

# Submission from Law Society of Scotland Legislative Consent on the UK Subsidy Control Bill December 2021

## Introduction

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

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

Banking, Company and Insolvency law sub-committee welcomes the opportunity to consider and respond to the Economy and Fair Work Committee questions on Legislative Consent for the UK the Subsidy Control Bill. The sub-committee has the following comments to put forward for consideration.

## General Comments

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

As subsidy control has now been substantially returned to the UK and is a reserved matter<sup>1</sup>, much of the autonomy that the Scottish government had when the UK was under the EU State aid regime has been transferred to the UK government. The UK Internal Market Act recognised the importance of consulting with the devolved administrations on its proposals for subsidy control. We hope that the spirit of section 53 of that Act will continue throughout the development of the regime, and that that the UK government will take the opportunity to consult fully with the devolved legislatures and administrations and other interests based in each of the UK jurisdictions (see comments on Part 6 of the Bill).

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<sup>1</sup> [UK Internal Market Act 2020, Part 7, section 52](#)

## **In practical terms, how do you see the subsidy control regime, established by this Bill, affecting the delivery of economic development and business investment in Scotland?**

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It is difficult to provide a view on this question in the abstract. The fundamental policy principle is set out at the beginning of Schedule 2:

*A Subsidies should pursue a specific policy objective in order to—*

*(a) remedy an identified market failure, or*

*(b) address an equity rationale (such as social difficulties or distributional concerns).*

The concept of “social difficulties or distributional concerns” lacks precision and, depending on how (and by whom) it is interpreted, this test could be applied in a way that legitimises assistance to economic actors in parts of the UK outside Scotland but does not provide similar cover for assistance to economic actors in Scotland, and in such a case would be detrimental to Scottish competitors. However, there is no reason to assume this would be the case at this point in time.

The opportunity for the Scottish Government to create schemes under the Bill covering all Scottish public bodies creates a welcome opportunity for schemes that are tailored to Scottish circumstances and create pre-cleared routes for the provision of subsidies.

## **Do you have suggestions for specific amendments to the UK Bill, including for example, where more detail on the face of the Bill would be preferable to being left to regulations?**

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The Bill is a helpful development in terms of providing more legal definition to questions of public subsidy. The principles outlined in Schedule 1, as listed in para. 30, are sensible ones from the point of view of targeting subsidy at demonstrable cases of market failure.

We would suggest the addition of something akin to an intra-UK adaptation of article 107(3) of the Treaty on the Functioning of the European Union thus:

*“Compatible with the UK internal market are:*

- subsidies to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, in view of their structural, economic and social situation;*
- subsidies to promote the execution of an important project of common United Kingdom interest or to remedy a serious disturbance in the economy of a part of the United Kingdom ;*
- subsidies to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*

- *subsidies to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the United Kingdom to an extent that is contrary to its common interest.”*

The Bill may also benefit from a cohesion provision - an intra-UK equivalent to Article 174 of the Treaty on the Functioning of the European Union, including its paragraph of which refers to northernmost and island regions” of the kind to be found in parts of Scotland. Such a provision might be worded as follows:

*An appropriate purpose of a subsidy is to strengthen the economic, social and territorial cohesion of the United Kingdom by seeking to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions. Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe natural or demographic handicaps such as those with very low population density and island and mountain regions.*

Including such provisions within the Bill itself would provide public bodies (and courts tasked with judging the reasonableness of those bodies' decisions) with clear guidance against which to consider the compatibility of any proposed assistance with the subsidy principles set out in the Bill.

We do however think it is important to acknowledge that the Trade and Cooperation Agreement with the EU provides the UK with the ability to put in place a less prescriptive regime than the EU State aid rules, and it is important not to lose sight of the freedom that the Bill gives public bodies to reach reasonable judgements about the compatibility of their decisions with the subsidy principles. This raises questions about who should test the compatibility, proportionality and indispensability of a particular measure. The more detail is placed on the face of the Bill, the more the courts (in this case the Competition Appeal Tribunal (CAT)) will be placed in the role of arbiter, rather than each grantor public authority being empowered to decide for itself (acting reasonably), which is what the Bill currently does.

In our previous responses to consultations on this, we expressed support for the proposal that the Competition Appeal Tribunal (CAT) hear challenges at first instance. Given the specialist, and potentially political, nature of decision-making, it is important for the CAT to be able to build up the relevant expertise. The CAT currently sits as a Scottish tribunal for proceedings which are categorised as Scottish proceedings, with appeals from the CAT in such cases being to the Inner House of the Court of Session rather than to the Court of Appeal. Indeed, we note that the CAT is amongst those tribunals for which responsibility is to be transferred under the terms of the Scotland Act 2016.

The enforcement provisions in the Bill may create interdependencies with matters for which the Scottish Parliament has competence notwithstanding the reservation of the law concerning subsidies. In particular, the Bill provides the CAT with the same powers as the Court of Session on an application to its supervisory jurisdiction, but aspects of those powers are devolved matters.

## **Do you have any other comments?**

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Regarding agriculture, we note the comments made concerning the impact of the Bill on the arrangements that are proposed in place of the Common Agricultural Policy (in particular in paragraph 37). However, the policy case for the CAP is contentious from a competition perspective (including within the EU) and the Scottish Government should consider whether there is a more principled basis for why it should be retained than simply hostility to change (essentially the message of para 37). Such a case may be made, for example by reference to agriculture and, indeed, land use generally, needing a special regime, especially in response to global warming and related sustainability concerns, but that should be balanced against the potential negative effects for competition and, consequently, for consumers.

### **Part 6 contains miscellaneous and general provisions.**

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

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

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