

LEGISLATIVE CONSENT MEMORANDUM

Subsidy Control Bill

1. This 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 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 impacts on the non reserved area of economic development, and triggers an LCM under section 107(6) of the Government of Wales Act 2006.
3. Further, an LCM is also triggered by Paragraph 34 of the Devolution Guidance Note (*'Parliamentary and Assembly Primary Legislation affecting Wales'* (April 2018)) which suggests that the UK Government considers that Senedd consent is required to impose a "reserved function" on a devolved Welsh authority, which the Subsidy Control Bill does.
4. The Subsidy Control Bill ("the Bill") was introduced in the House of Commons on 30 June 2021. The Bill can be found at: <https://bills.parliament.uk/bills/3015>

Policy Objective(s)

5. The United Kingdom (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

6. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy.
7. 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).

8. 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.

Provisions in the Bill for which consent is required

9. We consider the following provisions require the legislative consent of the Senedd:

Part 2 – Subsidy Control Requirements

Chapter 1 – Principles

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

11. LCM required in relation to clause 12, on the application of the subsidy control principles, and clause 13, on the application of the energy and environment principles. The provisions impact the devolved area of economic development and functions are imposed on Devolved Welsh Authorities in relation to subsidies.

Chapter 2 – Prohibitions and Other Requirements

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

13. LCM required in relation to clauses 14-31, covering; general prohibitions, ailing or insolvent enterprises, other specific prohibitions and requirements, subsidy schemes and subsidies or schemes subject to mandatory referral. The provisions impact the devolved area of economic development and functions are imposed on Devolved Welsh Authorities in relation to subsidies.

Chapter 3 – Transparency

14. These provisions impose requirements in relation to the subsidy database.

15. LCM required in relation to clause 33, covering a duty to include information in the subsidy database: the provisions impact the devolved area of economic development and functions are imposed on Devolved Welsh Authorities in relation to subsidies.

Part 3 – Exemptions

Chapter 1 – Introductory

16. This provision introduces the subsidy exemptions.

17. LCM required in relation to clause 35, introducing exemptions: the provisions impact the devolved area of economic development.

Chapter 2 – Minimal and SPEI Financial Assistance

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

19. LCM required in relation to clauses 36-40, covering; minimal financial assistance, Services of Public Economic Interest and mergers & acquisitions: the provisions impact the devolved area of economic development and functions are imposed by clauses 36-39 on Devolved Welsh Authorities in relation to subsidies. Whilst clauses 40, 41 and 42, covering mergers & 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.

Chapter 3 – Emergencies etc.

20. These provisions create exemptions which can be used if the Secretary of State says that they apply.
21. LCM required in relation to clauses 43 and 44, covering natural disasters and other exceptional circumstances, and national or global economic emergencies: the provisions impact the devolved area of economic development and functions are imposed on Devolved Welsh Authorities in relation to subsidies.

Chapter 4 – Other Miscellaneous Exemptions

22. These provisions set out what other exemptions could be available.
23. LCM required in relation to clauses 45 to 51, covering exemptions for national security, Bank of England monetary policy, financial stability, legacy and withdrawal agreement subsidies, and tax measures: the provisions impact the devolved area of economic development and functions are imposed on Devolved Welsh Authorities in relation to subsidies.

Part 4 – CMA: Referrals and Functions

Chapter 1 – Functions on Referrals of Subsidies and Schemes

24. These provisions set out the process of referring subsidies and schemes to the CMA.
25. LCM required in relation to clauses 52 to 64, covering mandatory and voluntary referrals to the CMA, the contents of the CMA report and post-award referrals: the provisions impact the devolved area of economic development and, those clauses, 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 Welsh Authorities in relation to subsidies.

Chapter 2 – General Functions

26. These provisions set out general requirements in relation to the CMA's role.
27. LCM required in relation to clauses 65 to 67, covering monitoring and reporting on subsidy control, the CMA annual report and information-gathering powers: the provisions impact the devolved area of economic development.

Chapter 3 – Subsidy Advice Unit

28. These provisions provide for the establishment of the Subsidy Advice Unit and for work to be undertaken by subsidy control groups.
29. LCM required in relation to clauses 68 and 69, covering the Subsidy Advice Unit and references to subsidy control groups: the provisions impact the devolved area of economic development.

Part 5 – Enforcement

30. These provisions set out the mechanism by which the provisions of the Bill may be enforced and for the powers available to public authorities where a subsidy has been misused.
31. LCM required in relation to clauses 70 to 77, covering appeals to the Competition Appeals Tribunal (CAT): the provisions impact the devolved area of economic development and, those clauses, with the exception of clauses 70 to 73 (covering the review of subsidy decisions, time limits for applications and CAT powers), impose functions on Devolved Welsh Authorities in relation to subsidies.

Part 6 – Miscellaneous & General

Chapter 1 – Miscellaneous

32. These provisions provide for the application of Schedule 3, 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 gross and gross cash equivalent amounts and amendments to the Financial Services Act 2021.
33. LCM required in relation to clauses 78 to 83, covering; subsidies and schemes in primary legislation, guidance, disclosure of information, modifications to subsidies and schemes, gross cash and gross cash equivalent amount of financial assistance, and minor amendment to the Financial Services Act 2021: the provisions impact the devolved area of economic development and, except in clauses 82 (gross cash and gross cash equivalent amount of financial assistance) and 83 (minor amendment to the Financial Services Act 2021), functions are imposed on Devolved Welsh Authorities in relation to subsidies.

Chapter 2 – General

34. These provisions concern general matters in relation to the Bill.
35. LCM required in relation to clauses 86 (power to make consequential provision), 89 (interpretation), 90 (extent), 91 (commencement): the provisions impact the devolved area of economic development.

Schedules

36. LCM required in relation to Schedule 1 'The Subsidy Control Principles': the provisions impact the devolved area of economic development.
37. LCM required in relation to Schedule 2 'The Energy and Environmental Principles': the provisions impact the devolved area of economic development.
38. LCM required in relation to Schedule 3 'Subsidies Provided by Primary Legislation': the provisions impact the devolved area of economic development.

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

39. 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 the Bill as introduced

40. 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 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.
41. 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.
42. We will not be able to recommend to the Senedd that it gives consent to the Bill as currently drafted.

43. We object in particular to the following elements of the Bill.

Part 1 – Overview and Key Interpretation

44. Section 10(4) only allows Ministers of the Crown to make streamlined subsidy schemes. Given the subsidy control regime impacts upon areas of devolved responsibility this power should be extended to Welsh Ministers.

45. Section 10(5) requires that streamlined subsidy schemes be laid before Parliament; if the power to raise such schemes is extended to Welsh Ministers this requirement should be extended to the Senedd Cymru.

Part 2 – Subsidy Control Requirements

46. Section 18, outlining the prohibition on the relocation of activities, includes intra-UK relocations but does not specify any limitation of time period within which such a prohibition is relevant. This means that a challenge could theoretically still be made even if activity is relocated several years after a subsidy has been provided. Defined parameters within which this restriction can operate must be defined in the Bill to prevent its abuse.

47. Section 31 explicitly prohibits subsidies or subsidy schemes subject to mandatory referrals until all required activity has been completed. This will prevent Welsh Ministers from disregarding these restrictions even if applied to areas of devolved responsibility. Given the intrusion into devolved competency this represents, the Bill must specify a route to enable Welsh Ministers to overrule such a standstill requirement if there is sufficient policy need.

Part 3 – Exemptions

48. Sections 43 and 44 outline the parameters under which subsidies can be provided for natural disasters, exceptional circumstances, national or global economic emergencies. In both cases, it relies on the Secretary of State for Business, Enterprise and Industrial Strategy (SoS BEIS) to declare the exemption applies to an occurrence. The Bill must extend this power to Welsh Ministers or at minimum define the processes by which Welsh Ministers can request such a declaration and challenge any subsequent refusal by the SoS BEIS.

Part 4 – CMA; Referrals and Functions

49. Section 54 empowers the SoS to extend the cooling-off period following a mandatory referral to the Competition and Markets Authority (CMA) for up to 30 days in the event that the CMA report “has identified that there are serious deficiencies in the public authority’s assessment” (section 54(4)). No definition is given as to what would be considered a ‘serious deficiency’, nor is there any requirement for such an extension to the cooling-off period to have been requested by the CMA beforehand; the

Subsidy Control Bill should be amended to require that such an extension be only upon the request of the CMA.

50. Section 60(4) requires that any SoS referral is made within 20 working days of either the award being entered on the Transparency database or, in the case of Services of Public Economic Interest (SPEIs), being made. This power should be extended to Welsh Ministers or, at minimum, the processes by which Welsh Ministers can request such a declaration and challenge any subsequent SoS BEIS refusal should be defined.
51. Section 61(7)(b) forbids the SoS from extending post-award referral periods where they relate to subsidies or schemes they have made. It is not clear whether this restriction extends to all BEIS subsidies/schemes. If so, comparable devolved departments should be covered by the same restriction. Otherwise, this potentially creates an unacceptable power imbalance between the UK Government and Devolved Governments in areas of devolved responsibility.
52. Section 61(5) implies that the SoS may reject a CMA request for an extension but does not give any parameters for when such a rejection could be allowable. The Bill must be amended to outline these parameters accordingly. Comparable devolved Ministers should also be empowered to reject CMA requests, or to require that the SoS BEIS reject such a request on their behalf.
53. Section 65(7) requires that the CMA lay reports on their five-yearly reviews on the effectiveness of the Subsidy Control Bill, and its impact upon competition and investment in the UK, before Parliament. Given the impact of the regime upon areas of devolved policy, this requirement must be extended to laying before Senedd Cymru.

Part 6 – Miscellaneous and General

54. Section 79(5) requires the SoS to consult those they deem appropriate regarding the development of detailed guidance on the operation of the UK subsidy control regime; Devolved Ministers must be specified for mandatory engagement.

Financial implications

55. 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

56. 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.

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