

LABOUR BRIEFING NOTES
THE SUBSIDY CONTROL BILL
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BACKGROUND

1. The 66 page long Subsidy Control Bill¹ deals with some of the consequences of Brexit – it isn't done and was never over-ready.
2. In December 2020, following the Brexit agreement, the UK ceased to be part of the EU state-aid and subsidies regime. Thereafter it became subject to the subsidy control commitments given in the 1,246 page long EU/UK Trade and Cooperation Agreement² (TCA). The framework for the UK's State aid rules is set out within the TCA, which is an international treaty commitment by the UK Government.
3. Contrary to the claims of some, the Bill does not sweep away EU State aid rules. Rather it incorporated some elements in the TCA, which is now being implemented by the Bill.
4. It should be noted that the subsidy Control requirements in the TCA were put directly into domestic law through the Future Relationship Act 2020³.

Therefore the obligations of the TCA apply to over 500 public bodies awarding subsidies in the United Kingdom.

The current Bill adds more flesh and details.

5. The Subsidy Control Bill does two things:
 - i. It provides the framework for implementing the UK's international commitments on subsidy control i.e. it covers the EU/UK agreement as well the impact of international free trade agreements with third countries already announced or may be announced plus and the WTO subsidy rules.
 - ii. In addition, it deals with subsidies that have, or are capable of having, an effect on competition or investment within the UK.

Therefore, unravelling and understanding this Bill is a massive task and requires consideration of a number of documents.

¹ <https://publications.parliament.uk/pa/bills/cbill/58-02/0135/210135.pdf>

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf

³ <https://www.legislation.gov.uk/ukpga/2020/29/enacted/data.htm>

SUBSIDY

6. Clause 2 of the Bill defines “**subsidy**”, which is essentially the grant of financial assistance by public authorities, or using public resources, where that assistance confers a benefit on an enterprise. It can include grants, loans, guarantees, certain tax breaks and, potentially, disposals of publicly owned assets at below market value. Financial assistance will only count as ‘subsidy’ if it favours one enterprise over another.

Therefore, financial assistance won’t count as subsidy where all market players benefit from the same favourable terms.

I assume that the EU defines it the same way.

7. However, the focus on “the financial” means that many other forms of assistance are ignored e.g. government contracts for cronies, favourable laws demanded by corporations, liability concessions given to auditing firms and lax enforcement of laws e.g. on tax avoidance.
8. The Bill requires public authorities to apply the Subsidy Control Principles to all subsidies (unless exempt) before granting them. Subsidies which do not comply with the principles must not be granted.
9. Before granting certain subsidies, an assessment from the Competition and Markets Authority (CMA) must be obtained (see below). But that assessment is not binding (so why get it?).
10. It should be noted that this procedure is far more permissive from the EU rules where all subsidies (unless exempt) required prior approval by the European Commission and without which the subsidy was illegal.
11. The CMA’s negative assessment does not seem to make a subsidy illegal. Presumably, a public authority would make the final decision.

VARIETIES OF SUBSIDIES

The Bill refers to many varieties of subsidies. The main action seems to be on **two** specific categories, which are not specifically defined.

- i. Subsidies of Interest: These are subsidies that are more likely to affect competition, trade or investment, including by reference to the value of the subsidies and the sector in which the intended beneficiaries will operate. Subsidies of Interest are to be defined via secondary legislation at a later date.

- ii. Subsidies of Particular Interest These may subsidies that are likely to be at the highest risk of affecting competition, trade or investment.

12. The scope of categories i) and ii) is not defined in the Bill. The Secretary of State will be empowered to define them – may well be by statutory instrument.

SUBSIDY CONTROL

13. The granting authorities may undertake more extensive analysis to assess their compliance with the Subsidy Control Principles (see below).

14. The Bill provides for referral to an independent body (either mandatory or voluntary) for Subsidies of Interest and Subsidies of Particular Interest.

15. The independent body will be a new Subsidy Advice Unit to be set up within the CMA.

16. The CMA will produced reports as requested but they will not be binding on the public authority.

17. The final decision to grant a subsidy rests with the public authority.

Presumably, the public authority will need to factor in the risk of challenge if the CMA report is negative.

The CMA report will be published but there is no commitment to publish the background data, correspondence with ministers, civil servants, advisers and others.

18. It should be noted that the referral by the Public Authority to the CMA is mandatory for Subsidies of Particular Interest. It is voluntary for Subsidies of Interest.

19. The Secretary of State may direct a public authority to refer the matter to the CMA where the subsidy is of 'Interest' or where there is a concern about a risk of negative effects on competition or investment within the UK.

20. The CMA is required to report within 30 working days (extendable by agreement or by the Secretary of State if requested by the CMA). In the case of mandatory referrals, the subsidy cannot be granted until five working days after the CMA report.

21. The proposed UK regime is lax compared to the EU rules.

For example, under the EU rules, all subsidies, unless exempt, require prior approval by the European Commission.

The UK Bill envisages that the CMA will only assess a subset of non-exempt subsidies, and in any case the CMA's assessment will not be binding.

22. There is also no investigative role for CMA. Under the EU regime, the European Commission can also investigate alleged illegal subsidies in response to complaints or on its own initiative. In contrast, the CMA has no such powers under the Bill.

STREAMLINED SUBSIDY SCHEMES

23. The Bill also introduces a new concept of Streamlined Subsidy Schemes (Clause 10), but provides little/no detail.

In general, this enables the Government to set out classes of subsidy that it considers to be compliant with various treaties and agreements.

Streamlined Subsidy Scheme will be permitted without a full assessment against the Subsidy Control Principles.

Is this similar to the EU's state "block exemption" regime, which covers certain types of aid for SMEs, research and development, training and infrastructure as well as regional aid? Around 95% of the EU state aid measures are granted on the basis of this exemption regime.

PUBLIC AUTHORITY

24. What is a "**Public Authority**". The Bill does not define that. Clause 6 has a negative definition

(1) For the purposes of this Act, "public authority" means a person who exercises functions of a public nature, but does not include—

(a) either House of Parliament,

(b) the Scottish Parliament,

(c) Senedd Cymru, or

(d) the Northern Ireland Assembly.

(2) Subsection (1)(a) is not to be taken as applying to—

(a) the Corporate Officer of the House of Commons,

(b) the Corporate Officer of the House of Lords,

(c) the House of Commons Commission, or

(d) any other person who acts on behalf of either or both of the Houses of Parliament.

(3) Subsection (1)(b) is not to be taken as applying to—

- (a) the Scottish Parliamentary Corporate Body, or
- (b) any other person who acts on behalf of the Scottish Parliament.
- (4) Subsection (1)(c) is not to be taken as applying to—
 - (a) the Senedd Commission, or
 - (b) any other person who acts on behalf of Senedd Cymru.
- (5) Subsection (1)(d) is not to be taken as applying to—
 - (a) the Northern Ireland Assembly Commission, or
 - (b) any other person who acts on behalf of the Northern Ireland Assembly.

25. So a public authority could be a government department, local authority, state-owned banks, central banks regulatory bodies, and other agencies, something else?

It is more likely to be the 500 bodies specified in the Future Relationship Act 2020⁴. Some clarity would help.

26. As the definition of public authority does not include the UK Parliament or the three devolved legislature, this means that any of these bodies could introduce a law providing for a subsidy without having to comply with the requirements set out in the Bill.

SUBSIDY CONTROL PRINCIPLES

27. The subsidy control principles (see Schedule 1 of the Bill) seem to be similar to the ones applied by the EU before Brexit.

It should be noted that the TCA requirements at Chapter 3 include a definition of what constitutes a subsidy and different ways in which a subsidy may be lawfully awarded. In most cases this involves applying six 'Common Principles'.

28. The Bill specifies seven principles, which apply to all subsidies.

- i. Principle A (common interest): 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.
- ii. Principle B (proportionality): Subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.
- iii. Principle C (designed to change economic behaviour): Subsidies should be designed to bring about a change of economic behaviour of the beneficiary. They must be conducive to achieving the specific policy objective and the change should be something that would not happen without the subsidy.
- iv. Principle D (costs that would be funded anyway): Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.

⁴ <https://www.legislation.gov.uk/ukpga/2020/29/enacted/data.htm>

- v. Principle E (least distortive means of achieving policy objective): Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means.
- vi. Principle F (competition and investment within the UK): Subsidies should be designed in a way to minimise any negative effects on competition and investment within the UK.
- vii. Principle G (beneficial effects outweigh negative effects): Subsidies' beneficial effects should outweigh any negative effects, in particular those on competition or investment both within the UK and internationally.

29. In addition, the Bill specifies **another nine principles (Schedule 2) which specifically apply to energy and environmental subsidies** (these do not appear to be part of the EU/UK Trade and Cooperation Agreement).

These nine principles do not apply to nuclear energy.

30. It appears that the Government will provide some guidance (at a later date? when?) to public authorities about how the principles may be applied.

If so, that would suggest that Ministers are able to make rules/laws without parliamentary scrutiny.

Would that power be abused?

How would courts adjudicate on disputes e.g. where UK companies feel that Ministers have advantaged some companies?

PROHIBITED SUBSIDIES

31. Certain subsidies are prohibited by the Bill. These include

- Unlimited guarantees to businesses;
- Subsidies that are contingent on export performance or the use of domestic goods and services;
- Subsidies given on the condition that the enterprise relocates all or part of its economic activities from one part of the UK to another (although there is a potential gap in relation to subsidies that have the consequence, rather than the requirement, of relocation); and
- Subsidies granted to “ailing or insolvent” enterprises where there is no credible restructuring plan.

Might the above hinder efforts to rebuild economy in economically disadvantaged parts of the UK?

EXEMPT SUBSIDIES

32. A limited set of subsidies will be exempt (Clause 36) from the new regulatory regime. These include

- Minimal financial assistance, where the total amount of minimal and SPEI (Services of public economic interest assistance) financial assistance received over a three financial year period is less than £315,000.

(Note: Services of Public Economic Interest (SPEI) are public services that would not be supplied (or would not be supplied under the required conditions) without public intervention, and which are of particular importance to society. Examples of an SPEI could include social housing or rural public transport services).

- SPEI assistance, where total amount of minimal and SPEI financial assistance received over a three financial year period is less than £725,000.
- Further exemptions are provided for, including subsidies for natural disasters, national or global economic emergencies and national security.

REGULATORY APPEALS

The changes in the enforcement regime should be noted.

33. Under the EU rules, a party/business concerned about unfair subsidies had two options

1. Complain to the European Commission; or
2. Initiate court proceedings in the Member State where the aid was granted.

In most cases option 1 has been exercised.

34. Under the UK Bill, the CMA will have no power to investigate complaints.

The only option (?) available to aggrieved parties will be to initiate costly court proceedings.

35. In England, the power to review the making of a subsidy decision will sit with the Competition Appeal Tribunal (CAT). Interested parties can challenge the decision but need to act quickly - within one month from the relevant date which may be, for example, the date on which a relevant entry is made on the subsidy control database.

The CAT must apply the judicial review standard in its review in proceedings in England, Wales and Northern Ireland, and the same principles as the Court of

Session would apply for proceedings in Scotland. The forms of relief that may be granted are in line with those available for a judicial review application. In addition, the CAT may order recovery of some or all of the subsidy where it has made an order (e.g. a quashing order) and in making its order found that the subsidy did not comply with the subsidy control requirements.

36. In the devolved nations, the relevant High Court or Court of Session will have jurisdiction.
37. Of course, those who are well-connected and resourced may lobby the Secretary of State to refer the subsidy to the CMA. But the CMA assessment can be ignored (see above).

What happens when the government has a political interest in granting subsidy?

Those negatively affected seem to have little room to manoeuvre.

CONCLUDING THOUGHTS

38. Overall, the Bill has a more permissive subsidy regime than the EU.
39. It is complex and lots of detail is missing.
40. It can't easily be reconciled with the claim of creating a "simple, nimble" regime.
41. Gaps in the legislation could deny Parliament a proper chance to scrutinise how the new system will work and may well lead to rows between the UK government and the devolved administrations, further fuelling calls for break-up of the UK.
42. It enables Ministers to make laws without parliamentary scrutiny.
43. The Bill provides for the making of statutory instruments, including regulations defining the meaning of 'Subsidies of Particular Interest' and 'Subsidies of Interest' and issuing guidance in relation to the applicable principles and requirements. This will be the key to understanding when public authorities will be expected to undertake a more extensive and involved subsidy control analysis, which in a particular case may extend to seeking the views of the CMA, and how compliance with the applicable principles and requirements will be assessed.
44. The regulations filling the gaps will be subject to much less scrutiny. Under this approach, the new regulations will be written without any input from the devolved administrations.

While subsidy control legislation has been reserved to Westminster (in the UK Internal Market Act), a successful system needs to have regard to the interests of all home nations. A collaborative approach is necessary.

45. The Bill does not give the CMA a role in enforcement, which risks potentially damaging subsidies going unchallenged in court if there is no willing 'interested party'.
46. The CMA is the supposed expert body on competition, but its assessment may be ignored by public authorities which may also pick and choose from CMA reports. Both bodies would claim to be serving the public interest, but would offer alternative interpretations. This would be a recipe for confusion and inconstant
47. Referral to the CMA is not always mandatory. So who will be concerned about abuses?
48. It encourages expensive litigation and lacks an effective dispute resolution framework.
49. The prohibition against giving a subsidy on condition that an enterprise relocates all or part of its existing activities from one part of the UK to another would sit uneasily with the government's levelling-up agenda. How will it reduce regional inequalities?