

The Welsh Government's Legislative Consent Memorandum on the Subsidy Control Bill

December 2021



1. Background

The UK Government's Subsidy Control Bill

1. The Subsidy Control Bill¹ (the Bill) was introduced into the House of Commons and had its first reading on 30 June 2021. It is sponsored by the Department for Business, Energy and Industrial Strategy.

2. The explanatory notes to the Bill state:

*"The purpose of the Subsidy Control Bill is to implement a domestic subsidy control regime in the United Kingdom that reflects the UK's strategic interests and particular national circumstances, providing a legal framework within which public authorities make subsidy decisions."*²

3. The Bill received its second reading on 22 September 2021 and, at the time the report was agreed, was at Committee stage in the House of Commons.

Obligations arising from the new UK-EU relationship

4. The Bill establishes a domestic subsidy regime following the UK's exit from the European Union. Provisions on subsidy control were agreed as part of the UK-EU Trade and Cooperation Agreement (TCA),³ which places duties on both parties and covers different types of subsidies.

5. The TCA's chapter on subsidy control constitutes part of its level playing field (LPF) provisions. LPF provisions aim to maintain, as far as possible, minimum standards for trade and investment between the UK and EU. If divergence between their future standards has a 'material impact on [UK-EU] trade or investment', either Party can take 'rebalancing measures' to address the situation. Other types of dispute settlement in the TCA apply to subsidies, providing the UK and EU with various options to settle subsidy disputes if they arise.

6. Other UK-EU agreements contain provisions on subsidy control, such as the Withdrawal Agreement, joint declarations and decisions of the UK-EU Joint Committee.

¹ [Subsidy Control Bill](#) [Bill 135 2021-22]

² Subsidy Control Bill, [Explanatory Notes](#), June 2021, paragraph 1

³ [Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part](#), 30 December 2020

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7. Standing Orders 29.1 and 29.2 provide that a Legislative Consent Memorandum is required when a relevant UK Bill modifies or falls within the Senedd's legislative competence.

8. On 13 July 2021 Rebecca Evans MS, Minister for Finance and Local Government and Vaughan Gething MS, Minister for the Economy (the Ministers), laid before the Senedd a Legislative Consent Memorandum⁴ (the Memorandum) in respect of the Bill.

9. The Business Committee agreed that the Legislation, Justice and Constitution Committee and the Economy, Trade and Rural Affairs Committee, should report on the Memorandum by 4 November 2021.⁵ The deadline was subsequently extended to 16 December 2021.⁶

10. The Economy, Trade and Rural Affairs (ETRA) Committee laid its report on the Memorandum on 9 November 2021.⁷

Provision for which the Senedd's consent is required

11. Paragraph 7 of the Memorandum summarises the Bill's purpose and states:

"The Bill makes provision regarding the control of subsidies following the UK's exit from the European Union (EU). Up until 31 December 2020, the UK was bound by the EU State aid rules. As of 1 January 2021, that was no longer the case. From 1 January 2021, the UK was required to comply with the provisions of the Trade and Co-operation Agreement with regards subsidy control. In addition, the UK is required to comply with any other commitments it has made on subsidy control, including those contained in the World Trade Organisation Agreement on Subsidies and Countervailing Measures; the Northern Ireland Protocol; and any Free Trade Agreements with other countries. The purpose of the Bill is to set out a new domestic subsidy control regime, which binds England, Wales, Scotland and Northern Ireland, and

⁴ Welsh Government, [Legislative Consent Memorandum, Subsidy Control Bill](#), July 2021

⁵ Business Committee, [Timetable for consideration of the Legislative Consent Memorandum on the Subsidy Control Bill](#), July 2021

⁶ Business Committee, [Revised Timetable for consideration: Legislative Consent Memorandum on the Subsidy Control Bill](#), November 2021

⁷ Economy, Trade and Rural Affairs Committee, [Report on the Legislative Consent Memorandum for the Subsidy Control Bill](#), November 2021

which ensures compliance with the aforementioned legislation. The Bill provides that functions that were previously held at an EU level, are now held at a domestic level by the Secretary of State, the Competitions and Markets Authority (CMA) or the Competition Appeal Tribunal (CAT)."

12. Paragraphs 9 to 38 of the Memorandum set out the Welsh Government's assessment of the provisions in the Bill which require Senedd consent, namely:

- Part 2 (Subsidy Control Requirements): clauses 12 to 31 and 33;
- Part 3 (Exemptions): clauses 35 to 40, 43 to 51 (it is unclear if the Welsh Government believes that clauses 41 and 42 require the Senedd's consent, as the wording is not explicit);
- Part 4 (CMA: Referrals and Functions): clauses 52 to 69
- Part 5 (Enforcement): clauses 70 to 77.
- Part 6 (Miscellaneous and General): clauses 78 to 83, 86, 89, 90 to 91; and
- Schedules 1 to 3.

13. The UK Government does not agree with the Welsh Government regarding consent being required for clauses 63 to 69, 70 to 75 and 80 to 92.⁸

The Welsh Government's position

14. Paragraph 39 of the Memorandum states:

"Subsidy control is a reserved matter under Schedule 7A to GOWA, and the Bill applies to England, Wales Scotland and Northern Ireland. However, despite it being a reserved matter, it impacts on the non-reserved matter of economic development, and the impact on this non-reserved area raises some concerns. UK Government have legislated in this way as they want a UK-wide approach to subsidy control."

15. Paragraphs 40 to 42 of the Memorandum include criticism of the Bill as introduced:

"The Welsh Government does not accept that the measures proposed in the Bill will serve to sufficiently regulate the provision of subsidies in the UK. We

⁸ Subsidy Control Bill, Explanatory Notes, June 2021, Annex A

are seeking a detailed regulatory framework that provides sufficient clarity on the parameters of what support can be deemed to be compatible with the UK's subsidy control regime for both subsidy awarding bodies and businesses investing in the UK. However, the proposals in the Bill remain high-level and lack sufficient granularity to achieve this objective. This translates into broad powers being given to the Secretary of State to shape the regime in the future with little scrutiny from the UK Parliament and no scrutiny available to Welsh Ministers or the Senedd.

The Subsidy Control Bill empowers the Secretary of State for Business, Enterprise and Industrial Strategy with the ability to refer subsidy awards or schemes in policy areas of devolved competence to the independent subsidy regulator and extend standstill requirements (classed as 'cooling-off' periods) upon referred awards or schemes. If enacted, these powers would undermine the long-established powers of the Senedd and Welsh Ministers to act in relation to matters within devolved competence such as economic development, agriculture and fisheries.

We will not be able to recommend to the Senedd that it gives consent to the Bill as currently drafted."

16. Paragraphs 43 to 54 of the Memorandum provide detail as to the particular clauses of the Bill that the Welsh Government objects to. These are considered separately below.

Clause 10 - Subsidy schemes and streamlined subsidy schemes

17. Clause 10 of the Bill introduces the concept of 'streamlined subsidy schemes'. These schemes are intended to allow the UK Government to make provisions to allow lower-risk subsidies to be given by public authorities more quickly and easily, without needing to assess compliance with the subsidy control principles in the Bill. As drafted, only Ministers of the Crown may make streamlined subsidy schemes; however, they can be used by any public authority that complies with its parameters. The Welsh Government believes the power should be extended to the Welsh Ministers "given the subsidy control regime impacts upon areas of devolved responsibility", with the addition of a requirement to lay such schemes before the Senedd.⁹

⁹ Memorandum, paragraphs 44-45

Clause 18 - Relocation of activities

18. Clause 18 prohibits a subsidy if it is given to an enterprise on the condition that it relocates its economic activities to another part of the UK. The Welsh Government does not object to this in principle but argues that parameters must be defined in the Bill to prevent subsidies being challenged “even if activity is relocated several years after a subsidy has been provided”.¹⁰

Clause 31 - Subsidies or schemes subject to mandatory referral

19. In certain circumstances, a public authority must request a report from the Competition and Markets Authority (CMA) before giving subsidies or making subsidy schemes. This is defined as a ‘mandatory referral’ in the Bill. If a mandatory referral is made, the CMA must publish a report on the proposed subsidy or scheme and subsidies cannot be given until after a cooling-off period. A subsidy given before the completion of these procedural steps is prohibited under the Bill.

20. The Memorandum argues that the Bill “must specify a route to enable Welsh Ministers to overrule such standstill requirements if there is a sufficient policy need”, as the Welsh Ministers will be prevented “from disregarding these restrictions even if applied to areas of devolved responsibility.”¹¹

Clause 43 - Natural disasters and other exceptional circumstances; Clause 44 - National or global economic emergencies

21. Under clauses 43 and 44, the subsidy control requirements outlined in the Bill do not apply to subsidies given to compensate damage caused by natural disasters, other exceptional occurrences or in response to national or global economic emergencies. However, this exemption only applies if the Secretary of State publishes a notice declaring that it applies to a specific occurrence and lays it before the UK Parliament.

22. The Memorandum argues that this power should be extended to the Welsh Ministers or, at a minimum, that the Bill should define the processes by which the Welsh Ministers can request a declaration from the Secretary of State and challenge any subsequent refusal.¹²

¹⁰ Memorandum, paragraph 46

¹¹ Memorandum, paragraph 47

¹² Memorandum, paragraph 48

Clause 54 - Cooling off period following mandatory referral; Clause 60 - Post-award referrals; Clause 61 - CMA reporting period for post-award referrals; Clause 65 - Monitoring and reporting on subsidy control

23. Part 4 of the Bill outlines the CMA's functions in relation to the operation of the subsidy control regime and the Memorandum proposes a number of amendments including:

- requiring that extensions under clause 54 to cooling-off periods (that must elapse before a public authority may give a subsidy or make a scheme on which the CMA has reported on) should be at the request of the CMA;¹³
- under clause 60 extending powers (for the Secretary of State) to the Welsh Ministers or otherwise providing a mechanism for challenging the decisions of the Secretary of State;¹⁴
- providing more detail on the parameters of the Secretary of State's powers under clause 61 and ensuring that power imbalances do not exist between the Secretary of State and the Welsh Ministers in areas of devolved responsibility;¹⁵
- providing that five-yearly reviews by the CMA on the effectiveness of the Bill under clause 65 must be laid before the Senedd in addition to the UK Parliament, given the impact of the new regime on areas of devolved responsibility.¹⁶

Clause 79 - Guidance

24. Under clause 79, the Secretary of State may issue guidance about the operation of the UK subsidy control regime. The Secretary of State is required to consult on such guidance before it is issued. In the Memorandum, the Ministers argue that the Bill should be amended to provide that "Devolved Ministers must be specified for mandatory engagement" on such guidance.¹⁷

Welsh Government Written Statement

25. Separately to the Memorandum, the Ministers released a written statement.¹⁸ It stated that the Welsh Government has:

¹³ Memorandum, paragraph 49

¹⁴ Memorandum, paragraph 50

¹⁵ Memorandum, paragraphs 51 and 52

¹⁶ Memorandum, paragraph 53

¹⁷ Memorandum, paragraph 54

¹⁸ Welsh Government, [Written Statement: The Subsidy Control Bill 2021](#), 14 July 21

"...serious concerns about the UK Government's approach as it does not reflect any of the issues previously identified by Welsh Ministers during the policy development process. Despite suggestions from the UK Government that detailed engagement has been undertaken, the Bill only reflects the narrow interests of the UK Government."

26. The statement adds that the Bill "has been developed on an unnecessarily tight timetable" with "minimal opportunity for devolved government Ministers to influence its content". The Ministers go on to express concern that the Bill "contains no defined pathway to allow disadvantaged regions of the UK to compete on a level playing field with more prosperous regions of the UK" and suggests that the Bill is being used "as a tool to reverse devolution through the back door".

Ministerial evidence to the ETRA Committee

27. The ETRA Committee held an evidence session with Rebecca Evans MS, the Minister for Finance and Local Government (the Finance Minister) on 21 October 2021.¹⁹

28. In her opening contribution, the Finance Minister noted that meetings with the UK Government on the Bill "have been nothing more than an opportunity for the UK Government to outline their position and their intentions moving forward" and that they have not provided opportunities for the Welsh Government to influence the development of the Bill.²⁰ She added that:

"...when UK Government has provided us with draft documents, the deadlines for our inputs have been too short to provide a reasoned and considered response, or the drafts shared with us have been just so vague and so general as to provide us with minimal insight into the development of the policy."²¹

29. When the ETRA Committee asked about the Welsh Government's concerns that the Bill lacks sufficient detail around the subsidy regime and what additional detail is needed, the Finance Minister said:

"UK Government has indicated that further information will be provided in secondary legislation and a suite of guidance, and we've been really keen to

¹⁹ [Economy, Trade and Rural Affairs \(ETRA\) Committee](#), 21 October 2021

²⁰ ETRA Committee, RoP [195], 21 October 2021

²¹ ETRA Committee, RoP [209], 21 October 2021

impress upon the UK Government the importance of developing that suite of guidance in partnership with the Welsh Government. But no early drafts have been shared with us to provide us with any kind of insight into how they envisage the resulting regime looking, which is obviously causing us concern, as the UK Government is essentially asking the devolved Governments to sign a blank cheque, with no explicit provision for further opportunity to scrutinise or input into that detail as it's being developed. But examples of additions required include making publicly available the detail on the forms of subsidy that the UK Government considers to be more distortive and then more likely to be subsidies of interest or potential interest, or less distortive and therefore open to the streamlined routes process...

And because the Bill contains such wide-ranging regulation powers for the Secretary of State, it also creates a lot of uncertainty as to how the regime may operate in practice and how it could potentially change over time. For example, clause 11 empowers the Secretary of State to define a subsidy and a subsidy scheme in regulations. And obviously these are key concepts... And clause 86 gives the Secretary of State broad consequential amendment powers, and there are no regulation-making powers conferred on Welsh Ministers and there are no consent or consultation requirements on how any of the Secretary of State's regulation-making powers are exercised in the Bill as drafted. So, clearly there's a real power imbalance, which is at the heart of several of our concerns about the Bill."²²

30. The Finance Minister was also questioned about the Welsh Government's call for the Welsh Ministers to have powers to make referrals of subsidies to the CMA, a power available to the Secretary of State under clause 60. She said:

"...the UK Government's response really is that the regulation of subsidies is a reserved matter and is the exclusive competence of the UK Government. Our counterargument is that the regulation of subsidies has huge implications for a swathe of devolved policy areas, and that's why devolved Ministers must have parity of esteem with regard to referrals. Otherwise, the Bill really does risk undermining devolution. But unfortunately, this argument hasn't been successful."²³

²² ETRA Committee, RoP [206-207], 21 October 2021

²³ ETRA Committee, RoP [222], 21 October 2021

31. The Finance Minister also said:

*"...prior to the imposition of the UK internal market Act, the Welsh Government argued strongly that subsidy control or state aid was a devolved matter, and that policy should be developed collegiately through the frameworks programme that was being developed. That's the kind of collegiate way of working that we would like to see going forward, and it's certainly not too late to develop that, but it will require some movement, I think, on the part of the UK Government."*²⁴

32. As regards the power of the Secretary of State to issue guidance under clause 79, the Finance Minister considered that this clause "gives the Secretary of State the power to essentially construct the whole day-to-day workings of the regime as they see fit, with no requirements to consult" other than such persons as the Secretary of State considers appropriate.²⁵ She added:

*"As the Bill is currently drafted, the Secretary of State isn't even required to talk to devolved Governments if they don't deem it appropriate, let alone take our positions into account when drafting. So, we want to see a firm, explicit commitment within the Bill that any guidance relating to the subsidy control regime should be subject to consultation and consent by devolved Governments, as we will be bound, of course, to follow the guidance as a public authority... As economic development is devolved, we should have the ability to scrutinise large wholesale changes of such an important regime, because obviously it makes up a large proportion of how we deliver our funds. So, I think there are strong arguments as to why devolved Governments should be able to have better influence on this particular area of work."*²⁶

33. The Finance Minister was also questioned about Schedule 3 to the Bill and analysis by George Peretz QC, a state aid lawyer. In a blog post Mr Peretz said that Schedule 3 is "replete with important constitutional issues" and considers that paragraphs 6 and 7 of Schedule 3 make it clear that devolved primary legislation may be challenged under the Bill, with challenges to

²⁴ ETRA Committee, RoP [223], 21 October 2021

²⁵ ETRA Committee, RoP [227-228], 21 October 2021

²⁶ ETRA Committee, RoP [230], 21 October 2021

Welsh legislation being brought before the High Court, whereas no provision is made for challenge in relation to Acts of Parliament.²⁷ The Finance Minister said:

"I would agree with the conclusion, essentially, that Schedule 3 to the Bill poses several potentially quite important constitutional questions, particularly in relation to the apparent departure from the general position that the judicial review of devolved legislation is not generally possible on the common law grounds of irrationality and reasonableness or arbitrariness. Notably, this departure only appears to apply to devolved legislation, not UK Government legislation... Schedule 3 reflects the general sense that the Bill is asymmetrical in terms of application and the allocation of powers and functions. It does unfairly disadvantage devolved Governments in comparison with the UK Government, and adversely impacts on the devolved area of economic development".²⁸

2. Committee consideration

34. We considered the Memorandum at our meetings on 11 October²⁹ and 15 November.³⁰ We agreed our report on the 15 November 2021.

Our view

35. We note that, as a member of the European Union (EU), the UK was subject to EU rules on subsidies (also called 'state aid') which were regulated by the European Commission. Now that the UK has left the EU, the UK Government can establish a new domestic subsidy control regime that complies with its post-Brexit international obligations, particularly with the TCA. We also note that the Bill brought forward by the UK Government aims to create a legal framework and set out conditions within which public authorities can provide subsidies to businesses.

36. We note the Finance Minister's evidence to the ETRA Committee in which she suggested that meetings with the UK Government have not provided a platform for full and proper intergovernmental discussions. We also note that, according to the Finance Minister, the UK

²⁷ EU Relations Law, [The Subsidy Control Bill and devolution: a balanced regime?](#), George Peretz QC, 15 July 2021

²⁸ ETRA Committee, RoP [241], 21 October 2021

²⁹ [Legislation, Justice and Constitution Committee](#), 11 October 2021

³⁰ [Legislation, Justice and Constitution Committee](#), 15 November 2021

Government considers that policy development on the Bill has involved frequent consultation with devolved Governments.³¹

37. It is disappointing to learn from the Finance Minister's evidence to the ETRA Committee that intergovernmental relations have not been as productive as they should have been and that the Welsh Government does not feel it has been fully involved in the development of legislative proposals. These proposals could have a pernicious impact on devolution and the exercise of devolved functions (particularly in ways that could limit the ability of the Welsh Government and public organisations to fund necessary projects). The Finance Minister's comments are similar to those expressed by the previous Welsh Government on the internal market legislation developed by the UK Government, which also has, potentially, a significant impact on devolution.³²

38. We hope this does not represent a trend of the UK Government refusing to co-operate and engage constructively where legislation has the potential to undermine the devolution settlement and the Welsh Government's ability to deliver policy in devolved areas. Such an approach risks complicating further the general understanding of devolution, particularly when the existing settlement is already needlessly complex. Furthermore, it could create uncertainty for business, public sector organisations and local government as well as unnecessary bureaucracy.

39. We consider that it would have been helpful if the Memorandum had included information about the extent of co-operation and engagement between the Welsh and UK Governments in the development of the Bill.

40. We have noted the concerns expressed by the Finance Minister about the wider constitutional implications of the Bill and Schedule 3 in particular. In this regard we also note another blog post by George Peretz QC on this matter, in which he states:

"Finally, the Bill has considerable implications for the UK's territorial constitution, especially when read with section 50 of the UK Internal Market Act 2020, which gives the UK government a very wide power to spend money in Scotland, Wales and Northern Ireland on matters within devolved competence, and section 52 of that Act, which made subsidy control a reserved (or, in Northern Ireland, excepted) matter outside devolved

³¹ ETRA Committee, RoP [209], 21 October 2021

³² See for example, Fifth Senedd, Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill](#), November 2020

*competence. 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 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."*³³

41. We share many of the concerns of the Finance Minister and are troubled by the wider constitutional implications of the Bill, that she, and others, have identified. In our view, this Bill, if enacted, has the potential to undermine the devolution settlement in a similar way to the UK Government's legislation on the internal market. It is a puzzling approach because there is more to be gained by governments working together constructively and finding an approach that is fair and operable within the existing constitutional framework, rather than creating bad, impenetrable law which is hard for citizens to understand and that sows doubt around where the boundaries of devolution lie.

42. It is not explicit from the Memorandum whether the Welsh Government is seeking consent for clauses 41 and 42 of the Bill.

Recommendation 1. For the avoidance of doubt, the Ministers should clarify whether the Welsh Government believes that clauses 41 and 42 require the Senedd's consent and, accordingly, whether it is seeking the Senedd's consent for them.

43. We note that there is disagreement between the Welsh and UK Governments as to whether consent is required for clauses 63 to 69, 70 to 75 and 80 to 92 of the Bill.

³³ UK Constitutional Law Association, [George Peretz QC: The Subsidy Control Bill: Part II – Application to legislation, questions & concerns](#), 29 October 2021

Conclusion 1. We agree with the Welsh Government that the legislative consent of the Senedd is required for clauses 63 to 69, 70 to 75 and 80 to 92 of the Bill.

44. We have also noted that the Welsh Government's objections to clauses 10, 18, 31, 43, 44, 54, 60, 61, 65 and 79. We share the concerns that the Welsh Government has highlighted. We agree that the Welsh Ministers should, for example, be provided with the appropriate powers to make subordinate legislation relevant to the Bill in areas of policy that are already devolved. Furthermore, we agree that the Bill should extend the powers to the Welsh Ministers provided to the Secretary of State under clause 43 and 44 (which would be preferable) or alternatively, in respect of these clauses define within the Bill the process by which the Welsh Ministers can both request that a notice is laid in the UK Parliament, and challenge any subsequent refusal to do so.

Conclusion 2. We would be supportive of amendments to the Bill that addressed the concerns of the Welsh Government outlined in the Memorandum in respect of clauses 10, 18, 31, 43, 44, 54, 60, 61, 65 and 79.

45. We note and share the Finance Minister's frustration about the lack of detail on the face of the Bill and also her comments that the UK Government has indicated that further information will be provided in secondary legislation and a suite of guidance. We note that the UK Government has published draft regulations for its Building Safety Bill.³⁴

Recommendation 2. The UK Government should publish draft regulations and guidance for both UK Parliamentarians and Members of the Senedd to consider the details of the subsidy control regime and to better understand the potential impacts of the Bill.

³⁴ Department for Levelling Up, Housing and Communities and Ministry of Housing, Communities & Local Government, [Building Safety Bill: draft regulations](#), 5 July 2021, [updated 14 October 2021]
