para 171

¹²² Explanatory Notes, paras 174-176

principles and requirements, or risks having negative effects on competition or investment within the UK. George Peretz QC notes that the Secretary of State does not appear to have the same power if the subsidy can potentially only affect foreign countries, though “such subsidies could well cause difficulty at international level”.¹²³

The Secretary of State must issue a direction for the granting authority to submit information about the subsidy in question to the CMA. When the CMA has had a referral, it must publish a report, which may also include advice about how to improve the ongoing subsidy or scheme and mitigate any negative effects on the UK market.

Reporting periods

Clause 53 clarifies the reporting period for mandatory referrals which the CMA must observe. **Clause 57** does the same for voluntary referrals, and **Clause 61** for post-award referrals. Generally, the CMA has 30 working days to publish a report, beginning with the day on which the CMA notifies the public authority that its request is complete. But the reporting period may be extended by mutual agreement. In relation to mandatory referrals, the CMA can request the SoS to extend the reporting period. An extension of a maximum of 40 working days may be granted in exceptional circumstances.

Regarding reporting periods which will bind the CMA, Jonathan Branton and Alexander Rose, of law firm DWF, warn that short lead times could create “false expectations”:

[...] if there is a short deadline for delivering a report, then the knock-on effect would be expected to be longer lead times between making any referral and the CMA agreeing the same is complete and thereafter "starting the clock".¹²⁴

Powers of the Secretary of State

The Secretary of State is granted several specific powers regarding the subsidy referrals process. Firstly, there’s a power to make regulations which specify further requirements as to the contents and form of a request for a mandatory, voluntary or post-award referrals, which a public authority submits to the CMA.¹²⁵ Further, the Secretary of State may by regulation amend the length of the CMA’s reporting periods¹²⁶ and make provision regarding the content of its reports.¹²⁷

¹²³ George Peretz QC, Ben Rayment, Monckton Chambers, [UK Subsidy Control Bill – a brief summary](#), 5 July 2021

¹²⁴ Jonathan Branton, Alexander Rose, DWF LLP, [The Subsidy Control Bill – a missed opportunity to improve the current regime?](#) 1 July 2021

¹²⁵ Regulations made under Clauses 52(3 to 4), 56(3 to 4) and Clause 60(8)(a) or (b) are subject to the negative procedure. Regulations under Clause 60(8)(c) are subject to the affirmative procedure.

¹²⁶ Clauses 53(12 to 13), 61(11 to 12), 57(8 to 9), the affirmative procedure

¹²⁷ Clauses 59(4), 62(5), the affirmative procedure

Significantly, the Secretary of State may also issue call-in directions requesting granting authorities to refer a subsidy to the CMA.

Noteworthy is the power to define in later regulations what subsidies will be considered “of interest” and of “particular interest” as described in section 3.1 above. Jonathan Branton and Alexander Rose argue that if the categories allowed for voluntary referrals (subsidies of interest) are wide this could result in significant volume of referrals as granting authorities might be “anxious to mitigate their risk, even if the burden of making such a referral is onerous”.¹²⁸

In addition, **Clause 64** (3 to 5) allows the Secretary of State to exempt some subsidies or schemes from mandatory referral requirements in “urgent and exceptional circumstances”. The SoS’s direction to this effect must be laid before Parliament.

The [Delegated Powers Memorandum](#) gives an overview of delegated powers awarded under the Bill and explains their purpose.

Other CMA functions

Clause 65 requires the CMA to **monitor and report** every five years on the overall effectiveness of the Act and its impact on competition or investment within the UK. The Secretary of State may direct the CMA to produce a report on another specified period.

Under **Clause 67**, the CMA has **information-gathering powers** to support its monitoring and reporting activities, as provided under Sections 41 to 43 of the UK Internal Market Act 2020. Explanatory notes of the Bill clarify that the CMA will be able to request information from individuals, businesses or public authorities. In case of noncompliance with its information requests, the CMA will be able to act, including imposing a financial penalty.¹²⁹

Box 5 gives background on the current functions of the CMA.

5 The Competition and Markets Authority

The Competition and Markets Authority is the UK’s main competition and consumer authority.

Governance

The CMA is a non-Ministerial department sponsored by the Department of Business Energy and Industrial Strategy (BEIS). The CMA’s work is overseen by a Board and led by the Chief Executive. Decisions in some investigations are

¹²⁸ Jonathan Branton, Alexander Rose, DWF LLP, [The Subsidy Control Bill – a missed opportunity to improve the current regime?](#) 1 July 2021

¹²⁹ [Explanatory Notes](#), paras 190-194

made by independent members of a CMA panel. The Chief Executive and members of the CMA Board and Panel are appointed by the Secretary of State for BEIS. They are appointed through “open competition for their experience, ability and diversity of skills in competition economics, law, finance and business”.¹³⁰

Functions

The CMA was established by the Enterprise and Regulatory Reform Act 2013 (“ERRA”). Under Section 25 of the ERRA, the CMA has a statutory duty to “seek to promote competition, both within and outside the UK, for the benefit of consumers”. Existing CMA functions include:

- Investigating mergers to ensure they do not reduce competition
- Investigating markets where there are suspected competition and consumer problems
- Investigating and bringing proceedings against businesses and individuals for anticompetitive behaviour
- Enforcing a range of consumer protection legislation

As required under the [UK Internal Market Act 2020](#), the CMA [is setting up an Office for the Internal Market \(OIM\)](#), an independent panel within the CMA to oversee the functioning of the UK internal market.

The Library briefing paper on [the UK competition regime](#) (25 May 2021) provides further information about the CMA’s existing role with respect to competition law.

Commentary

The provisions covering the functions of the CMA discussed above implement Article 371 of the UK-EU Trade and Cooperation Agreement (TCA) which includes an obligation to set up an “operationally independent” authority with an “appropriate role” to oversee the regime. The TCA requires that the body must be guaranteed independence in exercising its operational functions and must act impartially.¹³¹ The TCA does not require the government to assess subsidies in advance, or introduce a standstill period until a subsidy is cleared, as the EU state aid regime requires.

Many experts have previously agreed that due to its standing and expertise, the CMA would be well placed for the role of a subsidy control body. The CMA’s suitability is analysed in the Government impact assessment.¹³² However, some commentators have argued that the CMA is not the best fit

¹³⁰ Competition and Markets Authority, [Our Governance](#) [accessed 5 July 2021]; Schedule 14 Enterprise and Regulatory Reform Act 2013.

¹³¹ TCA, Article 371

¹³² [Subsidy Control Bill: impact assessment](#), paras 337-341

because working with public authorities, including devolved administrations, would require a different approach than that of the CMA's dealings with anti-trust and merger enforcement powers.¹³³

The issue of the (then state aid) authority's independence attracted considerable attention when Parliament scrutinised the plans of Theresa May's Government to appoint the CMA to this role in 2018. It was raised in the House of Lords in May 2018, and on several subsequent occasions, that there was a potential risk of the Government overriding the independence of the CMA's rulings.¹³⁴

The Impact Assessment of the Bill says that the non-binding nature of the advice will ensure that the independent body makes no judgement on the merits of the subsidy, its policy objective, and the balance of its impacts. As such, the integrity and political neutrality of the body is maintained.¹³⁵

The Institute for Government writes in its May 2021 report on UK subsidy policy that "the CMA's expertise and reputation for independence makes it best suited for this role." But to make the new regime work, it recommends reforming the governance of the CMA and making it "a genuine four-nation body":

Although the responsibility to legislate for such a regime is reserved to Westminster, it will affect all four nations in the UK and requires the buy-in of all four governments if it is to be effective. The devolved administrations should be able to appoint one member each to the board and should be involved in changes to regulation and guidance.¹³⁶

3.5

Part 5: Enforcement

Background

In the UK, judicial review is the normal process for challenging many decisions by public authorities. It generally focuses on the way decisions are made rather than the actual merits. If a public authority is found to have acted unlawfully, the remedies available to a court include quashing (setting aside) the unlawful decision and in some circumstances awarding damages.

In the TCA the UK and EU both committed to have in place courts or tribunals to review their subsidy regimes.¹³⁷ The Government thinks that judicial review is sufficient to meet this obligation, but that having a specialist forum to hear

¹³³ James Webber, [Twitter thread of 30 May 2021](#), Alexander Rose, [Twitter thread of 28 May 2021](#)

¹³⁴ HL Deb [24 May 2018](#), c1089, HL Deb [14 March 2019](#), c1152, c1161

¹³⁵ Impact assessment, para 322

¹³⁶ Thomas Pope, Eleanor Shearer, Institute for Government, [Taking back control. Replacing EU state aid rules in the UK](#), May 2021, p5

¹³⁷ TCA, Article 372

challenges to subsidy schemes and awards would be best. This is because a specialist forum might have a better technical knowledge of the area whilst also avoiding increasing the workload of the courts.¹³⁸

79% of respondents to the Government's consultation said that a specialist forum should hear challenges. The Government has therefore decided to give the Competition Appeals Tribunal (CAT) jurisdictions to hear challenges to public authorities on subsidy awards. This is on the basis that the CAT is already a UK-wide tribunal experienced in applying judicial review standards, and is well-regarded by practitioners.¹³⁹

The CAT was established by the Enterprise Act 2002 to hear appeals on competition cases. It is funded by the Department for BEIS and consists of a President, a panel of Chairs and a panel of ordinary members. In financial year 2019/20, the CAT had 18 staff and passed down judgment in 30 cases.¹⁴⁰

In the TCA the UK and EU also committed to having in place “an effective mechanism of recovery”¹⁴¹ in cases where unlawful subsidies are found to have been granted. This would require the public authority which acted unlawfully to recover the value of the subsidy it made, reversing its impact. The power to order recovery is not a remedy which is available to courts as part of judicial review so the Government is legislating to grant it to the CAT, although it will only be available for challenges brought within strict time periods (generally, one month from when details of the subsidy are published on the subsidy database).¹⁴² An ongoing threat of having a subsidy withdrawn once granted could make the beneficiary reluctant to spend it, so the strict time limit aims to minimise this uncertainty.

The Bill

Part 5 (**Clauses 70 to 77**) provides for the CAT to hear challenges to the granting of subsidies.

Clause 70 allows an “interested party” to challenge a subsidy decision by a public authority. “Interested party” means either the Secretary of State¹⁴³ or anyone whose interests are affected by the decision (such as a competitor to the business which received the subsidy).

The CAT will have the same powers to review subsidies as the High Court (in England, Wales and Northern Ireland) or the Court of Session (in Scotland). This includes powers to make an order setting aside decisions or to require the authority to stop doing something. In addition, the CAT will have the

¹³⁸ Consultation, [Subsidy control: designing a new approach for the UK](#), para 129

¹³⁹ [Consultation Response](#), pp55 and 56

¹⁴⁰ CAT, [Annual Report and Accounts 2019/2020](#), pp2, 4, 5 and 64

¹⁴¹ TCA, Article 373

¹⁴² [Consultation Response](#), p56

¹⁴³ In practice, the Business Secretary

power to make recovery orders that require the public authority to recover the subsidy from the beneficiary.¹⁴⁴

The CAT is not the final court of appeal – its decisions on the law can be appealed to the Court of Appeal (in England, Wales or Northern Ireland) or the Court of Session (in Scotland). An appeal requires permission either from the CAT or the relevant appeal court.¹⁴⁵

Clause 76 allows an “interested party” to request information from a public authority regarding a subsidy it has granted, for the purpose of deciding whether to challenge it. This is called a “pre-action information request” and the public authority must respond within 28 days.

Unless exceptional circumstances apply, the time limit for an “interested party” to apply to the CAT to challenge a decision is one month from the later of (i) receipt of the response to any pre-action information request; or (ii) the date on which the CMA publishes its [post-award referral](#) report. If neither of these have occurred, it will usually be one month from publication of the details of the subsidy on the database.¹⁴⁶ This one month deadline is shorter than the limitation periods for judicial review challenges, which is generally three months from when the decision being challenged was made.¹⁴⁷

Clause 77 expressly grants public authorities the right to recover subsidies which have been used for a different purpose to that which they were granted.

Impact of using the CAT

The Government says it “expects high levels of compliance” with the new regime, noting that under the EU regime the EU Commission had only found against the UK on state aid matters on 11 occasions since 1999, compared with 88 times for Germany and 48 for France.¹⁴⁸

It also believes using the CAT as an appeal tribunal could deliver cost savings compared with requiring challenges to go through judicial review. This is because the CAT is expected to hear cases more quickly than the courts would, which reduces the cost of the challenge for both the public authority and the litigant bringing the challenge. It recognises however that a quicker process could also incentivise more challenges, so it is difficult to conclude with certainty whether there will be any cost saving.¹⁴⁹

¹⁴⁴ Clauses 72 to 74

¹⁴⁵ Clause 75

¹⁴⁶ Clause 71

¹⁴⁷ [Subsidy Control Bill: impact assessment](#), para 391

¹⁴⁸ Consultation, [Subsidy control: designing a new approach for the UK](#), para 127

¹⁴⁹ [Impact assessment](#), para 421

Around 15-30 annual challenges are expected (in addition to its current caseload of around 110 live cases), increasing the CAT's running costs by an estimated 20% from £6m currently to £7.2 million.¹⁵⁰

3.6

Part 6: Miscellaneous and general

Subsidies and schemes in primary legislation

Clause 78 introduces **Schedule 3** which sets out which provisions of the Bill apply to subsidies given or subsidy schemes made by means of primary legislation, referring primarily to devolved primary legislation. As Explanatory Notes clarify, this may occur, for example, where an Act grants a subsidy or “makes a scheme on its face, or places prescriptive spending provisions which would amount to a subsidy”.¹⁵¹

It follows from Schedule 3 that subsidies and schemes introduced by devolved primary legislation:

- are subject to the subsidy control principles of Part 2, Chapter 1
- must observe the prohibitions and other requirements of Part 2, such as the prohibition with regard to export-related subsidies or conditions applying to rescue subsidies for ailing businesses. Part 3 of the Bill covering the exemptions also applies.

Court proceedings in relation to cases of subsidies provided by means of devolved primary legislation would be heard in the Court of Sessions, High Court in England and Wales, or High Court in Northern Ireland, as appropriate, instead of the Competition Appeals Tribunal.¹⁵²

Paragraph 10 of Schedule 3 provides that the appropriate (devolved) courts may order devolved administrations to recover subsidies provided by means of primary legislation.¹⁵³

Voluntary referrals to the CMA

Devolved administrations may voluntarily refer their legislative proposals concerning more risky “primary” subsidies “of interest” or “particular interest” to the CMA for advice, following procedures set out in Clauses 56, 57 and 59.¹⁵⁴ The mandatory referral provision for subsidies “of particular interest” or following a call-in direction of the Secretary of State set out in Clauses 52 to 55, does not apply.

¹⁵⁰ [Impact assessment](#), para 422

¹⁵¹ [Explanatory Notes](#), paras 215-225

¹⁵² Schedule 3, para 6

¹⁵³ Schedule 3, para 10

¹⁵⁴ Schedule 3, para 9

The procedure of voluntary referrals is also available to Bills introduced in the UK Parliament, which would provide subsidies “of interest” or “particular interest”.¹⁵⁵

Transparency

Scottish Ministers, Welsh Ministers or a Northern Ireland department, must place information on subsidies or schemes provided by means of primary legislation on the subsidy database. This obligation also applies to Ministers of the Crown or the Commissioners of the HMRC for subsidies provided under an Act of Parliament.¹⁵⁶

Power to issue guidance

Clause 79 of the Bill gives the Secretary of State power to make statutory guidance, which will assist public authorities in assessing their subsidies against the requirements of the regime.

The explanatory notes include examples of clarification that the guidance could provide. This could include:

- explaining how to apply elements of the definition of a subsidy, for example how to establish that financial assistance is given on commercial terms and would not qualify as a “subsidy”.¹⁵⁷
- setting out how the principles should be used to assess individual subsidies and schemes. This could include methodologies, ‘best practice’ examples of subsidy design, and on which features a public authority might want to focus to ensure that negative effects on other parties had been properly considered, such as subsidy races.
- explaining how subsidies might be given to support disadvantaged areas in a way that is consistent with the principles. It could indicate characteristics or criteria for an area to be considered disadvantaged and how that might be used to justify more ambitious or extensive subsidy interventions consistent with the principles.¹⁵⁸

The Secretary of State may revise or review the guidance regularly. Granting authorities “must have regard” to guidance when giving subsidies.

Other provisions

Clause 82 gives the Secretary of State power to make regulations about how to calculate the cash grant or its equivalent amount when a subsidy is

¹⁵⁵ Schedule 3, para 9

¹⁵⁶ Schedule 3, para 8

¹⁵⁷ Such assistance is not regarded as a subsidy under the Bill, because it is not seen as giving an economic advantage.

¹⁵⁸ [Explanatory Notes](#), paras 227-8

provided in another form than cash, for example as a loan. These Regulations are subject to the negative procedure.

Clause 86 would allow the Secretary of State to make consequential regulations. This is a Henry VIII power that could be used to change primary legislation or retained direct EU legislation, subject to parliamentary approval via the affirmative procedure. Otherwise the regulations are subject to the negative procedure. Any primary legislation, retained direct EU legislation or secondary legislation can be amended through these powers if the changes are consequential on this bill – there is no restriction to a specified set of laws.

The Government explain that:

While the Bill makes provision for changes to existing legislation where possible (i.e. to the Enterprise and Regulatory Reform Act 2013, on the duties of the CMA), it is highly likely that various technical changes to existing legislation may be required as the subsidy control regime is implemented and developed.¹⁵⁹

¹⁵⁹ Department for Business, Energy and Industrial Strategy, [Delegated Powers Memorandum for the Subsidy Control Bill](#) for the Delegated Powers and Regulatory Reform Committee.

The House of Commons Library is a research and information service based in the UK Parliament. Our impartial analysis, statistical research and resources help MPs and their staff scrutinise legislation, develop policy, and support constituents.

Our published material is available to everyone on commonslibrary.parliament.uk.

Get our latest research delivered straight to your inbox. Subscribe at commonslibrary.parliament.uk/subscribe or scan the code below:



 commonslibrary.parliament.uk

 [@commonslibrary](https://twitter.com/commonslibrary)