SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM

(MEMORANDUM NO.2)

Subsidy Control Bill

1. This Supplementary Legislative Consent Memorandum (LCM) is laid under Standing Order 29.2. Standing Order 29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a United Kingdom (UK) Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.

2. The Subsidy Control Bill ("the Bill") was introduced in the House of Commons on 30 June 2021. The House of Commons concluded its consideration of the Bill on 13 December. Second Reading in the House of Lords is scheduled to take place on 19 January 2022. The Bill can be found at:
https://bills.parliament.uk/bills/3015

3. This Supplementary LCM clarifies the Welsh Government position on two clauses (clauses 41 and 42) identified in the original LCM as requiring consent.

Policy Objective(s)

4. The UK Government's stated policy objective is to implement a domestic subsidy control regime in the UK that reflects the UK's strategic interests and particular national circumstances, providing a legal framework within which public authorities make subsidy decisions.

Summary of the Bill

5. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy.

6. 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 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).

7. The key provisions of the Bill cover:

    a) provision of a baseline legal framework to enable public authorities to award subsidies in line with the subsidy control principles it outlines. There will be a statutory duty for public authorities to consider these principles and only award a subsidy if the subsidy is consistent with these principles;
    b) the extension of the remit of the UK subsidy control regime from the current externally-facing regime to include the UK Internal Market;
    c) The introduction of a small number of prohibitions to prevent public authorities granting subsidies with overly distortive or harmful economic impacts;
    d) in limited circumstances, provision for various foreshortened subsidy award pathways, some of which are yet to be defined;
    e) the imposition of a requirement for public authorities to use the UK transparency database, to enable basic expenditure monitoring and scrutiny under the regime;
    f) the establishment of the Subsidy Advice Unit (located within the Competition and Markets Authority) to provide monitoring and oversight of the new regime. The Subsidy Advice Unit will also possess limited advisory functions for subsidies that it considers to be more likely to distort UK competition and investment and international trade;
    g) the empowering of the Secretary of State for Business, Enterprise and Industrial Strategy to refer subsidy awards to the Subsidy Advice Unit for review, as well as impose limited 'cooling-off' periods post-review;
    h) the enabling of interested parties to challenge subsidy decisions on judicial review grounds in the Competition Appeal Tribunal;
    i) provision for the Secretary of State for Business, Energy and Industrial Strategy to issue statutory guidance on the application of the subsidy control regime.

Clauses included in the Bill as introduced for which the consent of the Senedd is required, but our position was not made clear in the first Legislative Consent Memorandum

8. We consider the following additional provisions, included in the Bill as introduced, require the legislative consent of the Senedd:

Part 3 – Exemptions

Chapter 2 – Minimal and SPEI Financial Assistance

9. These provisions lay down requirements in respect of minimal financial assistance and Services of Public Economic Interest Assistance (SPEI).

10. An LCM is required in relation to clauses 41 and 42, covering mergers & acquisitions, exemptions for SPEI assistance, and supplementary and interpretative provisions. Whilst these do not directly impose functions on those Authorities, the content of those clauses will impact how those Authorities exercise their functions.

Reasons for making these provisions for Wales in the Subsidy Control Bill

11. 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.

Welsh Government position on Clauses 41 and 42 of the Bill as introduced

12. As we set out in the LCM laid on 13 July 2021 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. Clauses 41 and 42 allow the Secretary of State to alter subsidy thresholds and define parameters within the UK subsidy regime without a requirement to obtain the consent of the Devolved Governments beforehand. 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.

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

14. This supplementary LCM objects in particular to the following elements of the Bill.

Part 3 – Exemptions

15. Section 41 exempts certain subsidies being given to enterprises delivering Services of Special Public Interest (SPEI) and defines activities that can be considered to be SPEIs. Section 42 is a supplementary and interpretative provision empowering the Secretary of State to amend Minimal and SPEI Financial Assistance thresholds and providing definitions for terminology used within the two clauses. Whilst Sections 41 and 42 do not directly impose functions on Devolved Governments in relation to subsidies, their

content will impact upon the exercising of devolved functions. For this reason, we consider that these clauses make provision with regard to devolved areas.

Financial implications

16. 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.

Conclusion

17. As we have set out in paragraphs above, clauses 41 and 42 of the Bill make 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 to the inclusion of clauses 41 and 42 in the Bill, or the other provisions as set out in the original LCM, unless the Bill is amended to address our concerns.

Rebecca Evans MS Minister for Finance and Local Government
Vaughan Gething MS Minister for the Economy

6 January 2022