Written Evidence submitted by Jonathan Branton and Alexander Rose, DWF

We are submitting this evidence in advance of our appearance at the Select Committee on Tuesday 26 October 2021. The views expressed reflect the private thoughts of the authors only.

Executive Summary

1. The general structure of the new framework in the Subsidy Control Bill[1] (the "Bill") appears fit for purpose, but we strongly recommend that changes are made so that the new regime (a) better supports Levelling Up; (b) achieves a higher standard of transparency and accountability; and (c) does not inadvertently lose some of the benefits obtained through the greater flexibility afforded through the UK's commitments in the EU/UK Trade & Cooperation Agreement ("TCA"), as against the previous EU State aid regime.

2. The decision not to seek to replicate in any way the EU-driven notion of "assisted areas" means that there is currently no preferential system to incentivise investment into disadvantaged regions. Since that appears to be at the forefront of the general Levelling Up agenda, this would seem to be a missed opportunity. Under the new regime, if a manufacturer was considering whether to locate to Middlesbrough or Mayfair, there is no mechanism to make it necessarily easier to fund the former location. Indeed, under the Subsidy Control Principles at Schedule 1, it could be actually slightly easier to make the argument for the latter[2]. We recommend that a Streamlined Subsidy Scheme is set up under Article 10 to address this and the prohibition on relocation at Article 18 is removed to better support Levelling Up. This need not mean that subsidies cannot be awarded in non-disadvantaged areas, just that if it were easier to award in disadvantaged areas, this would be helpful, with comparable awards in those more affluent areas justifiably requiring more scrutiny and therefore a somewhat higher bar.

3. The Transparency provisions at Chapter 3 of the Bill reflect a system that has been in force (via the TCA) from 11pm 31 December 2020 under which a business that believes it has been harmed by an unlawful subsidy has as little as one month to bring a Judicial Review from the moment information about the subsidy is entered on the national database[3]. It is therefore crucial to the integrity of the system that the date the information is entered onto the website can be seen by businesses and other organisations that might be affected by an unlawful subsidy.

4. Unfortunately the transparency database is currently not fit for purpose. This is because the most important piece of information (the date the entry is made) cannot be searched on the website. In many instances such information is not available on the transparency website. This issue is not currently addressed in the Bill.

5. We also note that 50% of the subsidies entered into the transparency database are recorded as having a nil value[4]. We recommend that the Bill addresses this, by amending Article 34 so the national transparency website clearly shows when awards are inputted, that to assist potential complainants the correct information must be posted within 60 days of an award and there is a sanction when this is not achieved[5]. Accountability is at the heart of a properly functioning Subsidy Control regime, which we recommend is strengthened in two ways. The time limit for a business to challenge an unlawful subsidy at Article 71 might be extended to as soon as possible but not later than three months, so it is consistent with other areas of Judicial Review. We believe there is also a case to give the Competition and Markets Authority ("CMA") the power to initiate its own investigations where it can demonstrate

[1] Our evidence is based on the Bill as published at 14 October 2021.
[2] As the cost base would be higher there would be a greater viability gap in need of being bridged.
[3] https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government.
[4] At 14 October 2021, 257 of the 500 listings showed a £0 budget (i.e. 51.4%)/
[5] We recommend that awards made outside the time limits made by challenged for six months from the point information is correctly posted online.

sufficient material public interest, with such reports being limited to non-binding recommendations rather than to replicate the national court's powers to order recovery when the relevant circumstances are met. Safeguards would need to be in place so that this power is only ever used sparingly.

6. The Bill promotes schemes (frameworks under which multiple subsidy awards can be made) by allowing these only to be challenged at the point information about the scheme is published on the national transparency database, rather than when awards are made from the schemes later. This creates potential for lack of accountability because businesses are only likely to discover that they have been harmed by a subsidy at the point an unlawful award is made to a competitor, not at the time a scheme is devised (which might one day lead to an award to a competitor). We believe Article 70(2) ought to be amended so the award of an unlawful subsidy made under a scheme may be challenged like any other subsidy, rather than potentially being time barred without an adequate opportunity for the market to have considered.

Contributing to Levelling Up the United Kingdom

7. The Rt Hon Kwasi Kwarteng MP has stated that "*the regime proposed in the Subsidy Control Bill has been designed to reflect our strategic interests, strengthen our Union and level up the country by driving economic growth and prosperity across the whole of the UK*"[6].

8. The Prime Minister, the Rt Hon Boris Johnson MP has described Levelling Up as "*the greatest project that any government can embark upon*"[7]. Whilst it is easy to support the sentiment, there is nothing within the Bill which currently contributes to Levelling Up, and some elements which might even be seen to be capable of thwarting it.

9. There are two main reasons for this. The first is that at Article 18 of the Bill contains a prohibition on subsidies which are awarded to relocate economic activity. The Article is drafted so that it appears there would need to be an express condition requiring relocation for the prohibition to apply (so may be susceptible to circumvention) but we question why such an Article exists given the Government's commitment to Levelling Up. There are many very productive relocation projects that could contribute well to Levelling Up and need not be unduly distortive of competition in so doing, and individual case by case analysis (as the current law would imply) would deal with that. It is not clear why the Bill would want to prevent this.

10. Under EU State aid law there was an exemption called Regional Aid under which a percentage of investment (30% for a small business) would be considered lawful provided it was within an area categorised as having economic difficulty. The new regime does not contain such provisions, which sounds more open and flexible but actually means that there is no express advantage or preference for a deprived area over a non-deprived area. Moreover, since the way the Common Principles are drafted can be viewed through a relatively local prism, ie. what does it take to bring this project to this area, then absent national direction there is no means (via Subsidy Control) to steer intervention to those areas that need it most.

11. Whilst this issue could possibly be addressed by a more stringent approach to the first Subsidy Principle at Schedule 1 (for example prescribing only a few policy objectives in national guidance) we feel that such an approach may unnecessarily hinder flexibility within the new regime. A better approach would be to set up a Streamlined Subsidy Scheme under Article 10 to address this issue.

[6] Letter to Pete Wishart MP dated 30 June 2021.
[7] https://www.spectator.co.uk/article/full-text-boris-johnson-s-conservative-conference-speech.

12. A Streamlined Subsidy Scheme is a framework made possible by the Bill (which we thoroughly support) and is established by a Minister of the Crown under which awards have legal cover when the terms are met. Our recommendation is that the Committee seeks assurance that such a Streamlined Subsidy Scheme is created to direct funding, within certain limitations, into deprived areas. We recommend that this is established in a different manner to EU State aid assisted areas, instead being available where any one of several markers of deprivation are present[8], rather than necessarily by reference to a predefined map of regional disadvantage such as the EU uses. We believe that having the legal certainty which comes from the Streamlined Subsidy Scheme route should be attractive for many organisations considering offers from different areas and therefore contribute to Levelling Up. This would not prevent subsidy in non-deprived areas but it would mean this would be more complicated in contrast, and therefore to a degree, less attractive.

Greater Transparency

13. Although the Subsidy Control Bill has been presented as replacing EU State aid rules[9], such rules were already largely dis-applied under Section 3 of the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 which came into effect from 11pm 31 December 2020[10] (in effect implementing Chapter 3 of the TCA). The interim Subsidy Control regime requires an assessment against the UK's international trade commitments relating to subsidies. In most cases, the assessment will focus upon the TCA only which at Article 369 contains a provision whereby once information is placed on a transparency database then a challenge may be brought within a period, which may be as short as one month. This is considerably different to EU State aid law, where awards can be investigated and challenged for up to 10 years after the last instalment of the award.

14. A national transparency website has been created at: https://searchforuksubsidies.beis.gov.uk/ ("Transparency Database"). However, thus far this website does not appear to be as functioning as well as might be hoped.

15. Even though the date on which the subsidy information is posted on the transparency database is central to an award being able to be challenged, the Transparency Database does not list this.

16. This hinders the ability of a business which has been unfairly affected by an unlawful subsidy to mount a challenge. Indeed, we note that the TCA states that the information needs to be made available to enable an interested party "*to make an informed decision as to whether to make a claim or to understand and properly identify the issues in dispute in the proposed claim*"[11].

17. We also note that, whilst there are over 500 public bodies capable of awarding subsidies in the United Kingdom, only 501 subsidies have been recorded between 31 December 2020 and 22 October 2021.

18. Furthermore, over 50% of the subsidies listed on the national transparency website are recorded as having a nil value[12]. This may dissuade an interested party from bringing a challenge, because if the subsidy is genuinely nil then there will be no impact on their business. However if it is not, then the entry on the Transparency Database is

[8] Therefore avoiding situations under the EU State aid rules where an investment is precluded because it is in a small area that is deprived, within a larger area that is not.
[9] https://www.bbc.co.uk/news/business-57656812 - New UK laws to sweep away EU state aid rules.
[10] Section 3 of the State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 disapplies EU State aid law for awards made on or after 11pm 31 December 2020.
[11] Article 369(5) of the TCA.
[12] We observe that some of these will be schemes, but this seems even more serious because it is proposed under Article 70(2) of the Bill the challenge period for schemes would be limited to the period after the information about the scheme is published. If the budget is shown as zero, how could a potential challenger conclude that this will be a threat to their business?

misleading. Such potential incompleteness also invites speculation as to the legal validity of the notice for the purposes of starting the time limit for challenge.

19. Therefore at present the Transparency Database is not working as it might. We believe that the Bill should address this.

20. In this respect we recommend that Chapter 3 of the Bill contains prescriptive requirements for the national transparency database to ensure it operates much better than it has done during the interim period. This should include at Article 34 an express statement that the Transparency Database clearly lists the date that any information is posted or modified[13], as well as the identity of the funder. We would also recommend that steps are taken to ensure that it is as easy as possible for interested parties to find information. This should include a better search function.

Greater accountability

21. Accountability is at the core of an effective Subsidy Control regime. Public money should be properly managed and therefore the new regime should contain appropriate provisions to enable unlawful subsidies to be successfully challenged. Of course, a challenge does not necessarily mean an award will be set aside, indeed in the majority of situations we would anticipate that the public body will be able to quickly demonstrate that it has fulfilled all its legal obligations under the Bill.

22. Noting this, we believe that the opportunities to bring a challenge under the Bill are currently overly restrictive. In particular we would recommend that the challenge period at Article 71 is brought into line with other Judicial Review decisions. So that rather than one month from the transparency requirements being fulfilled, the period is set at a maximum of three months[14]. This reflects that unlawful subsidies can have a significant negative impact on other businesses and therefore should not be subject to a shorter challenge period than any other public body decision. Three months would still represent a significantly shorter challenge window than the 10 years the European Commission has under EU State aid law.

23. We also believe that the CMA should have the right to instigate investigations where there is sufficient material public interest, noting that this power would only be exercisable in very limited situations and any report the CMA creates would be non-binding in any event. At the moment, only the Secretary of State for Business, Energy and Industrial Strategy decides whether the CMA investigate a subsidy (either by a referral under Article 55 or by deciding what is a subsidy of "particular interest" under Article 11(2)). We recommend an alternative route to investigation being available to ensure fullest coverage. This might be achieved by modifying Article 55 to include an additional section under which the CMA might undertake its own investigation if it could demonstrate a public interest in such activity. The reports produced at the culmination of such an investigation would not be binding, but would assist in establishing best practice for the over 500 public bodies which will apply the rules set out in the Bill.

24. Article 70(2) of the Bill contains a provision which states that schemes (frameworks under which multiple subsidy awards can be made) may only be challenged in the period after they are established – as opposed to when the subsidies are actually awarded. We believe that this may undermine the accountability of the new regime by preventing businesses affected by unlawful subsidies awarded under the cover of a scheme from having a legal remedy. Furthermore, this runs a risk of inconsistency with Article 373 of the TCA, which acknowledges that the

[13] Noting that the current wording is not sufficient, because such information may be hidden away. At the moment, there is a way to find when the information was posted, but it is not listed or available through the search function.
[14] It may also be sensible to encourage the CAT to consider the substance of how the awarding body has complied with the Subsidy Principles, given this is central to ensure that subsidies are actually controlled.

challenge period will only be limited to the point when a scheme is established if sufficient information has been made available to interested parties to be able to make an informed assessment as to whether their interests are affected. In practice, we believe this means that only where the scheme clearly identifies the beneficiaries and the amount which will be awarded to each that such cover could be available (because it is only at that point that a business can genuinely appraise whether its "*interests may be affected by the giving of the subsidy or the making of the subsidy scheme*"[15]).

25. We also believe preventing challenges to awards made under a scheme runs contrary to the logic of the system, which seems to be to allow those affected to test the lawfulness of awards at the point they are affected. To fix this we recommend that Article 70(2) is modified so that awards made under schemes may be challenged if the individual awards are non-compliant. There would still be value in establishing a scheme because it is subject to lighter touch transparency requirements and is also an easier route to administer multiple similar awards.

<u>Responses to the Committee's Specific Questions[16]</u>

The Government's objectives for the future subsidy control regime are:

(i) facilitating interventions to deliver on the UK's strategic interests;

(ii) maintaining a competitive and dynamic market economy;

(iii) protecting the UK internal market; and

(iv) acting as a responsible trade partner.

A. Is the framework for subsidy control set out in the Subsidy Control Bill fit for this purpose?

26. The overall structure of the new framework appears fit for purpose, but the Bill could benefit from changes being made in order to better deliver upon the objectives.

27. In doing so, we note that the Government's objectives set out in the consultation document[17] have been supplemented in the Subsidy Control Bill Explanatory Notes[18] by a greater focus upon delivering "*benefits for the taxpayer*". We understand this to mean that there is an intention on the part of the Government in bringing the Bill to implement rules that aim to avoid wasteful subsidies and promote better financial management, in addition to the objectives listed above.

28. As set out above, although the Subsidy Control Bill has been promoted as replacing EU State aid rules[19], there has been an interim Subsidy Control regime in place since 11pm 31 December 2020. Some of the advantages of the new regime therefore already came into effect when the UK left the EU State aid regime, for example the ability to intervene in a wider variety of situations, such as greater flexibility to support the steel sector.

29. Taking the objectives in order, assessing how successful the Bill is at facilitating interventions involves taking account of the flexibility to be able to intervene whilst factoring in the administrative burden involved. In this regard, we believe that it is helpful to assess the new regime against how it applies to three categories of subsidy,

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[15] Definition of Interested Party at Article 70(7) of the Bill.

[16] These questions are from https://committees.parliament.uk/committee/365/business-energy-and-industrial-strategy-committee/news/157720/state-aid-and-competition-policy-business-committee-launch-inquiry/.

[17] Subsidy control: Designing a new approach for the UK.

[18] Paragraph 6

[19] <u>https://www.bbc.co.uk/news/business-57656812</u> - New UK laws to sweep away EU state aid rules.

these being broadly (i) regular, ie. non-contentious; (ii) novel, ie. innovative and different; and (iii) contentious subsidies.

30. In our view, regular subsidies are rendered slightly more difficult to administer under the new (TCA) regime than under EU State aid law[20]. This is because all but the smallest awards[21] are obliged to apply the Subsidy Control Principles at Schedule 1 of the Bill. This creates greater administrative burden[22] because a bespoke substantive assessment needs to be undertaken for each award[23].

31. However this problem could be quickly and decisively addressed by way of simple and well targeted *Streamlined Subsidy Schemes*, which can be set up under Article 10 of the Bill. Given that the majority of regular awards may well be provided by way of Streamlined Subsidy Schemes in future, it is important that these are not designed in isolation. Our recommendation is that a taskforce of leading practitioners from across the public and private sector are chosen to support the drafting of the Streamlined Subsidy Scheme alongside a broad spectrum of stakeholders from relevant awarding authorities from across the United Kingdom. Failing this, there should at least be a wide consultation.

32. For novel subsidies, the regime envisaged within the Bill (as already now existing via the TCA) is much more flexible as against the regime set out under the EU State aid rules. This is because under EU State aid rules such awards would have had to be approved through the notification process, which involved significant administration and often took between 6 and 24 months. Under the Bill, such measures may proceed by completing an individual assessment against the Subsidy Control principles listed at Schedule 1[24]. This is a significant benefit and encourages public bodies to be more innovative in designing interventions, and moreover it avoids the burden previously encountered of having to go through long and burdensome notifications to the European Commission, which often had a dissuasive effect.

33. For contentious subsidies, the regime envisaged in the Bill (as already in place via the TCA) is again more permissive that under EU State aid law. The prohibited subsidies mirror those in the TCA (and therefore this is lighter touch than EU State aid rules that prescribe prohibitions in respect of a wider range of activities). The Secretary of State has not yet published the types of subsidies that will require referral to the CMA, but we expect this to be informed by the activities most likely to lead to a dispute with the UK's trading partners. Clearly a balance will need to be struck between enabling potentially contentious measures to proceed more easily and being able to prevent awards of subsidy that may damage the UK economy by breaching trade agreements.

34. In terms of contribution to the UK's strategic interests, we note that these are not defined, but are understood to include Levelling Up, achieving net zero and increasing UK R&D investment. As set out in respect of Levelling Up, the new regime does not expressly direct or incentivise funding towards these activities (albeit they are not ruled out). Again, Streamlined Subsidy Schemes could assist to address this issue for regular subsidies[25]. As above, we

[20] Under EU State aid law regular subsidies were almost all awarded on the basis of the General Block Exemption Regulation.
[21] Those falling within the Minimal Financial Assistance provision.
[22] As the process of conducting a substantive assessment against the UK Subsidy Principles is time consuming.
[23] For example, Subsidy Principle E requires a consideration as to whether the intervention could be achieved through less distortive means. To assess distortion it is necessary to look at the award in the context of the market in which the beneficiary operates within at the time the funding is committed. We therefore think it would be very difficult to make a convincing argument that this is made at the point a programme is established.
[24] This involves some administration, but much less than was required to submit a notification.
[25] The updated Subsidy Control guidance published on 24 June 2021, confirms that the assisted areas map which was used to apply regional aid under EU State aid rules is no longer applicable under the Subsidy Control rules. This removes a clear incentive to invest in deprived areas and therefore we recommend that a similar regime is included as a Streamlined Subsidy Scheme.

observe that the prohibition on relocation subsidies at Section 18 of the Bill appears to be potentially unfavourable to the Levelling Up objective.

35. The Bill will only contribute to maintaining a competitive and dynamic market economy if the rules are followed by all public bodies. In this context, the enforcement provisions envisaged in the Bill are much lighter than under EU State aid law, which contained the ability for parties whose interests were prejudiced by unlawful aid to complain to the regulator at no cost and action to be taken for a period of ten years from last award. Under the new regime, the challenge process is Judicial Review and the period of challenge can be as little as one month from the discharge of transparency provisions.

36. We also note that the Bill will apply, not only to over 500 public bodies administering public funding in the UK, but also to organisations acting on their behalf[26]. Part 5 of the Bill envisages that challenges will be brought by way of Judicial Review and Section 2(3) explains that a challenge can be made against a public body acting through an agent. However the Bill would benefit from also expressly covering situations where private sector organisations given discretion to administer programmes of public funding on behalf of the public sector, in particular where the private sector body has discretion as to how the awards are made. Our view is that the guidance should be clear that the public body should continue to be held responsible for individual awards made by the private sector body and these would be challengeable once information was posted in line with the requirements of Chapter 3 of the Bill.

37. The Bill does seek to protect the internal market and this is demonstrated by expanding the definition of subsidy at Article 2 to include situations where the internal market is affected and the additional Subsidy Control Principle at Schedule 1 (although this is drafted in open terms and may be better worded as a prohibition at Chapter 2 against damaging subsidy control races). We note that the Secretary of State has standing to challenge subsidies, but would suggest that the internal market would be better protected if all public authorities were also able to be treated as interested parties and therefore capable of challenging an unlawful subsidy which prejudiced a business in their area. This could be achieved by including public bodies within the definition of interested party, provided a demonstrable interest could be shown (NB. it is important that potential for abuse of process is guarded against).

38. Finally, the Bill does assist in meeting the Government's objective of demonstrating that the UK will act as a responsible trade partner because it fulfils some sections of the TCA (for example, Article 371 of the TCA which contains the commitment to establish an independent authority for the regime). There are some parts of the Bill that do not directly align with the TCA, for example the exclusion relating to nuclear energy. A view should be taken as to whether such disparities might give rise to a dispute in future.

B. What are the gaps in the Subsidy Control Bill and how will these be filled by secondary legislation? For example: How should subsidies of interest and subsidies of particular interest be defined?

39. The Bill contains several sections where it is anticipated that secondary legislation will be brought forward. This includes Article 11 (subsidies of interest and particular interest), Article 42 (minimal financial assistance thresholds) and Article 55 (Mandatory referral to CMA).

40. It would be preferable that the text of the secondary legislation was shared during the passage of the Bill through Parliament, noting that these will have a significant bearing on the operation of the new regime.

41. Subsidies of interest and particular interest should be defined narrowly and essentially be reserved for situations where there is a real prospect that the award could give rise to a dispute under the TCA or other trade agreements.

[26] Noting that the definition of subsidy includes indirect awards.

Failing this, the ability of the new regime to move quickly, especially in contrast to the EU regime, may be compromised. Therefore categories we would expect to be included as being of particular interest include very high value investment subsidies in sensitive sectors only.

C. How will the Bill be enforced when the CMA has no enforcement powers on subsidies?

42. It is anticipated that the Bill will be primarily enforced by way of Judicial Review, ie. via the national courts. Given that such challenges will be a significant safeguard to the lawful award of subsides by over 500 public bodies as well as other organisations acting on their behalf, we strongly recommend that steps are taken to support such organisations to make informed decisions.

43. As the Rt Hon John Penrose MP has said "*Sunlight is the best disinfectant*"[27] and therefore at the forefront of the new regime should be an easily accessible Transparency Database that allows interested parties, but also taxpayers, the opportunity to assess subsidies.

44. Equally important to ensuring that the Judicial Review system provides a meaningful safeguard is having a clear process. At the moment it is not clear how private organisations making awards with public funds will be able to be challenged. This should be clarified and the process to raise concerns should be as easy as possible (noting again that in most instances the public body will be able to demonstrate it has acted lawfully).

45. The CMA's lack of enforcement powers is (we understand) based on wanting to avoid replicating a UK version of the European Commission and its role in State aid enforcement across the EU. We agree with the notion that the best and most objective means of regulation should be through the national courts.

46. That said, there is a case that the CMA could add value to the functioning of the new regime by having a limited power to bring its own investigations at the end of which it publishes non-binding reports identifying whether the awards in question are lawful and providing recommendations for future actions to prevent harmful practices from recurring. That said, this is not to advocate that the role of the European Commission is recreated and we would recommend that strong safeguards are established to ensure that this power complements the functioning of the system in which the primary enforcement remedy is via the national courts.

47. We acknowledge that such a power would need to be used sparingly and therefore there would need to be a strong public interest test incorporated into the Bill. However such investigations and resulting recommendations could assist over time in ensuring compliance with the Bill at all levels and across the United Kingdom. They could also assist in giving added confidence in the system and its objectivity and impartiality, which would be useful both for domestic and international trade negotiation purposes.

Jonathan Branton and Alexander Rose, 25 October 2021

About the authors

DWF is recognised as being one of the United Kingdom's strongest law firms for subsidy control advice[28]*. Jonathan Branton leads DWF's dedicated Subsidy Control team and has over 25 years of experience advising on subsidy matters, including in international trade disputes, obtaining State aid approval through the EU notification procedure and advising some of the*

[27] Subsidy Control Bill Second Reading, Hansard Volume 701: debated on Wednesday 22 September 2021.
[28] For example, Legal 500 Directory entry for North West EU / Competition from October 2021 includes a client testimonial that reads: "*DWF are simply the best Subsidy Control and State aid practice outside the City of London. They have unrivalled experience acting for applicants for subsidy and subsidy granting bodies, right across the board, large and small. They have also acted in a number of court cases both for and against subsidy awarding bodies*".

UK's largest companies and public authorities on the legality of funding under the current Subsidy Control regime. Alexander Rose is a Director in the team and was previously a Senior Solicitor within the Government Legal Department, advising Civil Servants administering public funding upon compliance issues on a daily basis and working on secondment within the European Commission on the drafting of State aid regulations, including the General Block Exemption Regulation. In June 2020, Jonathan Branton and Alexander Rose gave evidence to the House of Lords EU Internal Market Sub-Committee on the subject of designing the UK's post-Brexit State aid regime.