



T: 0300 244 4000
E: scottish.ministers@gov.scot

Caroline Nokes MP
Chair
Subsidy Control Bill Committee
House of Commons
London
SW1A 0AA

Email: scrutiny@parliament.uk

17 November 2021

Dear Ms Nokes,

Subsidy Control Bill: Written Evidence

You will recall that I committed during my oral evidence to the Committee to provide written evidence. This includes expanding on my response to Ms Malhotra.

This is attached. In short, however, I have serious concerns about a number of areas within the Bill. The case-specific powers proposed for the Secretary of State undermine the devolution principle and the lack of a strong, independent regulatory body offering ex-ante approval will increase uncertainty for both awarding bodies and potential recipients.

The inclusion of agriculture in the Bill may lead to increasing complexity and the risk of legal challenge.

If enacted these powers would undermine the long established powers of the Scottish Parliament and Scottish Ministers to act in relation to matters of devolved competence including economic development, the environment and agriculture.

IVAN MCKEE

Written Evidence submitted by Mr Ivan McKee, Scottish Government Minister for Business, Trade, Tourism & Enterprise.

I am submitting this evidence in support of my appearance at the Public Bill Committee on Tuesday 26 October 2021 and to address specific questions of the Committee for which members requested a written response.

Summary

The Scottish Government has consistently made strong representations at Ministerial and official level for the UK Nations to be equally represented and involved in the creation and development of the new regime. Officials have raised concerns at several engagements with UK Government which have not been adequately addressed. This has been reflected in the UK Government response to the Consultation and the regime which is outlined in the Bill.

We, in Scottish Government, recognise the need for a Bill and equally, that the Bill must work for everybody. Many of the specifics have still to be laid out in draft guidance and regulations and my evidence therefore is based on principles and practicalities – as we go forward any early sight and involvement in this process is essential and will facilitate further discussion at Ministerial and Official level.

Reference is made throughout this paper to the Bill's impact on the devolved area of economic development, since this is perhaps the most obviously affected area in the sense that the promotion of economic development is sometimes the rationale for giving a subsidy. However, there is the potential for many other devolved areas to be impacted as well, according to the subject matter / objective of any given subsidy. References to the impact on economic development should therefore be read with that in mind.

Our main concerns in respect of the Bill are:

- Aspects of the Bill alter the executive competence of the Scottish Ministers, impacting on the devolved areas of economic development and the environment, and have the potential to affect many other areas of devolved competence as well. I have laid out in detail the specific areas affected later in the document, in my answer to a question laid by Seema Malhotra (MP).
- The inclusion of sweeping powers for the Secretary of State for Business which undermine the devolution settlement, and the absence of equivalent powers being granted to the Devolved Administrations. I will expand on this area later in the document in my response to a question laid by Seema Malhotra (MP).
- A weak regulatory regime with little legal certainty, lack of enforcement powers for the independent body and no option of a pre notification (advance approval) route. I shall expand on this in more detail later in the document.
- The inclusion of agriculture in the provisions of the Bill. We have serious concerns this may restrict future plans for support to the sector. Agriculture

currently has its own separate subsidy control arrangements under the EU through the Common Agricultural Policy (CAP), and under the WTO through the Agreement on Agriculture (AoA). The EU-UK Trade and Cooperation Agreement (TCA) has provided interim rules on subsidy control in the UK since we left the EU, however, the TCA does not apply to subsidies that are subject to the provisions of Part IV or Annex 2 of the AoA – that is most agricultural subsidies. The UK Government has not given a clear reason as to why agriculture should be included in the new regime when it is so often carved out of standard subsidy control regimes. I shall expand on our specific concerns on this area later in the document.

It is essential that Scottish Government are able to support different parts of Scotland, given that we have responsibility for economic development in Scotland. The EU rules allowed different parts of Scotland to be treated differently depending on the varying circumstances and allowed us to make decisions on how we saw fit to spend money and take action within those rules. We do not see any specific advantages to current proposals in this Bill and to the contrary, the Bill as it stands, creates a 'race to the bottom' in addition to lack of certainty for funding bodies and recipients. It also replaces the security of set State aid rules and guidance with a risk based regime and considerable powers in the hands of Crown Ministers.

The Regulatory Regime and Independent Body

I expressed my concern to the Minister for London and Parliamentary Under Secretary of State (Minister for Small Business, Consumers and Labour Markets) in June, as officials have done at several engagements with UK Government colleagues, at the lack of a strong independent body with enforcement powers and remain unconvinced that an internal UK Subsidy war can be prevented without the presence of such a body.

The advisory nature of the CMA's Subsidy Advice Unit is entirely at odds with UK Government's original proposal and I understand that only 18% of the consultation responses opposed an independent body with enforcement powers.

Designating the CMA as a purely advisory and monitoring body ignores the clear benefits of ex-ante approval. The absence of an optional pre-notification and approval process means grant awarding bodies cannot obtain legal certainty in complex cases. This potentially undermines consistency in the application of subsidy control requirements and risks discrediting the system as it is implemented. Further to this, businesses as potential recipients in such cases will miss out on the reassurance of legal certainty, and will ultimately bear the risk of clawback on any subsidy they have been allocated.

Furthermore, the independent body should have powers that will allow it, at its own initiative, to investigate or highlight areas of concern which have come to light. The implementation of a 5-yearly report structure where the CMA will publish findings on how the regime is working does not go far enough to ensure that any failings are identified quickly and dealt with in a timeous manner. As stated by Bill Esterson during the Committee hearing "Five years seems like a bit of a long time to wait if there are specific examples of inappropriate applications of subsidies...if you identify

something that is wrong on an individual subsidy level, that will only really get anywhere if somebody asks you about it...it seems the process is lacking a proactive part.”

Agriculture

Agriculture subsidies do not fit neatly into standard subsidy control regimes - this is why agriculture has its own separate subsidy control arrangements under the EU through the CAP and under the WTO through the AoA. The TCA has provided interim rules on subsidy control in the UK since we left the EU. However, the TCA does not apply to subsidies that are subject to the provisions of Part IV or Annex 2 of the AoA – that is most agricultural subsidies.

We are not suggesting that agriculture subsidies be completely exempt from any form of subsidy control - they are already subject to specific controls and requirements under the AoA and will remain so to meet our WTO obligations. We do not see the need to add a further regime, not specifically tailored to agricultural needs, on top of that.

Agriculture is fully devolved and so including agriculture within the scope of the Bill and the powers this places on Crown Ministers, specifically the Secretary of State, would impact heavily on areas of devolved competence.

Farmers and crofters in Scotland face some challenges which are not found elsewhere in the UK, and yet the principles set out in Schedule 1 of the Bill risk constraining our ability to develop future policies that are tailored to meet these specific challenges.

For example, income and coupled support payments play an important role in many of the businesses operating in our most remote and constrained areas, and yet they would seem to be incompatible with the proposed principles, especially principle C (changing economic behaviour of the beneficiary) and principle F (competition and investment within the UK).

As there is a significantly higher proportion of agricultural land in Scotland that is subject to such constraints, compared to elsewhere within the UK, it is important that we retain the ability to provide this type of support for our agricultural businesses. The level of such support is too small to have any trade distortion effect, but it is vital for the survival of many businesses.

Far from providing a simple, streamlined regime, the application of the principles to agricultural subsidies could lead to increased complexity and risk of legal challenge.

For example, we are concerned that a subsidy that does not unlawfully distort international trade is challenged, successfully or otherwise, on the basis that it does not minimise negative effects on competition or investment in the UK (as set out in Schedule 1 under principle F). If there are concerns about the impacts of agriculture subsidies on the UK internal market, then there is a mutually agreed common frameworks process specifically to manage divergence.

Clauses 48 and 81 deal with legacy schemes and should allow our existing CAP schemes, including our income support schemes, to continue. However, we are not clear that these clauses provide the assurance we need that we can make any necessary changes to develop and progress our agricultural policies in future.

Indeed, given our concerns about the inclusion of agriculture in the scope of the regime, these clauses may actually create a perverse incentive to continue with a legacy scheme for as long as possible, even if a modified or new scheme would provide better outcomes. The Bill does not contain any exemptions for new agricultural subsidies, regardless of whether or not they are subject to the provisions of Part IV or Annex 2 of the AoA.

We have raised concerns repeatedly with the UK Government – through official level meetings, through our response to the consultation, and through various ministerial correspondence – but we have yet to see any substantive response that addresses our concerns or that the UK Government would accept the exclusion of agriculture from the Bill at this point in time.

When I raised this issue in my oral evidence session, Minister for London and Parliamentary Under Secretary of State (Minister for Small Business, Consumers and Labour Markets) stated that a majority of respondents to the consultation on subsidy control wanted agriculture to be in scope. However, we have not seen details of who responded or the specific reasons given for why agriculture should be included, even on an anonymised basis. It is also unclear whether or how responses have been weighted; this includes the responses of the Devolved Administrations. . Despite previous offers to discuss possible bespoke solutions for agriculture, no meaningful engagement with Department for Business, Enterprise and Industrial Strategy officials on this issue has yet occurred.

All administrations in the UK must be able to develop and implement agriculture policies in the manner that best suits their needs and policy ambitions in this devolved area. Given the lack of detail available, we would ask to remove those subsidies that are already subject to the provisions of Part IV or Annex 2 of the AoA (which is most agricultural subsidies) from the scope of the Bill, in a similar fashion to the current arrangement under the TCA.

Responses to Committee's Specific Questions

Seema Malhotra asked: The first is on being prepared to be involved in discussions, the question being what outcomes would be achieved. Do you feel clear at the moment on what specific changes, whether in relation to call-in powers, an obligation to consult or consent, you would want to see inserted in the Bill to meet some of those concerns? It would be very helpful to understand specifically what they were.

Response: I would say that from the outset we have made strong representation that all four nations should have equal input into the formulation of any subsidy regime, regulations and processes involved. As Minister for London and Parliamentary Under Secretary of State (Minister for Small Business, Consumers

and Labour Markets) has stated, there have been a number of meetings held between Department for Business, Enterprise and Industrial Strategy and devolved administrations at official level and also at Ministerial level. However, this engagement has often taken the form of a request for input on key areas at extremely short notice and without sufficient time to review and consider documentation such as draft legislation and guidance, making it extremely difficult for devolved administrations to give a full and meaningful response. In addition to this, concerns which have been raised repeatedly, as mentioned earlier, have failed to be adequately addressed by the UK Government.

The UK Government needs to ensure that the Devolution Settlement is fully taken into account and devolved powers are not undermined. Explicit commitment must be made to respect the devolved powers, responsibilities and the individual economies of each administration, ensuring each administration has the power to address the individual needs of their own nation given they have the local knowledge and are best placed to deliver.

The following provisions of the Bill impinge on the Devolution Settlement and devolved powers:

Overview and definitions of key terms:

Part 1 of the Bill (at clause 1(7)) requires the exercise of any power conferred by legislation (whenever passed or made) to be read as subject to the subsidy control requirements (except so far as a contrary intention appears in the case of an Act of Parliament). This alters the executive competence of the Scottish Ministers.

Subsidy Control Requirements

Chapter 1 – Principles

These provisions set out the principles which will apply to subsidies and subsidy schemes.

Clause 12 relates to the application of the subsidy control principles and places a duty on public authorities to consider the principles before deciding to give a subsidy. It also provides that a public authority must not give the subsidy unless it is of the view that the subsidy is consistent with those principles. Clause 13 makes similar provision about additional principles that apply to subsidies in relation to energy and environment. These provisions impact the devolved areas of economic development and the environment, and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Chapter 2 - Prohibitions and schemes subject to mandatory referral:

These provisions set out the types of subsidies which are prohibited or restricted, the implications of this, and define what constitutes a Service of Public Economic Interest.

Clauses 14 to 31 deal with: general prohibitions, ailing or insolvent enterprises, other specific prohibitions and requirements, subsidy schemes and subsidies or schemes subject to mandatory referral (to the CMA). While subsidy control is a reserved matter, the Bill impacts on the devolved areas of economic development and the environment, and has the potential to affect many other areas of devolved competence as well. **Every time the Scottish Ministers wish to exercise their powers to give funding or support in a particular area of devolved competence, there will be new constraints on these powers.** For example, grants to support the tourism industry and grants to public transport providers fall within devolved areas and would now be impacted by the Bill. The provisions of the Bill relating to enforcement will also have an impact on the Scottish justice system. The UK Government has legislated in this way to secure a UK-wide approach to subsidy control, without having regard to the reality that this would impact on the exercise of devolved powers in situations where it is the devolved administrations that have the relevant local knowledge, experience and expertise.

Chapter 3 – Transparency

Clause 33 places a duty on public authorities to publish certain information in UK Government's new subsidy database. This provision impacts the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Minimal financial, and services of public economic interest assistance, emergencies and miscellaneous exemptions:

Clauses 36 to 42 make provision about: minimal financial assistance up to the value of £315,000, assistance to enterprises providing Services of Public Economic Interest, and assistance given prior to mergers and acquisitions. These provisions impact the devolved area of economic development and functions are imposed by clauses 36-39 on Devolved Scottish Authorities in relation to subsidies. Whilst clauses 40, 41 and 42, covering mergers and acquisitions, exemptions for SPEI assistance, and supplementary and interpretative provisions, do not directly impose functions on those Authorities, the content of those clauses will impact how those Authorities exercise their functions.

Provisions for emergencies create exemptions which can be used if the Secretary of State (BEIS) publishes a notice declaring that they apply.

Clause 43 makes provision about subsidies given to compensate the damage caused by natural disasters and other exceptional circumstances. Clause 44 makes provision about subsidies given to respond to a national or global economic emergency. These clauses impact the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Clauses 45 to 51 make provision about: exemptions for national security, Bank of England monetary policy, financial stability, legacy and withdrawal agreement subsidies, and tax measures. These clauses impact the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Competition and Markets Authority (CMA): Referrals and Functions

Chapter 1 – Functions on Referrals of Subsidies and Schemes, sets out the process of referring subsidies and schemes to the CMA for review.

Clauses 52 to 64 cover: mandatory and voluntary referrals to the CMA, the contents of the CMA report and reporting timescales, and post-award referrals. These provisions impact the devolved area of economic development and, with the exception of clauses 58 (call-in direction following voluntary referral), 59 (CMA report following mandatory or voluntary referral) and 62 (CMA report following post-award referral), impose functions on Devolved Scottish Authorities in relation to subsidies without taking proper account of their local knowledge, experience and expertise to make these decisions.

Enforcement through the Competition and Appeals Tribunal (CAT):

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. Clause 71 sets out the time limits for making such an application. Clause 73 makes provision about the CAT's powers on review in Scotland (and states that these are the same as the powers of review of the Court of Session in an application to the supervisory jurisdiction of that court). Clause 74 provides that the CAT may make recovery orders, giving a public authority the right to recover a subsidy from the beneficiary and requiring it to exercise that right. Clause 75 makes provision about the right of appeal against decisions of the CAT, which in Scotland will be an appeal to the Court of Session. Clause 76 provides that an interested party may request information about a subsidy or subsidy scheme from a public authority, and imposes an obligation on public authorities to provide this within 28 days. Clause 77 gives public authorities the right to recover a subsidy from the beneficiary where it is used for a purpose other than the purpose for which it was given.

These provisions impact the devolved areas of justice and economic development and, with the exception of clauses 70 to 73 (review of subsidy decisions, time limits for applications and CAT powers), impose functions on Devolved Scottish Authorities in relation to subsidies.

Earlier in this hearing, it was raised by George Peretz QC that there is in fact a level of ambiguity around the term "interested party", as referred to in Clause 70 (7). As he stated "*The Secretary of State is automatically an interested party because of clause 70(7)(b). The Secretary of State does not have to demonstrate a role. However, the role of Devolved Administrations remains uncertain, as George Peretz QC explained, "any court... will look at paragraph 6 of article 369 of the trade and co-operation agreement, which seems to be where this comes from. That refers to both parties being obliged to make sure that interested parties have a right to challenge. It then defines interested parties as including competitors, trade associations and a couple of other things. However, they are all people with very direct commercial interests in subsidies, most obviously competitors who feel that the subsidies will make life difficult for them when they compete.*"

When one goes back to article 369, the argument that we have put is that it does not cover bodies such as concerned next-door local authorities and the Scottish and Welsh Ministers...it would be a problem for any other Government authority in the United Kingdom that has concerns.” The definition of “interested party” should be amended within the Bill to include Devolved Administrations and bodies such as Local Authorities, therefore removing any ambiguity in this area.

Miscellaneous provisions

Clauses 78 to 83 make provision about: the application of Schedule 3 (subsidies provided, or subsidy schemes made, by means of primary legislation – which includes an Act of the Scottish Parliament), guidance to be produced by the Secretary of State, rules in relation to the disclosure of information, rules in relation to the modification of subsidies and schemes, the Secretary of State’s power to make regulations regarding the determination of gross cash and gross cash equivalent amounts, and amendments to the Financial Services Act 2021.

These provisions impact the devolved area of economic development and, with the exception of clauses 82 (gross cash and gross cash equivalent amount of financial assistance) and 83 (minor amendment to the Financial Services Act 2021), impose functions on Devolved Scottish Authorities in relation to subsidies.

There is a need for the Bill to be amended to allow Devolved Administrations equivalent powers to those given to the Secretary of State, as they refer to devolved areas.

The reasoning for this requested amendment is supported in a recent published article¹ on the Subsidy Control Bill, where George Peretz QC, who has also given evidence to the Committee, states:

“Where the authority is part of central government (or even the Secretary of State himself) it is hard to be confident that the Secretary of State will be keen to use his clause 55 or 60 powers or to seek judicial review of a suspect decision. One way of ameliorating those concerns would be to widen the class of persons entitled to refer subsidies to the CMA under clauses 55 and 60 (to include devolved governments and perhaps local authorities or even a body such as the National Audit Office) and the class of automatically “interested parties” so as to include those bodies and any other person who would have standing under ordinary public law principles.

The Secretary of State’s extensive regulation-making powers, and his power to make “streamlined subsidy schemes” without any review by the CMA, are all exercised without any requirement to consult, let alone obtain the agreement of, the devolved administrations, even though those powers may have considerable impact on their powers and policies. Given that the Secretary of State is part of the UK government which in many areas of government activity acts only for England, there is some

¹ [George Peretz QC: The Subsidy Control Bill: Part II – Application to legislation, questions & concerns – UK Constitutional Law Association](#)

concern that those powers will be exercised with more of an eye on England than on the other nations of the UK. Further...the Secretary of State has powers to intervene in decisions of the devolved administrations (by referring subsidies to the CMA and challenging decisions before the CAT): but those powers do not apply vice versa in relation to subsidy decisions taken by the UK government that may substantially affect Scotland, Wales and Northern Ireland.”

I have laid out in detail for you below, the specific areas where it is imperative that Devolved Administrations have equivalent powers to those given to the Secretary of State:

Clause	Nature of power	Why problematic?
10(4)	The Bill provides that “streamlined subsidy schemes” can only be made by ‘a Minister of the Crown’, i.e. Secretary of State for BEIS or any UKG Minister.	No equivalent power for DAs. This represents further asymmetry between UKG and the DAs.
43 (3)	Notice of a natural disaster or other exceptional circumstance - exempting relevant subsidies from the principles, prohibitions and restrictions but not the transparency provisions)	A notice must be published by the Secretary of State for the purposes of this section declaring that the exemption applies in respect of that natural disaster or occurrence. This potentially means Scottish Ministers would have no powers to declare a natural disaster, even if it was limited to Scotland. We have not seen any detail or criteria on how this would operate.
44(3)	Notice of national or global economic emergency (exempting relevant subsidies from the prohibitions and restrictions but not from the principles or transparency provisions)	A notice must be published by the Secretary of State for the purposes of this section declaring that the exemption applies in respect of that emergency. This potentially means Scottish Ministers would have no powers to declare an emergency, even if it was limited to Scotland. We have not seen any detail or criteria on how this would operate.
47(1)	Directions to dis-apply, for reasons of prudential policy, specified subsidy control requirements set out for certain subsidies or subsidy schemes (power for HM Treasury)	No route for DAs to request action from Treasury.
53(4)	Direction to extend cooling off period	No equivalent power for DAs. Power must be extended to DAs or a route to request an extension to the cooling off period.
53(6)	Direction to extend reporting period following mandatory referral.	No equivalent power for DAs.

		Power must be extended to DAs or a route to request an extension to the reporting period.
55(1)	Direction to a public authority to request a report from the CMA in relation to a proposed subsidy or scheme	No equivalent power for DAs. DAs must be given a route to request similar action by CMA – This is not only about giving DAs a mechanism for seeking to ensure the lawfulness of subsidies given in other parts of the UK. In the case of the Scottish Ministers, it is also about ensuring that subsidies given by public bodies <i>within Scotland</i> are lawful.
60(1)	Referral to the CMA's Subsidy Advice Unit of a subsidy or subsidy scheme after the subsidy has been made (a 'calling in' power)	No equivalent power for DAs. DAs must be given a route to request similar action by CMA – This is not only about giving DAs a mechanism for seeking to ensure the lawfulness of subsidies given in other parts of the UK. In the case of the Scottish Ministers, it is also about ensuring that subsidies given by public bodies <i>within Scotland</i> are lawful.
61(5)	Direction to extend reporting period following post-award referral.	No equivalent power for DAs. Power must be extended to DAs or a route to request an extension to the reporting period.
64(3)	Direction to exempt a subsidy or subsidy scheme from mandatory referral requirement in urgent exceptional circumstances.	No equivalent power for DAs. Similar powers must be extended to DAs
70(7)	Secretary of State may apply to the CAT for a review of a subsidy decision (as well as any interested party whose interests may have been affected by the subsidy being able to do so.	No equivalent power for DAs. Similar powers must be extended to DAs. Definition of 'interested party' should be expanded to include DAs.
79(5)	Before issuing guidance the Secretary of State must consult such persons as the Secretary of State considers appropriate.	DAs should be specified in this provision as a party who should be consulted.

Seema Malhotra asked: I was not fully clear on what your view was in relation to local authorities. It seemed that it was more for the Scottish Parliament to decide what local authorities in Scotland may or may not do, rather than local authorities across the UK being able to make subsidies if they felt that they were in line with the subsidy control principles, and beneficial for their area. I was slightly confused on what your view was about local authorities being able to make subsidy decisions in Scotland.

Response: The Scottish Government continues to work closely with Local Authorities and COSLA in all areas of Subsidy Control, as we did under previous State Aid rules. Local authorities have always been able to grant aid within the rules that exist, so effectively nothing changes there as a result of the Bill. It is worth noting, however, that a high percentage of local authority funding is determined by Ministers and paid via block grants. The proposals within the Bill would result in devolved administrations having no powers to step in even in those circumstances.

What changes with regard to the Bill is the authority that it gives the Secretary of State that it does not give in devolved areas to Ministers in the Devolved Administrations. That is our concern.

As stated by Dr Serafin Pazos-Vidal of COSLA who also gave evidence to the Committee *"We should not underestimate the importance for this Bill of the participation of the devolved Administrations, and also local government....It is about policy outcome and political rationale, and we have a very divided system of Governments, which is asymmetric in certain respects. If a decision is just taken by a Minister, or a Minister just issues guidance...that will not work."*

For example, the Secretary of State's proposed powers to establish 'streamlined subsidy schemes' would enable the Secretary of State to make schemes that apply exclusively to 'English' subsidies. There is no equivalent ability in the Bill for Devolved Administrations to introduce such routes following consultation with Local Authorities in their own regions, making use of local knowledge, experience and expertise.

Closing remarks

To conclude, I have set out the main areas for concern and fundamental issues with the Bill from a Devolved Administration perspective as well as concerns from a practical and operational point of view. As it stands, the Bill represents an assault on devolved areas of responsibility and therefore on the devolution settlement itself.

I look forward to concerns being fully addressed by colleagues in UK Government, not dismissed. We in Scottish Government will be ready to engage and continue to monitor and make strong representation as the Bill progresses through the next stage of Parliament and at the same time expect to be fully involved in the process of drafting guidance and regulations.

Ivan McKee
Minister for Business, Trade, Tourism & Enterprise
Scottish Government

November 2021