



Department for
Business, Energy
& Industrial Strategy

Subsidy control

Designing a new approach for the UK

Closing date: 31 March 2021



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Any enquiries regarding this publication should be sent to us at: subsidycontrolconsultation@beis.gov.uk

Foreword

Now that the United Kingdom has left the European Union, we have an opportunity to develop home-grown solutions to longstanding social and economic problems – to make our own policy choices and stand by our own decisions. We will seize this moment.



This Government has major ambitions for the UK; we will Build Back Better from Covid-19, level up opportunities for people and businesses across the country, and transition to a net zero economy. We will forge a new relationship with the EU on the basis of free trade and friendly cooperation, while also striking new trade deals across the world in the spirit of Global Britain’s great liberal heritage.

Subsidies, when shaped by a clear rationale and value-for-money considerations, can play an important role in achieving those objectives. The Government is setting the pace, for example, as part of our commitment to increase UK investment in Research and Development to 2.4% of GDP by 2027, and is funding research and development critical to our leading role as a global centre for science and innovation. This research has delivered benefits that range from boosting economy-wide productivity growth to forming the basis of our response to, and recovery from, the Covid-19 pandemic.

We will not, of course, return to antiquated command and control methods of economic management, or encourage wasteful use of public money by propping up failing businesses. We will instead foster a dynamic, prosperous, and outward-looking economy – in every part of the UK – and the best way of doing this remains the operation of free markets powered by the entrepreneurial zeal of businesses. As Adam Smith wrote in *The Wealth of Nations*, “in general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so”.

We are proud of our Union – the UK is the most successful political and economic partnership in history. The governments of Scotland, Wales and Northern Ireland will remain in charge of their own spending decisions and we will, by working constructively with the Devolved Administrations, create a regime that works for the whole of the UK. In this way we will secure the integrity of our internal market – the basis of our national prosperity – and avoid subsidy races which might distort competition between the UK nations and be costly for the taxpayer.

This consultation sets out the future of the UK’s subsidy control regime – a regime that will set out a clear and transparent set of principles and guidelines, ensuring that public authorities at all levels of government fully understand their legal obligations, and which will allow businesses to make long-term investment decisions on that basis. At the same time, we will avoid burdening public authorities with undue bureaucracy, and seek to maintain their freedom to act swiftly in response to economic emergencies or natural disasters. Our subsidy control regime will also play its part in ensuring that the UK remains a reliable trading partner that

upholds its various international commitments, whether as part of our ambitious free trade agreements or under the Northern Ireland Protocol.

The foundation of our approach to subsidy control is a common-sense set of principles that subsidy givers will have to respect when awarding subsidies. We will, in line with standard international practice, prohibit particularly contentious subsidies – like export and local content subsidies. We propose to adopt a light touch approach to low-risk or low-value subsidies given their limited risk of distorting the market. The Government is open minded on the best means to meet its objectives and welcomes constructive suggestions on how to achieve them.

This wide-ranging consultation sets out the options available to the UK to design a bespoke subsidy control regime. I hope that this consultation gives as many businesses, public authorities, and people as possible the opportunity to make their voices heard and helps us to build a lasting subsidy control regime that truly meets the needs of people and businesses across the United Kingdom.

THE RT HON KWASI KWARTENG MP

Secretary of State for Business, Energy and Industrial Strategy

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General information

Consultation details

Issued: 3 February 2021

Respond by: 11.45p.m. on 31 March 2021

Enquiries to: subsidycontrolconsultation@beis.gov.uk

Consultation reference: Subsidy Control - Designing a new approach for the UK.

Audiences: The government seeks views from businesses and business representative organisations, subsidy granters, legal advisers and all other parties interested in subsidy control. Alongside digital responses, the Government intends to hold stakeholder engagement events on a number of topics during the consultation period.

Territorial extent: The whole of the United Kingdom.

How to respond

Your response will be most useful if it is framed in direct response to the questions posed, and with evidence in support wherever possible. Further comments and wider evidence are also welcome. When responding, please state whether you are responding as an individual or representing the views of an organisation.

We encourage respondents to make use of the online e-consultation wherever possible when submitting responses as this is the government's preferred method of receiving responses. However, responses via email will also be accepted. Should you wish to submit your main response via the e-consultation platform and provide supporting information via email, please be clear that this is part of the same response to this call for evidence.

Respond online at: <https://beisgovuk.citizenspace.com/eu-exit/subsidy-control-consultation>

or

Email to: subsidycontrolconsultation@beis.gov.uk

A response form is available on the GOV.UK consultation page:

<https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

We will summarise all responses and publish this summary on [GOV.UK](#). The summary will include a list of names of organisations that responded, but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the government's [consultation principles](#).

If you have any complaints about the way this consultation has been conducted, please email: beis.bru@beis.gov.uk.

Chapter 1 – Introduction

A new approach to subsidy control

1. Now that we have left the European Union (EU), the UK has the freedom to design a domestic subsidy control regime that reflects our strategic interests and particular national circumstances. While the EU's State aid rules are designed for the particular circumstances of the EU, our own bespoke regime should work for the specific needs of the UK economy while meeting our international commitments. It should facilitate strategic interventions to deliver Government priorities such as levelling up and achieving net zero carbon, as well as supporting the economy's recovery from Covid-19. It should maintain a competitive and dynamic market economy and, importantly, protect the UK internal market. The Government does not intend to return to the 1970s approach of Government trying to run the economy or bailing out unsustainable companies.

2. All parts of the United Kingdom will benefit from this new subsidy control regime. The new system will take account of the economic needs of all parts of the UK while providing authorities, businesses and consumers in England, Northern Ireland¹, Scotland and Wales with the certainty that they are operating within a consistent, coherent and UK-wide system. This new subsidy control regime will ultimately ensure the strengthening of the economic bonds of our Union following the UK's exit from the EU. As set out in the UK Internal Market Act 2020, the Government will provide a draft of the proposed response to this consultation to devolved authorities and consider any representations they may have regarding it before a final report is published.

3. This consultation invites views on the best ways to design a bespoke approach to subsidy control. Subject to the outcomes of this consultation, the Government will bring forward primary legislation to establish, in domestic law, a system of subsidy control that works for the entirety of the UK. This system will advance both the growth of the UK's economy and the interests of its citizens, while reflecting our international obligations.

Subsidies and subsidy control

4. In general terms, a subsidy is a financial contribution using public resources which confers a benefit on the recipient. This could include, for example, a cash payment, a loan with interest below the market rate, or a loan guarantee. Subsidies are administered by all levels of government in the UK.

¹ Subject to the state aid provisions under the terms of Article 10 of the NI Protocol, please refer to guidance at: <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments-from-1-january-2021>.

5. Subsidies should be in the public interest and given to promote a social good or address a market failure. Subsidies can, for instance, incentivise businesses to undertake research and development that increases economic productivity and wider prosperity, or to increase the uptake of low carbon technology. They can also help level up all parts of the UK.

6. There is, however, potential for harm or distortive effects. Subsidies can give recipients an unfair advantage over their competitors or be an inefficient use of public money if they do not bring about net positive change.

7. To minimise these risks, and increase the likelihood that subsidies achieve positive outcomes, the Government can design policy that regulates (or places “controls” on) the potentially distortive or harmful effects of subsidies. There are a wide variety of potential models for subsidy control systems, which will be discussed in subsequent chapters.

The UK’s international commitments

8. Since 1 January 2021 the UK has followed the commitments on subsidy control set out in its Free Trade Agreements (FTAs) with the EU and other countries and the World Trade Organisation (WTO) rules on subsidies, as well as the relevant provisions relating to Northern Ireland contained in Article 10 of the Withdrawal Agreement with the EU.

9. A short summary of the UK’s international commitments is set out below. Further details can be found in the Government’s guidance on complying with the UK’s international obligations on subsidy control.²

World Trade Organisation

10. The WTO deals with the rules of trade between nations at a multilateral level. WTO members recognise the need for rules on subsidies given their potential to distort international trade.

11. The WTO subsidy rules are set out in the 1995 Agreement on Subsidies and Countervailing Measures (ASCM) which contains an internationally recognised definition of a subsidy. These rules only apply to subsidies granted to companies that produce goods and not to companies that supply services. While the rules prohibit the granting of two types of subsidies³, all other subsidies are permitted in principle but could be potentially “actionable” if another WTO Member State can show evidence that they cause harm. The agreement contains processes to deal with the situation where a WTO member grants a prohibited subsidy and where disputes relating to potentially actionable subsidies arise between trading

² <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities>

³ Subsidies that are contingent, in law or fact, whether wholly or as one of several conditions, on export performance; and subsidies that are contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

partners. It also has provisions on the use of countervailing measures, which are primarily tariffs used to offset the damage subsidies can cause.

12. WTO members are obliged to publish details (“notify”) of subsidies given within their territory every two years. The notification needs to include information on, among other things, the form, purpose, duration and value of the subsidy.

Free Trade Agreements

13. Alongside the UK’s commitments on subsidies under the WTO, the UK has made agreements with trading partners that contain provisions on subsidies, including the UK-EU Trade and Cooperation Agreement (TCA) which is discussed below. Many FTAs use the WTO ASCM definition of a subsidy as the basis of what is in scope of their subsidy chapter, but some agreements build upon that definition to extend the scope to the supply of services, as well as goods, and they can include additional prohibitions. The UK-Japan Comprehensive Economic Partnership, for example, builds on the ASCM by extending the definition of a subsidy to include the supply of services as well as goods⁴, and prohibits subsidies to ailing firms without a credible restructuring plan and the use of unlimited guarantees⁵. The UK has negotiated other FTAs, such as those with South Korea, Canada and Ukraine, that contain chapters related to subsidies⁶.

14. The most common categories of additional prohibitions within FTAs include unlimited guarantee subsidies and rescue without restructuring subsidies. The former are subsidies where public authorities cover debts or liabilities of enterprises without any limitation (including amount and duration). The latter are subsidies to “insolvent or ailing enterprises” given without first establishing a credible restructuring plan to bring the enterprise back to long-term viability within a reasonable time-period. Where an FTA contains these commitments on prohibited subsidies, the restrictions usually only apply if they have an impact on trade between the UK and the relevant trading partner. This is different to the categories of subsidies which are prohibited under the WTO ASCM, which are unlawful under any circumstances.

15. FTAs also frequently include subsidy-specific transparency commitments. They commit the parties to report information on subsidies to the other party, and these commitments may go further than the ASCM transparency requirements in terms of timing, details or sector. Alongside these transparency commitments, FTAs may contain obligations for consultation between parties about particular schemes or individual subsidies. The results of these consultations are not typically binding, although there are obligations to provide information about the subsidy in question, if requested, and often obligations to make attempts to find mutual resolution.

⁴ UK-Japan CEPA, Chapter 12 Article 12.2 - <https://www.gov.uk/government/publications/ukjapan-agreement-for-a-comprehensive-economic-partnership-cs-japan-no12020> (volume 1, page 245)

⁵ Ibid, Article 12.7 (a) and (b), page 250

⁶ Further information on UK FTAs that contain subsidy provisions can be found at: <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities>

16. In relation to these commitments, a number of subsidy chapters in FTAs may have ‘value’ thresholds whereby the parties agree that the whole chapter, or certain obligations within the chapter, do not apply to subsidies valued at below a certain amount.

UK-EU Trade and Cooperation Agreement

17. On 24 December 2020, the UK and EU announced that they had reached agreement on the Trade and Cooperation Agreement (TCA). Both the UK and EU must have in place their own independent system of subsidy control but neither side is bound to follow the rules of the other. The TCA includes some broad principles that shape the design of both sides’ systems, which are aimed at ensuring that the granting of a subsidy does not have detrimental effects on trade or investment between the UK and the EU⁷. The TCA makes clear that it is for the Government to determine how these principles will be implemented in UK domestic law, as long as they are respected when subsidies are granted. It also includes some specific conditions relating to subsidies that are particularly distortive⁸.

18. The Agreement requires both sides to be transparent about the subsidies they grant⁹ and to establish or maintain an independent body with an appropriate role in their respective subsidy systems, while retaining full discretion over any functions that body may have¹⁰. The TCA also includes provisions on the role of domestic courts in reviewing domestic subsidy decisions¹¹. The UK and EU have also agreed that in limited circumstances, domestic courts should have the power to order recovery of subsidies that have been granted improperly under domestic law¹².

19. Finally, the UK and the EU have agreed a reciprocal mechanism that allows either side to take rapid action where a subsidy granted by the other side is causing or is at serious risk of causing significant harm to its industries. These measures can be challenged using an accelerated arbitration procedure and there is the possibility of compensation if either party has used these measures in an unnecessary or disproportionate manner¹³.

The Protocol on Ireland/Northern Ireland and the Withdrawal Agreement

20. The Protocol on Ireland/Northern Ireland, part of the UK-EU Withdrawal Agreement, contains provisions relating to subsidy control. Article 10 of the Protocol provides that the EU State aid rules will continue to apply in the limited circumstances where subsidies affect trade in goods between Northern Ireland and the EU, and therefore, in principle, aid that is granted to service providers is not covered. The State aid rules will also apply to trade in respect of wholesale electricity between Northern Ireland and the EU.

21. Article 10 of the Protocol has been subject to specific further consideration as part of the work of the UK-EU Joint Committee overseeing the implementation of the Protocol. The EU’s

⁷ TCA, Article 3.4, 184

⁸ TCA, Article 3.5, 184

⁹ TCA, Article 3.7, 187

¹⁰ TCA, Article 3.9, 189

¹¹ TCA, Article 3.10, 189

¹² TCA, Article 3.11, 190

¹³ TCA, Article 3.12, 191-192

declaration in the Joint Committee¹⁴ has clarified that subsidies granted in Great Britain are only in scope of Article 10 where there is a clear benefit from, and a genuine, direct link between the subsidy and companies in Northern Ireland.

22. The UK-EU Withdrawal Agreement also contains provisions that allow for any subsidies awarded within the UK before the end of 31 December 2020 to be investigated by the European Commission for a limited time afterwards.

A bespoke UK subsidy control regime

23. The UK needs a subsidy control system that minimises distortions to the normal operation of a dynamic and thriving market economy, and which facilitates strategic interventions to deliver Government priorities such as levelling up and achieving net zero carbon. As we recover from COVID-19 and the resulting uncertainty in the economic environment, we must also maintain the flexibility to support the UK's strategic interests. Taking this opportunity to design a bespoke UK subsidy control regime will allow us to tailor our approach to ensure it best meets the unique needs of the UK's internal market, as opposed to EU State aid rules, which were designed to support the EU Single Market.

24. The next chapter describes in more detail the possible benefits and challenges that arise from the use of subsidies and the objectives that should guide the design of any system. The final chapter describes the Government's proposed approach for a UK domestic subsidy regime.

¹⁴ Unilateral declarations by the European Union and the United Kingdom of Great Britain and Northern Ireland in the Withdrawal Agreement Joint Committee on Article 10(1) of the Protocol, accessible here - <https://www.gov.uk/government/publications/the-northern-ireland-protocol>

Chapter 2 – Subsidy control objectives

25. The Government wants a subsidy control system that strikes the right balance between allowing the benefits that can be derived from subsidies while limiting the most harmful impacts. The Government's objectives for the future subsidy control regime are:

- *Facilitating interventions to deliver on the UK's strategic interests*
- *Maintaining a competitive and dynamic market economy*
- *Protecting the UK internal market*
- *Acting as a responsible trade partner*

26. These objectives drive the proposals and detailed design elements of the subsidy control regime within Chapter 3. This chapter considers these aims in turn and how they relate to subsidies. The questions at the end of this Chapter seek views on these objectives, the types of subsidies the system should allow for and those it should prohibit or otherwise set conditions on.

Facilitating interventions to deliver on the UK's strategic interests

27. The UK Government wants to have a flexible system that empowers public authorities to design and award subsidies that bring benefits for society whilst providing clarity and certainty to both subsidy givers and recipients.

28. There are many examples where subsidies can help markets deliver better economic outcomes. For instance, businesses may underinvest in certain activities, such as research and development, that bring wider benefits to society.¹⁵ Firms will tend to underspend on research and development where they do not capture all the benefits stemming from their investment.¹⁶ Other businesses may be able to learn from or copy the resulting inventions or innovations without providing compensation to the firm that carried out the research. Well-designed subsidies to fund high-risk, high-payoff emerging areas of research can therefore help foster a greater level of innovation, which is beneficial to society as a whole. For example, the Government is developing a unique and independent funding body for advanced research, modelled on the United States' Advanced Research Project Agency. This new research body will back breakthrough technologies and basic research by experimenting with new funding models across long-term time horizons. Subsidies can also be used to equip individuals with the skills needed to drive economic growth and improvements in productivity.

29. Allowing public authorities greater flexibility in the awarding of subsidies can also help to produce socially desirable outcomes. For instance, a key priority of this Government is to help those regions that have been left behind and level up prosperity across the UK. Subsidies, alongside other forms of intervention, will be important tools in helping address regional imbalances. The Government committed at Spending Review 2020 to taking a new, holistic,

¹⁵ <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government>

¹⁶ Rodrik, D. (2004). Industrial policy for the twenty-first century.

place-based approach to supporting regional development. This includes the establishment of a 'levelling up' fund¹⁷ which allows local areas to seek support for local infrastructure investment that has a visible impact on people and their communities and will support economic recovery. The emphasis is to empower local areas to drive growth and regeneration. This fund sits alongside others, such as the UK Shared Prosperity Fund, which will replace bureaucratic structural funds that have been administered by the EU. It will support people and communities in opening up new opportunities and supporting regeneration and innovation. Other elements of the fund also include bespoke employment and skills programmes tailored to local needs. Subsidies for regional development also contribute to the objectives of "maintaining a competitive and dynamic market economy" and "protecting the UK internal market".

Maintaining a competitive and dynamic market economy

30. We want a dynamic and thriving UK economy that is the best place in the world to do business and delivers good outcomes for consumers. A well-functioning competitive market can deliver a number of benefits to society. Markets provide signals and incentives for businesses to provide products that customers want. Competition amongst firms helps to keep prices down for consumers and provides incentives for business to innovate in order to gain a competitive advantage.

31. The Government does not intend to return to the policies of the past, such as in the 1970s, where the Government attempted to run the economy or to pick winners through selective interventions. Governments rarely have access to the same level of market information and insight as businesses. Subsidies targeting specific businesses or sectors solely because the Government wants to support 'winners' are often unsuccessful. The issue here is not the use of subsidies in and of itself, but the misuse of subsidies for reasons other than addressing forms of market failure or to deliver other social equity objectives such as providing transport for residents of remote areas.

32. Although subsidies have a role to play in addressing market failures and equity imbalances, in some cases subsidies can interfere in the functioning of the market and have harmful effects on competition in the UK's business environment. For example, subsidies can dampen the incentives for recipients to operate efficiently and respond to consumer demands.¹⁸ In extreme situations, subsidy recipients may be able to undercut rivals until unsubsidised firms can no longer compete and exit the market. Increased market concentration can lead to higher prices and other costs for consumers such as reduced quality. Subsidies can also act as a barrier to entry, preventing new competitors from entering an area of business, and lead to a less competitive and weaker domestic economy over time.¹⁹

¹⁷ <https://www.gov.uk/government/publications/spending-review-2020-documents/spending-review-2020> - 'The government is launching a new Levelling Up Fund worth £4 billion for England, that will attract up to £0.8 billion for Scotland, Wales and Northern Ireland in the usual way'

¹⁸ Friederiszick, H. W., Röller, L. H., & Verouden, V. (2006). European state aid control: an economic framework. Handbook of antitrust economics, 625-669.

¹⁹ <http://www.oecd.org/regreform/sectors/2731940.pdf>

33. Subsidies should not be used to prevent unsustainable businesses or declining industries from failing. Allowing these businesses to persist can hamper the emergence of more productive firms and prevent resources from being redistributed to more competitive areas of the economy.²⁰ Subsidies should also be designed to bring about a change that would not have otherwise occurred and therefore to deliver social benefits and impacts beyond what would have happened in the absence of a subsidy. Subsidies that do not achieve either of these aims are unlikely to represent value for money to the UK taxpayer.

34. Subsidies can set harmful business expectations about the extent and nature of future support. A 'culture of subsidies' can lead to firms relying on government support rather than taking action to address inefficiencies.²¹ Similarly, if subsidies are for a specific activity – such as investing in research and development – an expectation of a subsidy may discourage businesses from undertaking this activity pre-emptively.²² Relatedly, business subsidies can make inefficient use of government resources by funding activity that would have happened anyway.²³ Repeated subsidies to the same industry can also lead businesses to lobby for further subsidies and continue investing in activity that may not be efficient in the long term.²⁴

Protecting the UK internal market

35. Now that we have left the EU it is important that we take a coherent and consistent approach to subsidy control across the UK as a whole to ensure the functioning of the UK internal market. The Government is committed to maintaining the integrity and operation of the UK internal market so that businesses can trade and prosper in all parts of the UK, whilst ensuring interventions are consistent with our international obligations, including the Northern Ireland Protocol.

36. A subsidy control system should discourage or prohibit subsidies that are likely to cause harmful distortion to the internal market, such as giving a business in one nation or region an unfair competitive advantage over those operating in another area. Firms may provide benefits to their host regions through increased rates revenue, employment, and demand for inputs from local suppliers. Competition across regions may lead to subsidy providers trying to outbid one another to attract a business. Businesses looking to establish or relocate an operation may attempt to use the subsidy offers from different public authorities to create a bidding war between them. The Government considers that an effective system for governing subsidies should help prevent inefficient and costly subsidy races.

Acting as a responsible trade partner

37. The UK Government is committed to upholding its obligations under the World Trade Organisation (WTO) Agreement on Subsidies and Countervailing Measures. Any subsidies granted which are found to be in violation of the WTO rules will damage the UK's international reputation, international cooperation and could lead to the UK facing countervailing duties and

²⁰ Rodrik, D. (2004). Industrial policy for the twenty-first century.

²¹ Friederiszick, H. W., Röller, L. H., & Verouden, V. (2006). European state aid control: an economic framework. Handbook of antitrust economics, 625-669.

²² Ibid.

²³ Mazzucato, M. (2013). The Entrepreneurial State: Debunking Public vs. Private Sector Myths, 1.

²⁴ Ibid.

other measures. Contravention of our international obligations may also undermine the negotiation of future trade deals and the UK's role in championing free trade, compliance and transparency at the WTO. Conversely, the UK will also be able to use the WTO's dispute settlement mechanism to challenge other WTO members where the UK believes they are not upholding their WTO obligations.

38. In addition to the WTO rules on subsidies, the UK Government has signed a number of Free Trade Agreements (FTAs) which include obligations on subsidies. These FTAs include dispute resolution chapters, some of which can apply to subsidy obligations. This means that the UK, or the relevant trade partner, can use the agreement's dispute resolution process to raise an issue if one partner believes the other is failing to meet their obligations, such as those on prohibited subsidies or transparency. Although many FTAs include provisions for consultations on subsidies, the outcome of the consultation is not binding.

39. The Trade and Cooperation Agreement (TCA) with the EU includes the same obligations and goes further than other FTAs on subsidies in a number of areas. The TCA sets out that each Party to the agreement shall have in place and maintain its own independent system of subsidy control. The TCA contains principles that must be embedded within the design of the domestic subsidy control system. It also includes provisions on the role of domestic courts in reviewing domestic subsidy decisions²⁵ The UK and EU have also agreed that, in limited circumstances, domestic courts should have the power to order recovery of subsidies that have been granted improperly under domestic law²⁶. For the UK, this would be available at the end of a successful judicial review (which looks at the legality, process and rationality rather than the merits of the decision) brought promptly within a specified time period. Given the UK's track record on compliance with subsidy control provisions, we anticipate that the recovery power would only be used in exceptional circumstances. The TCA also allows a party to take unilateral 'remedial measures' if a subsidy granted by the other party causes, or there is a serious risk it will cause, a significant negative effect on trade or investment between the parties. The remedial measure has a high threshold for use, must be proportionate and can be challenged by the responding party through an arbitration tribunal or the wider dispute resolution mechanism covering the entire TCA.²⁷ For these reasons and the reasons above, we anticipate that subsidies given by UK public authorities should continue to be unlikely to result in use of these measures.

40. The remedial measures are separate from the 'rebalancing measures' which can be applied by either party where there is a material impact on trade or investment arising as a result of significant divergence between the parties on subsidy control. The rebalancing measures are much less likely to be used than remedial measures and are the precursor to discussions around reviewing the entire trade heading of the TCA.

²⁵ TCA, Article 3.10, 189

²⁶ TCA, Article 3.11, 190

²⁷ TCA, Article 3.12, 191-192

Chapter 2 questions

41. We invite respondents' thoughts, ideally with appropriate evidence, on the types of subsidies that are beneficial and should be encouraged, as well as the types of subsidies that may be harmful and should be minimised. With reference to Question 5, we ask for this information in accordance with the Public Sector Equality Duty (PSED) set out in section 149 of the Equality Act 2010. This information will assist us in gathering evidence and information in order to complete the relevant assessments under our PSED duty as set out in the Act.

42. We specifically invite responses to the following questions:

Question 1: What type of subsidies are beneficial to the UK economy?

Question 2: What type of subsidies are potentially most harmful and distortive?

Question 3: Do you agree with the Government's objectives for a future subsidy control regime? Are there any other objectives that the Government should consider?

Question 4: We invite respondents' thoughts on further sources of evidence that would help to strengthen our analysis of policy impacts. In particular:

- Additional datasets (other than the European Commission's Transparency Award Module) on local or regional subsidy awards (e.g. by value, sector or category)
- Research and evaluation projects that have been conducted on the impacts of different types of subsidy awards on domestic competition and trade (e.g. by value, sector or category)

Question 5: We invite respondents' views on whether our proposed subsidy control regime, including the way it functions, may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) or sexual orientation) in different ways from people who do not share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.

Chapter 3 – Designing an approach that works for the UK

43. Now that we have left the EU, the UK has the freedom to design a domestic subsidy control regime that works for the specific needs of the UK economy while meeting our international commitments. This Chapter outlines the main elements of a subsidy control regime, beginning with a definition of subsidy, the seven principles that public authorities will have to respect when designing their subsidies and the categories of subsidies that will be exempt from certain obligations of the regime or out of scope entirely. The Chapter outlines specific types of subsidies, and subsidies to individual sectors, that are prohibited or controlled. There are further proposals on presumed compliance, protecting the UK internal market, transparency requirements, judicial enforcement and some of the potential roles that an independent body might play in a subsidy control regime.

44. Legislating for a subsidy control regime will ensure that subsidy provision across all UK public authorities, including local authorities and the devolved administrations, is consistent. The UK Internal Market Act 2020 reserves to the UK Parliament the exclusive ability to legislate for a UK-wide subsidy control regime to regulate subsidies which are or may be distortive or harmful, whether that is in relation to international trade or the UK internal market. The UK Internal Market Act 2020 also contains a duty to consult the devolved administrations on the outcomes of this consultation before the Government response is published. It is important to note that public authorities, including the devolved administrations, will continue to be responsible for decisions about devolved spending on subsidies – how much, to whom, and for what – within any future UK-wide subsidy control regime.

45. Any future regime will only take effect when the relevant legislation comes into force; it will not apply retrospectively to subsidies awarded in the interim. Until then, and as described in Chapter 1, the UK will continue to follow its international commitments on subsidy control. Guidance for public authorities on those international commitments has been published on GOV.UK²⁸.

46. A subsidy control regime can strengthen open and fair competition across all regions of England, Scotland, Wales, and Northern Ireland and thereby ensure that the most productive businesses grow and thrive in the UK's dynamic market economy. It can prevent uncompetitive or failing businesses seeking government support at the expense of more dynamic, emerging firms. It can also provide greater clarity and certainty for businesses and investors, support the smooth functioning of the UK's internal market, and diminish the risks stemming from the most distortive types of subsidies.

47. The Government wants to establish a modern system to ensure that open and fair competition remains the basis of the UK's dynamic free market, and that any government

²⁸ www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities.

subsidies minimise potentially distortive and harmful effects to this market and in relation to international trade. It should facilitate strategic interventions to deliver Government priorities such as levelling up and achieving net zero carbon, as well as supporting the economy's recovery from Covid-19. The central elements of the Government's preferred approach to subsidy control are explored in more detail below.

A model for the UK's future domestic regime

Definition

48. The first step in setting out a bespoke domestic subsidy control regime for the UK is to define what is meant by a subsidy, and what type of support by public authorities would fall within this regime.

49. The Government considers that there are four key characteristics of a subsidy. A support measure must meet all of these to be classified as a subsidy for the purposes of any regime:

1. It must constitute a financial contribution provided by a 'public authority', including, but not limited to, central, devolved, regional or local government or any other person providing financial assistance originating from public resources. The financial contribution could be a grant, loan or loan guarantee or other form of financial assistance, such as forgoing of revenue that is otherwise due.
2. The award of the subsidy must confer a benefit on persons supplying goods or services in the course of a business, which would not be available under commercial terms.
3. The subsidy must be specific which means it benefits a particular enterprise, or enterprises in a particular sector, industry, or region.
4. It has, or could have, a harmful or distortive effect on trade or investment within the UK or internationally.

50. In order to design a bespoke regime that works for the specific needs of the UK economy while fulfilling our international obligations, the definition we use for our domestic regime must be consistent with the definitions used under the WTO and those agreed in our FTAs. The UK-EU TCA contains a detailed definition of a subsidy and is therefore highly relevant in terms of subsidy definitions²⁹. The TCA also defines a subsidy using a four limbed test:

- i) there must be financial assistance arising from government resources (including the transfer of funds such as direct grants, loans or loan guarantees, the forgoing of revenue otherwise due, or the provision of goods or service, or the purchase of goods or services),

²⁹ TCA, Article 3.1(1),182

- ii) that confers an economic advantage on one or more 'economic actors' i.e. businesses,
- iii) where the benefit is specific to certain economic actors over others,
- iv) and the subsidy has, or could have, an effect on trade or investment between the UK and EU.

51. Accordingly, the Government considers that the four key characteristics in paragraph 49 allow us to meet our international obligations and that this definition covers the whole of the UK's economy and applies to both subsidies granted to companies that produce goods and those that supply services. It should be noted that the terms businesses, firms, companies and enterprises have been used interchangeably in this consultation. These also encompass individuals and partnerships where they operate on a commercial basis.

Question 6: Do you agree with the four key characteristics used to describe a support measure that would be considered a subsidy? If not, why?

Question 7: Should there be a designated list of bodies that are subject to the new subsidy control regime? If so, how could that list be constructed to ensure that it covers all financial assistance originating from public resources?

Scope

52. The UK is already subject to international rules in relation to agricultural and fisheries subsidies. The WTO Agreement on Agriculture (AoA) contains rules for providing subsidies to agriculture³⁰. The ASCM applies to fisheries subsidies, although there is currently no sector-specific WTO agreement in place³¹ akin to the AoA. Agricultural subsidies in scope of the AoA and fisheries subsidies are not subject to the TCA.³² However, 'agricultural' spending not covered by the AoA, which meets the TCA definition of a subsidy, will be subject to the TCA subsidy control obligations. For example, a scheme that funds both producers of agricultural goods and non-agricultural producers would be both in and out of scope of the TCA. A farmer could be funded by schemes that fall within the AoA (e.g. to improve soil) and others which fall within the TCA (e.g. forestry).

53. The Government is seeking views on to what extent fisheries subsidies and those in scope of the AoA should be within scope of the proposed domestic arrangements. Including subsidies on fisheries and those in scope of the AoA could minimise scheme design complexity and reduce the potential of legal challenge for those schemes designed to be open to both

³⁰ Annex 1 to the WTO Agreement on Agriculture

³¹ Negotiations are continuing in the WTO to prohibit the most harmful fisheries subsidies contributing to illegal, unreported and unregulated (IUU) fishing, and overfishing and overcapacity. We expect the negotiations to conclude, and an agreement reached, by the end of 2021. This will provide additional guidance and rules on the granting of subsidies in the fisheries remit.

³² TCA, Article 3.2(5), 183

agricultural producers and non-agricultural producers. But legacy EU Common Agricultural Policy schemes could be harder to accommodate within all the principles, for example a requirement for a subsidy to be designed to bring about a change in the practices of the subsidy beneficiary that would not be achieved in the absence of a subsidy.

54. For fisheries subsidies and those in scope of the AoA, an alternative approach could be applied to the proposed principles, rather than a duty to comply with each individually. This could range, for example, from an obligation on public authorities to take account of all the domestic principles at one end of the spectrum, to – at the other – a duty to comply with some of the principles; or some combination of the options within that range.

55. Similarly, the audio-visual sector is excluded from the provisions of the Subsidies Chapter in the TCA³³. The Government will consider whether it is desirable to replicate this exclusion for audio-visual in the domestic regime and is seeking views in this consultation. The Government remains committed to providing support to the audio-visual sector via our existing domestic public policy framework.

56. The Government intends to implement an exemption for subsidies where they are required for the purpose of defence or safe-guarding national security. It is also considering whether to explicitly carve-out activities conducted by the Bank of England in pursuit of its statutory monetary policy objectives³⁴.

Question 8: Do you think agricultural subsidies in scope of the AoA and fisheries subsidies should be subject to the proposed domestic arrangements? If so, what obligations should apply?

Question 9: Do you think audio-visual subsidies should be subject to the domestic regime? Please provide a rationale for your answer.

Subsidy control principles

57. Principles can be used as criteria for evaluating possible subsidies. Compliance with high-level principles will involve a judgement by the decision-maker, which may be able to provide flexibility and discretion for public authorities, whether national or local government. In designing a bespoke subsidy control system for the UK, the Government proposes a legislative regime built around a set of subsidy control principles aligned with the objectives outlined in Chapter 2.

58. As noted in Chapter 1, the UK and the EU have agreed a set of subsidy control principles under the TCA that must be implemented through the design of a subsidy control system in domestic law.³⁵ These ensure that taxpayer money is used effectively and efficiently and were

³³ TCA, Article 3.2(6), 183

³⁴ Bank of England Act 1998, section 11

³⁵ TCA, Article 3.4, 184

agreed because they aligned with our strategic objectives for the domestic regime. Where subsidies are in scope of the TCA, public authorities must meet the terms of the principles. For example, subsidies will need to meet a public policy goal which the market would not deliver without support, which could be greater environmental protection or supporting the provision of rural transport. They should be the least amount needed to deliver the goal and bring about a change in the practices of industry recipients.

59. The principles we put at the heart of our domestic regime can be designed to support the specific needs of the UK economy and our internal market while meeting our international commitments. Therefore, Government proposes an additional principle (no. 6 in the table below) specifically focused on protecting the UK internal market by minimising the distortive effects on competition. We want to ensure that public authorities design subsidies in such a way that they deliver strong benefits and good value for money for UK taxpayers. The Government is seeking comment on the proposed subsidy control principles set out below and specifically whether to include any additional principles above what is required by the terms of the TCA.

60. There would be a legal obligation placed on public authorities to meet the terms of these principles. Public authorities would be required to follow and apply the principles unless they fall within an exemption (see section below). Guidance would be issued by the Government, and could be placed on a statutory footing, on how to demonstrate compliance with the principles. The Government would also give public authorities more information and assistance to help them fulfil their obligations. This would include a template – building on that already provided in current guidance – for public authorities to record how they have complied with the principles in designing their subsidy.

61. The Government seeks views on whether there should be any additional principles to those set out below and what level of guidance or information would be helpful to public authorities in order to consider effectively their compliance with the principles.

Principle	Explanation
<p><i>1. Subsidies are provided to meet a specific public policy objective to remedy an identified market failure or to address an equity concern.</i></p>	<p>Public authorities will need to consider, explain and assess the policy objective behind the subsidy to ensure there is a benefit to wider society in providing the subsidy. Social equity objectives could include providing transport for residents of remote areas.</p>
<p><i>2. Subsidies are proportionate and should be the minimum size necessary to achieve the stated public policy objective.</i></p>	<p>Subsidies should be the minimum necessary to achieve the desired aim. In choosing a subsidy the body granting the subsidy (“the public authority”) must adopt those causing</p>

	the least possible disruption in pursuit of the public policy objective.
<i>3. Subsidies are designed to bring about a change in the practices of the subsidy beneficiary that would not be achieved in the absence of a subsidy and that will assist with achieving the stated public policy objective.</i>	Subsidies must incentivise and lead to a change in the behaviour of the beneficiary. They must help to address the public policy objective being pursued.
<i>4. Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.</i>	Subsidies should be targeted to bring about an effect that is additional to any that would occur in the absence of the subsidy. They should not normally cover everyday business expenses.
<i>5. Subsidies are an appropriate policy instrument to achieve the stated public policy objective and that objective cannot be achieved through other less distortive means.</i>	Alternative policy levers that are likely to cause less distortion to competition should be considered before turning to subsidies.
<i>6. Public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that might arise from a subsidy.</i>	Public authorities should assess the material competition effects which are likely to arise from providing the subsidy. This is a domestic test to ensure that a subsidy does not unduly favour one firm to the detriment of a competitor or new entrants to the UK market, or unduly reduce competition within the UK market.
<i>7. Subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on domestic competition and international trade or investment.</i>	Public authorities will need to assess the material effects on competition and international trade or investment and judge whether the benefits of the subsidy are greater than the harmful impacts of providing the subsidy.

Question 10: Do you agree with the inclusion of an additional principle focused on protecting the UK internal market by minimising the distortive effects on competition?

Question 11: Do you think there should be any additional principles?

Question 12: What level of guidance or information would be helpful for public authorities to assist with their compliance with the principles?

Exemptions

62. The Government is proposing to introduce specific kinds of exemptions to ensure that the lowest risk and most time-critical subsidies can proceed without having first to ensure that they respect the subsidy control principles outlined above, or in some case the other obligations set out below. Exemptions or limited exemptions from obligations are often set out in FTAs, including the TCA, and it is important to be aware of the UK's international obligations in this respect.

Small amounts of financial assistance

63. The Government proposes to exempt smaller subsidies from the legal duty to respect the subsidy control principles. This is in recognition of the fact that lower value subsidy awards are less likely to significantly distort international trade and investment, or competition in the UK internal market.

64. Under the terms of the TCA any subsidies awarded to a single recipient below the value of 325,000 Special Drawing Rights (SDR)³⁶ over a three-year fiscal period are exempt from all of the obligations contained with the subsidy control chapter³⁷. The UK international subsidy control guidance³⁸ explained that this threshold applied to the UK from 1st January 2021. The Government is consulting on whether this threshold of 325,000 SDR should be maintained in the domestic regime; at the time of publication, 325,000 SDR was equivalent to approximately £340,000.

65. Although the TCA sets a ceiling for the threshold at which subsidies are exempt from the obligations in the subsidy control chapter, the Government is seeking views on whether it should be lower, and if so, to what level. Secondly, the Government is seeking views on whether for ease of compliance with the threshold, it should be fixed at an amount of pound sterling (GBP). This could give subsidy givers and recipients more certainty but some of the flexibility of using SDR would be lost as the fixed GBP amount would have to be set slightly below the equivalent SDR amount to account for current fluctuations. As discussed in the next section, Services of Public Economic Interest (SPEI) would also benefit from an exemption, but with a higher threshold.

66. The Government is also proposing to implement a partial exemption for subsidies below this threshold from the prohibitions and conditions listed in the section below. As set out above, these subsidies are exempt from all obligations in the subsidies chapter of the TCA. However, as explained in Chapter 1, the UK has international obligations on prohibited subsidies under the WTO rules (for goods) which would apply to subsidies below the proposed threshold. The WTO prohibitions relate to subsidies that are contingent on export performance, and subsidies that are contingent upon the use of domestic over imported goods. The Government therefore

³⁶ Special drawing rights (SDR) are supplementary international reserve assets defined and maintained by the International Monetary Fund (IMF). They can be calculated into national currencies such as GBP.

³⁷ TCA, Article 3.2(4), 183

³⁸ <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities>

proposes that subsidies under the proposed threshold would have to comply with the WTO prohibitions, but would be exempt from other prohibitions and conditions.

67. More detail on when subsidies need to be recorded in compliance with the regime's transparency obligations are set out in a later section.

Question 13: Should the threshold for the exemption for small amounts of financial assistance to a single recipient replicate the threshold in the UK-EU Trade and Cooperation Agreement at 325,000 Special Drawing Rights over a three-year period? If not, what lower threshold would you suggest and why?

Question 14: If you consider the small amounts of financial assistance threshold should replicate the UK-EU Trade and Cooperation Agreement, should it be fixed at an amount of pound sterling (GBP)?

Question 15: Do you agree that subsidies under the proposed small amounts of financial assistance threshold be exempt from all obligations under the domestic regime, except for the WTO prohibitions? If not, why?

Relief to compensate for exceptional occurrences

68. Subsidy awards in this category may include compensation for drought, flood, severe storms or wildfire or other exceptional non-economic occurrences such as compensating businesses for the immediate economic impact of a pandemic. The Government is proposing exempting these subsidies from provisions on principles, prohibitions and conditions in the subsidy control regime. They would still be subject to transparency obligations (as described in the transparency section below) and subject to challenge through the courts on grounds such as non-compliance with the transparency obligations or standard public law principles (such as the misapplication of the natural disaster relief exemption). Under the TCA, these subsidies are exempt from principles, prohibitions and conditions and remedial measures³⁹.

Question 16: Should relief for exceptional occurrences be exempted from obligations regarding principles, prohibitions and conditions in the subsidy control regime?

Subsidies granted temporarily to address a national or global economic emergency

69. Another category where there is an urgent need for public authorities to rapidly respond and disburse subsidy awards are temporary subsidies to address the effects of a national or global economic emergency, such as a financial crisis, and for measures taken by the UK authorities for prudential reasons, such as the protection of depositors or investors or to maintain the stability of the UK's financial system. The TCA requires these subsidies to be

³⁹ TCA, Article 3.2 (1), 183

targeted, proportionate, and likely to be effective in achieving their stated policy objective. These subsidies are exempt from the prohibitions and remedial measure articles under the TCA, but public authorities still need to follow other provisions, including the subsidy control principles and transparency rules, when granting these subsidies. The Government is proposing exempting this category of subsidies from the rules on prohibited subsidies and any additional rules set out below.

Question 17: Should subsidies granted temporarily to address a national or global economic emergency be exempted from the rules on prohibited subsidies and any additional rules set out below?

Services of Public Economic Interest

70. Services of Public Economic Interest (SPEI) are public services that would not be supplied (or would not be supplied under the required conditions) without public intervention, and which are of particular importance to citizens. Examples of an SPEI include social housing or rural public transport services.

71. The TCA sets out specific exemption thresholds for subsidies aimed at SPEIs. The subsidy chapter does not apply to SPEIs below 750,000 SDR⁴⁰ over a three-year period (as opposed to below 325,000 SDR⁴¹ for all other subsidies as outlined in the section on 'small amounts of financial assistance'). There is an additional, specific exemption for SPEIs related to transparency. The TCA sets out that the transparency obligations in the chapter do not apply to SPEI subsidies below 15 million SDR⁴² per task. As with the general exemption for small amounts of financial assistance, the UK is committed under the TCA to set thresholds no higher than these figures⁴³, but the Government seeks views on whether these thresholds should be set at a lower level and, whether the threshold should be set in SDR or a slightly lower pound sterling GBP value to account for currency fluctuations.

72. Further to the UK's TCA obligations, subsidies granted for SPEI will be required to meet certain conditions⁴⁴. The subsidy must be limited to what is necessary to cover all or part of the costs incurred in the discharge of the public interest task, taking into account the relevant receipts and a reasonable profit for discharging that task. Subsidy givers must also ensure that any funding for SPEI where there is cross-subsidisation of the recipient's commercial activities is structured in a way that is compliant with the UK's international obligations.

⁴⁰ At the time of publication 750,000 SDR was equivalent to approximately £790,000

⁴¹ At the time of publication, 325,000 SDR was equivalent to approximately £340,000

⁴² At the time of publication, 15 million SDR was equivalent to approximately £15.7 million

⁴³ TCA, Article 3.3(2)-(3), 183

⁴⁴ TCA, Article 3.3(1)-(2), 183-184

Question 18: Should the threshold for the exemptions for Services of Public Economic Interest replicate the relevant thresholds in the UK-EU Trade and Cooperation Agreement at 750,000 Special Drawing Rights over a three year period, and for transparency obligations at 15 million Special Drawing Rights per task? If not, what lower threshold would you suggest and why?

Question 19: If you consider the SPEI thresholds should replicate the UK-EU Trade and Cooperation Agreement, should they be fixed at an amount of pound sterling (GBP)?

Prohibitions and conditions

73. the domestic regime will have a clear set of rules. Legal rules are more prescriptive than principles in that they dictate a particular result. This provides less flexibility than principles - and complex rules can produce administrative burdens - but may offer more certainty for public authorities and subsidy recipients around compliance. Among other things, these rules will outright prohibit or place conditions on certain types of subsidies and impose certain obligations on subsidy givers. The Government aims to strike the right balance here in line with its objectives for the future system.

74. Limited categories of subsidies are at particularly high risk of distorting the market, or of being a poor use of taxpayer money. In addition, the UK has certain international obligations, including under the WTO and the TCA, regarding the use of these types of subsidies as they are deemed to be especially liable to distort international trade⁴⁵. Accordingly, the Government is proposing to prohibit the following subsidies:

- Export subsidies, which are conditional on the exporting performance of the recipient. As noted in Chapter 1, these subsidies are prohibited under the WTO ASCM in the case of goods, with exceptions for certain permitted export credit insurance measures. The TCA and some FTAs prohibit subsidies of this kind to both goods and services⁴⁶.
- Subsidies contingent upon the use of domestic over imported goods or services. These types of subsidy are also prohibited under the WTO ASCM for goods. The TCA and some FTAs prohibit this type of subsidy for both goods and services⁴⁷.

75. The Government is also proposing to prohibit an additional two categories of subsidies. These categories of subsidies are not prohibited under WTO rules but are often agreed as prohibited under FTAs. The UK has agreed a number of FTAs, including the TCA, which prohibits the following subsidies:

⁴⁵ Additional information on subsidies that the UK has agreed are prohibited with trade partners as part of international agreements can be found at: <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>

⁴⁶ TCA, Article 3.5(8)-(11), 185-186

⁴⁷ TCA, Article 3.5(12), 186

- Subsidies in the form of unlimited state guarantees to enterprises, where the subsidy giver places no limit on the amount of debt or liabilities covered, or where the duration of the guarantee is similarly unlimited will be prohibited⁴⁸.
- Subsidies granted to “ailing or insolvent enterprises” (defined as enterprises highly likely to fail in the short to medium term in the absence of subsidy), where there is no credible restructuring plan to restore the business in question to long-term profitability will be prohibited. These types of subsidy have the potential to be highly distortive to the ordinary functioning of markets, as well as to the UK internal market, and the TCA sets out an additional set of conditions attached to how rescue and restructuring subsidies should be awarded. Enterprises, with the exception of SMEs, will also need to provide significant assets towards the costs of their own restructuring. Short-term assistance, in the form of loans and guarantees, would be allowed while a restructuring plan is being developed. The UK is already bound by its obligations and commitments in international agreements⁴⁹. It is no longer bound by the definitions and guidelines in the EU’s State aid rules⁵⁰ (including as regards the definition of an ailing or insolvent company). The EU’s “undertakings in difficulty” test has been a particular source of concern for stakeholders who judge that they have been unfairly caught within scope.

76. The TCA also sets out specific conditions on the following limited categories of subsidy. In order to implement these into domestic law, the Government proposes to make the following subsidies subject to conditions:

- Restructuring subsidies (subject to an applicable exemption or exception) for certain financial institutions such as banks may only be allowed in specific circumstances to ensure the continued stability of the financial system. Restructuring subsidies will require the preparation of a credible plan to restore long-term viability to a firm in difficulty; if this is not possible, then support should be limited to the minimum required to facilitate the firm’s orderly exit from the market. Liquidity provisions within scope of subsidy control rules must be temporary, charging a competitive rate of interest and should not be used as loss-absorbing capital⁵¹. In considering how to assess such subsidies for financial institutions against these criteria, the Government will take account of the existing framework for recovery and resolution as set out in the Banking Act 2009.
- Subsidies granted to an air carrier for the operation of routes must meet specific conditions, including, for example, the satisfaction of a different public interest test⁵².
- Subsidies granted in the context of large cross-border or international cooperation projects will be subject to additional conditions. These projects generally need to demonstrate societal benefit in another country, beyond the UK⁵³.

⁴⁸ TCA, Article 3.5(2), 184

⁴⁹ TCA, Article 3.5(3), 185

⁵⁰ Except for the limited circumstances set out in the Northern Ireland Protocol and other relevant areas of the Withdrawal Agreement

⁵¹ TCA, Article 3.5(6)-(7), 185

⁵² TCA, Article 3.5(15), 187

⁵³ TCA, Article 3.5(12), 186

Question 20: Do you agree with the Government's approach to prohibitions and conditions? Should any types of subsidy be added to either category? If so, why?

Question 21: Would more detailed definitions of any of the terms set out in this section, including the definition of "ailing or insolvent enterprises" be useful to ensure a consistent and proportionate approach to compliance? If so, what should these be?

Protecting the UK internal market

77. As noted in Chapter 2, the Government is committed to maintaining the integrity and effective operation of the UK internal market. Among other things, this includes discouraging subsidies that are likely to give a business in one nation or region an unfair competitive advantage over those operating in another area. The UK internal market objective is reflected in principle 6 of the Government's proposed subsidy control principles, which says that public authorities should seek to minimise any negative impacts on competition within the UK internal market that might arise from a subsidy. However, the Government is seeking views on whether protecting the UK Internal Market should be addressed in additional ways over and above the inclusion of this principle.

78. Internationally, countries have taken different approaches to protecting their internal market. The EU has an expansive, detailed set of controls over subsidies, including prior approval by the European Commission in certain instances, in order to minimise distortion to competition and trade within the EU European Single Market. Other international models tend to be less onerous and narrower in reach. The Canadian inter-provincial trade agreement⁵⁴ prohibits a limited set of subsidies and obliges provinces to refrain from, among other things, engaging in bidding wars to attract investors from other provinces. Switzerland generally grants its cantons wide discretion to award subsidies, with legislation setting out general principles governing subsidy provision⁵⁵. Australia's competitive neutrality policies ensure government business activities do not possess a competitive advantage over private providers as a result of their public ownership. The US does not have a regulatory system governing subsidies. However, US courts have in several cases ruled against subsidies provided by local authorities or US states on the grounds that it discriminates against interstate commerce and therefore violates the Commerce Clause of the U.S. Constitution.

79. The UK Government wants to have a flexible system that empowers public authorities to design and award subsidies that bring benefits for society whilst providing clarity and certainty to both subsidy givers and recipients. That being said, some further controls may be helpful for

⁵⁴ <https://www.cfta-alec.ca/>

⁵⁵ Federal Law on Financial Aid and Compensation (Subsidies Act). (1990). <https://www.admin.ch/opc/fr/classified-compilation/19900241/>

meeting the Government's objective of maintaining the integrity and effective operation of the UK internal market so that businesses can trade and prosper throughout the UK.

Question 22: Should the Government consider any additional ways to protect the UK internal market, over and above the inclusion of a specific principle to minimise negative impacts? If so, what?

Competition Impact Reviews

80. Public authorities would always be required to follow and apply the proposed principles on a case-by-case basis to subsidies unless they fall within an exemption. The Government will support public authorities in demonstrating compliance with these principles, through issuing guidance and a template to record how the terms of the principles have been met when designing the subsidy. However, in relation to principle 6, the Government seeks views on whether to include an additional process that would specify how to evaluate subsidies which could be considered to be at high-risk of causing harmful distortion to the UK internal market.

81. Legislation could, for example, require public authorities to carry out a more detailed review of the effects on competition for 'high risk' subsidies before their award. The criteria for a 'high risk' subsidy could be based on the value of the proposed award, the sector(s) in which it is being given, or if the recipient commands a significant share of the affected market. Details of the required review could be set out in guidance, including the factors that the subsidy giver would need to expressly consider as part of the decision-making process. Depending on the nature of the review, this may help to mitigate against the risk of successful legal challenge. There may also be a role for the independent body, as explained in a following section.

82. However, given that public authorities would have to make an assessment of potential internal market impacts in order to judge compliance with principles 6, the Government seeks views on whether or not such a mandatory process would better achieve the objective of protecting the internal market.

83. If such a measure were included, the Government would need to consider whether the scope of any more detailed competition review in respect of the impact of a high risk subsidy on the UK internal market should be extended to include impact on trade and investment with other countries. Public authorities will already need to consider the extent to which their proposed subsidy could cause negative effects on domestic competition and international trade or investment in order to comply with the balancing exercise entailed by seventh subsidy control principle. The Government would also need to consider whether public authorities should be obliged to make any competition impact review publicly available (with any commercially sensitive information redacted) and any circumstances when public authorities should be permitted to override competition impact reviews.

Question 23: Would an additional process for subsidies considered at high-risk of causing harmful distortion to the UK internal market add value to the proposed principles? If so, how should it be designed and what criteria should be used to determine if the subsidy is at high-risk of causing distortion?

Question 24: Should public authorities be obliged to make competition impact reviews public? If not, why?

Question 25: Should public authorities be permitted to override competition impact review e.g. in the case of emergencies? If so, why?

Relocation of economic activity

84. Additional measures could be included to prevent the uneconomic relocation of economic activity between England, Scotland, Wales, and Northern Ireland. For instance, there could be additional guidance, a role for the independent body or a ban on subsidies that would directly result in an operation located within the UK relocating to another part of the UK. This approach could draw on a similar measure under Canada's internal agreement between provinces and territories. Any additional measures here would need to recognise the value of subsidies which seek to address regional inequalities. The Government seeks views on whether such provisions would be beneficial.

Question 26: Should there be additional measures to prevent subsidies that encourage uneconomic migration of jobs between the four nations?

Presumed compliance for lower risk subsidies

85. The Government wants, as set out in the preceding chapter, a subsidy control regime that meets its wider socio-economic objectives and international obligations without placing undue bureaucracy and cost on public authorities. While the higher risk subsidies set out above could have a tighter set of conditions attached to them (where they are not explicitly prohibited), the Government seeks views on whether additional measures could help ensure that lower risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy. This would only be relevant where subsidies are above the proposed threshold for small amounts of financial assistance, set out in paragraphs 63 - 65 above.

86. As explained in the section on judicial enforcement below, judicial review is the normal procedure for challenging a decision made by a public authority. It is not concerned with the merits of a decision but on the legality and rationality of a decision and the process by which it was made. It is proposed, therefore, that granting authorities' decisions should therefore be considered to be lawful unless they have made a material error of law in failing to apply the principles where required or acted irrationally or inconsistently with any other public law principles in applying the principles. If a judicial review were successful, any remedies applied should be proportionate (see judicial enforcement section for further detail).

87. The Government could, however, set out categories of subsidy that are considered to be in compliance with our legal obligations and the principles, and which could be relied on by public authorities. The aim of these provisions would be to provide public authorities with a route to designing subsidies that are presumed to be in compliance with the principles at the outset, or where the Government has stated that they are in compliance. Other relevant legal duties, including the need to report the subsidy on the transparency database, would still apply. The Government proposes that ‘low risk’ subsidies could include those that are unlikely to have a material impact on trade or significantly distort the UK single market; this definition will also need to be mindful of the UK’s international obligations. The Government seeks views on what should be included within the definition of low risk subsidies, subject to these conditions.

88. The Government is aware that there are a number of ways to develop additional measures for low risk subsidies. This may entail, for example, developing a framework – which could be set out in secondary legislation - for public authorities’ use when designing subsidy schemes. National and local schemes designed using the framework would be deemed to have respected the subsidy control principles. Moreover, the government could consider setting out additional rules in legislation. These could define certain types of subsidy which are deemed to be in compliance with the principles and the UK’s international obligations. Alternatively, the Government may issue guidance to address these issues. In any case, this would need to avoid having the effect of creating barriers to awarding subsidies or create overly rigid categories of permissible subsidies, but also allows the Government and other public authorities to award most subsidies quickly and with minimal bureaucratic burden – the Government is open to views on which specific categories of subsidies would benefit from provisions of this kind, and, if so, what level of guidance would be most appropriate.

Question 27: Could additional measures help ensure that lower risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy? What should be included within the definition of ‘low-risk’ subsidies?

Question 28: What guidance or information would be helpful for public authorities to assist on lower risk subsidies?

Sector and category specific provisions

89. The Government understands that some sectors of the economy, and types of subsidies, may require specific provisions to deliver wider public policy objectives. For example, this may be because a sector is caught within one of the categories of controlled subsidies, set out above, or is one in which public investment is required to grow the market over the longer term. These provisions may also define the subsidies in these sectors or categories that are deemed to be in compliance with the principles and the UK’s international obligations, in line with the provisions in the preceding section.

90. The Government could set out a framework in legislation for subsidies to energy and environmental projects. Under the TCA, the UK has a general duty to ensure that energy and environmental subsidies are aimed at delivering, and duly incentivise the beneficiary in

delivering, a secure, affordable and sustainable energy system and a well-functioning and competitive energy market, or increasing the level of environmental protection compared to the level that would be achieved in absence of the subsidy⁵⁶. The UK's specific obligations under the TCA, with respect to subsidies to energy and environmental projects, include:

- Ensuring that subsidies for electricity generation adequacy, renewable energy and cogeneration do not clash with or otherwise undermine the UK's obligations under relevant energy sections of the TCA, including the normal competitive functioning of wholesale energy markets or unnecessarily affect the efficient use of electricity connectors⁵⁷;
- If exemptions from energy-related taxes and levies in favour of energy-intensive users are introduced, such exemptions shall not exceed the total amount of the tax or levy⁵⁸;
- Compensation for electricity-intensive users in the event of an increase in electricity cost resulting from climate policy shall be restricted to sectors at significant risk of 'carbon leakage' due to the cost increase⁵⁹;
- Subsidies for the decarbonisation of emissions linked to the UK's industrial activities shall achieve an overall reduction in greenhouse gas emissions. The subsidies shall reduce the emissions directly resulting from the industrial activity⁶⁰.

91. The Government seeks views on whether these rules should apply only in so far as they are necessary to comply with trade agreements or whether they should apply under the domestic regime more generally.

92. There is a case for the Government to introduce additional provisions and conditions for other specific sectors or categories of subsidy. These additional provisions and conditions could provide public authorities with guidance and direction when awarding subsidies to specific sectors or types of subsidies, or they could be specific legislative rules in relation to subsidy schemes. Examples of areas where such provisions could be introduced include the areas contained in the joint declaration on subsidy control policies that was published alongside the TCA⁶¹.

93. This declaration, which is not binding, sets out that either party may consider introducing specific provisions into their regimes to cover the following areas:

- *Subsidies for the development of disadvantaged areas.* The declaration sets out that subsidies may be granted for the 'development of disadvantaged or deprived areas or regions'. It is proposed that this will typically require a degree of matched investment from the recipient of the subsidy and acknowledges the importance of subsidies not unduly distorting the UK's internal market. There is no longer a subsidy control

⁵⁶ TCA, Article 3.5(12), 186, and Annex ENER-2 Energy and Environmental Subsidies, page 782.

⁵⁷ TCA, Annex ENER-2(1), 782

⁵⁸ TCA, Annex ENER-2(3), 782

⁵⁹ TCA, Annex ENER-2(4), 782

⁶⁰ TCA, Annex ENER-2(5), 782

⁶¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948105/EU-UK_Declarations_24.12.2020.pdf at pages 5-6

requirement to have in place an “assisted area map” (such as those drawn up by EU Member States and notified to the European Commission under the EU State aid rules). However, specific provisions related to the development of disadvantaged areas may help facilitate the Government economic objective of ‘levelling up’ regions of the UK and using funds to support local, community focused projects. The Government is interested in views on whether the regime should include specific provisions on subsidies for the development of disadvantaged areas, and if so, how that could best facilitate regional development and delivery of the levelling up agenda.

- *Transport*. The declaration covers subsidies to airports, for road infrastructure projects and to ports. In order to receive subsidies to fund operating costs, an airport (other than a small regional airport) should demonstrate its ability to ensure future viability to allow for the subsidy to be progressively phased out. Subsidies to road infrastructure projects may be granted where they provide benefits to society at large rather than selectively benefiting a particular business or sector. Subsidies to ports may be granted for dredging or for infrastructure projects if they are limited to the minimum amount necessary to commence the project.
- *Research and Development (“R&D”)*. The declaration states that subsidies for R&D-related activity should generally be considered permissible. Any R&D subsidies should be necessary, proportionate and not primarily designed to attract investment from other parts of the UK or from trading partners. The declaration notes R&D includes fundamental research, industrial research and experimental development.

94. The Government seeks views on whether specific sectors and categories of subsidies (such as for disadvantaged areas, R&D, transport, and skills investment) would benefit from tailored provisions, including whether the areas in the non-binding TCA declaration should be covered and whether any additional sectors or categories should be considered and, if so, the nature and extent of those provisions.

Question 29: Should the specific rules on energy and environment subsidies apply only in so far as they are necessary to comply with trade agreements? Or should they apply under the domestic regime more generally?

Question 30: Which sectors or particular categories of subsidy (such as for disadvantaged areas, R&D, transport, skills, etc.) would benefit from tailored provisions or specific guidance on subsidy control? If so, why, and what should the nature, extent and form of the provisions be?

Transparency

95. The Department for Business, Energy and Industrial Strategy has developed a new publicly accessible transparency database for public authorities to record subsidies. The database will be launched in early 2021. This will be beneficial in providing for greater public scrutiny of subsidies that have been awarded, and enabling new analysis of subsidies given in the UK and

their effectiveness. It will also help us to comply with most of our international reporting requirements under certain FTAs and as a member of the WTO.

96. The Government proposes placing a legal obligation on public authorities to submit information on any subsidies awarded above set values⁶². This would include, but not be limited to, details of the subsidy instrument, amount, date granted, granting authority, and the purpose of the subsidy. Where a subsidy is provided under the terms of a scheme, rather than as a one-off subsidy, public authorities will also need to provide information about the categories of beneficiary, the terms and conditions of eligibility for subsidy and the basis for the calculation of the subsidy (including any relevant conditions relating to subsidy ratios or amounts).

97. The Government seeks views on the proposed thresholds where public authorities would be obliged to make information available on the new transparency database. The proposed thresholds are as follows:

- all subsidy schemes should be uploaded and all individual awards over £500,000 within a scheme should be uploaded.
- all subsidies, of any amount, outside the above schemes should be uploaded to the transparency database unless it meets any of the following conditions:
 - i. it is below the value set for small amounts of financial assistance given to a single enterprise over a three-year period (as set out in paragraph 63 above); or
 - ii. it is below the value set for transparency for Service of Public Economic Interest (as set out in paragraph 70 above).

98. It is possible that some information on subsidies given below these thresholds will have to be collected separately in order to fulfil the UK's reporting obligations under some other FTAs. To avoid placing undue administrative burden on public authorities, the Government seeks views on whether the threshold should be lowered to £175,000 over three years to cover both the WTO and all FTA reporting obligations; and conversely whether there should be a minimum threshold of £50,000 below which no subsidies have to be reported.

99. Public bodies would be placed under an obligation to upload information within six months of the commitment to award a subsidy; this is in line with the UK's commitments under the TCA⁶³. To ensure consistency, a standard methodology will be provided, including an interest rate benchmark for calculating the net present value of grants given in tranches over time and the effective value of loan.

⁶² Subsidies which must still be uploaded to EU databases because EU State aid law applies will be exempt from the requirement to upload to the UK database. These subsidies include those limited number of measures in scope of Article 10 of the Northern Ireland Protocol and grants made as part of the UK's remaining share of European Structural Investment Funds to which the EU State aid rules apply by virtue of Article 138 of the UK-EU Withdrawal Agreement.

⁶³ TCA, Article 3.7(1), 187. Information on subsidies in the form of tax measures shall be submitted within one year from the date the tax declaration is due.

100. Interested parties have the right to review the granting of a subsidy by a public authority or any relevant decision. This allows third parties to identify if the principles or other rules have been improperly applied as well as provide sufficient time for them to consider whether they wish to challenge a decision via judicial review. In line with the UK's commitments under the TCA, public authorities must supply, within 28 days of the request being made in writing, the information that allows the interested party to assess the application of the subsidy control principles⁶⁴. This is subject to any proportionate restrictions which pursue a legitimate objective, such as commercial sensitivity, confidentiality or legal privilege.

Question 31: Do you agree with the proposed rules on transparency? If not, why?

Question 32: Do you agree that the thresholds for the obligation on public authorities to submit information on the transparency database should replicate the thresholds set for small amounts of financial assistance given to a single enterprise over a three-year period and for transparency for SPEI?

Question 33: If not, should the threshold be lowered to £175,000 over a three-year period to cover all reporting obligations for Free Trade Agreements, enabling all of the UK's international subsidy transparency obligations to be met through one database?

Question 34: Should there be a minimum threshold of £50,000 below which no subsidies have to be reported?

Question 35: Do you agree that the obligation should be to upload information within six months of the commitment to award a subsidy?

Oversight and enforcement

Independent body

101. The Government is committed, under the terms of the TCA, to the establishment of an independent body that will have an appropriate role within the UK subsidy control regime⁶⁵. The precise role of this body is not set out in the TCA and as such its functions and powers can be tailored to fit the needs of a UK subsidy control regime. Many advanced economies have not established or maintained an independent body for subsidy control. The role the EU Commission plays in State aid rules, approving the award of certain subsidies before they are given and taking enforcement action against those illegally awarded, is unique. As such there is a broad spectrum of options for the role a regulator could play in the UK's domestic subsidy control regime and the possibilities are set out below.

102. The Government seeks views on the functions of the independent body, including its responsibilities in facilitating and managing a subsidy control regime as well as potential

⁶⁴ TCA, Article 3.7(5), 188

⁶⁵ TCA, Article 3.9(1), 189

enforcement functions. An independent body with the right functions could help improve the quality of decision-making by public authorities, evaluate the effectiveness of the regime, and maintain public trust in the system.

103. The role and functions of any oversight body must be appropriate, and commensurate with the legal obligations placed on public authorities. Oversight would also need to be consistent with the overarching emphasis on giving greater flexibility to public authorities that award subsidies. Any independent body should not create unnecessary burdens and bureaucracy or hinder the ability of subsidy providers to offer timely interventions.

104. Any responsibilities of the body after the award of a subsidy, either through review of subsidies or enforcement functions, would need to complement the judicial enforcement routes set out below. It will be important to consider the balance between routes of enforcement. For example, if the independent body has minimal enforcement powers, then challenges to potentially unlawful or improperly awarded subsidies would need to be largely addressed by Court action. Although the Courts will always provide an important backstop to challenge potentially unlawful subsidies it may be appropriate to ensure that the independent body is the primary route of scrutiny and enforcement. Equally, it is important to consider the basis on which any enforcement takes place. Judicial enforcement through existing judicial review processes can only be brought on the usual public law grounds rather than through a merits-based review. The section on judicial enforcement sets out further information on this position. The Government seeks views on the balance between the functions of the independent body and court-based enforcement.

105. There are a large range of functions an independent body could fulfil. However, many of these may not be appropriate to the UK's new subsidy control regime, and the UK does not have any specific obligations arising from FTAs or elsewhere to grant any particular functions to it. The Government therefore seeks views on what responsibilities would be appropriate and coherent with the proposals outlined above. The below section outlines some of the broad categories of tasks that could fall within the remit of the independent body:

- Information and enquiries – The body could be responsible for explaining the regulatory framework to public and private bodies including being tasked with updating and maintaining any relevant guidance.
- Review and evaluations – The body could focus on large scale issues, through scrutinising and reporting on the operation and effectiveness of the system ‘as a whole’.
- Subsidy development advice – The body could have a limited role in providing advice on individual subsidy awards or schemes before they are awarded. In particular, public authorities awarding high-value or ‘high risk’ subsidies may be able to consult, or perhaps requested to engage, with the body to receive advice on the design and impact of their subsidy. The public authority awarding the subsidy would still be responsible for deciding whether to proceed following any pre-award discussions.
- Post-award review – There could be a role for the body in providing a review of certain subsidy awards, for example, following a complaint. After a review, the body could be

given responsibilities to provide guidance to public authorities and inform the government of any systemic issues.

- Enforcement powers – The body could be given certain powers to enforce elements of the regime and take action against unlawful or improperly granted subsidies.

106. Within each of these broad functions there are a number of nuances to the responsibilities and powers afforded to the independent body. Not all of these functions would necessarily be appropriate and coherent within the regime the UK establishes, or it may be the case that certain functions are only suitable in a limited number of circumstances. These categories are explored in further detail below.

Question 36: What should the functions of the independent body be? Should it be responsible for any of the following:

- information and enquiries;
- review and evaluations;
- subsidy development advice;
- post-award review; and/or,
- enforcement.

Information and enquiries

107. The body could be responsible for explaining the regulatory framework to public and private bodies. This could include answering queries from subsidy givers and recipients on the implementation and application of the regime and giving guidance on best practice concerning the application of the principles. The body could engage in proactive public information campaigns to raise awareness of the regime and the UK's international subsidy commitments. It would also be possible to give the body the responsibility of producing and updating any necessary guidance for public authorities, including on the additional provisions for lower risk subsidies and on how to conduct a competition impact review.

Review and evaluations

108. Oversight would focus on large scale issues, through scrutinising and reporting on the operation and effectiveness of the system 'as a whole'. This could include publishing regular reports that provide an overview of subsidy spending, similar to those published by the German Federal Ministry of Finance⁶⁶ or the Internal Trade Secretariat in Canada⁶⁷. These reports could go further and review the effectiveness of the regime at meeting its objectives as well as offer recommendations on how the regime could be improved. This would be similar to

⁶⁶ Federal Ministry of Finance. (2020). 27th Subsidy Report. https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Press_Room/Publications/Brochures/2020-03-03-27subsidy-report.html

⁶⁷ Internal Trade Secretariat. (2020). Annual Report. <https://www.cfta-alec.ca/annual-reports/>

the work of the Law Commission, which makes non-binding recommendations on changes to the law to improve its operation.

Subsidy development advice

109. The independent body could have a pre-award function whereby it can provide advice to public authorities on the development of individual subsidy or schemes. This would likely be voluntary, with public authorities seeking out the expertise of the body, and the advice of the body being non-binding. For example, a public authority could provide the body with their assessment against the principles which underpins a proposed subsidy. The body could then give its own independent assessment of this review and provide analysis on whether the benefits of the proposed subsidy outweigh any potential negative impacts. This review could consider all the principles, and the interaction between them, or only some principles (for example, those relating to the effect on competition).

110. In addition, the body could make recommendations to the public authority on how the design of the subsidy, or scheme, could be amended to minimise any potential distortive impacts or improve its compliance with the regime. This may help to improve the quality of decision-making by public authorities, providing greater comfort that legal duties were being met, and reduce the risk of judicial enforcement.

111. The Government is also considering in limited circumstances the possibility of obtaining pre-award advice from the independent body compulsory for certain subsidies that could create significant distortions or harm. The criteria for a 'high risk' subsidy could be based on the value of the proposed award, the sector(s) in which it is being given, or if the recipient commands a significant share of the affected market. The Government is seeking views on what role the independent body could have before a subsidy is awarded.

Question 37: Should any review of a subsidy by the independent body consider all the principles, and the interaction between them, or only some principles, and if so which ones?

Question 38: What role, if any, should the independent body play in advising public authorities and reviewing subsidies before they have been awarded?

Post-award review

112. There could be a role for the independent body in providing a review of certain subsidy awards. These reviews could be prompted by a complaint or persistent complaints about how a public authority designs and awards subsidies. Further consideration will need to be given to the criteria on what types of complaints the body could receive and who could make such complaints. The body could also have the power to request that the public authorities provide justifications or analysis of how their subsidy is compliant with the regime (for example, that it does not contradict any statutory prohibitions, or how it respects the principles overall) of its own volition if it believed a subsidy was improperly awarded. The body could have the power to request more information from the public authority and any relevant parties to the subsidy as

well as request the public authority to provide access to further information on the transparency database (or other online platform). Where it felt it was necessary the body could issue guidance to public authorities to help them improve the design and award of subsidies in the future.

113. Consideration will need to be given on how responsibilities or powers given to the body to review subsidies after they have been awarded interacts with the provisions for judicial enforcement. Depending on the nature and potential outcomes of any post-award responsibilities give to the body, compared to court enforcement, those who wish to challenge subsidies may be drawn to judicial routes of enforcement, particularly if there are time limits on when court action can be taken.

114. The body could also have a more overarching ability to conduct a comprehensive review of how public authorities approach subsidies and provide recommendations on how to improve the implementation and application of the system. Public authorities could use the findings of the body to improve how they design and award subsidies to further improve compliance with the regime.

Question 39: If the independent body is responsible for post-award review, what types of complaints should it be able to receive and from whom?

Enforcement powers

115. The body could be given certain powers to enforce elements of the regime and take action against improperly awarded subsidies. There are a number of circumstances where the body could utilise enforcement powers. For example, if in response to a complaint the body reviewed the award of a subsidy and concluded it have been given improperly. This could be because the subsidy was not awarded in line with the principles, that the subsidy was in fact prohibited, it was not recorded on the transparency database properly or that the subsidy was in breach of any further rules or provisions, such as those related to specific types of subsidies.

116. If the body were to be tasked with enforcement in these circumstances it would be necessary to set out what powers would be available to the body. These powers could include the ability to: issue penalties for non-compliance with legal obligations; initiate judicial enforcement proceedings – including being able to order the halt of an ongoing subsidy pending the outcome of judicial proceedings; instruct public authorities to amend or withdraw the subsidy in order to be compliant with the regime; or order the recovery of any support dispersed through the unlawful scheme or subsidy.

117. Whilst it is not necessary to empower the body with enforcement functions it may be appropriate to do so in response to the obligations placed on public authorities and the other responsibilities the body is tasked with. As set out previously, it is important to consider the interplay and coherence between different routes of enforcement, including ensuring any system does not lead to forum shopping. Further detail on the role of the courts is set out in the judicial enforcement section below. The Government seeks views on which, if any, of these

enforcement powers the independent body could be given, the circumstances where the body could deploy them, routes of appeal and the interaction with judicial enforcement.

118. This consultation leaves open the question of which body would carry out this work and its governance, as the form of the oversight body will, by necessity, follow the functions it is required to carry out. There are a range of options to consider including establishing a new Committee, a new statutory or non-statutory body, or subsuming the functions within the remit of an existing body (such as the Competition and Markets Authority). Although under the terms of the TCA the UK needs to establish an independent body, it may be the case that different elements of the regime are ultimately overseen by a combination of bodies, with the relevant bodies being empowered with the relevant functions, responsibilities and powers. Subsidies, and the impact they have, are far ranging in the consequences touching on issues of competition, the UK internal market, international trade obligations and the use of public money. The UK already has independent bodies established in some of these areas and the expertise they have could be relied upon to advise or oversee specific issues. The Government seeks views on how the independent body should be established. Should the final proposals lead to the creation of new central government arm's length bodies, then the usual, separate government approval process would apply for such entities.

Question 40: Which, if any, enforcement powers should the independent body be given? In what circumstances could the body deploy them? What would be the routes of appeal and the interaction with judicial enforcement?

Question 41: How should the independent body be established in order to best guarantee its independence and impartiality when exercising its operational functions?

Judicial enforcement

119. Decisions by a public authority to award a subsidy will be open to challenge through the courts for breaches of statutory duty and other public law principles. As outlined in the above section on the independent body, the extent to which enforcement of the subsidy control regime takes place through the courts depends on whether the body is given enforcement responsibilities and powers.

120. Within the TCA, the UK committed to maintaining a court and tribunal enforcement system which is competent to review subsidies awarded by public authorities and, where applicable, the decisions of the independent body⁶⁸. This commitment extended to ensuring that UK courts could award remedies including the suspension, prohibition or requirement of action by a public authority, the award of damages and in some circumstances the recovery of a subsidy from its beneficiary. A claimant will need to have standing to initiate a judicial review, which will involve demonstrating that they have sufficient interest in the case.

⁶⁸ TCA, Article 3.10(1), 189

121. The terms of the TCA commitment on courts and tribunals are met through the UK's judicial review process. Judicial review is the normal procedure for challenging a decision made by a public authority. It is not concerned with the merits of a decision but on the process by which decisions were made. A judicial review will examine whether a public authority has complied with its statutory duty or acted in a way that is inconsistent with general public law principles (for example, if the public authority acted unlawfully, irrationally, or with procedural unfairness). The Government considers that this is an appropriate standard of review, given the non-judicial nature of the subsidy assessment (and in particular whether the positive benefits of a subsidy outweigh any negative effects) and that assessments as to whether subsidy measures respect the principles should not be subject to a more extensive standard of review (for example a full merits appeal to a court). Granting authorities' decisions should therefore be considered to be lawful unless they have made a material error of law in failing to apply the principles where required or acted irrationally or inconsistently with any other public law principles in applying the principles.

122. The scope of judicial review, including as regards the review of primary legislation through this route, remains unaffected by the terms of the TCA⁶⁹.

123. If the judicial review process finds that a public authority has made an unlawful decision, then a number of remedies are generally available to the courts. These include a court quashing or setting aside the subsidy being challenged, issuing a declaration that a subsidy is unlawful, in limited circumstances awarding damages, and making an order for an injunction to restrain a public authority from acting in an unlawful way.

124. In addition, the UK has committed to providing a recovery power for the courts in limited circumstances, in relation to subsidies that are found to have been given unlawfully under the TCA⁷⁰. Establishing recovery as a remedy available to the courts will enable them to order a public authority to recover the value of a subsidy already awarded in order to undo its effects in limited circumstances following a successful judicial review. The circumstances in which recovery is available as a potential remedy will be constrained by the relevant TCA time limits.

125. The intention, in line with the TCA, is that recovery would only be available if an interested party acts promptly by either, challenging a decision to grant a subsidy within one month of the date the subsidy scheme or one-off award was made publicly available on an official website or a public database, or where an interested party communicated that it may challenge a decision and has asked a public authority for an explanation of how the subsidy control principles have been applied, one month from the date that explanation was received by the interested party⁷¹.

126. Following the expiry of these time limits, recovery of the subsidy on grounds that it does not respect the subsidy principles would not be an available remedy, although the subsidy could still be challenged and other remedies could be given. With respect to schemes the time limit applies to the overarching scheme and once the time limit has expired, individual awards

⁶⁹ TCA, Article 3.10(3), 189-190

⁷⁰ TCA, Article 3.11(1)-(3), 190-191

⁷¹ TCA, Article 3.11(2)-(3), 190-191

distributed under that scheme are not subject to recovery. Finally, any subsidies contained in an Act of Parliament would be protected from recovery.

127. Under the EU regime the UK had a good track record⁷² on compliance with subsidy control provisions, with very few cases ending in recovery, and compared very favourably with similarly sized EU economies. Whilst our subsidy control system has changed, the Government expects high levels of compliance to be maintained by public authorities throughout the UK. We therefore anticipate that it will only be necessary for the courts to make use of the new recovery power in exceptional circumstances.

128. The Government seeks views on the implementation of this recovery power in light of the proposals for the rest of the subsidy control system set out above. For example, a voluntary or statutory standstill period could be considered before highest risk subsidies are disbursed to allow challenges or requests for information to be received. If no challenge is received within, for example, a month of a scheme being published on the transparency database, then recovery will no longer be an option and the standstill period would be lifted allowing the public authority to disburse funds. Another option could be, as discussed above, to provide for the independent body to offer advice on compliance for the highest-risk subsidies. This could take the form of a review of the public authorities' assessment and, if required, recommendations on how to design the subsidy to minimise distortive effects.

Question 42: In addition to the application of time limits, are there any other considerations for implementation of the recovery power?

Alternative judicial forum

129. Although the use of judicial review, amended to allow for recovery, would meet the terms of the TCA, it is possible that a different judicial forum may be more appropriate to hear challenges of subsidy schemes and awards. Due to the technical nature of subsidies and any potential legal implications regarding their impact, it may be desirable or necessary for a judicial forum with more specialist economic and legal knowledge (for example, the Competition Appeals Tribunal) to review disputed subsidies. There may also be considerations regarding the volume of work for the administrative courts, particularly whilst public authorities, subsidy recipients, the independent body and other interested parties get used to implementing and complying with the new regime. Therefore, the Government seeks views on whether an alternative, specialist judicial forum would be more appropriate in order to meet the needs of a UK subsidy control regime and our obligations under the TCA.

Question 43: Should a specialist judicial forum such as the Competition Appeals Tribunal hear challenges to subsidy schemes and awards? If not, why?

⁷² Since 1999, EU Commission negative State Aid decisions issued to Member States: UK 11 (7 with recovery, 4 without) Germany 88 (64 with recovery, 24 without), France 46 (29 with recovery, 17 without).

Working with the devolved administrations

130. The Government intends to design a subsidy control scheme that promotes a dynamic market economy throughout the UK, and which minimises distortions to the UK's internal market. In doing this, the Government recognises the importance of maintaining a constructive and collaborative relationship with the devolved administrations whilst designing a new subsidy control system that works for all parts of the UK. We will continue to engage constructively with the devolved administrations to ensure that their particular circumstances are fully considered. It is important to note that the devolved administrations will remain responsible for their own spending decisions within the subsidy control framework.

131. As set out in the UK Internal Market Act 2020, the Government will provide a draft of the proposed response to this consultation to the devolved administrations, inviting them to make representations. The Secretary of State will then consider any representations and may alter the report in light of that consideration. In addition to regular and ongoing engagement, this demonstrates the Government's commitment to involve the devolved administrations in the development of future proposals for a UK-wide subsidy control regime.

Consultation questions

132. We invite respondents' thoughts, where possible with appropriate evidence, on the design of the UK's future subsidy control regime. We specifically invite responses to the following questions:

Question 1: What type of subsidies are beneficial to the UK economy?

Question 2: What type of subsidies are potentially most harmful and distortive?

Question 3: Do you agree with the Government's objectives for a future subsidy control regime? Are there any other objectives that the Government should consider?

Question 4: We invite respondents' thoughts on further sources of evidence that would help to strengthen our analysis of policy impacts. In particular:

- Additional datasets (other than the European Commission's Transparency Award Module) on local or regional subsidy awards (e.g. by value, sector or category)
- Research and evaluation projects that have been conducted on the impacts of different types of subsidy awards on domestic competition and trade (e.g. by value, sector or category)

Question 5: We invite respondents' views on whether our proposed subsidy control regime, including the way it functions, may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) or sexual orientation), in different ways from people who don't share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.

Question 6: Do you agree with the four key characteristics used to describe a support measure that would be considered a subsidy? If not, why?

Question 7: Should there be a designated list of bodies that are subject to the new subsidy control regime. If so, how could that list be constructed to ensure that it covers all financial assistance originating from public resources?

Question 8: Do you think agricultural subsidies in scope of the AoA and fisheries subsidies should be subject to the proposed domestic arrangements? If so, what obligations should apply?

Question 9: Do you think audio-visual subsidies should be subject to the domestic regime? Please provide a rationale for your answer.

Question 10: Do you agree with the inclusion of an additional principle focused on protecting the UK internal market by minimising the distortive effects on competition?

Question 11: Do you think there should be any additional principles?

Question 12: What level of guidance or information would be helpful for public authorities to assist with their compliance with the principles?

Question 13: Should the threshold for the exemption for small amounts of financial assistance to a single recipient replicate the threshold in the UK-EU Trade and Cooperation Agreement at 325,000 Special Drawing Rights over a three-year period? If not, what lower threshold would you suggest and why?

Question 14: If you consider the small amounts of financial assistance threshold should replicate the UK-EU Trade and Cooperation Agreement, should it be fixed at an amount of pound sterling (GBP)?

Question 15: Do you agree that subsidies under the proposed small amounts of financial assistance threshold be exempt from all obligations under the domestic regime, except for the WTO prohibitions? If not, why?

Question 16: Should relief for exceptional occurrences be exempted from obligations regarding principles, prohibitions and conditions in the subsidy control regime?

Question 17: Should subsidies granted temporarily to address a national or global economic emergency be exempted from the rules on prohibited subsidies and any additional rules set out below?

Question 18: Should the threshold for the exemptions for Services of Public Economic Interest replicate the relevant thresholds in the UK-EU Trade and Cooperation Agreement at 750,000 Special Drawing Rights over a three-year period, and for transparency obligations at 15 million Special Drawing Rights per task? If not, what lower threshold would you suggest and why?

Question 19: If you consider the SPEI thresholds should replicate the UK-EU Trade and Cooperation Agreement, should they be fixed at an amount of pound sterling (GBP)?

Question 20: Do you agree with the Government's approach to prohibitions and conditions? Should any types of subsidy be added to either category? If so, why?

Question 21: Would more detailed definitions of any of the terms set out in this section, including the definition of "ailing or insolvent enterprises" be useful to ensure a consistent and proportionate? approach to compliance? If so, what should these be?

Question 22: Should the Government consider any additional ways to protect the UK internal market, over and above the inclusion of a specific principle to minimise negative impacts? If so, what?

Question 23: Would an additional process for subsidies considered at high-risk of causing harmful distortion to the UK internal market add value to the proposed

principles? If so, how should it be designed and what criteria should be used to determine if the subsidy is at high-risk of causing distortion?

Question 24: Should public authorities be obliged to make competition impact reviews public? If not, why?

Question 25: Should public authorities be permitted to override competition impact review e.g. in the case of emergencies? If so, why?

Question 26: Should there be additional measures to prevent subsidies that encourage uneconomic migration of jobs between the four nations?

Question 27: Could additional measures help ensure that lower risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy? What should be included within the definition of 'low-risk' subsidies?

Question 28: What guidance or information would be helpful for public authorities to assist on lower risk subsidies?

Question 29: Should the specific rules on energy and environment subsidies apply only in so far as they are necessary to comply with trade agreements? Or should they apply under the domestic regime more generally?

Question 30: Which sectors or particular categories of subsidy (such as for disadvantaged areas, R&D, transport, skills etc) would benefit from tailored provisions or specific guidance on subsidy control? If so, why, and what should the nature, extent and form of the provisions be?

Question 31: Do you agree with the proposed rules on transparency? If not, why?

Question 32: Do you agree that the thresholds for the obligation on public authorities to submit information on the transparency database should replicate the thresholds set for small amounts of financial assistance given to a single enterprise over a three-year period and for transparency for SPEI?

Question 33: If not, should the threshold be lowered to £175,000 over a three-year period to cover all reporting obligations for Free Trade Agreements, enabling all of the UK's international subsidy transparency obligations to be met through one database?

Question 34: Should there be a minimum threshold of £50,000 below which no subsidies have to be reported?

Question 35: Do you agree that the obligation should be to upload information within six months of the commitment to award a subsidy?

Question 36: What should the functions of the independent body be? Should it be responsible for any of the following:

- information and enquiries;
- review and evaluations;
- subsidy development advice;
- post-award review; and/or,
- enforcement.

Question 37: Should any review of a subsidy by the independent body consider all the principles, and the interaction between them, or only some principles, and if so which ones?

Question 38: What role, if any, should the independent body play in advising public authorities and reviewing subsidies before they have been awarded?

Question 39: If the independent body is responsible for post-award review, what types of complaints should it be able to receive and from whom?

Question 40: Which, if any, enforcement powers should the independent be given? In what circumstances could the body deploy them? What would be the routes of appeal and the interaction with judicial enforcement?

Question 41: How should the independent body be established in order to best guarantee its independence and impartiality when exercising its operational functions?

Question 42: In addition to the application of time limits, are there any other considerations for implementation of the recovery power?

Question 43: Should a specialist judicial forum such as the Competition Appeals Tribunal hear challenges to subsidy schemes and awards? If not, why?

Next steps

133. The Government would like to engage a wide range of stakeholders on the questions posed in the previous chapter, and invites views from businesses, civil society, think tanks and academics, public authorities, and the devolved administrations.

134. The consultation on these questions will begin on 3 February 2021 and close on 31 March 2021. The Government will publish the response to this consultation on the GOV.UK website, summarising the received responses and setting out the actions that will be taken in developing our final proposals.

This consultation is available from: <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk>

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