

Report on the Legislative Consent Memorandum for the Subsidy Control Bill

November 2021

Introduction

1. The Welsh Government laid a Legislative Consent Memorandum (LCM) (PDF 112KB) on the Bill before the Senedd on 13 July 2021. On 14 September 2021, the Business Committee agreed (PDF 38.5KB), in accordance with Standing Order 29.4(i), to invite the Economy, Trade and Rural Affairs Committee and the Legislation, Justice and Constitution Committee to consider and report on the LCM to the Senedd by 4 November 2021. The Economy, Trade and Rural Affairs Committee took evidence from the Minister for Finance and Local Government on the LCM at its 21 October meeting, before agreeing this report to the Senedd through correspondence.

Background

2. The **Subsidy Control Bill** (the Bill) was introduced in the House of Commons on 30 June 2021, and is sponsored by the Department for Business, Energy and Industrial Strategy (BEIS). The long title to the Bill notes that it is *"to make provision regulating the giving of subsidies out of public resources; and for connected purposes."*

3. The UK is no longer subject to EU State aid rules, which are the EU's subsidy control regime, and in September 2020 the UK Government announced its intent to design a new domestic subsidy control regime *"that best suited the needs of the UK, representing value for money to the UK taxpayer, and complying with international obligations."*

4. As set out in the **Explanatory Notes** to the Bill (EN), its purpose 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."

5. The EN explains that a subsidy is:

"where a public authority – for example central, regional or local government – provides support to a business, or other organisation, that gives them an advantage over competitors. This can take the form of a grant, a tax break, a loan or guarantee on favourable terms, or the use of facilities below market price."

Overview of the Bill

6. The Bill as introduced consists of 5 Parts, with 92 clauses and three Schedules. The Explanatory Note explains the aims of the proposed new regime and the key provisions of the Bill:

- The Bill sets out seven principles that public authorities must assess their proposed subsidies against. The Bill defines these as the subsidy control principles. Additional principles may apply to specific energy and environmental subsidies;
- The Bill prohibits certain subsidies and requires that certain subsidies can only be granted where specified requirements are met;
- The Bill requires certain subsidies to be published on a database;
- Exempting certain subsidies from some or all of these requirements;
- The establishment of a new **Subsidy Advice Unit** in the **Competition and Markets Authority (CMA)**, which will monitor and report on the regime and report on certain subsidies and schemes before and after they are given or made; and
- Making provision for the **Competition Appeal Tribunal (CAT)** to hear applications to review subsidy decisions and to order recovery in certain cases, imposing a duty on public authorities to provide pre-action information at the request of an interested party, and conferring a right on public authorities to recover subsidies which are misused.

7. The Bill also provides for measures which will support the UK to remain compliant with its international obligations under the World Trade Organisation's Agreement on Subsidies and

Countervailing Measures (ASCM), the UK-EU Trade and Cooperation Agreement (TCA), and other free trade agreements.

Provisions for which consent is sought

8. The provisions which require the consent of the Senedd are summarised below.
9. Annex A at page 38 of the Explanatory Notes prepared by BEIS sets out the provisions in respect of which the UK Government consider that a legislative consent motion is required. Unless otherwise stated below, the UK Government and the Welsh Government agree that the consent of the Senedd is required in respect of the provisions. It is not clear whether the Welsh Government considers that the Senedd's consent is needed for clauses 41 and 42 of the Bill. The LCM explicitly states that consent is required for clauses 36-40, but later provides commentary on clauses 41 and 42.
10. The Bill applies to England, Wales, Scotland and Northern Ireland. The UK Government want to establish a UK wide approach to subsidy control. Although subsidy control is a reserved matter, it impacts on the devolved subject of economic development. Welsh Government have therefore applied the purpose test, as required by Standing Order 29.1(i), i.e. does the provision have a devolved purpose.

PART 1 – OVERVIEW AND KEY INTERPRETATION

11. Part 1 (clauses 1 to 11) sets out definitions of key terms used in the Bill.
12. Clause 10 of Part 1 makes a distinction between several categories of subsidies within the Bill. This includes the distinction between 'subsidy schemes' and 'streamlined subsidy schemes'. Streamlined subsidy 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. Streamlined subsidy schemes can only be made by the UK Government, however they can be used by any public authority that complies with its parameters.
13. The Welsh Government and the UK Government are in agreement that the Senedd's consent is not required for clauses 1-11 of the Bill as currently drafted.

PART 2 – SUBSIDY CONTROL REQUIREMENTS

14. Part 2 of the Bill sets out the principles that underpin the subsidy control regime, including seven main principles (which are then set out in Schedule 1 of the Bill) and nine additional energy and environmental principles. Clause 12 provides for a public authority to consider the

subsidy control principles before giving a subsidy or making a subsidy scheme, and not to give a subsidy or make a subsidy scheme unless it is consistent with those principles.

15. Clause 13 sets out that subsidies given in relation to energy and environment, and schemes made which make provision for the giving of these subsidies, must consider the energy and environment principles in Schedule 2. Subsidies should not be given, and schemes should not be made, unless the public authority is of the view that they are consistent with the principles.

16. Clause 14 introduces Chapter 2 of Part 2, stating that it prohibits the giving of certain subsidies and imposes requirements for other subsidies.

17. Clauses 15 to 34 detail the provisions on prohibition of subsidies and definitions relating to those provisions. In summary, the prohibitions include a subsidy:

- in the form of a guarantee of the debts or liabilities of an enterprise if there is no limit on the debt or liabilities guaranteed, or there is no limit on the duration of the guarantee;
- that is contingent upon export performance relating to goods or services, unless the requirements listed in the clause are complied with;
- that is contingent upon the use of domestic over imported goods or services, unless the exceptions in clause 17 apply;
- given to an enterprise subject to a condition that the enterprise relocates all or part of its existing economic activities, and the relocation would not occur if not for the subsidy;
- for rescuing or restructuring an ailing or insolvent enterprise, deposit taker or insurance company, or to support liquidity provision for such an enterprise, deposit taker or insurance company, unless the conditions in clauses in that part of the Bill are met;
- to insurers providing export credit insurance unless this insurance for marketable risk is either provided on commercial terms or does not directly or indirectly benefit the insurer's export credit insurance business;
- to an air carrier for the operation of a route unless a condition in clause 28 is met;
- under Clause 29 a public authority may only award a subsidy for the delivery of an SPEI (Service of Public Economic Interest) if it does so in a transparent manner, and it

is satisfied that the value of the subsidy is restricted to what is necessary to deliver the service;

- to the extent that the subsidy scheme provides for a prohibited subsidy, or otherwise does not meet the relevant requirements provided for by the Bill;
- which is given or made in circumstances where:
 - a mandatory referral request should have been made to the Competition and Markets Authority (“CMA”), but wasn’t; or
 - a mandatory referral request was submitted but the public authority did not wait for the process to conclude before giving the subsidy or making the scheme.

18. Chapter 3 of Part 2 relates to transparency measures, setting out a requirement for a publicly accessible database of subsidies. Clause 33 places a duty on a public authority to make an entry in the subsidy database in respect of a subsidy/subsidy scheme it makes.

19. The view of the Welsh Government and the UK Government is that the Senedd’s consent is required for Chapter 1 (clauses 12-13), Chapter 2 (clauses 14-31), and clause 33 of the Bill, and all parties agree that consent is not needed for clauses 32 or clause 34.

PART 3 – EXEMPTIONS

20. Part 3 of the Bill sets out certain types of subsidies that are exempt from the subsidy control requirements in Part 2. It provides for cases in which the subsidy control requirements do not apply to the giving of a subsidy. In summary these include:

- **Minimal financial assistance** - these are subsidies provided by public authorities that are considered low risk with minimal effect on competition and trade and with a value under a threshold of £315,000 over a three-year period (see Clauses 36 and 37); and
- **Services of Public Economic Interest(SPEI)** - these are public services that would not be supplied (or would not be supplied under the required conditions) without some kind of public intervention, and which are of particular importance to society. Examples of an SPEI include social housing or rural public transport services. Subsidies given through the exemption do not have to apply the subsidy control requirements if the total amount of minimal and SPEI financial assistance received by

the intended beneficiary totals less than £725,000 over a three financial year period.
(Clauses 38 and 39)

21. Clause 40 provides that, in the case of mergers and acquisitions, all prior minimal and SPEI financial assistance subsidies granted before the merger or acquisition should be taken into account.

22. Clause 41 provides exemptions from the duty to upload information to the subsidy database.

Secondary Legislation to amend value thresholds for financial assistance

23. Clause 42 allows the Secretary of State to make secondary legislation to:

- a) amend the value thresholds for the 'minimal financial assistance' and 'SPEI assistance' exemptions as well as the transparency exemption for SPEI assistance; and
- b) provide for a lower threshold for the 'minimal financial assistance' and 'SPEI assistance' exemptions, and the transparency exemption for SPEI assistance, for specific sectors.

Subsidies to compensate damage caused by 'a natural disaster', or 'national or global economic emergency'

24. Clause 43 states that subsidies given to compensate damage caused by a natural disaster or other exceptional circumstances are exempt from complying with the subsidy control requirements. However, such subsidies are not exempt from the transparency requirements of the regime.

25. Clause 44 provides that subsidies given in response to a national or global economic emergency are not subject to the provisions on prohibited and restricted subsidies in the Bill. The Bill EN details that:

(...) the use of this exemption is restricted in that it can only be used when the Secretary of State has published a notice stating a particular emergency has occurred and therefore the 'national or global economic emergency' exemption can be used to remedy that situation. A published notice must be laid in Parliament, and may be withdrawn by the Secretary of State.

26. This requirement to publish a notice in Parliament is also required in relation to subsidies given in response to 'natural disasters and other exceptional circumstances' in Clause 43.

Other exemptions

27. Other exemptions provided for in the Bill include:

- the giving of a subsidy by or on behalf of the Bank of England in pursuit of monetary policy (Clause 46);
- the giving of a subsidy, or the making of a subsidy scheme, so far as a financial stability direction provides (Clause 47);
- legacy subsidies (Clause 48);
- a tax measure which is permitted under Article 413 of the TCA (Clause 49);
- for large cross-border international cooperation projects, unless such subsidies meet a specific condition (Clause 50);
- excluding nuclear energy from the requirements of clause 13 (Clause 51);

28. The Welsh Government's view is that Senedd consent is required for clauses 35-40, 43, 44, and 45-51. It is unclear from paragraph 19 of the Welsh Government's LCM, whether it believes that clauses 41 and 42 require Senedd consent, as the wording is not explicit. The UK Government considers that Senedd consent is required for all of the clauses in Part 3 (clauses 35-51).

PART 4 – COMPETITION AND MARKETS AUTHORITY (CMA) : REFERRALS AND FUNCTIONS

29. Clauses 52-69 in Part 4 of the Bill deal with the role and functions of the CMA in relation to referrals and reporting on subsidies, and the setting up of a new Subsidy Advice Unit within the CMA. Clause 52 deals with the making of mandatory pre-award referrals to the CMA. In such cases, public authorities must request a report from the CMA before giving a) a subsidy, or subsidy scheme, of particular interest; or b) a subsidy or scheme which the Secretary of State has directed the authority to refer to the CMA before it is given or made.

30. Clause 53 makes provision for the period during which the CMA must report on a subsidy or scheme which is subject to a mandatory referral by a public authority. Clause 54 makes provision about the "cooling off" period that must elapse before a public authority may give a subsidy or make a scheme on which the CMA has published a report. Clause 55 gives the Secretary of State a reserve power to direct a public authority to request a report from the CMA before it is able to give a subsidy or make a subsidy scheme.

Voluntary Referrals and Reporting

31. Clause 56 enables public authorities to request a report from the CMA on a subsidy or scheme of interest on a voluntary basis, and Clause 57 provides for the period within which the CMA must report, where it decides to prepare a report following such a request. Clause 58 makes provision as to the effect of a call-in direction made by the Secretary of State in respect of a subsidy or scheme of interest that a public authority has already voluntarily referred to the CMA.

32. Clause 59 makes provision about the content of the CMA report to be produced following a mandatory or voluntary referral. Clause 60 makes provision about the referral by the Secretary of State of subsidies or schemes after they have been given or made (a “post-award referral”). In this case, Clause 61 provides that the CMA must publish a report on the subsidy or scheme before the end of the period of 30 working days. The 30 day period begins with the earlier of the day on which the required information is provided by the public authority to the CMA, or the day after the expiration of the deadline for providing such information. Clause 62 makes provision as to the content of the report which must be published by the CMA following a post-award referral.

Exemptions

33. Clause 63 excludes from Chapter 1 of Part 4 subsidies which are given under a subsidy scheme. The subsidy scheme would instead be subject to referral to the CMA. Clause 64 provides for the exemption of certain subsidies and subsidy schemes from some or all of the requirements of Chapter 1 of Part 4.

Requirement for Periodic Review

34. Clause 65 requires the CMA to undertake a periodic review of the effectiveness of the operation of the Bill (once enacted), and its impact on competition and investment within the United Kingdom. The CMA must carry out its reviews every five years. Clause 66 makes it a requirement for the CMA’s annual report to include certain information about the number and types of subsidies or schemes on which it has prepared a report under Chapter 1 of Part 4. Clause 67 applies sections 41 to 43 of the United Kingdom Internal Market Act 2020 for the purpose of assisting the CMA in carrying out its functions (monitoring and reporting on subsidy control).

Establishment of a Subsidy Advice Unit

35. Clause 68 requires the CMA to establish a committee of the CMA Board to be known as the Subsidy Advice Unit. Clause 69 enables the Subsidy Advice Unit to make a reference to the

CMA Chair for the constitution of a CMA panel group (under Schedule 4 to the Enterprise and Regulatory Reform Act 2013).

36. The view of the Welsh Government is that consent is required in respect of all clauses in Part 4 (clauses 52-69), whereas the UK Government considers that consent is required in respect of clauses 52-62, but not in respect of clauses 63-69.

PART 5 - ENFORCEMENT: THE COMPETITION APPEAL TRIBUNAL

37. Part 5 of the Bill deals with enforcement by the Competition Appeal Tribunal (Tribunal). Clause 70 enables interested parties to apply to the Tribunal for review of a decision to give a subsidy or make a subsidy scheme. Clause 71 amends the Competition Appeal Tribunal Rules 2015, to set out the time limits that apply in relation to the making of an application to the Tribunal for the review of a subsidy control decision. Clause 72 confers powers on the Tribunal to grant certain forms of relief in the same way as the High Court on an application for judicial review in England and Wales, or Northern Ireland.

38. Clause 73 sets out that the powers of the tribunal in proceedings in Scotland are to be the same as those for the Court of Session in an application to the supervisory jurisdiction of that Court, and they should apply the same principles as the Court of Session would in these cases.

39. Clause 74 confers a power on the Tribunal to make a recovery order if it has granted relief in respect of a subsidy decision, and found that the decision was in contravention of the subsidy control requirements in Chapter 1 and 2 of Part 2. Clause 75 enables appeals against decisions of the Tribunal to be made to the Court of Appeal in England and Wales or Northern Ireland, or the Court of Session in Scotland. Clause 76 imposes a duty on public authorities to provide certain information to interested parties about a subsidy or subsidy scheme. Clause 77 makes provision in respect of the misuse of subsidies and confers a right on public authorities to recover subsidies which are used for a purpose other than that for which they were given.

40. The Welsh Government view is that Senedd consent is required in respect of clauses 70-77, whereas the UK Government considers that consent is required for clauses 76 and 77 only, and not for clauses 70-75.

PART 6 – MISCELLANEOUS AND GENERAL

41. Part 6 of the Bill - Clauses 78-92 of the Bill - provide for a number of miscellaneous and general matters, including:

- introducing Schedule 3, which applies provisions of the Bill to subsidies provided, or subsidy schemes made, by means of primary legislation;

- the Secretary of State’s power to issue guidance on the meaning and effect of the subsidy control principles, and how far they can compel public authorities to comply with the principles.
- establishing that any duty or power to divulge information provided for in the Bill does not override the provisions of data protection legislation;
- establishing that, unless a modification of a subsidy or scheme is a “permitted modification”, changes to it are to be regarded as being a new subsidy or scheme and as such, the public authority will have to comply with the subsidy control requirements;
- The Secretary of State’s power to set out a methodology for calculating the gross cash equivalent of a subsidy that is not provided in cash terms. These could include loans or guarantees;
- consequential amendments to the Financial Services Act 2021, in relation to the meaning of ‘insurance company’, ‘deposit taker’ and ‘insurer’;
- that expenditure incurred under the terms of the Bill is to be met from supplies provided by the UK Parliament;
- matters of Crown application; powers to make consequential provision by regulation; and other procedural matters including on definitions, commencement, and the short title of the Bill.

42. Welsh Government’s view is that Senedd consent is required in respect of clauses 78-83, 86, 89, 90 and 91. The UK Government considers that consent is required for clauses 78 and 79, but not for clauses 80-92.

SCHEDULES 1-3

43. Schedule 1 describes the seven main subsidy control principles, six of which are derived from the TCA. The UK Competition and Investment Principle (Principle F), is an additional domestic principle that was proposed in the consultation document.

44. Schedule 2 sets out the additional principles that must, where relevant, be applied to specific categories of energy and environmental subsidies. These are derived from the UK’s international obligations, specifically under the ENER-2 annex within the TCA.

45. Schedule 3 deals with the application of the Bill in the case of subsidies provided for by primary legislation. This may occur where an Act grants a subsidy, or makes a scheme on its face, or places prescriptive spending provisions which would amount to a subsidy.

46. The Welsh Government and UK Government both consider that Senedd consent is required for Schedules 1-3 to the Bill.

Reasons for making these provisions for Wales in a UK Bill)

47. Paragraph 39 of the Welsh Government's LCM states the reasons why provision is being made for Wales in this Bill:

"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."

48. The previous Welsh Government had argued that subsidy control was devolved as it was not a reserved matter under any heading of the Reserved Matters Schedule in the Government of Wales Act 2006, although the UK Government considered state aid a reserved matter. The UK Internal Market Act 2020 removed any ambiguity by reserving to the UK Parliament the exclusive ability to legislate for a subsidy control regime. In respect of Wales, Section 52(3) of the Act does this by adding the regulation of distortive and harmful subsidies to the list of reserved matters in Schedule 7A to the Government of Wales Act 2006.

Welsh Government position - as set out in the LCM

49. The Welsh Government concludes in Paragraph 56 of the LCM that:

"As set out above, the Bill makes provision within the devolved competence of the Senedd and therefore Senedd's consent is required. However, we will not be in a position to recommend that consent be granted unless the Bill is amended to address our concerns."

50. In the written statement which accompanied the Bill, the Minister for the Economy said that the UK Government's approach to subsidy control caused the Welsh Government "serious concerns", as it did not reflect issues identified in the policy development process.

51. The Welsh Government says in the LCM that it *"does not accept that the measures proposed in the Bill will serve to sufficiently regulate the provision of subsidies in the UK"*. It states that the Bill's proposals have not taken the Welsh Government's concerns into account. The Bill's proposals are *"high-level"* and *"lack sufficient granularity"* to provide clarity on what is deemed to be compatible with the UK's proposed subsidy control regime, both for subsidy awarding bodies and businesses investing in the UK.

52. The LCM criticises *"broad powers"* being given to the Secretary of State to shape the regime in future with *"little scrutiny from the UK Parliament and no scrutiny available to Welsh Ministers or the Senedd"*. It also believes that other powers conferred on the Secretary of State in the Bill would, if enacted, *"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"*. The LCM sets out the Welsh Government's objections to specific elements of the Bill, and ways it believes the Bill can be amended to address these concerns:

- **Clause 10** allows the UK Government to make provisions to allow lower-risk subsidies to be given by public authorities through a **'streamlined subsidy scheme'**. The Welsh Government believes the power should be extended to Welsh Ministers *"given the subsidy control regime impacts upon areas of devolved responsibility"*.
- **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 states that parameters within the Bill should be defined to prevent subsidies being challenged if a **relocation** takes place several years after the award of a subsidy.
- **Clause 31** sets out that in certain circumstances a public authority must request a report from the CMA before giving subsidies or making a subsidy scheme. This is called a **'mandatory referral'**, and the CMA must publish a report on the proposed subsidy or scheme. Subsidies cannot be given until after a cooling-off period. The Welsh Government is asking for the Bill to *"specify a route to enable Welsh Ministers to overrule such standstill requirements if there is a sufficient policy need"*.
- **Clauses 43 and 44** include exemptions for subsidies given to compensate damage caused by **natural disasters**, other exceptional occurrences or in response to national or **global economic emergencies**. The Secretary of State can publish a notice declaring that these exemptions apply to a specific occurrence, and lay this before the UK parliament. The Welsh Government would like this extended to Welsh

Ministers, or at a minimum the Bill should allow Welsh Ministers to request that the UK Government makes a declaration and can challenge a refusal to do so.

- **Part 4** outlines the CMA's functions and the LCM proposes a number of amendments, including greater detail on the Secretary of State for BEIS powers; and providing mechanisms to extend powers to Welsh Ministers or to challenge decisions made by the Secretary of State.
- **Clause 79** allows the Secretary of State for BEIS to **issue guidance** about the subsidy control regime, and requires consultation on such guidance. The Welsh Government would like the Bill to specify the need for **mandatory engagement** with devolved Ministers in relation to this guidance.

Issues raised with the Minister in Committee

53. The Minister for Economy was not available to give evidence to the Committee in advance of the reporting deadline, but the Minister for Finance and Local Government, Rebecca Evans MS, attended the Committee's meeting on 21 October 2021.

Welsh Government engagement with UK Government on the Bill

54. The Committee explored this with the Minister for Finance and Local Government, to understand the differences between the Welsh and UK governments' views on the content and scope of the Bill.

55. The Minister for Finance and Local Government was asked what engagement there had been with the UK Government on the Bill since its introduction, and what amendments the Welsh Government would be seeking to the Bill as it progresses through Westminster. The Minister had met with the Parliamentary Under-Secretary of State in BEIS, Paul Scully, on 29 September, and Welsh Government officials were engaged on a fortnightly basis via the BEIS devolved administrations subsidy control forum. However, the Minister said these meetings have been:

"nothing more than an opportunity for the UK Government to outline their position and their intentions moving forward. They haven't really been meaningful in the sense of opportunities for us to influence the development of the Bill, unfortunately, and that's why we're seeking amendments in a number of areas, and they're areas that I've raised with Paul Scully previously."

56. James Fenwick, Welsh Government's senior state aid policy adviser, confirmed that although meetings had been "illuminating" about the UK position, and representations had been made on Welsh Government's position:

"...we've yet to see any reflection of those positions appearing in the UK's position in terms of how it was initially developed and how it has evolved into the Bill. We've talked with the UK Government on numerous occasions early on as the Bill was progressing, and yet none of our requests appeared in the amendments to the Bill that the UK has proposed and have been put into the next draft of it."

Amendments to the Bill sought by Welsh Government

57. The Minister said she was seeking amendments specifying the parameters for the Secretary of State for BEIS's call-in powers (Clauses 55 and 58 of the Bill as introduced), restricting their use for intra-UK cases where there could be a perceived conflict of interest:

"...so, for example, a proposed subsidy close to the Wales-England border or where the potential beneficiary is active in an industry that is really heavily represented in England."

58. Welsh Government was also seeking commensurate powers to call in any subsidy or scheme in the UK for the First Minister, *"to decrease the power disparity that currently exists in the Bill."*

59. Amendments are also being sought that would allow Welsh Ministers to propose **streamlined** routes in priority areas (Clause 10 of the Bill as introduced). The Minister pointed out that:

"...currently, this is the exclusive competence of the UK Government, and streamlined routes, of course, are designed to bring added value through lighter touch processes. The lack of ability for Welsh Ministers to take advantage of this process to develop routes under which Welsh schemes could be raised will place Wales, we think, at a disadvantage to England."

Agricultural and Fisheries Subsidies

60. The written statement released alongside the LCM also stated that the Welsh Government and other devolved administrations wanted agricultural and fisheries subsidies to remain outside the scope of the subsidy control regime. The Minister was asked to set out why she considered these subsidies should not be included within the scope of the regime, and how they should be

regulated. The Minister pointed out that agricultural subsidies were already regulated through a *"tried and trusted process"* via the World Trade Organization agreement on agriculture, and that was why they were excluded from the general subsidy controls under the UK-EU trade and co-operation agreement. She also said including them would *"inevitably lead to an additional administrative burden and potential restrictions on both Government and agricultural recipients,"* and that *"we haven't yet had an explanation of the rationale behind this approach."* The Minister went on to say Welsh Government would:

"continue to proactively engage with the UK Government on this to try and continue to ensure that the views of Wales are taken into account during the design of the subsidy control regime."

Policy detail missing from the Bill

61. The LCM sets out Welsh Government's concerns that the Bill does not set out how the subsidy regime will operate in sufficient detail. The Committee asked the Minister what level of additional detail was needed to provide sufficient clarity

62. In addition to concerns about provision of information and consultation on secondary legislation and co-design of guidance with the devolved administrations (see section below), the Minister said that examples of additions required included 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.

63. The Minister said that information provided on initial thresholds for certain forms of subsidy, such as £315,000 over three years for minimum financial assistance, was *"a good start"*. However, she added that *"in this particular instance, the UK Government has hinted that the threshold may vary for agriculture and for fisheries, without giving any clarity about what the alternative may be. So, at best we only have part of the picture there."*

64. The Minister went on to explain that 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. She gave the example of clause 11, which empowers the Secretary of State to define a subsidy and a subsidy scheme in regulations, stating *"obviously these are key concepts"*.

65. The Minister also pointed to the regulation powers at Part 4 of the Bill empowering the Secretary of State to make important changes to the referral process to the Competition and Markets Authority, including the information that must be provided and the timescales for

reporting on a referral. She further noted clause 86, giving the Secretary of State broad consequential amendment powers with no regulation-making powers conferred on Welsh Ministers, and 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."

66. The Institute for Government has suggested that, to create a subsidy control regime with buy-in from across the UK, regulations resulting from the Bill should be made in consultation with the devolved administrations. The Minister was asked if this approach would allay concerns about the level of detail in the Bill, whether this had been raised with the UK Government, and what the response had been.

67. The Minister stated that:

"...we've been really keen to 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."

68. The Minister said that consultation should be *"on a truly collegiate basis, with the regime developed from the ground up on an iterative basis with all of the parties involved"*. She stated that to date there had been *"minimal involvement for us in the construction of the proposed regime"*, with deadlines to consider drafts being *"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."* The Minister said Welsh Government was seeking a framework-type policy development process with the devolved governments, with a clear requirement that this is reflected on the face of the Bill.

69. The Minister described the lack of consent or consultation requirements on how the Secretary of State's regulation-making powers would be exercised in the Bill as *"a real void and vacuum"* which she hoped would be addressed as the Bill moved forward.

Impact of the Bill on Wales - Support for Disadvantaged Areas

70. The UK Government's impact assessment anticipates that the Bill will have a positive regional impact overall, although as policy details are still to be determined it will need to undertake further analysis. The Bill EN states that the guidance to be developed on the practical application of the Bill may set out how subsidies can be used to support disadvantaged areas, and may define which areas would be eligible for support in this way.

71. The UK Government Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, Paul Scully MP, stated on 22 September that assisted area maps are not the only way of addressing inequalities, and that "a map can be a blunt instrument, making it difficult to address inequality and disadvantage within regions".

72. In a written statement on 14 July, the Welsh Ministers set out concerns around the Bill not including mechanisms to support disadvantaged areas within the UK to compete with more prosperous areas. The Committee asked the Minister what analysis Welsh Government had undertaken of the potential impacts of the Bill on Wales, and the findings of any analysis, and how she would like to see support for disadvantaged areas brought into the Bill.

73. The Minister said that absence of information made it very hard to make an analysis but the real concern was that *"it will mean that investment is pulled away from those communities that need it most."* The Minister referred to the 'Merthyr competing with Mayfair' analogy, in the absence of a mechanism in the Bill to direct investment to the areas of disadvantage - i.e. an equivalent to the regional aid guidelines or to the assisted areas map in the EU state aid regime.

74. The Minister said these previous mechanisms were "absolutely instrumental" to help offset structural disadvantages in more disadvantaged regions of Wales:

"The absence of this approach risks a concentration now of prosperity in the wealthier parts of the UK, pulling investment away from the areas that need it most and actually, it's the polar opposite of levelling up."

75. The Minister acknowledged that it could be argued the proposed new subsidy regime might allow more flexibility for Welsh Government to support economic development than under the EU state-aid rules, but that *"this is by no means clear, given the current uncertainty around exactly how the new regime would operate in practice."*

76. The Minister added that *"in any event, a more flexible regime would not necessarily equate to a positive impact for Welsh investment."*

77. It was also pointed out by the Minister that the proposed regime introduces legal uncertainty: while aid provided for under the old EU regime was more restrictive, it did at least provide legal certainty to awarding authorities and beneficiaries looking to invest. The Minister said it appeared that the new regime *“will mean that awarding authorities are making judgment calls, and that obviously could lead to uncertainty for beneficiaries and lead them to taking their investment elsewhere.”*

78. The Minister returned to the point that although some of these issues might be fleshed out in regulations and guidance, Welsh Ministers had no formal role in the development of *“really key pieces of the jigsaw to ensure that investment can be targeted. Because at the moment, it can't be targeted, and that is the big concern—that we no longer have those assisted area maps.”* Without the necessary detail the Minister said *“the jury was out”* on what this will mean in practice.

79. Welsh Government wants the detail of support for disadvantaged areas to be developed on a quadrilateral basis by all four Governments in the UK, the Minister noting that all could offer unique insights:

...from our perspective in Wales we have a huge breadth of experience in terms of managing the dispersal of EU structural funds and the use of EU regional aid, and that could really help avoid any pitfalls for the future and help ensure that the resulting regime is fit for purpose for the whole of the UK.”

Powers to provide subsidies in ‘exceptional circumstances’

80. Clauses 43 and 44 of the Bill outline the parameters under which subsidies can be provided for natural disasters, exceptional circumstances, and national or global economic emergencies. In both cases, it relies on the Secretary of State to declare the exemption applies to an occurrence by laying a published notice in the UK Parliament. As previously noted, the Welsh Government would also like this power extended to Welsh Ministers, or at a minimum the Bill should allow Welsh Ministers to request that the UK Government makes a declaration and can challenge a refusal to do so.

Powers for Welsh Ministers to make referrals

81. The LCM sets out that the Welsh Government is calling for Welsh Ministers to have powers to make referrals of subsidies to the Competition and Markets Authority, a power that the Secretary of State for BEIS has under clause 60(4) of the Bill. The Minister told the Committee that this had been raised regularly, both with the BEIS Minister Paul Scully, and in meetings

between officials, but without success - the UK Government's response was that regulation of subsidies is a reserved matter and is the exclusive competence of the UK Government.

82. The Minister explained Welsh Government's counterargument was 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."*

83. The Minister pointed out that prior to the UK Internal Market Act coming into force, 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. She said:

"it's certainly not too late to develop that [collegiate way of working], but it will require some movement, I think, on the part of the UK Government."

Representation on the Subsidy Advice Unit - parity of esteem

84. Clause 68 requires the establishment of a Subsidy Advice Unit (SAU) within the Competition and Markets Authority, and Clause 69 enables the unit to make a reference to the CMA Chair for the constitution of a CMA panel group. The Minister said it was vital for the Unit to be representative of the whole of the UK, and for the Bill to *"clearly carve out a role for devolved Governments in appointments"*. The Minister said that the fact that this would bring parity of esteem with the appointments process for the Office of the Internal Market added weight to the argument.

Engagement with UK Government on guidance under clause 79(5) of the Bill

85. The LCM also highlights that the Welsh Government believes engagement with devolved Ministers should be mandatory in relation to guidance made under clause 79(5) of the Bill.

86. The Minister pointed out that as currently worded Clause 79(5) of the Bill 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 beyond paragraph 5's requirement to 'consult such persons as the Secretary of State considers appropriate.' She explained that proper engagement was necessary given that economic development is devolved and any changes to guidance *"will have the potential to impact upon our own economic development plans or approach."*

Constitutional implications of the Bill

87. The state aid expert George Peretz QC has analysed the implications of the Subsidy Control Bill for devolution. He has concluded that, while the subsidy control regime under the Bill will be more permissive than the EU regime, it gives the UK Government *"considerable power to set the subsidy control agenda and gives it an ability to subject subsidies by devolved governments to scrutiny which is not reciprocal."*

88. George Peretz QC identifies a number of parts of the Bill (including clauses 70(7)(b) and 79) where the Secretary of State is awarded powers, but the devolved administrations are not given these and there is no requirement for them to be consulted which he views as *"distinctly unbalanced"*. He states that Schedule 3 to the Bill is *"replete with important constitutional issues"*, as it will allow for challenges to subsidies provided for by devolved primary legislation, whereas Acts of Parliament are exempt from such challenges.

89. The Minister for Finance and Local Government agreed with this conclusion regarding Schedule 3 of the Bill:

"...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, and I think the UK Government themselves have acknowledged that Schedule 3 does require an LCM. 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."

Financial Implications

90. Paragraph 55 of the Welsh Government's LCM also highlights a lack of clarity regarding the financial implications of the Bill for Wales. This states as follows:

"It is unclear on the face of the Bill whether there will be direct financial implications for the Welsh Government or the Senedd arising from the powers under the Bill."

Committee View

91. The Committee is grateful to the Minister for Finance and Local Government for attending Committee to discuss the Subsidy Control Bill LCM. The Committee has noted Welsh Ministers' concerns about the Bill as drafted, and frustrations about the approach to consultation and development of a new regime that will impact on significant devolved policy areas in Wales and across the UK. Members have sympathy with the parity of esteem issues raised, particularly given the inconsistency with the Framework process adopted to manage substantive areas of UK-wide policy development required as a result of leaving the EU.

92. There is insufficient time for the Committee to undertake further scrutiny of the Bill and the LCM before the reporting deadline of 4 November. In any case it appears that there is insufficient detail available currently about how the proposed new subsidy regime might work in practice. This prevents any meaningful assessment of the potential impact on Wales.

93. The Committee has therefore agreed to publish its report on the LCM by the 4 November deadline set by the Senedd's Business Committee. The Committee will also write to the Department for Business, Energy and Industrial Strategy, in order to draw UK Ministers' attention to the issues raised in this report. That letter will be copied to the Chair of the House of Commons Select Committee on Business, Energy and Industrial Strategy, which is conducting an inquiry 'Post-pandemic economic growth: State Aid and Post Brexit Competition Policy', and to the Public Bill Committee tasked with line-by-line scrutiny of the Bill in the House of Commons, which first sat on 26 October.