Submission from Scottish Enterprise
Legislative Consent on the UK Subsidy Control Bill
December 2021

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?

Scottish Enterprise (SE) sees a risk that for public bodies and companies, doing business in the new UK subsidy regime (as compared with the previous EU state aid regime) may be more complex and complicated, and so more costly – at least in the new regime's early years.

This is informed by a consideration of some central tenets of the new regime:

- Introduction of new legal terminology, concepts and definitions which are similar to or potentially the same as familiar EU legal terminology, concepts and definitions – with consequential legal uncertainty as to nuance and interpretation. For example 'subsidy' for 'state aid', 'small amounts of financial assistance' for 'de minimis', and 'services of public economic interest' for 'services of general economic interest'.

- Requirement to consider a range of international commitments in determining legal compliance. For example a given case may require consideration of the World Trade Organisation rules, UK Free Trade Agreements (including the UK-EU Trade and Cooperation Agreement), and the Northern Ireland Protocol.

- Focus on and use of key principles, which seem intended to offer flexibility but may require deep and broad legal and economic analysis to determine and demonstrate compliance in each case, with potential for differing interpretations and uncertainty as the new regime establishes. For example the requirement in some cases to consider not only the effect on trade between the UK and the EU but also the effect on international trade and investment, having regard to things like: the size and intervention rate of the subsidy (where higher = riskier); the subsidy recipient's international competitors including their size and importance to their country's economy; and whether the subsidy may impact the sales volume, prices or profits of international producers of similar goods in the UK or foreign markets.

- Introduction of new legal measures to protect the UK internal market.

SE would champion the importance for all stakeholders of the new regime being simple to do business with, and featuring complexity and complication only to the extent proportionately required. (This may not have been the case for all elements of the previous EU state aid regime.) To help achieve this we believe it is important that the new regime includes a clear, comprehensive and user-friendly framework for lower risk subsidies – see 'streamlined subsidy schemes' below.

Scottish Enterprise offered a summary along the above lines in its 31 March 2021 response to the then consultation by the UK Department for Business, Energy and Industrial Strategy Enterprise Innovation and Skills titled ‘Subsidy control: Designing a new approach for the UK’.

Since then, although the Bill has been published, some relevant detail has not:

- Definition via secondary legislation of ‘streamlined subsidy schemes’ setting out what types and amounts of subsidy will be declared compliant with no need for bespoke assessment against the new set of key principles. This mechanism has potential parallels with the EU state aid ‘safe harbour’ mechanism and, compared with the alternative of carrying out individual subsidy assessments against the new key principles, may be a more efficient method of ensuring the legal compliance of most SE (and other Scottish public sector) subsidy. However, this will depend on the detail to be published.

- Definition via secondary legislation of particular categories of subsidy for scrutiny by the Competition and Markets Authority (CMA) as independent authority. This include subsidies of ‘particular interest’ which are deemed potentially more distortive and must be referred to the CMA; ‘subsidies of interest’ which subsidy granting authorities can voluntarily refer to the CMA for a report; and ‘harmful or trade-distorting’ subsidies where if the relevant UK Secretary of State has concerns they will have the power to refer subsidies to the CMA.

- We understand that the proposed new requirement that subsidy granting authorities consider the effect of any subsidy on competition or investment within the UK and minimise negative distortive effects within the UK awaits further detail. This includes for example whether and how there may be a connection with the ‘levelling-up’ agenda, where news reports earlier this month indicated that the UK Government’s white paper is likely to be delayed until next year.

The detail still to be published will inform SE’s view of the Bill and its likely impact. Meanwhile, SE would remain cautious about the prospects of public bodies and companies being able to do business in the new regime as effectively and efficiently as before, and the consequential potential impact on economic development and business investment in Scotland – at least in the regime’s early years.

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?

No.

Do you have any other comments?

No.