



Subsidy Control Bill

HL Bill 84 of 2021–22

Author: Nicola Newson

Date published: 13 January 2022

On 19 January 2022, the second reading of the Subsidy Control Bill is scheduled to take place in the House of Lords.

The bill would establish a new domestic subsidy control regime following the UK's departure from the EU. Before giving a subsidy, public authorities would have to be satisfied it was compatible with subsidy control principles defined in the bill. Certain subsidies would be prohibited. Public authorities would have to publish details of subsidies they had given, but some subsidies would be exempt from transparency requirements, including those below £315,000 and subsidies to services of public economic interest below £14.5m. Subsidies of 'particular interest' and those called in by the secretary of state would have to be referred to the Competition and Markets Authority (CMA) for a non-binding report on their compliance with the subsidy control requirements. Subsidies of 'interest' could be referred to the CMA on a voluntary basis. The Government has not yet defined the terms subsidies of interest or particular interest. The CMA would not have an enforcement role, but the secretary of state and interested parties could apply to the Competition Appeal Tribunal (the CAT) for a review of a decision to give a subsidy. The CAT could consider applications on a judicial review basis only, rather than reviewing the merits of the subsidy.

Under article 10 of the Northern Ireland Protocol, EU state aid rules continue to apply to subsidies related to trade in goods and the single electricity market that affect trade between Northern Ireland and the EU. The bill would not apply to subsidies that are subject to article 10. However, MPs have questioned how public authorities and subsidy recipients would know which regime should apply. The Government is in discussions with the EU over article 10.

A handful of minor government amendments were made at committee stage in the House of Commons. At report stage, the bill was not amended. Three non-government amendments were defeated on division, to do with exempting agricultural subsidies from the bill, seeking devolved consent for defining subsidies of interest/particular interest, and including net-zero commitments in the subsidy control principles. MPs from across the House raised concerns about the transparency requirements for recording subsidies on the database.

Labour supports the need for a post-Brexit subsidy control system. However, it argues the bill is not backed up by a strategy for how to use subsidies to achieve strategic objectives such as net zero or levelling up, and that it does not provide a fair role for the devolved administrations. The Scottish and Welsh Governments have said they are unable to recommend legislative consent for the bill, pointing to a lack of powers for the devolved administrations in comparison to those of the secretary of state. The regulation of harmful or distortive subsidies is a reserved matter, but the Government is seeking legislative consent for parts of the bill that would alter devolved competence.

Table of Contents

1. Introduction
2. Development of the UK's post-Brexit subsidy control policy
3. Devolved consent
4. What would the bill do?
5. Bill stages in the House of Commons
6. Read more

Table of Contents

1. Introduction	1
2. Development of the UK's post-Brexit subsidy control policy	1
2.1 From EU state aid rules to WTO subsidy control rules.....	1
2.2 Consultation on designing a new approach for the UK.....	2
2.3 Northern Ireland Protocol.....	3
2.4 UK-EU Trade and Cooperation Agreement.....	7
3. Devolved consent	8
4. What would the bill do?	10
4.1 Part 1: Overview and key interpretation.....	10
4.2 Part 2: Subsidy control requirements.....	13
4.3 Part 3: Exemptions.....	16
4.4 Part 4: Competition and Markets Authority—referrals and functions.....	20
4.5 Part 5: Enforcement.....	24
4.6 Part 6: Miscellaneous and general.....	26
5. Bill stages in the House of Commons	29
5.1 Second reading.....	29
5.2 Committee stage.....	30
5.3 Report stage.....	30
5.4 Third reading.....	38
6. Read more	39

1. Introduction

The [Subsidy Control Bill](#) had its first reading in the House of Lords on 14 December 2021 and is scheduled to receive its second reading on 19 January 2022.

The Government has described the purpose of the bill as:

[...] to implement a domestic subsidy control regime in the United Kingdom that reflects the UK’s strategic interests and particular national circumstances, providing a legal framework within which public authorities make subsidy decisions.¹

The Government has published [explanatory notes](#), an [impact assessment](#), a [delegated powers memorandum](#) and a series of [policy papers](#) alongside the bill.

2. Development of the UK’s post-Brexit subsidy control policy

2.1 From EU state aid rules to WTO subsidy control rules

The decision to implement a new subsidy control regime in the UK is a consequence of Brexit. While the UK was a member of the EU, and during the transition period that followed the UK’s formal withdrawal, the UK was subject to the EU’s state aid rules.

The EU defines state aid as “an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities”.² This includes things like subsidies, grants, interest or tax reliefs, guarantees and, the granting of preferential terms, where it is done selectively, for example only to specific companies or industry sectors or regions. Generally, EU law prohibits state aid where it would distort or threaten to distort competition between member states, although it may be permitted in some circumstances.³

EU member states must notify the European Commission before implementing state aid measures and must wait for the Commission’s decision before they can put the measure into effect.⁴ There are some exceptions to mandatory notification, such as aid covered by a block exemption, aid that does not exceed €200,000 per undertaking over any period of three fiscal years and aid granted under a scheme already

¹ [Explanatory Notes](#), p 2.

² European Commission, ‘[State aid overview](#)’, accessed 6 January 2022.

³ [Article 107 of the Treaty on the Functioning of the European Union](#).

⁴ European Commission, ‘[State aid overview](#)’, accessed 6 January 2022.

authorised by the Commission. The Commission can approve aid which helps achieve defined policy objectives such as regional economic development or better environmental protection. The Commission also has powers to recover state aid if it was incompatible with the EU rules.

In December 2020, Parliament approved regulations that removed EU state aid provisions from domestic law from 1 January 2021.⁵ Alok Sharma, the then Secretary of State for Business, Energy and Industrial Strategy, said that from that date, the Government would follow the World Trade Organisation (WTO) rules for subsidy control, which he said were “the internationally recognised common standard for subsidies”.⁶

Key differences between the EU state aid rules and the WTO subsidy control rules are:

- The default position in WTO rules is that subsidies are generally allowed, while EU rules consider subsidies to be generally illegal.
- WTO rules apply to goods, but EU rules include services too.
- EU rules are applied prospectively (ie legality must be proved *before* awarding any support), while WTO rules are only reactive, and are only triggered if a member country lodges a complaint.
- WTO rules rely on state-to-state enforcement while under EU rules there are remedies available to businesses and individuals.
- Under EU rules, a business has to repay illegal state aid. There is no such mechanism to remove anti-competitive effects under the WTO rules.⁷

Mr Sharma also said that the Government would run a consultation on whether to go further than the WTO commitments, including whether legislation was necessary.⁸

2.2 Consultation on designing a new approach for the UK

The Government ran the consultation on designing a new UK subsidy control framework in February and March 2021.⁹ The Government

⁵ [State Aid \(Revocations and Amendments\) \(EU Exit\) Regulations 2020](#); see also: House of Lords Library, ‘[Draft State Aid \(Revocations and Amendments\) \(EU Exit\) Regulations 2020](#)’, 30 November 2020.

⁶ [HC Hansard, 9 September 2020, col 20WS](#).

⁷ House of Commons Library, [EU State Aid Rules and WTO Subsidies Agreement](#), 4 August 2021.

⁸ [HC Hansard, 9 September 2020, col 20WS](#).

⁹ Department for Business, Energy and Industrial Strategy, ‘[Subsidy control: Designing a new approach for the UK](#)’, published 3 February 2021, updated 30 June 2021.

published the consultation outcome document on 30 June 2021, the same day that the bill was introduced in the House of Commons. It said it had used the responses to the consultation to inform the design of a new scheme, the key features of which included:

[...] a clear, proportionate and transparent set of principles, underpinned by guidance, that will ensure public authorities fully understand their legal obligations and embed strong value for money and competition principles. There are seven main principles; and a limited number of additional principles will apply to energy and environment subsidies. Under this regime, public authorities will be able to take subsidy decisions that facilitate strategic interventions to support the UK's economic recovery and deliver government priorities such as levelling up and net zero. It will also give them the freedom to act swiftly to deliver support where it is most needed. Subsidies below a small amounts of financial assistance (minimal financial assistance) threshold, subsidies for services of public economic interest under a certain threshold and certain subsidies in response to economic emergencies or natural disasters will be exempt from some or all requirements. In addition to this, certain categories of subsidies that are always damaging—such as unlimited subsidies to shore up failing companies, where there is no plan for their restructure—will be prohibited.¹⁰

The Government also explained it would publish guidance to help public authorities comply with the obligations set out in the new regime, assisting them to award compliant subsidies.¹¹ The Government announced it would establish a subsidy advice unit within the Competition and Markets Authority (CMA) to review certain subsidies and monitor how the system was working as a whole. The CMA would not have an enforcement role, but the new system would be enforced through the UK's courts and tribunals system, with the specialist Competition Appeal Tribunal (CAT) responsible for reviewing whether the grant of a subsidy was within the powers of the public authority that made it, procedurally fair and rational.

2.3 Northern Ireland Protocol

Although Parliament approved regulations that removed EU state aid provisions from domestic law from 1 January 2021, EU state aid provisions do still apply to the UK in respect of Northern Ireland through the Northern Ireland Protocol. The Government has been seeking since mid-2020 to clarify or change how this will operate, both through proposing unilateral legislation and through discussions with the EU.

¹⁰ Department for Business, Energy and Industrial Strategy, [Government Response to the Consultation on Subsidy Control](#), 30 June 2021, CP 469, pp 9–10.

¹¹ *ibid*, p 10.

Under the protocol, Northern Ireland remains part of the UK’s customs territory but continues to apply the EU’s customs code, VAT rules and single market rules for goods. Article 10(1) of the protocol provides that EU law on state aid shall apply to the UK “in respect of measures which affect that trade between Northern Ireland and the [European] Union which is subject to this protocol”. Annex 5 lists the specific EU law state aid provisions that this covers. These provisions of the protocol apply in domestic law through section 7A of the European Union (Withdrawal) Act 2018.¹²

Initially, in its May 2020 command paper on its approach to the protocol, the Government said that state aid provisions in the protocol would apply only narrowly because the protocol “is limited in scope to the movement of goods and wholesale electricity markets”.¹³ However, it later acknowledged that the state aid provisions of the protocol could be interpreted more broadly:

There is a risk that a maximalist interpretation of article 10 of [the] protocol by the EU, which was never intended but is nonetheless a risk we must protect against, could give the European Commission extensive jurisdiction over subsidies granted in the rest of the UK, known as reach-back. All the subsidies granted to the services sector in Northern Ireland could be caught, even if there is no link, or only a trivial one, to a goods provider.¹⁴

The House of Lords European Union Committee noted in its report on the protocol, published in June 2020, that its expert witnesses believed the scope of the protocol’s provisions on state aid could be broadly interpreted, such that a UK state aid provision applying to the UK in general could potentially be subject to EU intervention and judicial review.¹⁵ The committee concluded “the only way for the UK to avoid EU intervention in its state aid decisions would be to ensure that its independent state aid policy does not allow for the level of support available to industry to exceed that available under the EU regime”.

The Government sought to address the issue of EU ‘reach-back’ through the United Kingdom Internal Market Bill. As introduced in the House of Lords in September 2020, the bill contained a clause—clause 45—through which the Government sought to give itself the power to unilaterally

¹² Department for Business, Energy and Industrial Strategy, [Explanatory Memorandum to the State Aid \(Revocations and Amendments\) \(EU Exit\) Regulations 2020](#), November 2020, p 3.

¹³ Cabinet Office, [The UK’s Approach to the Northern Ireland Protocol](#), May 2020, CP 226, p 15.

¹⁴ [HC Hansard, 21 September 2020, col 652](#).

¹⁵ House of Lords European Union Committee, [The Protocol on Ireland/Northern Ireland](#), 1 June 2020, HL Paper 66 of session 2019–21, p 51.

determine the interpretation of article 10 of the protocol.¹⁶ It would have allowed the secretary of state to make regulations to:

- set out when article 10 does or does not apply to state aid granted in respect of activities outside Northern Ireland; or
- allow article 10 not to be interpreted in accordance with EU legislation or the case law of the European Court.

Clause 45 was in part 5 of the bill as introduced. Part 5 was controversial because the Government acknowledged that the powers in some clauses within it, including clause 45, would “break international law in a very specific and limited way”.¹⁷ The European Commission launched infringement proceedings against the UK in October 2020.¹⁸ The Commission argued that the UK Government’s failure to withdraw the contentious parts of the bill meant it had “breached its obligation to act in good faith, as set out in article 5 of the withdrawal agreement”.

The House of Lords removed part 5 of the bill, including clause 45, at committee stage.¹⁹ The Government initially sought to reinstate the controversial clauses when the bill returned to the House of Commons. However, following progress in discussions with the European Commission in the Joint Committee (the UK-EU body that oversees the implementation of the withdrawal agreement and the protocol), the Government later agreed to the removal of these provisions from what became the United Kingdom Internal Market Act 2020.²⁰

One of the areas of progress in the Joint Committee related to state aid. Following the discussions in the Joint Committee, the European Commission issued a unilateral declaration on state aid in December 2020. This said that when applying state aid rules under the protocol, the European Commission would have “due regard to Northern Ireland’s integral place in the United Kingdom’s internal market”.²¹ It also said that any effect on trade between Northern Ireland and the EU covered by the protocol could not be “merely hypothetical, presumed, or without a genuine and direct link to Northern Ireland”. However, legal commentators have suggested this unilateral

¹⁶ The bill’s provisions are covered in more detail in House of Lords Library, [United Kingdom Internal Market Bill](#), 9 October 2020.

¹⁷ [HC Hansard, 8 September 2020, col 509](#).

¹⁸ European Commission, [‘Withdrawal Agreement: European Commission sends letter of formal notice to the United Kingdom for breach of its obligations’](#), 1 October 2020.

¹⁹ House of Lords Library, [‘United Kingdom Internal Market Bill and the Northern Ireland Protocol: What happened at the Lords committee stage?’](#), 17 November 2020.

²⁰ House of Commons Library, [Joint Committee Decisions on the Northern Ireland Protocol](#), 23 December 2020, p 22.

²¹ HM Government, [Unilateral Declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10\(1\) of the Protocol](#), 17 December 2020, p 2.

declaration might not assist the Government much in practice in preventing ‘reach back’.²²

The Government is currently seeking to amend the continued application of EU state aid rules under the Northern Ireland Protocol, arguing that circumstances have changed since it was negotiated in 2019. In its July 2021 command paper setting out proposals for “the way forward” on the protocol, the Government argued that commitments in the Trade and Cooperation Agreement (TCA) agreed between the UK and the EU at the end of 2020, and the provisions of the Subsidy Control Bill “provide a more than sufficient basis to guarantee that there will be no significant distortion to goods trade between the UK and the EU, whether from Great Britain or Northern Ireland”.²³ The Government therefore maintained that the provisions of article 10 of the protocol are “redundant in their current form”. However, it said it would be prepared to establish “enhanced processes for any subsidies on a significant scale relating to Northern Ireland”, such as enhanced referral powers or consultation, to address EU concerns.

Discussions over the protocol have been ongoing between the UK and the EU in the months since the publication of the command paper. Shortly before he resigned as the minister in charge of these discussions in December 2021, Lord Frost issued a statement summing up the state of play on the talks. He said there had been “some limited discussions on subsidy control”.²⁴ He reiterated that the rules “need to evolve to reflect [the] new reality” of the TCA and the UK’s national subsidy control regime. He said businesses in Northern Ireland were facing “unjustified burdens and complexity” and the Government could not deliver aid to Northern Ireland, for instance Covid recovery support, without asking for the EU’s permission. Lord Frost argued that “more appropriate and proportionate arrangements” should be put in place to “reflect the low level of risks posed to the single market in practice by subsidies in Northern Ireland”.

He indicated the UK would be prepared to reach an interim agreement with the EU on the most “acute problems” caused by the protocol, including subsidy control, and address other issues—such as the impact of increasing UK-EU divergence over time—in the longer term. However, he regretted that to date the UK and EU had not even been able to agree what the core elements of such an interim agreement might be.

²² See section 4.6 of House of Commons Library, [Joint Committee Decisions on the Northern Ireland Protocol](#), 23 December 2020.

²³ HM Government, [Northern Ireland Protocol: The Way Forward](#), July 2021, CP 502, p 20.

²⁴ Cabinet Office, [Lord Frost statement on the Protocol on Ireland/Northern Ireland](#), 17 December 2021.

The Foreign Secretary, Liz Truss, has said that the UK's position on the Northern Ireland Protocol had not changed since she replaced Lord Frost as the minister overseeing the talks with the EU.²⁵ She wrote in January 2022 that: "As a sovereign nation, we cannot be in a situation where we have to notify the EU to provide vital support to business—such as targeted tax breaks—in one part of our country".²⁶

The EU has said it will not renegotiate the protocol.²⁷ It has focused on what it describes as a "package of enhanced opportunities" to simplify the implementation of the protocol in relation to medicines, customs and sanitary/phytosanitary (SPS) procedures and democratic engagement.²⁸ These do not cover the application of state aid rules to Northern Ireland.

2.4 UK-EU Trade and Cooperation Agreement

The issue of what the UK's future subsidy policy might look like was for a long time one of the main sticking points in the future relationship negotiations between the EU and the UK. The EU sought 'level playing field' provisions to ensure that the UK, a geographically close and interconnected economy, would not undercut the EU single market by providing government support to businesses.²⁹

The Trade and Cooperation Agreement (TCA), the deal eventually agreed between the UK and the EU in December 2020, contains provisions on subsidy control.³⁰ In summary:

Under the TCA, both the UK and the 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 the EU. The principles broadly require that subsidies benefit wider society and contribute to public policy

²⁵ Arj Singh, '[No change in UK's Brexit negotiating position after Lord Frost's resignation, Liz Truss says](#)', inews.co.uk, 21 December 2021.

²⁶ Liz Truss, '[I will trigger Article 16 if the EU does not cooperate](#)', *Telegraph* (£), 8 January 2022.

²⁷ BBC News, '[Brexit: Šefčovič says EU will not renegotiate NI Protocol](#)', 14 October 2021.

²⁸ European Commission, '[Speech by Vice-President Šefčovič on the Commission's proposal on bespoke arrangements to respond to the difficulties that people in Northern Ireland have been experiencing because of Brexit](#)', 13 October 2021.

²⁹ The issue of state aid/subsidy rules in the future relationship negotiations is discussed in detail in the House of Commons Library briefing on [UK Subsidy Policy: First Steps](#), 19 October 2020.

³⁰ [Trade and Cooperation Agreement](#), articles 363 to 375.

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.

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

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.³¹

More detail on the subsidy control provisions of the TCA, and on the agreement’s broader level playing field provisions, is set out in the House of Commons Library briefing on [The UK-EU Trade and Cooperation Agreement: Level Playing Field](#), 20 May 2021.

The Government has stated that the provisions of this bill will help it to meet the UK’s international commitments in the TCA, as well as those in the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and in other free trade agreements.³²

3. Devolved consent

The Government legislated in the United Kingdom Internal Market Act 2020 to stipulate that “regulation of the provision of subsidies which are or may be distortive or harmful” is a reserved matter in Scotland and Wales and an excepted matter in Northern Ireland.³³ The Scottish and Welsh Governments objected to this as that act was being passed.³⁴

The provisions in the Subsidy Control Bill would extend and apply to the whole UK, apart from clause 48(4) which does not extend to Northern Ireland (see section 4.3 of this briefing for further details). The Government is seeking legislative consent from the devolved legislatures for some of the

³¹ House of Commons Library, [Subsidy Control Bill 2021–22](#), 17 September 2021, pp 12–3.

³² [Explanatory Notes](#), p 2.

³³ Section 52.

³⁴ See: House of Lords Library, [United Kingdom Internal Market Bill](#), 9 October 2020, pp 58–9; and House of Commons Library, [UK Internal Market Bill: Lords Amendments Explained](#), pp 40–1.

bill's provisions, as they would alter the competence of the devolved administrations.³⁵ Annex A of the explanatory notes sets out in details which provisions of the bill this applies to.

The Scottish Government has declared that it is unable to recommend consent for the bill as currently drafted, due to the potential constraints on Scottish ministers to act in devolved areas of competence.³⁶ The Scottish Government has argued that the bill should give Scottish ministers the same powers as the secretary of state over matters such as referring subsidies to the Competition and Markets Authority, making streamlined subsidy schemes, and providing subsidies in response to natural disasters or other emergencies. The Scottish Government also has concerns about the inclusion of agricultural subsidies within the scope of the bill (this is covered in further detail in section 5.3 of this briefing).

Similarly, the Welsh Government has also said it is not in a position to recommend consent be granted unless the bill is amended.³⁷ The Welsh Government said it did “not accept that the measures proposed in the bill will serve to sufficiently regulate the provision of subsidies in the UK”. It was concerned that “broad powers [are] being given to the secretary of state to shape the regime in future with little scrutiny from the UK Parliament and no scrutiny available to Welsh ministers or the Senedd”. The Welsh Government was concerned that “if enacted, these powers would undermine the long-established powers of the Senedd and Welsh ministers to act in relation to matters within devolved competence such as economic development, agriculture and fisheries”. Like the Scottish Government, the Welsh Government called for more powers for Welsh ministers within the bill. The Senedd Economy, Trade and Rural Affairs Committee and Legislation, Justice and Constitution Committee have both reported on the bill and the legislative consent memorandum.³⁸

George Peretz QC, a lawyer who specialises in state aid and competition law, is in agreement that the bill is “distinctly unbalanced” in terms of the powers given to the devolved administrations compared to the secretary of state. Using the Welsh Government as an example, he pointed out:

[...] if the Welsh Government decides to grant a subsidy to which the secretary of state objects (perhaps on the basis of its impact on

³⁵ [Explanatory Notes](#), p 5.

³⁶ Scottish Government, [Legislative Consent Memorandum—Subsidy Control Bill](#), 26 October 2021, p 10.

³⁷ Welsh Government, [Legislative Consent Memorandum—Subsidy Control Bill](#), 13 July 2021, p 9.

³⁸ Senedd Economy, Trade and Rural Affairs Committee, [Report on the Legislative Consent Memorandum for the Subsidy Control Bill](#), 9 November 2021; and Senedd Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill](#), 7 December 2021.

England), the secretary of state may be able to refer it to the CMA [Competition and Markets Authority], and will have standing to challenge it before the CAT [Competition Appeals Tribunal]. The secretary of state may also be able to issue guidance that recommends against the type of subsidy that the Welsh Government might have in mind—guidance to which the CMA and the Welsh Government have to have regard. On the other hand, if the secretary of state grants subsidies to businesses in England—or, using his powers under section 50 of IMA20 [the United Kingdom Internal Market Act 2020], to businesses in Wales—to which the Welsh Government has objections, none of those possibilities are open to the Welsh Government.³⁹

James Webber, a lawyer who specialises in state aid and subsidy control, has argued that the bill would give the devolved administrations much greater freedom to be able to make spending decisions and craft economic interventions than they would have had if the UK had remained an EU member state.⁴⁰

4. What would the bill do?

4.1 Part I: Overview and key interpretation

Part I of the bill defines key terms that are used in the rest of the bill, including ‘subsidy’, ‘public authority’ and ‘enterprise’.

Subsidy control principles

Clause 9 introduces the ‘subsidy control principles’, which are set out in full in schedule 1, and the ‘energy and environment principles’, which are set out in full in schedule 2.

The Government has summarised the subsidy control principles as follows:

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.

³⁹ George Peretz, ‘[The Subsidy Control Bill and devolution: A balanced regime?](#)’ EU Relations Law Blog, 15 July 2021.

⁴⁰ House of Commons Business, Energy and Industrial Strategy Committee, [Oral Evidence: Post-Pandemic Economic Growth: State Aid and Post-Brexit Competition Policy](#), 30 November 2021, HC 742 of session 2021–22, Q77.

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.

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 address 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.⁴¹

The Government has stated that of the seven subsidy control principles, six derive from the TCA, while principle F is an additional domestic requirement.⁴²

Energy and environment principles

The energy and environment principles are additional principles applicable to specific categories of energy and environmental subsidies. The Government has stated that they derive from the UK's international obligations, specifically under the ENER-2 annex within the TCA.⁴³

Subsidy schemes and streamlined subsidy schemes

Clause 10 defines 'subsidy scheme' and 'streamlined subsidy scheme'. Any public authority could make a subsidy scheme under which it could give subsidies. Primary public authorities (ministers of the Crown, Scottish

⁴¹ [Explanatory Notes](#), p 9.

⁴² *ibid.*

⁴³ *ibid.*, p 10.

ministers, Welsh ministers, Northern Ireland departments and other authorised public authorities) could make a subsidy scheme under which other public authorities could also make subsidies. Only a minister of the Crown could make a streamlined subsidy scheme, and it would have to be laid before Parliament after being made or modified.

The Government has explained that a subsidy scheme would provide a means for public authorities to award a number of subsidies to enterprises on a discretionary basis, as opposed to awarding subsidies on a case-by-case basis to individual enterprises.⁴⁴ The Government has described streamlined subsidy schemes as “a particular kind of subsidy scheme which can be used by any public authority that complies with its parameters”.⁴⁵ They are intended to allow the Government to make provisions to allow lower-risk subsidies to be given by public authorities more quickly and easily, without needing to assess compliance with the subsidy control principles or other subsidy control requirements.

Subsidies and schemes of interest or particular interest

Clause 11 would give the secretary of state power to define in regulations a ‘subsidy, or subsidy scheme of interest’ and a ‘subsidy, or subsidy scheme of particular interest’. These regulations would be subject to the affirmative procedure. The definition could make reference to the value of a subsidy or the sector in which expected beneficiaries operate. The Government’s intention is that defining these categories would help to ensure that “additional attention is given to subsidies that are more likely to cause negative effects to competition and investment within the United Kingdom”.⁴⁶

If a public authority proposed to give a subsidy or make a scheme of particular interest, it would have to refer it to the CMA and wait for the CMA to publish a report and for a cooling-off period to elapse before it could give the subsidy or make the scheme (clause 52). Failure to do so would mean the subsidy or scheme was prohibited (clause 31). Public authorities may also voluntarily refer subsidies or schemes of interest to the CMA but is not required to do so (clause 56). The Government envisages that regulations made under clause 11 would capture a relatively small number of subsidies and schemes that are more likely to be inconsistent with the subsidy control requirements or have distortive effects on competition and investment within the UK.⁴⁷

⁴⁴ [Explanatory Notes](#), p 8.

⁴⁵ *ibid.*

⁴⁶ Department for Business, Energy and Industrial Strategy, [Government Response to the Consultation on Subsidy Control](#), 30 June 2021, CP 469, p 39.

⁴⁷ [Explanatory Notes](#), p 8.

Some commentators have criticised the fact that there is currently little indication about how subsidies of interest and of particular interest will be defined and what the differences will be between them.⁴⁸ They argue that this will be important for defining what the CMA's future role will be.

4.2 Part 2: Subsidy control requirements

Part 2 of the bill sets out requirements that public authorities would have to comply with when giving subsidies and making subsidy schemes.

Principles

Clause 12 would require public authorities to consider the subsidy control principles when giving an individual subsidy or making a subsidy scheme. They could not give a subsidy or make a subsidy scheme unless they were of the view it would be consistent with the principles. If the subsidy related to energy and the environment, they would also have to comply with similar requirements relating to the energy and environment principles (clause 13).

Prohibitions and restrictions

Chapter 2 of part 2 sets out that subsidies would be prohibited if they:

- Guaranteed an enterprise's debts or liabilities for an unlimited value or an unlimited amount of time (clause 15).
- Were contingent on export performance, although the prohibition would not apply to certain short-term export credit support (clause 16).
- Were contingent on the use of domestic over imported goods or services (known as a 'local-content' subsidy), although the prohibition would not apply to subsidies related to the audio-visual sector (clause 17).
- Explicitly require enterprises to relocate economic activities from one area of the UK to another, where the relocation would not have happened without the subsidy (clause 18).

The Government has stated that apart from the relocation condition, all these prohibitions implement the UK's international obligations, including those arising from the TCA and the WTO ASCM.⁴⁹

⁴⁸ Thomas Pope, '[The Subsidy Control Bill does not guarantee post-Brexit state aid success](#)', Institute for Government, 1 July 2021; House of Commons Business, Energy and Industrial Strategy Committee, [Oral Evidence: Post-Pandemic Economic Growth: State Aid and Post-Brexit Competition Policy](#), 30 November 2021, HC 742 of session 2021–22, Q107.

⁴⁹ [Explanatory Notes](#), p 11.

Chapter 2 of part 2 also sets out restrictions on the use of subsidies in particular circumstances:

- Subsidies could be given to ‘ailing or insolvent’ enterprises, deposit takers (eg banks) or insurance companies only in the specific circumstances set out in the bill (clauses 19–26).
- Subsidies could not be given to insurers that provide export credit insurance unless the insurance for marketable risk is provided on a commercial basis and the subsidy would not directly or indirectly benefit the insurer’s export credit insurance business (clause 27).
- Subsidies could only be given to air carriers if they met conditions set out in the bill (clause 28).
- A public authority could subsidise an enterprise providing services of public economic interest (SPEI) only if it was done in a transparent manner and the public authority was satisfied that the value of the subsidy was restricted to what was necessary to deliver the service (clause 29). SPEIs are public services that would not be supplied without public intervention, and which are of particular importance to society, for instance social housing or rural public transport services.⁵⁰ The subsidy control principles would only apply to subsidising the provision of a SPEI to the extent that applying them would not obstruct the delivery of the service.

Clause 30 would prohibit subsidy schemes so far as they provided for a prohibited subsidy or a subsidy that did not meet the other conditions set out in chapter 2 of part 2. However, subsidies that did meet the requirements could still be awarded under such a scheme.

Clause 31 would prohibit subsidies and subsidy schemes that are subject to a mandatory referral request to the CMA (see section 4.4 of this briefing) if the request was not properly submitted, or if the public authority did not wait for the conclusion of the referral process before giving the subsidy or making the scheme.

Transparency

Chapter 3 of part 2 contains transparency requirements relating to the recording of subsidies. The secretary of state would be obliged to make arrangements for a subsidy database that would be accessible to the public free of charge, and which public authorities could edit (clause 32). The secretary of state could direct the CMA to take on responsibility for the database.

⁵⁰ [Explanatory Notes](#), p 15.

Clause 33 places obligations on public authorities to record subsidies and subsidy schemes in the database, in compliance with the following requirements:

- Subsidies of less than £500,000 would not have to be recorded if they were made under a scheme and the scheme was recorded on the database.
- Subsidies in the form of tax measures would have to be added to the database within a year from the date of the tax declaration.
- Subsidies of any other form would have to be recorded within six months of the decision to give the subsidy or make the subsidy scheme.
- Subsidies would have to remain on the database for six years from the date they were entered, or for the duration of the subsidy or scheme if longer.
- Modifications to a subsidy or scheme (other than permitted modifications under clause 81) would have to be recorded within one year of the modification for tax measures, or within six months for all other forms of subsidy.

In addition to the exemptions in clause 33, other exemptions in part 3 of the bill would also mean that subsidies would not have to be entered on the database if they were:

- below the minimal financial assistance threshold of £315,000 in clause 36;
- below the SPEI assistance threshold of £14.5 million in clause 41; or
- SPEI assistance of any amount if the subsidy is for one of the SPEI services set out in clause 41(1)(b).

Subsidies that were exempt from the subsidy control requirements would not have to be entered on to the database. Section 4.3 of this briefing gives further details about what types of subsidy would be exempted from the subsidy control requirements.

Clause 34 would give the secretary of state the power to make regulations specifying the information that must be included in the database entries. These regulations would be subject to the negative procedure. Clause 34 sets out criteria that could be included in the regulations, such as: the policy objective of the subsidy or scheme, the name of the beneficiary, the amount given or budgeted, or any conditions attached. The Government has stated

that some of these categories reflect information which the UK is obliged to provide under international agreements such as the TCA.⁵¹

4.3 Part 3: Exemptions

Part 3 of the bill sets out exemptions from the subsidy control regime for certain types of subsidies.

Minimal financial assistance

Subsidies given as minimal financial assistance would be exempt from the subsidy control requirements if the total amount of minimal or SPEI financial assistance given to an enterprise within the elapsed part of the current financial year and the two preceding financial years was less than £315,000 (clause 36). However, subsidies awarded to goods under this exemption would not be exempt from the prohibition on ‘export performance’ and ‘use of domestic goods and services’. Procedural requirements relating to this exemption are set out in clauses 37 and 40.

Services of public economic interest

Subsidies given as SPEI would be exempt from the subsidy control requirements if the total amount of minimal or SPEI assistance given to an enterprise within the elapsed part of the current financial year and the two preceding financial years was less than £725,000 (clause 38). However, subsidies awarded to goods under this exemption would not be exempt from the prohibition on ‘export performance’ and ‘use of domestic goods and services’. Procedural requirements relating to this exemption are set out in clauses 39 and 40.

SPEI assistance of less than £14.5 million per task would not need to be uploaded to the subsidy database (clause 41). SPEI assistance of more than £14.5 million would not need to be uploaded to the database if the subsidy was 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; or
- certain air or maritime links to islands, airports and ports where average annual passenger numbers were below a certain threshold.

⁵¹ [Explanatory Notes](#), p 17.

Clause 42 would give the secretary of state powers to amend the value thresholds that apply to the minimal financial assistance, SPEI assistance and SPEI transparency exemptions. Regulations made under these powers would be subject to the affirmative procedure. The powers could be used to lower the thresholds but could only be used to raise the thresholds in response to a change in currency valuation between the value of special drawing rights and sterling.⁵²

Emergencies

Subsidy control requirements would not apply to subsidies given to compensate the damage caused by natural disasters or other exceptional circumstances (excluding occurrences that have only an economic effect) (clause 43). The transparency requirements about uploading details of the subsidy to the database would still apply.

The prohibitions and restrictions on giving subsidies would not apply to subsidies given to respond to a national or global economic emergency (clause 44). Such subsidies could be given only on a temporary basis. They would still be subject to the subsidy control principles and the transparency requirements.

The exemptions in clause 43 and 44 could only be used where the secretary of state had published a notice stating that an emergency had occurred and the exemption applied.

Legacy subsidies

Clause 48(1) would exempt the following 'legacy' subsidies and schemes from the subsidy control requirements:

- New subsidies made under subsidy schemes that existed before this subsection comes into force (clause 48(1)(a)). This would include legacy schemes that were made under EU state aid rules before the end of the transition period on 31 December 2020, and legacy schemes that were made between 1 January 2021 and clause 48's entry into force.⁵³
- Subsidies given in accordance with Regulation (EC) No 1370/2007 (clause 48(1)(b)). This regulation is directly applicable as retained EU law in the UK.⁵⁴ It sets out the conditions under which authorities may award public service

⁵² [Explanatory Notes](#), p 19.

⁵³ *ibid*, p 21.

⁵⁴ *ibid*.

obligation contracts to bus and train operating companies.⁵⁵ Subsidies made in accordance with this regulation would be treated for the purposes of the bill as subsidies that had been made under a scheme.

However, the exemption from subsidy control requirements would not mean an exemption from the transparency requirements for most legacy schemes and subsidies. Subsections 48(2) and (5) would ensure the transparency requirements would still apply to legacy schemes and subsidies except for subsidies that are subject to the WTO Agreement on Agriculture, or that relate to the audio-visual sector or trade in fish/fish products. These subsections were added to the bill at committee stage in the House of Commons.

Subsection 48(4) would omit article 9 from the retained EU law version of Regulation (EC) No 1370/2007. Article 9 makes provision to do with compatibility with the common market. Clause 90 provides that subsection 48(4) extends to England and Wales and Scotland only. The rest of the bill extends to the whole of the UK.

Withdrawal Agreement subsidies (including Northern Ireland Protocol)

Under subsection 48(3), the subsidy control requirements would not apply to subsidies and subsidy schemes subject to:

- Article 10 of the Northern Ireland Protocol
- Article 138 of the Withdrawal Agreement. This covers the application of EU state aid rules to subsidies given in relation to UK participation in EU programmes and activities under the EU's multiannual financial framework (MFF) for 2014–20 or earlier MFFs.

Paul Scully, Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy, explained at committee stage in the Commons that the purpose of this provision was to “avoid double regulation of subsidies”.⁵⁶ He stated that: “Subsidies that are subject to the protocol and comply with the EU state aid laws will be exempt from the requirements of the new domestic regime”. He emphasised the UK regime had been specifically worked out so there was “no double jeopardy” of having to comply with both EU state aid rules and the UK regime in respect of the same subsidy.⁵⁷

⁵⁵ Department for Transport, [Explanatory Memorandum to the Regulation \(EC\) No 1307/2007 \(Public Service Obligations in Transport\) \(Amendment\) \(EU Exit\) Regulations 2020](#), 2020, p 1.

⁵⁶ Public Bill Committee, [Subsidy Control Bill](#), 2 November 2021, 6th sitting, col 208.

⁵⁷ *ibid*, col 209.

However, other members of the public bill committee questioned how public authorities and recipients of subsidies would know whether a subsidy was subject to EU state aid rules under article 10 of the protocol or to the domestic subsidy control regime.⁵⁸ They maintained there was a lack of certainty about the extent of the ‘reach back’ of the protocol and the possible outcome of ongoing discussions between the UK and the EU about the UK’s proposal to amend article 10 and bring all subsidies within the UK’s domestic regime.

Mr Scully pointed out the Government had published guidance on 31 December 2020 on the practical application of article 10 of the protocol, as required by section 48 of the United Kingdom Internal Market Act.⁵⁹ He said the guidance was intended to help public authorities reach a view on whether article 10 applied to subsidies granted in Northern Ireland or elsewhere in the UK. Mr Scully acknowledged that the status and applicability of article 10 would “depend heavily” on the outcome of the UK’s talks with the EU about amending the protocol.⁶⁰ He promised the guidance on article 10 would “keep pace with the outcome of the talks”.

Other exemptions

The subsidy control requirements would not apply to the following:

- Subsidies given for the purpose of safeguarding national security (clause 45)
- Subsidies given by or on behalf of the Bank of England in pursuit of monetary policy (clause 46)
- Subsidies or subsidy schemes so far as a financial stability direction given by the Treasury for prudential reasons (eg protecting investors, depositors, policy-holders or others, or ensuring the integrity and stability of the UK financial system) provides that the subsidy control requirements should not apply (clause 47)
- Tax measures that are permitted under article 413 of the TCA (clause 49)

Subsidies and subsidy schemes for large cross-border or international cooperation projects would not have to be consistent with the subsidy control principles if the public authority making the subsidy or scheme was

⁵⁸ Public Bill Committee, [Subsidy Control Bill](#), 2 November 2021, 6th sitting, cols 206–13.

⁵⁹ Department for Business, Energy and Industrial Strategy, ‘[Complying with the UK’s international obligations on subsidy control: guidance for public authorities](#)’, published 31 December 2020, updated 24 June 2021. Section 6 of the guidance specifically covers the Northern Ireland Protocol.

⁶⁰ Public Bill Committee, [Subsidy Control Bill](#), 2 November 2021, 6th sitting, col 209.

satisfied that the project would have benefits beyond the participating enterprises, sectors or states and (clause 50).

Subsidies and subsidy schemes for nuclear energy would not have to be consistent with the energy and environment principles (clause 51).

4.4 Part 4: Competition and Markets Authority—referrals and functions

In the consultation outcome document, the Government explained that for some subsidies, public authorities would be required to obtain a report from an independent body on their assessment of whether the subsidy complies with the subsidy control principles.⁶¹ For other subsidies, public authorities would have the option of obtaining such a report. A new subsidy advice unit would be established within the Competition and Markets Authority (CMA) to be the independent body. The Government said the CMA had “the experience and expertise to act as an authoritative, objective body for subsidy control”. Part 4 of the bill sets out the referral process and the functions of the CMA.

Mandatory referrals

A public authority would have to request a report from the CMA:

- When giving a subsidy, or making a subsidy scheme, of particular interest (clause 52). The definition of a subsidy or scheme of particular interest would be set by the secretary of state in regulations to be made under the power in clause 11.
- Where directed to do so by the secretary of state (clause 52). Under clause 55, the secretary of state could make a call-in direction in relation to:
 - a subsidy or scheme of interest;
 - any other subsidy or scheme they considered was at risk of failing to comply with the subsidy control principles, energy and environment principles, or prohibitions and restrictions on giving subsidies or making schemes;
 - or any other subsidy where they considered there was a risk of negative effects on competition or investment within the UK.

Clause 53 sets out obligations on the CMA for mandatory referrals. It would have five working days to notify a public authority whether it had properly made the referral request, and a further 30 working days (extendable in

⁶¹ Department for Business, Energy and Industrial Strategy, [Government Response to the Consultation on Subsidy Control](#), 30 June 2021, CP 469, p 11.

specified circumstances) to make its report. Subsidies or schemes covered by the mandatory referral requirement would be prohibited if they had not been correctly referred to the CMA (clause 31).

The CMA's report would have to evaluate the public authority's assessment of whether the subsidy or scheme complied with the subsidy control principles, the energy and environment principles (where relevant) and the prohibitions and restrictions in part 2 of the bill (clause 59). The evaluation would have to take into account any effects of the proposed subsidy or scheme on competition or investment within the UK. The report could also include advice about how the public authority could improve its assessment, or how the proposed subsidy or scheme could be modified to ensure compliance.

After the CMA had published its report, there would be a cooling-off period of five working days before the public authority could give a subsidy or make a scheme (clause 54). The secretary of state could direct the cooling-off period to be extended if the CMA report identified "serious deficiencies" in the public authority's assessment of the subsidy or scheme's compliance. However, if the CMA failed to publish a report within the 30 working-day reporting period, the public authority could go ahead with the proposed subsidy or scheme once the reporting period had expired.

Witnesses to the House of Commons Business, Energy and Industrial Strategy Committee suggested it could be challenging for the CMA to meet the 30-day deadline.⁶²

Voluntary referrals

A public authority would be able voluntarily to request a report from the CMA before giving a subsidy or making a scheme of interest (clause 56). The definition of a subsidy or scheme of interest would be set by the secretary of state in regulations to be made under the power in clause 11.

The CMA would have to notify the public authority within five working days whether or not it would produce a report, and if not then explain the reasons why (clause 57). If it undertook to produce a report, it would have to do so within 30 working days, or within a timescale agreed with the public authority. If the public authority went ahead with the subsidy or scheme before the end of the reporting period, the CMA could decide whether or not to continue with the report.

⁶² House of Commons Business, Energy and Industrial Strategy Committee, [Oral Evidence: Post-Pandemic Economic Growth: State Aid and Post-Brexit Competition Policy](#), 30 November 2021, HC 742 of session 2021–22, QQ 92 and 95.

The same requirements about the contents of the CMA report would apply to voluntary referrals as for mandatory referrals (clause 59).

Post-award referrals

The secretary of state could refer subsidies or schemes to the CMA after they had been made, if they considered (clause 60):

- there had been or may have been a failure to comply with the principles, prohibitions or restrictions in part 2 of the bill; or
- there was a risk of negative effects on competition or investment in the UK.

The secretary of state could make a post-award referral within 20 working days of the subsidy or scheme being entered on to the database, or within 20 working days of the subsidy being given or the scheme being made for SPEI subsidies that did not have to be entered on to the database.

The CMA would have 30 working days (extendable in specified circumstances) to publish its report (clause 61). The report would have to set out the CMA's evaluation of the public authority's assessment of the subsidy or scheme, taking into account any effects on competition or investment within the UK (clause 62). If the public authority had not provided an assessment, the report would have to state that, along with any reasons given for not providing the assessment. If the subsidy or scheme was ongoing, the CMA report could include advice about how it could be modified to ensure compliance with the principles, prohibitions or restrictions in part 2 of the bill.

Exemptions

Clause 63 specifies that the CMA referral process would not apply to subsidies awarded under a scheme. The explanatory notes state that it is the overarching scheme that would be subject to referral to the CMA.⁶³

Clause 64 sets out that the CMA referral process would not apply to the following subsidies or schemes:

- Streamlined subsidy schemes (clause 10)
- Minimal financial assistance (clause 36)
- SPEI assistance (clause 38)
- Natural disasters and other exceptional circumstances (clause 43)

⁶³ [Explanatory Notes](#), p 25.

- National or global economic emergencies (clause 44)
- National security (clause 45)
- Bank of England monetary policy (clause 46)
- Legacy and withdrawal agreement subsidies (clause 48)
- Tax measures (clause 49)
- Large cross-border or international cooperation projects (clause 50)
- Subsidies or schemes to which a financial stability direction applies (clause 47)
- Subsidies or schemes made by the Treasury or Bank of England only for prudential reasons (clause 47(3))
- Subsidies or schemes where the secretary of state has directed a mandatory referral requirement does not apply. The secretary of state could make such a direction only where they are satisfied that there are “urgent and exceptional circumstances that justify the direction being given in the public interest”.

General functions of the CMA

The CMA would be required to report every five years on the effectiveness of the operation of the act and its impact on competition and investment within the UK (clause 65). The secretary of state could also direct the CMA to produce a report covering a specified period. The CMA would be allowed to use the information-gathering powers it has under sections 41 to 43 of the United Kingdom Internal Market Act 2020 to assist it in carrying out these monitoring and reporting functions (clause 67).

The CMA would also have to produce an annual report detailing which subsidies and schemes it had considered under the mandatory, voluntary and post-award referral processes (clause 66).

Some commentators have argued that the CMA should have a role in enforcement of the regime, or the ability to make binding decisions. For instance, Thomas Pope of the Institute for Government has suggested that without an enforcement role for the CMA, “potentially damaging subsidies [risk] going unchallenged in court if there is no willing ‘interested party’” to bring proceedings (see section 4.5 of this briefing).⁶⁴ On the other hand, James Webber, a lawyer specialising in state aid and subsidy control, has taken the view that “it was never practical to give the CMA binding decision-

⁶⁴ Thomas Pope, [‘The Subsidy Control Bill does not guarantee post-Brexit state aid success’](#), Institute for Government, 1 July 2021.

making authority over other elements of government that are making public spending decisions”.⁶⁵

Subsidy Advice Unit

The CMA would be required to establish a committee of the CMA board to be known as the subsidy advice unit (clause 68). The CMA could delegate its subsidy control functions under the bill to the subsidy advice unit. The subsidy advice unit could refer some of its functions to a CMA panel group (clause 69).

4.5 Part 5: Enforcement

Part 5 of the bill makes provision about the enforcement of the subsidy control requirements.

Clause 70 provides that “an interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal (CAT) for a review of the decision”. The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy which decides cases involving competition or economic regulatory issues.⁶⁶ It was established by the Enterprise Act 2002.⁶⁷ Cases are heard by a Tribunal consisting of three members: either the President or a chairman (High Court judges or equivalent, or senior lawyers) and two ordinary members (experts in law, business, accountancy, economics or a related field).

Clause 70 would require the CAT to apply judicial review principles when determining an application, or in Scotland the same principles as would be applied by the Court of Session on an application to its supervisory jurisdiction. In a judicial review proceeding, the judge reviews the lawfulness of a decision or action of a public body, rather than whether the ‘right’ decision was reached.⁶⁸ The Government has said this means the CAT “will not be reviewing whether the public body made the ‘correct’ decision, but whether it was within its powers, procedurally fair and rational”.⁶⁹

Clause 70 defines an interested party as the secretary of state or “a person whose interests may be affected” by the subsidy or scheme. At report stage in the Commons, there was some debate about the standing of the devolved

⁶⁵ House of Commons Business, Energy and Industrial Strategy Committee, [Oral Evidence: Post-Pandemic Economic Growth: State Aid and Post-Brexit Competition Policy](#), 30 November 2021, HC 742 of session 2021–22, Q90.

⁶⁶ Competition Appeal Tribunal, [‘Competition Appeal Tribunal’](#), accessed 7 January 2022.

⁶⁷ Competition Appeal Tribunal, [‘About the Tribunal’](#), accessed 7 January 2022.

⁶⁸ Courts and Tribunals Judiciary, [‘Judicial review’](#), accessed 7 January 2022.

⁶⁹ Department for Business, Energy and Industrial Strategy, [Government Response to the Consultation on Subsidy Control](#), 30 June 2021, CP 469, p 12.

administrations to apply to the CAT for a review as an interested party.⁷⁰ Paul Scully, Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy said that devolved administrations or local authorities would generally be able to apply for the review of a subsidy when people in the areas for which they were responsible might be adversely affected, but not where the subsidies had only a “tenuous connection” with the interests of people in those areas.⁷¹

Clause 71 sets out the time limits for making an application to the CAT. Interested parties would have to send their notice of appeal to the CAT within one month of the relevant date. The relevant date is the date on which:

- The public authority provides notice it has responded to a pre-action information request. Clause 76 would enable an interested party to request information from a public authority about a subsidy it has given or a scheme it has made, for the purpose of deciding whether to apply to the CAT for a review of the decision. The public authority would be obliged to respond within 28 days.
- The CMA publishes a post-award referral report.
- Details of the subsidy or scheme are published on the subsidy database.
- The interested party first knew, or ought to have known, about the subsidy decision, for subsidies that are exempt from the requirement to be published on the subsidy database.

The CAT could extend these time limits only in exceptional circumstances.

Clause 72 would give the CAT the same remedies that are available to the courts in judicial review proceedings for applications made in England and Wales and Northern Ireland. This would include a mandatory order (an order that the respondent does something); a prohibiting order (an order that the respondent stops doing something); a quashing order (an order setting aside a decision); a declaration or an injunction. For applications made in Scotland, clause 73 would give the CAT the same powers as those that apply to the Court of Session in an application to its supervisory jurisdiction.

Clause 74 would enable the CAT to make recovery orders requiring a public authority to recover the amount of a subsidy from the beneficiary. The Government anticipates that it will be rare for recovery orders to be made

⁷⁰ [HC Hansard, 13 December 2021, col 837.](#)

⁷¹ *ibid*, col 862.

because it expects high levels of compliance by public authorities throughout the UK.⁷²

Clause 75 would provide for appeals against the CAT's decisions to be made to the Court of Appeal in England and Wales and Northern Ireland, or the Court of Session in Scotland. An appeal could be brought by a party to the CAT proceedings or any other person with a "sufficient interest". Appeals could be made on a point of law, and would require the permission of the CAT or the appellate court.

Clause 77 would enable public authorities to recover subsidies from a beneficiary if the subsidy had been misused. The public authority could recover an amount from the beneficiary to the extent it had been used for a purpose other than the purpose for which it was given.

4.6 Part 6: Miscellaneous and general

Part 6 of the bill contains miscellaneous and general provisions.

Subsidies provided in primary legislation

Clause 78 and schedule 3 would apply certain provisions of the bill to subsidies or schemes introduced in primary legislation. This refers primarily to devolved primary legislation passed by the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly. Under paragraphs 6 and 7, subsidies or schemes introduced by devolved primary legislation would have to comply with:⁷³

- the subsidy control principles and the energy and environment principles in chapter 1 of part 2;
- the prohibitions and other requirements in chapter 2 of part 2; and
- the exemptions in part 3.

The explanatory notes state that:

In any proceedings, the appropriate court would be required to consider provisions by reference to the considerations and views of the promoter of the proposed legislation (that is, minister or other members of the devolved legislatures introducing a bill, or members

⁷² Department for Business, Energy and Industrial Strategy, [Government Response to the Consultation on Subsidy Control](#), 30 June 2021, CP 469, p 12.

⁷³ Schedule 3 would make technical modifications to certain provisions relating to prohibitions, and to other requirements and exemptions to ensure those provisions operated properly when applied to devolved primary legislation ([Explanatory Notes](#), p 29).

who lodge amendments amounting to subsidies). Court proceedings in relation to such cases would be heard in the Court of Session, High Court in England and Wales, or High Court in Northern Ireland, as relevant, rather than the Competition Appeal Tribunal as in Part 5 of the bill.⁷⁴

For subsidies or schemes introduced by devolved primary legislation or UK Parliament primary legislation:

- the transparency requirements would apply.
- subsidies of interest and subsidies of particular interest could be referred to the CMA on a voluntary basis. However, mandatory referrals would not apply.⁷⁵

George Peretz QC has described schedule 3 as “replete with important constitutional issues”.⁷⁶ Referring to potential legal proceedings against subsidies in devolved primary legislation, he notes that the bill does not explain what standard of review should be applied but concludes that “it is likely that the usual judicial review/supervisory jurisdiction standards apply”. He implies this could amount to “a significant departure from the general position, set out in *AXA General Insurance v Lord Advocate* [2011] UKSC 46, that judicial review of devolved legislation is not generally possible on the general common law grounds of irrationality, unreasonableness or arbitrariness”.

Mr Peretz has also identified an issue that arises from applying the subsidy control requirements to subsidies contained in devolved primary legislation compared to those given by public authorities:

One difficulty is that, in many cases (eg on the application of the subsidy control principles) the bill requires the authority to be satisfied as to various matters—a requirement that is not easy to apply [to] a legislative body. So the bill applies that requirement (along with various other requirements such as the clause 76 requirement to provide information) to the “promoter” of the legislation (either the relevant minister or the person in charge of the bill). This identification of a “promoter” is unusual if not unprecedented: and it is not obvious that it is right to assume that the views of the promoter are necessarily the views of the legislature as a whole. However, it is hard to see what else could have been done, given that the TCA requires the application

⁷⁴ [Explanatory Notes](#), p 29.

⁷⁵ [ibid](#), p 30.

⁷⁶ George Peretz, ‘[The Subsidy Control Bill and devolution: A balanced regime?](#)’ EU Relations Law Blog, 15 July 2021.

of the subsidy control rules to all but Acts of the UK Parliament (Article 372(4)).⁷⁷

Guidance

Clause 79 would enable the secretary of state to publish guidance about the practical application of the subsidy control principles; the energy and environment principles; the subsidy control prohibitions, requirements and exemptions; referrals to the CMA; the misuse of subsidies; and modifications to subsidies and schemes. Public authorities would be under a duty to have regard to guidance issued under this power.

The Government has said it will publish guidance ahead of the subsidy control regime coming into force.⁷⁸ It said the guidance would:

[...] help public authorities comply with the obligations set out in the regime, assisting them to award subsidies that are compliant with the subsidy control principles that are at the core of the new regime. This guidance will promote considerations intrinsic to the levelling up agenda and set out the criteria for promoting economic development of relatively disadvantaged areas, as well as protecting UK competition and investment against subsidy races and other harmful distortive effects of subsidies.

Modifications to subsidies and schemes

Clause 81 would provide that modifications to subsidies and schemes should be treated as new subsidies or schemes which would be subject to the subsidy control requirements, unless it was a ‘permitted modification’, as defined in subsection 81(3).

General

The general provisions in chapter 2 of this part cover financial provision for the subsidy database and the new functions of the CMA; crown application; powers to make consequential provisions; powers to make regulations; and the making of directions. Clause 89 contains definitions of terms within the bill. Clause 90 provides that the bill extends to the whole of the UK, except for subsection 48(3), which does not extend to Northern Ireland.

⁷⁷ George Peretz, ‘[The Subsidy Control Bill: Part II—Application to legislation, questions and concerns](#)’, UK Constitutional Law Association Blog, 29 October 2021.

⁷⁸ Department for Business, Energy and Industrial Strategy, [Government Response to the Consultation on Subsidy Control](#), 30 June 2021, CP 469, p 10.

Clause 91 sets out commencement provisions. Part 1 of the bill (overview and key interpretation) and the general provisions in part 6 would come into force when the bill received royal assent. The regulation-making powers in parts 2, 3, 4 and chapter 1 of part 6 would also come into force at royal assent. The rest of the provisions would come into force on a day appointed by the secretary of state in regulations.

5. Bill stages in the House of Commons

5.1 Second reading

Second reading took place on 22 September 2021.⁷⁹ Kwasi Kwarteng, the Secretary of State for Business, Energy and Industrial Strategy, said the bill would promote “autonomy, transparency and accountability” by “empower[ing] hundreds of local authorities, as well as the devolved administrations and other public authorities, to take control, allowing them to design subsidies to meet local needs while also meeting national policy objectives”.⁸⁰ He said the regime would provide certainty and confidence to UK businesses and foreign investors by protecting against harmful or distorting subsidies and would ensure the best use of public money by imposing “our usual, traditional, stringent spending controls”.⁸¹ He argued that a cultural change would be needed alongside the bill, “to take more responsibility for our own decisions, not simply outsourcing difficult decisions to the European Commission as we did for nearly 50 years”.⁸² He believed this would give the new regime more agility than under the EU’s state aid rules.

In response, Seema Malhotra, Shadow Minister for Business, Energy and Industrial Strategy, said that Labour recognised the need for subsidy control legislation to establish the framework for the UK’s post-Brexit regime, to enable the UK to comply with its international obligations and to protect the UK’s internal market.⁸³ For these reasons, Labour would not oppose the bill’s second reading. However, Labour believed there were “significant gaps of concern”. Seema Malhotra argued that “crucial aspects are yet to be defined”, which meant the bill “fails to provide any clear indication as to how and where the Government plan to see those subsidies being spent and at what scale”.⁸⁴ She also believed the bill “does not provide a fair role for devolved administrations”. She also expressed concerns that the bill “does not strike the right balance between efficiency and oversight”.

⁷⁹ [HC Hansard, 22 September 2021, cols 336–80.](#)

⁸⁰ *ibid*, col 336.

⁸¹ *ibid*, col 338.

⁸² *ibid*, cols, 339–40.

⁸³ *ibid*, col 340.

⁸⁴ *ibid*, col 341.

The bill was given its second reading by 287 votes to 50, a majority of 237.⁸⁵

The second reading proceedings are covered in further detail in the House of Commons Library briefing [Subsidy Control Bill: Progress of the Bill](#), 9 December 2021.

5.2 Committee stage

Committee stage took place over eleven sittings between 26 October 2021 and 18 November 2021.⁸⁶ Five government amendments were agreed to without division:

- In clause 48 (two amendments) to ensure that legacy subsidies and schemes would be subject to transparency requirements, except for legacy subsidies for agriculture, fisheries and the audio-visual sector.
- In clause 54 to allow a public authority to give a subsidy after the CMA mandatory reporting period expires, but not on the day it expires (as would have been allowed before the amendment).
- In clause 62 to modify what the CMA would have to include in a post-award report to ensure consistency with what it would have to include in a pre-award report.
- In clause 64 to make nuclear energy subsidies subject to the CMA referral processes.

No non-government amendments were made. The committee stage proceedings are covered in further detail in the House of Commons Library briefing [Subsidy Control Bill: Progress of the Bill](#), 9 December 2021.

5.3 Report stage

Report stage took place on 13 December 2021.⁸⁷ No amendments were made to the bill. Three non-government amendments were defeated on division, to do with exempting agricultural subsidies from the bill, seeking devolved consent for defining subsidies of interest/particular interest, and including net-zero commitments in the subsidy control principles. MPs from across the House raised concerns about the transparency requirements for recording subsidies on the database. The minister indicated the Government might return to this issue in the House of Lords.

⁸⁵ [HC Hansard, 22 September 2021, cols 379–80](#).

⁸⁶ Public Bill Committee, [Subsidy Control Bill](#), 18 November 2021 (compilation of all sittings).

⁸⁷ [HC Hansard, 13 December 2021, cols 829–73](#).

Exemption for agricultural subsidies (NCI)

The SNP moved new clause 1, which would have exempted agricultural subsidies from the subsidy control requirements in part 2 of the bill. Kirsty Blackman, SNP spokesperson on the economy, argued that agricultural subsidies do not fit neatly into subsidy control regimes.⁸⁸ She said this was recognised by both the WTO, which has a separate Agreement on Agriculture, and the EU, which deals with agricultural support through the common agricultural policy (CAP). She suggested that a control regime for agriculture should not form part of the main subsidy control regime established by the bill.

Deidre Brock, SNP spokesperson for environment, food and rural affairs, said the UK Government had chosen to ignore the “serious concerns” raised by the Scottish and Welsh Governments.⁸⁹ Mairi Gougeon, the Scottish Cabinet Secretary for Rural Affairs and Islands, wrote to George Eustice, the Secretary of State for Environment Food and Rural Affairs, on 30 November 2021 to raise the Scottish Government’s concerns on this matter, including that:⁹⁰

- It was unclear why agriculture should be included in the new subsidy control regime when it is often carved out of standard subsidy control regimes.
- The principles set out in schedule 1 of the bill risk constraining the Scottish Government’s ability to develop future policies tailored to the needs of Scottish agriculture.
- How the regime would work for legacy CAP schemes that “would seem to be incompatible” with the principles, as they are intended to “ensure that farming businesses are economically viable” rather than to bring about a change in practice. The Scottish Government said it was not clear that clauses 48 and 81 dealing with legacy schemes provided enough assurance on this point.
- The application of the new regime to subsidies already subject to the WTO Agreement on Agriculture would effectively lead to avoidable ‘double-banking’ of subsidy control schemes, which would add further complexity and enhanced risk of legal challenge. The Scottish Government was particularly concerned that a subsidy that does not unlawfully distort international trade could be challenged, successfully or otherwise, on the basis that it did not minimise negative effects on competition or investment in the UK (as set out in schedule 1 under principle F). This

⁸⁸ [HC Hansard, 13 December 2021, col 833.](#)

⁸⁹ [ibid, col 846.](#)

⁹⁰ Scottish Government, ‘[Subsidy Control Bill: Amendment letter to UK Government](#)’, 30 November 2021.

particular principle goes beyond the minimum required under the TCA.

- Including agriculture in the scope of the bill diminishes the role of the agreed common frameworks process in this area.

Ms Brock repeated these points during the debate.⁹¹ She argued it was “vital” to have a support system that could recognise and fully take into account Scotland’s “unique agricultural conditions and practices”.⁹² She maintained that if agriculture was left in the bill, it “could create serious problems for the devolved governments in the delivery of their own policies on food production”.⁹³

These concerns were echoed by MPs from the other devolved nations. Jim Shannon (Democratic Unionist Party MP for Strangford) said he sympathised and agreed with Ms Brock’s argument.⁹⁴ Liz Saville Roberts (Plaid Cymru Westminster Leader) said the SNP amendment was “a vital new clause that protects our farmers and ensures that the devolved nations can continue to tailor support to local requirements and priorities”.⁹⁵

Seema Malhotra, Shadow Minister for Business, Energy and Industrial Strategy, said these were important concerns and that Labour would be listening closely to how the Government responded.⁹⁶

In response, Paul Scully, Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, argued that having agriculture within the same framework as other sectors would “protect competition and investment within agriculture, while securing consistency for public authorities and subsidy recipients”.⁹⁷ He maintained the bill would empower public authorities to give subsidies that best fitted local needs.⁹⁸ He rejected the argument that agriculture should be exempt from the bill’s regime.

New clause 1 was defeated by 292 votes to 31, a majority of 261.⁹⁹

⁹¹ [HC Hansard, 13 December 2021, cols 845–7.](#)

⁹² *ibid*, col 846.

⁹³ *ibid*, col 847.

⁹⁴ *ibid*.

⁹⁵ *ibid*, col 849.

⁹⁶ *ibid*, col 853.

⁹⁷ *ibid*, col 862.

⁹⁸ *ibid*, col 863.

⁹⁹ *ibid*.

Devolved consent for defining subsidies of interest or particular interest (amendment 19)

Labour moved amendment 19, which would have required the secretary of state to seek consent from the devolved administrations before making regulations under clause 11 to define a subsidy or subsidy scheme of interest or of particular interest. If they did not give consent within one month, the secretary of state could still make the regulations, but would have to make a statement to the House of Commons explaining why they were doing so without devolved consent.

Seema Malhotra explained that Labour believed the devolved administrations should have a formal role in defining subsidies of interest and of particular interest.¹⁰⁰ She said the amendment reflected the devolved consent mechanism under the United Kingdom Internal Market Act 2020.

Liz Saville Roberts expressed her support for amendment 19.¹⁰¹ Kirsty Blackman said the SNP backed it “not because it was perfect but because it would have made the bill marginally better than it is currently”.¹⁰²

Paul Scully did not address amendment 19 specifically, but on the subject of the role of the devolved administrations generally, he said the Government had engaged with them regularly on the design of the UK-wide subsidy control scheme and would continue to listen to their views.¹⁰³ However, he said it was important to reiterate that subsidy control was a reserved matter.

Amendment 19 was defeated by 292 votes to 180, a majority of 112.¹⁰⁴

Other concerns relating to the role of the devolved administrations were raised during the debate, although not voted on.

The SNP tabled amendment 10 which would have allowed the devolved administrations to create streamlined subsidy schemes within their areas of devolved competence. Kirsty Blackman described this as a request for parity for the devolved administrations, arguing that it made “no sense” in areas of devolved competence that only the secretary of state could create a streamlined scheme.¹⁰⁵ In response, Paul Scully said that all public authorities would be able to use such schemes, but they would “function best when

¹⁰⁰ [HC Hansard, 13 December 2021, col 858.](#)

¹⁰¹ *ibid*, col 850.

¹⁰² *ibid*, col 876.

¹⁰³ *ibid*, col 862.

¹⁰⁴ *ibid*, col 866.

¹⁰⁵ *ibid*, col 833.

they apply throughout the UK”.¹⁰⁶ He said the devolved administrations would be able to create schemes for the use of local authorities and other public bodies within their remit.

Seema Malhotra described the bill as “not a fair four nations bill” because:¹⁰⁷

As it stands, regulations and guidance can be devolved without seeking the consent of the devolved administrations; only the secretary of state can call for subsidies to be assessed by the CMA; and there are no requirements for the devolved administrations to be represented on the CMA’s new subsidy advice unit.

She spoke to Labour amendments intended to address such issues. Overall, Ms Malhotra said that a system was needed that would command the confidence of all four nations. She called for the devolved administrations to be given a “genuine voice” in developing and implementing the new regime.

Liz Saville Roberts cited the Welsh Government’s criticisms of the bill and described it as “an assault on devolution” that “speaks to an unconstructive disdain for the rights and responsibilities of the devolved nations from the Government”.¹⁰⁸

Net zero commitments (amendment 16)

Seema Malhotra moved amendment 16, which would have added a new requirement to the subsidy control principles in schedule 1, namely that the beneficial effects of subsidies should outweigh their negative effects on “consistency with the United Kingdom achieving its net zero commitments established under the Climate Change Act 2008”. She said that COP26 had highlighted how committed action would be needed across Government for the UK to reach its net zero targets.¹⁰⁹ She contended it was “not good enough” that this commitment was not enshrined in the new subsidy regime.¹¹⁰

The SNP and Liberal Democrats, who had tabled their own amendments, also highlighted that the bill did not specifically mention net zero targets. Kirsty Blackman said the bill would “not stand the test of time” if it did not contain a way of holding people to account on the impact of public spending decisions on climate change.¹¹¹ Sarah Olney, Liberal Democrat spokesperson

¹⁰⁶ [HC Hansard, 13 December 2021, col 862.](#)

¹⁰⁷ *ibid*, col 858.

¹⁰⁸ *ibid*, col 851.

¹⁰⁹ *ibid*, col 854.

¹¹⁰ *ibid*, col 855.

¹¹¹ *ibid*, col 839.

for business, energy and industrial strategy, said her party would have welcomed the opportunity to put the transition to net zero at the heart of the UK's subsidy regime.¹¹² She argued that public subsidies were an important part of the levers available, and taxpayers needed to see that they were being used effectively and in line with long-term aims on the path to net zero.

Responding to Labour's amendment, Paul Scully said that adding an explicit net-zero test to the balancing test principle in schedule I was "unnecessary".¹¹³ The balancing test means public authorities could only give a subsidy if they considered its beneficial effects outweighed its negative effects, in particular negative effects on competition or investment within the UK, or on international trade or investment. Mr Scully argued that although these particular negative effects were specified in principle G, the terms of the balancing test were not limited only to those negative effects. This is why he said adding in a specific reference to net zero commitments here was not necessary.

Amendment 16 was defeated by 292 votes to 178, a majority of 114.¹¹⁴

Transparency

Several amendments relating to transparency were discussed, although none were put to a vote.

John Penrose (Conservative MP for Weston-super-Mare), who carried out an independent review for the Government on the UK's competition policy,¹¹⁵ tabled amendments to:

- Reduce the threshold for entering subsidies into the subsidy database from £500,000 to £500.
- Require subsidies or schemes to be entered in the database within one month of being made, rather than the bill's current deadlines of one year (for tax measures) or six months (for subsidies other than tax measures).
- Require the date a subsidy or scheme was entered on to the database to be included in the information public authorities are required to enter on to the database.
- Require that minimal financial assistance subsidies would not be exempt from the database transparency requirements, though would remain exempt from other subsidy control requirements.

¹¹² [HC Hansard, 13 December 2021, col 852.](#)

¹¹³ *ibid*, col 863.

¹¹⁴ *ibid*, col 870.

¹¹⁵ John Penrose, [Power to the People: Independent Report on Competition Policy](#), February 2021.

- Allow individual subsidies given under a broad scheme to be reviewed, without requiring the broader subsidy scheme to be reviewed too.

Mr Penrose said the bill “ought to be a major piece of post-Brexit dividend” that would allow the UK to have “a faster, more nimble and more economically rational way of dealing with subsidies”.¹¹⁶ However, he argued that without sufficient transparency, any lack of compliance with the subsidy principles might not be spotted until it was too late, or not at all, and companies could be driven out of business. He described his package of amendments as a “modest proposal” and said he had not heard a single argument that “unpicks the logic” of what he was suggesting.¹¹⁷

Kirsty Blackman, speaking for the SNP, agreed that subsidies should be uploaded to the database more quickly, so that there would be “a longer time for challenge and a shorter time for upload”.¹¹⁸ She suggested that for tax measures, indicative amounts could be entered even if the actual final amount was not known until it appeared on a tax declaration.¹¹⁹ She also agreed with John Penrose that all subsidies, including those under the minimal financial assistance level, should be entered on the database.¹²⁰

Sarah Olney, speaking for the Liberal Democrats, agreed that the threshold for entering a subsidy on the database should be lower.¹²¹ She said that there could be “a great deal of market-distorting subsidy” below the £500,000 reporting threshold proposed by the Government, but competitors would be unable to challenge subsidies that had disadvantaged them if they did not know about them in the first place.

Seema Malhotra said that Labour supported John Penrose’s amendments. She argued that:

Transparency on public expenditure—who is paying out, how much is being given, who it is going to and what it is being used for—are basic questions that we should know answers to as a matter of routine on subsidies being paid by our governments, local authorities or other public authorities. Greater transparency, not less, should underpin the system of self-assessment by public authorities that sits at the heart of the bill and our responsibility to the taxpayer.¹²²

¹¹⁶ [HC Hansard, 13 December 2021, col 840.](#)

¹¹⁷ *ibid*, col 844.

¹¹⁸ *ibid*, col 835.

¹¹⁹ *ibid*, cols 835–6.

¹²⁰ *ibid*, col 836.

¹²¹ *ibid*, col 852.

¹²² *ibid*, col 856.

On this last point, she noted that as “a permissive regime that challenges subsidies after they have been granted”, the arrangements in the bill were very different from the EU state aid regime, where subsidies must be pre-notified and scrutinised before being allocated. She also called for bringing public economic interest subsidies with a value of over £500 in scope of the transparency requirements, questioning why the bill exempted public economic interest subsidies up to £14.5 million from the transparency requirements.¹²³

Seema Malhotra also called for the database to be subject to routine audit, as inaccurate, incomplete or poor-quality information could lead to “misguided legal challenges or to harmful subsidies failing to be addressed”.¹²⁴ She said the public bill committee had heard “clear evidence that the database in its current form contains significant inaccuracies and gaps”.

Responding to the debate, Paul Scully said he took the topic of transparency “really seriously”.¹²⁵ He said the Government would review again the evidence on transparency provided to the public bill committee and the consultation on subsidy control. He further committed that the Government would “reflect carefully” on the points raised so far, engage further with parliamentarians in both Houses as the bill progressed, and consider carefully what further action the Government could take to address transparency concerns if they were raised again in the House of Lords.

However, Mr Scully declared the amendments tabled at report stage would “create an additional administrative burden for public authorities, including small local authorities”. He also said they could “paradoxically [...] make it harder to identify in the database the most potentially harmful subsidies that are eligible to be challenged in the Competition Appeal Tribunal”. John Penrose described this argument as “clearly bonkers and not right”.¹²⁶

Mr Scully argued that shortening the deadlines for entering subsidies on the database would create an additional administrative burden, might make mistakes more likely, and could cause confusion if the data on tax measures was subject to later revision.¹²⁷

On the subject of challenging a subsidy made under a broader scheme, Mr Scully argued this was “unnecessary” as public authorities should not create a scheme unless they believed subsidies given under it were

¹²³ [HC Hansard, 13 December 2021, col 857.](#)

¹²⁴ *ibid*, cols 857–8.

¹²⁵ *ibid*, col 859.

¹²⁶ *ibid*, col 860.

¹²⁷ *ibid*, cols 860–1.

consistent with the principles.¹²⁸ However, he confirmed that if a question arose as to whether a subsidy made under a scheme really met the terms of the scheme, it could be challenged on the basis that it should be treated as a standalone subsidy.

Levelling up

A further area of debate was around levelling up and the role of subsidies in addressing economic inequalities.

Liz Saville Roberts accused the bill of “wrongly assum[ing] that the UK economy is a level playing field, deserving therefore of a level subsidy regime”.¹²⁹ Seema Malhotra called for the bill to explicitly state that subsidies and streamlined subsidy schemes could be used for the purpose of reducing regional inequality.¹³⁰ She suggested that, given the Government’s creation of a department for levelling up, Labour was “surprised that mandate is not clear” in the bill. She argued that supporting areas of deprivation “should fall squarely within the subsidy control principles”.

Paul Scully argued that relative economic deprivation was already covered by the first subsidy control principle, that subsidies should pursue a specific policy objective in order to remedy an identified market failure or address an equity rationale, such as social difficulties or distributional concerns.¹³¹

5.4 Third reading

Third reading took place directly after report stage on 13 December 2021.¹³² Kwasi Kwarteng, Secretary of State for Business, Energy and Skills, described the bill as a “hugely important piece of legislation” that “demonstrates the Government’s clear commitment to seize the opportunities arising from Brexit”.¹³³ He said that local authorities, public bodies and the devolved administrations would be empowered to decide if they could issue subsidies by acting consistently with the principles in the legislation. He argued the new regime would “help to unlock potential so that all areas of the UK feel the benefits of targeted subsidies” and “ensure that the UK maintains a competitive free market economy, which is fundamental to our national prosperity, while protecting the interests of the British taxpayer”.¹³⁴

¹²⁸ *ibid*, col 862.

¹²⁹ [HC Hansard, 13 December 2021, col 850](#).

¹³⁰ *ibid*, col 855.

¹³¹ *ibid*, col 863.

¹³² *ibid*, cols 873–6

¹³³ *ibid*, col 874.

¹³⁴ *ibid*.

He said the Government would be “mindful and attentive” to continuing debate on elements of the new regime as the bill moved to the House of Lords, but he did not make any specific commitments beyond that.¹³⁵

Jonathan Reynolds, Shadow Secretary of State for Business, Energy and Industrial Strategy, said the bill was not just a “technical matter” as it might appear on the face of it.¹³⁶ He argued that it was of “major interest” to the nation how the powers and responsibilities in the bill would be used as “the country needs a plan for growth if we are to generate the living standards and public services that the British people rightly expect”. However, he suggested the Government had no “coherent strategy” behind the bill.¹³⁷ He believed there was “a huge role for the Government in partnering with industry to meet our national objectives, particularly on net zero”.

Mr Reynolds expressed regret that the Government had not taken up any of the amendments discussed at report stage on transparency, net zero commitments and powers for the devolved administrations.¹³⁸ He said he hoped these arguments would be taken up by members of the House of Lords.

The bill received its third reading without a division.

6. Read more

- George Peretz, ‘[The Subsidy Control Bill: Part II—Application to legislation, questions and concerns](#)’, UK Constitutional Law Association Blog, 29 October 2021
- Jonathan Branton and Alexander Rose, ‘[The Subsidy Control Bill: Key questions for Parliament to consider](#)’, Local Government Lawyer, 24 September 2021

¹³⁵ [HC Hansard, 13 December 2021, col 874.](#)

¹³⁶ *ibid.*

¹³⁷ *ibid.*, col 875.

¹³⁸ *ibid.*

About the Library

A full list of Lords Library briefings is available on the [Library's website](#).

The Library publishes briefings for all major items of business debated in the House of Lords. The Library also publishes briefings on the House of Lords itself and other subjects that may be of interest to Members.

Library briefings are produced for the benefit of Members of the House of Lords. They provide impartial, authoritative, politically balanced information in support of Members' parliamentary duties. They are intended as a general briefing only and should not be relied on as a substitute for specific advice.

Every effort is made to ensure that the information contained in Lords Library briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Disclaimer

The House of Lords or the authors(s) shall not be liable for any errors or omissions, or for any loss or damage of any kind arising from its use, and may remove, vary or amend any information at any time without prior notice. The House of Lords accepts no responsibility for any references or links to, or the content of, information maintained by third parties.

This information is provided subject to the conditions of the [Open Parliament Licence](#).

Authors are available to discuss the contents of the briefings with the Members and their staff but cannot advise members of the general public.

Any comments on Library briefings should be sent to the Head of Research Services, House of Lords Library, London SW1A 0PW or emailed to hlresearchservices@parliament.uk.
