



Department for
Business, Energy
& Industrial Strategy

Government response to the consultation on subsidy control

A flexible, principles-based approach for the
UK

Consultation closed: 31 March 2021

CP 469

June 2021



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A flexible, principles-based approach for the UK

Presented to Parliament by the Secretary of State for Business, Energy and

Industrial Strategy

By Command of Her Majesty

June 2021

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Foreword

The United Kingdom's exit from the European Union means we can decide for ourselves how we achieve our ambitions for growth as we build back better from Covid-19, level up opportunities for people and businesses across all corners of the UK, and transition to a net zero economy. The UK government has seized this moment to develop a new, bespoke regime for subsidy control within the UK, with the Subsidy Control Bill being introduced to Parliament today. This new regime has been designed to reflect our strategic interests, strengthen our Union and help to drive economic growth and prosperity across the whole of the UK.



Previously, public authorities had to follow a bureaucratic, detailed set of EU rules and regulations – and in some cases, needed prior approval from the European Commission – before providing vital funds to viable businesses or pursuing key domestic policy objectives.

Our new system has been designed to be more flexible, agile, and tailored to support business growth and innovation, as well as maintain a competitive free market economy and protect the UK internal market.

This flexibility will allow authorities to deliver subsidies where they are needed to support economic growth and recovery without facing excessive bureaucracy or lengthy pre-approval processes. Authorities will have the freedom to act quickly to provide support to respond to economic emergencies or natural disasters.

We have developed a clear, proportionate and transparent set of principles underpinned by guidance. This will ensure public authorities fully understand their legal obligations and embed strong value for money and competition principles.

This new subsidy control system has been designed to reflect the strength of our Union's ties and work for the whole of the UK. This new approach to subsidy control will provide a coherent framework to protect the internal market. It also ensures that we uphold the devolution settlements, by providing flexibility for public authorities, including the devolved administrations, to design subsidies that are tailored and bespoke for local needs. Under this system, local authorities, public bodies and the governments of Scotland, Wales and Northern Ireland will be empowered by a set of UK-wide principles to award these bespoke subsidies.

The UK is one of the most successful political and economic partnerships in history. We are proud of our Union, what it has achieved and what it will achieve in the future. The strength and stability of the UK's economy is needed now more than ever as we strive to achieve our

collective aims. When we work together, we are stronger, more prosperous, and better able to deliver for the whole of the UK.

Through this new subsidy control regime we have been given an opportunity to improve the UK for the better. Designing this regime would not have been possible without the responses to our subsidy control consultation earlier this year. As such, I am grateful to each and every respondent for taking the time to submit responses to our proposals. Your views have enabled us to develop a subsidy control regime that truly meets the needs of people and businesses across the UK. Thank you.

THE RT HON KWASI KWARTENG MP

Secretary of State for Business, Energy and Industrial Strategy

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1. Overview

Summary

Now that the UK has left the European Union and we are no longer bound by the EU's prescriptive and bureaucratic State aid rules¹, the Government is bringing forward legislation for a new, tailored UK-wide subsidy control framework. This will reflect our strategic interests, strengthen our Union, and help to drive economic growth and prosperity across the whole of the UK as we build back better from the pandemic.

Between 3 February and 31 March 2021, the Government undertook a public consultation on the future of the UK's subsidy control regime. This consultation presented the Government's ambitions for this regime and invited views on the regime's proposed:

- Objectives;
- Definition of a subsidy and scope;
- Principles;
- Exemptions;
- Prohibitions and conditions;
- Measures for protecting the UK internal market;
- Compliance for lower risk subsidies;
- Sector and category specific provisions;
- Transparency thresholds; and
- Oversight and enforcement, including the role of the independent body.

Overall, the consultation received 234 responses. Respondents represented a broad range of stakeholders from across the UK, including business representative organisations and trade industry groups, charities, academics, businesses, private individuals, local government, and the devolved administrations. All responses to this public consultation have been recorded and the government has analysed the common themes that emerged to obtain an indication of the most frequently expressed points of view. This document includes a summary of responses received based on this analysis. A list of respondents to this consultation is provided in Annex A.

¹ Subject to the State aid provisions under the terms of Article 10 of the NI Protocol. Please refer to the 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>

Analysis has shown that the majority of respondents supported most of the proposals set out in the consultation. There was at least 70% support for each of the following proposals: the objectives, definition of a subsidy and scope of the regime, the proposed principles, suggested exemptions, prohibitions and conditions, the transparency arrangements and for a specialist forum to hear challenges to subsidies.

There were a broader range of views regarding presumed compliance, managing higher risk subsidies, the role of the independent body and enforcement of the regime. For these areas, most respondents agreed with the intention of the policy, but differed in their opinions on how these elements should be delivered.

The Government has used these consultation responses to inform design of a regime that will provide a bespoke and dynamic framework, which will:

- Empower local authorities, public bodies, and central and devolved administrations to design subsidies that deliver strong benefits for the UK taxpayer.
- Enable public authorities to deliver subsidies that are tailored and bespoke for local needs to support the UK's economic recovery and deliver UK government priorities such as levelling up and achieving net zero.
- Provide certainty and confidence to businesses investing in the UK, by protecting against subsidies that risk causing distortive or harmful economic impacts, including to the UK domestic market.
- Contribute to meeting the UK's international commitments on subsidy control, including its international commitments at the World Trade Organization and in Free Trade Agreements.

Our system achieves this through:

- The principles and rules that make clear which subsidies are permitted and prohibited, and under what circumstances.
- The tools that enable public authorities to make proportionate assessments.
- Oversight and enforcement mechanisms that incentivise granting authorities to comply with the rules and hold them to account where they do not.

Principles and rules

The foundation of this new regime is a clear, proportionate, and transparent set of principles, underpinned by guidance, that will ensure public authorities fully understand their legal obligations and embed strong value for money and competition principles. There are seven main principles; and a limited number of additional principles will apply to energy and environment subsidies. Under this regime, public authorities will be able to take subsidy decisions that facilitate strategic interventions to support the UK's economic recovery and deliver government priorities such as levelling up and achieving net zero. It will also give them

the freedom to act swiftly to deliver support to where it is most needed. Subsidies below a small amounts of financial assistance (minimal financial assistance) threshold, subsidies for Services of Public Economic Interest under a certain threshold and certain subsidies in response to economic emergencies or natural disasters will be exempt from some or all requirements. In addition to this, certain categories of subsidies that are always damaging – such as unlimited subsidies to shore up failing companies, where there is no plan for their restructure – will be prohibited.

This new approach to subsidy control will provide a coherent framework to protect the internal market, a priority for both government and consultation respondents. This will ensure a consistent approach throughout the UK that maintains a competitive free market economy, is live to taxpayer interests and is clear to business. To maintain a consistent approach, the sectoral scope will be broad, including agricultural, fisheries and audio-visual sector subsidies.

As part of these protections to UK competition and investment a series of additional measures will be introduced. This includes introducing a prohibition on subsidies that are explicitly contingent on relocation within the UK.

Through these principles and rules, our subsidy control regime will also play its part in ensuring that the UK remains a reliable trading partner that upholds its international commitments.

Tools that enable public authorities to make their assessments

Guidance will be produced to help public authorities comply with the obligations set out in the regime, assisting them to award subsidies that are compliant with the subsidy control principles that are at the core of the new regime. This guidance will promote considerations intrinsic to the levelling up agenda and set out the criteria for promoting economic development of relatively disadvantaged areas, as well as protecting UK competition and investment against subsidy races and other harmful distortive effects of subsidies. There will be a statutory duty for public authorities to use this guidance. This guidance will be published ahead of this regime coming into force.

The foundation of this new regime is a clear, proportionate and transparent set of principles supported with guidance, that will ensure public authorities fully understand their legal obligations and embed strong value for money and competition principles. The great majority of subsidies can be granted as long as they can demonstrate compliance via one of two self-assessment routes: either by undertaking a principles-based assessment of compliance against the subsidy control principles or through streamlined routes.

Our guidance will show how the assessment of compliance against the principles should be carried out and how different benefits and distortive impacts should be assessed, for different kinds of subsidies. This is a proportionate, risk-based approach that balances the need to manage potential risks to UK competition and investment against our aim to minimise burdens on public authorities. This route will be taken for any subsidies that do not meet the criteria for streamlined routes, Subsidies of Interest or Subsidies of Particular Interest, which are outlined in more detail below.

The Government will create streamlined routes to demonstrating compliance for categories of subsidies at low risk of causing market distortions, that promote our strategic policy objectives and which the Government judges to be compliant with the principles of the regime. These routes will be even simpler than the process of principle-by-principle assessment, as public authorities need only demonstrate that they meet the published compliance criteria for that route. This will ensure that these authorities are able to deliver these subsidies with minimum bureaucracy and maximum certainty.

In order to protect UK competition and investment, there will be certain subsidies in respect of which public authorities will be required to obtain a report from the independent body on their assessment of whether the subsidy complies with the principles, and in certain other cases public authorities will have the option of doing so.

As part of their assessment of the subsidy against each of the seven main principles, public authorities granting Subsidies of Interest will be strongly encouraged to undertake a more extensive analysis into the potential distortion of the UK internal market. These authorities will have the option to have the independent body review their assessment of compliance. The independent body may also provide advice on how that assessment and the design of the subsidy might be improved.

For Subsidies of Particular Interest, public authorities will be required to seek advice from the independent body on their assessment of compliance before the subsidy can be awarded. After the independent body has carried out that review, there will be a short 'cooling off period' after its publication, which the Secretary of State may extend for a limited period if necessary.

We will set out the specific criteria for Subsidies of Interest and Subsidies of Particular Interest in a way that makes it simple for authorities to determine whether a particular subsidy falls into those categories. This will enable closer scrutiny of subsidies which are considered to be at greater risk of having harmful or distortive effects. Both categories are likely to be a very small proportion of the overall number of subsidies granted under the new domestic regime.

The Secretary of State will also have a power to require in limited circumstances that the public authority refers other subsidies to the independent body before or after they are given for review. A subsidy may only be called in by the Secretary of State where the subsidy threatens to have negative effects on competition and investment in the UK, or there is a risk that the subsidy would or may have failed to comply with the subsidy control requirements. This will again result in the body reviewing the assessment of compliance undertaken by the public authority and may likewise include advice on how that assessment and the design of the subsidy might be improved.

Oversight and Enforcement

The independent body will be the Subsidy Advice Unit – a body established within the Competition and Markets Authority (CMA). The CMA has the experience and expertise to act as an authoritative, objective body for subsidy control.

The Subsidy Advice Unit will have a role in monitoring and reporting on how the regime is working as a whole. The Subsidy Advice Unit will provide advice to public authorities on Subsidies of Interest and Subsidies of Particular Interest, as set out above, and will also provide advice in respect of other subsidies where it has been requested by the Secretary of State either before or after a subsidy has been granted.

Under the new regime, enforcement will be through the UK's courts and tribunal system. The Competition Appeal Tribunal (CAT) will be responsible for hearing applications for the review of a subsidy decision applying the judicial review standard. This means the CAT will not be reviewing whether the public authority made the 'correct' decision, but whether it was within its powers, procedurally fair, and rational.

The CAT will be able to award the same remedies as are available to the courts in judicial review proceedings. In addition, the CAT will have discretion to make a recovery order where a subsidy is found to contravene the subsidy control requirements. The Government expects high levels of compliance by public authorities throughout the UK. We therefore anticipate that it will be rare for recovery orders to be made.

Public authorities will also be required to upload information to the transparency database, which they are already using, on subsidies and subsidy schemes above certain thresholds, which may vary depending on whether the subsidy is to a Service of Public Economic Interest (SPEI); whether it is an individual award or part of a scheme; and the sector it is in. In most cases, public authorities will be obliged to upload information to the database within six months of committing to award the subsidy.

Consultation Background

The consultation was launched on 3 February 2021 and closed formally on 31 March 2021.

The consultation was published online. Responses were submitted through an online response tool or by email. BEIS also held 24 stakeholder meetings during this period, including nine roundtable events. Nine responses were submitted by email shortly after this deadline and these were accepted. One response was received significantly after the closure of the consultation. Although not captured in the consultation response itself, in keeping with maintaining fairness for all stakeholders, the Government has reviewed the feedback provided.

Summary of responses to the consultation

This section presents a summary of the opinions given by respondents to the consultation. This is provided for each of the nine core components of the subsidy control regime, as presented in the original consultation. A full breakdown of the consultation responses is given in section two of this document.

Objectives

- There was strong agreement ² with the Government's objectives for the subsidy control regime. Respondents' views on beneficial and harmful subsidies were also closely aligned to the Government's priorities for the regime.
- Throughout the consultation responses there was strong support for the use of subsidies to further the UK's strategic interests, in particular net zero and levelling up.
- There was also strong support for the need for the regime to minimise distortions to competition and investment, and to protect the UK internal market.

Definition

- Many respondents agreed with the Government's proposed characteristics of a subsidy. Additional suggestions for the specific terminology used within these characteristics were also made.

Scope

- Many respondents to the questions believed that agricultural subsidies in scope of the WTO Agreement on Agriculture (AoA), fisheries subsidies and audio-visual subsidies should all be subject to the domestic regime. This was felt to be the best way to achieve consistency and certainty.

Subsidy control principles

- Six of the principles to be used as criteria for evaluating possible subsidies were agreed between the UK and the EU under the TCA. These six principles, plus an additional principle focused on protecting the UK internal market, were presented to respondents in the consultation.
- Many respondents agreed with the inclusion of the additional principle to protect the UK internal market, to reinforce the requirement to minimise distortions to competition and investment in domestic markets as well as to international trade.

Exemptions

- There was strong agreement on the government's proposed exemptions for small amounts of financial assistance (minimal financial assistance), relief for exceptional circumstances, subsidies granted temporarily to address national or global economic emergencies and the threshold for exemptions for Services of Public Economic Interest (SPEIs).

² Further information on the use of these terms is provided in the responses received to the consultation section (page 16)

Prohibitions and conditions

- Many respondents agreed with the government's proposals for prohibitions and conditions. Prohibitions were proposed for:
 - Subsidies that are contingent upon export performance of the recipient³.
 - Subsidies contingent upon the use of domestic over imported goods or services.⁴
 - Subsidies in the form of unlimited state guarantees to enterprises.
 - Subsidies granted to "ailing or insolvent" enterprises where there is no credible restructuring plan.
- The consultation also presented proposals to make several subsidies subject to specific conditions. Restructuring subsidies (subject to an applicable exemption or exception) for certain financial institutions such as banks will only be allowed in specific circumstances to ensure the continued stability of the financial system. Subsidies granted to an airline carrier for the operation of routes and subsidies granted in the context of large cross-border or international cooperation projects will also be subject to additional conditions.

Protecting the UK internal market

- The majority of respondents felt that the Government should consider additional ways to protect the UK internal market over and above the specific principles, and that there should be additional measures to prevent uneconomic migration of jobs within the UK, including between cities and regions as well as between the four nations.

Transparency

- The respondents that answered the questions on transparency agreed that:
 - 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 is below the minimal financial assistance threshold given to a single enterprise over a three-year period, or it is below the value set for transparency for SPEIs.
 - An obligation should be placed on public authorities to upload information to the transparency database within six months of the commitment to award a subsidy.⁵

³ These subsidies are prohibited under the WTO ASCM in the case of goods, with the exceptions for certain permitted export credit insurance measures.

⁴ These subsidies are prohibited under the WTO ASCM in the case of goods. The UK-EU TCA and some FTAs prohibit subsidies of this kind to both goods and services.

⁵ For subsidies in the form of tax measures, the information shall be made public within one year of the date the tax declaration is due.

Oversight and Enforcement

- Many respondents supported the suggested functions for the independent body: information and enquiries, review and evaluations, subsidy development advice, post-award review, and/ or enforcement. For example, 90% supported the independent body having a role in relation to information and enquiries.
- Separately, when asked in isolation, 69% supported the independent body having enforcement powers. However, in a follow-up question, few respondents supported the independent body having strong enforcement powers such as pre-award prevention. Opinions were mixed on what the enforcement functions should look like, with wide variation across respondents. Powers suggested ranged from those which will not be in the regime, those have been partially implemented and given to the independent body, and powers which are not aligned to the objectives of the regime or responses given to other questions in the consultation.
- Whilst there was no specific consultation question on which body should perform the role of the independent body, many respondents suggested this should be led by the Competition and Markets Authority (CMA).
- With regards to the role of the independent body pre-award, 47% of respondents to the question mentioned a role for advice and 12% mentioned a role for review or approval.
- There was strong support in responses for utilising a specialist judicial forum, such as the CAT, as part of the enforcement architecture for the new subsidy control regime.

Working with the Devolved Administrations

The government has designed a subsidy control scheme that promotes a dynamic market economy throughout the UK and that minimises distortions to the UK's internal market. To ensure that this system works for all parts of the UK, the government has worked closely with the devolved administrations throughout this process.

On 17 May, in line with our statutory duty under section 53 of the UK Internal Market Act 2020, we shared the Government's draft response to the subsidy control consultation with the DAs and invited them to make representations. To support this process, BEIS worked closely with the DAs at official and Ministerial level. BEIS organised three forums for the DAs to discuss their particular areas of focus. There have also been a number of Ministerial meetings to hear the DAs views on the draft response document.

Next Steps

The Government is grateful to those who took the time to respond to our consultation and participate in our stakeholder engagement events. Government has today (30 June 2021) brought forward legislation on the UK's domestic Subsidy Control regime.

2. Government response to the consultation

Responses received to the consultation

This Government response outlines the consultation position, a high-level summary of the stakeholder responses to the consultation and the UK Government's response to these, organised under each consultation question.

In reporting the overall response to each question, we have used a number of terms:

- 'majority' indicates the clear view of more than 50% of respondents to that question;
- 'minority' indicates the clear view of fewer than 50% of respondents to that question;
- 'about half' indicates an overall response within a few percentage points of 50% (either way).

The following terms have been used in summarising additional points raised in the responses:

- 'a few respondents' means fewer than 30% of respondents have shared this view;
- 'some respondents' means between 30% and 70% of respondents have shared this view;
- 'many respondents' indicates between 70% and 85% of respondents have shared this view; and
- 'strong agreement' indicates that between 85% and 100% of respondents have shared this view.

In the Government response sections, 'we' refers to the UK Government. We received a total of 234 responses to the consultation, including two instances where we received a response from the same respondent both online and by email: 56 responded online, 178 by email. Of these, 72 were from business representative organisations and trade industry groups, 13 from charities, 29 from academics, 40 from businesses, 9 from individuals, 45 from local government and 23 from other public sector organisations. We also received formal responses from the Scottish Government, Welsh Government and the Northern Ireland Executive.

Additionally, BEIS held 24 stakeholder meetings on the consultation including nine roundtables, and 7 sessions with leading, relevant academics.

Respondents responded to the consultation in different ways. Some responded directly to the consultation questions through the online portal, while others responded by email but with their responses structured around the specific questions. Many respondents did not structure their responses around the specific questions, and the majority of respondents who did answer the specific questions did not answer every question. Instead, many respondents provided a broader response by email, covering their views on the overall domestic regime. As a result, for each individual question set out below, the proportion of respondents who answered each

question ranges from 8% to 66%. Where respondents expressed an explicit view relating to one of the specific questions in their broader responses, we have counted these answers towards the respective question. We have also thematically analysed each response as a whole based on the themes set out in the consultation and identified via stakeholder engagement.

Responses which did not explicitly express their support or disapproval of the specific question were logged but classified as neither supportive nor non-supportive. When summarising stakeholder responses to the consultation, all accompanying written text was analysed for each question.

In two instances we received a response from the same respondent both online and by email. In such cases both entries were reviewed, and the content assessed but only the online response counted for aggregated analytical purposes, to avoid double-counting respondents.

We are thankful to Ministers from the Scottish Government, Welsh Government and the Northern Ireland Executive for their engagement on the development of this scheme. BEIS officials met with their counterparts in the DAs on eight occasions during the consultation. BEIS also shared a draft copy of this document with the DAs for comment prior to its publication.

BEIS has carefully considered the views and representations provided by DA officials and ministers throughout this process.

BEIS will continue this close cooperation and engagement with the DAs into the future.

The UK Government is grateful to each and every respondent to the subsidy control consultation for taking the time to submit their views on the proposals.

Objectives

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?

Consultation position

The consultation set out the Government's four objectives for the subsidy control regime, these aim to strike 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 regime are:

1. Facilitating interventions to deliver on the UK's strategic interests,
2. Maintaining a competitive and dynamic market economy,
3. Protecting the UK internal market, and
4. Acting as a responsible trade partner.

Views were sought from respondents on these suggested objectives, the types of subsidies that are beneficial and should be encouraged, and the types of subsidies that may be harmful and should be minimised.

Summary of stakeholder responses to consultation

The types of subsidies beneficial to the UK economy

Respondents noted that beneficial subsidies “address regional imbalances and left behind communities, incentivise growth and investment locations vital to the Government's levelling up agenda... and support both the wider economic recovery and help the UK transition to a greener economy and society”. One respondent also noted beneficial subsidies “add value to key economic sectors, provide for delivery of public good... are delivered on an equitable basis between the UK nations, and are delivered in line with applicable legal and international obligations”.

66% of respondents answered the question on the types of beneficial subsidy, with many respondents supporting the use of subsidies to deliver Government's key strategic objectives, including levelling up, achieving net zero carbon, supporting Covid recovery, and national security. Respondents noted that these objectives could be achieved through subsidies that support investment in research & development, innovation, infrastructure, improvements to productivity, skills development, and supporting start-ups and small and medium-sized enterprises (SMEs).

A few respondents also noted specific sectors that would benefit from subsidies including; arts and culture, agriculture and fisheries, charities and social enterprises, heritage, and digital industries.

Finally, a few respondents noted that social benefits sometimes outweigh economic interests. These respondents encouraged continued support for Services of Public Economic Interest (SPEI). It was also noted that, following the Covid-19 pandemic, subsidies could also be beneficial in an emergency response.

The types of subsidies that are potentially most harmful and distortive subsidies

51% of respondents answered the question on the types of subsidies that are potentially the most harmful and distortive. Respondents noted that harmful subsidies: distort the UK internal market, encourage subsidy races between different parts of the UK and encourage the relocation of economic activity, are awarded to failing entities, especially without a credible restructuring plan, and create an unfair competitive advantage for a company or sector.

Individual respondents also noted that harmful subsidies: impact upon international relations, crowd out private investment, are environmentally harmful, are overtly political, and undermine efficiency.

One respondent noted their view that all subsidies, except those given as a last resort in an emergency, are harmful.

Objectives for the regime

46% of respondents directly answered question three. Of those that responded, 83% agreed with the Government's objectives.

Government Response

Respondents agreed with the Government's objectives for the subsidy control regime. The types of subsidies that were identified as beneficial and potentially harmful to the UK economy were also closely aligned to the Government's priorities for the regime.

These objectives and priorities have been utilised to drive policy development for the proposals and detailed design elements of the subsidy control regime outlined later in this document.

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.

Consultation position

The consultation asked questions to seek 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, and any information relevant to the Public Sector Equality Duty (PSED) set out in section 149 of the Equality Act 2010.

Summary of stakeholder responses to consultation

25% of respondents answered question four on sources of evidence on policy impacts. Of the respondents that did reply 41% mentioned relevant evaluations only, 9% mentioned data sources, 16% mentioned both and 34% did not identify either. These evaluations included government reports on previous subsidy schemes and academic evidence. A range of datasets were identified, mainly in relation to data that might aid in evaluation the impacts of subsidies – such as local level socio-economic data – and data on subsidies in particular areas such as innovation.

20% of respondents answered question five on potential equalities impacts. Of the respondents that did reply, 9% explicitly identified impacts that the domestic regime could have and 87% said that there were no relevant equalities impacts. Respondents that explicitly identified impacts mentioned age, disability and race as protected characteristics which might be impacted differently by some elements of the domestic regime. For example, one respondent specifically noted the potential impacts on the representation of protected groups within film and TV that may come about from the inclusion of audio-visual subsidies in the regime. It was noted that this representation is important for supporting these groups' mental and social wellbeing as well as awareness raising of their experiences among the wider public.

Only one respondent specifically referred to evidence, mentioning the Government's Taking Part Survey 2019/20 on the differences in engagement with the arts by ethnicity.

Government Response

We have carefully considered the evidence on policy impacts, including datasets and evaluations, that were suggested in the consultation responses and, where possible, have used this directly in our analysis of the domestic regime or as a catalyst to seek out additional evidence and conduct further analysis.

Based on the replies, and other analysis and stakeholder engagement, we have reached a provisional conclusion that the domestic regime does not create any foreseeable impacts of concern under the PSED. We will continue to analyse equalities impacts as we develop further elements of the domestic regime.

Alongside this document we have published an Impact Assessment which contains our full assessment of the expected impacts of the new domestic regime.

Definition

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?

Consultation position

The consultation set out the four key characteristics which the Government believes make up a subsidy. The four characteristics were:

- 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.
- 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.
- The subsidy must be specific which means it benefits a particular enterprise, or enterprises in a particular sector, industry, or region.
- It has, or could have, a harmful or distortive effect on trade or investment within the UK or internationally.

The Government considered that the four characteristics outlined would allow the UK to meet the specific needs of the UK economy whilst fulfilling our international obligations. This definition covers the whole of the UK and applies to both the production of goods and the provision of services.⁶

⁶ 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.

Views were sought on these four key characteristics and whether the Government should develop a designated list of bodies that are subject to the new regime.

Summary of stakeholder responses to consultation

18% of respondents answered question six on the proposed characteristics. Of those that responded, 72%, agreed with the Government's four characteristics of a subsidy. Further responses were also provided on the terminology used for three of the four characteristics. Suggestions were also made that the Government should widen the characteristics to capture key strategic objectives such as net zero and levelling up.

For the first characteristic, "financial assistance" was recommended instead of "financial contribution". The respondent believed that "financial contribution" could be interpreted as requiring a positive act.

For the second characteristic, respondents noted potential issues around the phrase "in the course of business" as this appeared to include activity within the UK regime that would not be in the scope of the EU regime. Two respondents also noted the subjectivity of the phrase "would not be available under commercial terms". It was suggested that this phrase either be removed, or specific parameters or guidance be developed to provide clarity. Finally, there was a suggestion that "provision of goods or services or the purchase of goods or services" should be used to align to the wording of the UK-EU TCA.

For the fourth characteristic, several respondents noted that the UK-EU TCA does not include the terms "harmful" or "distortive". It was recommended by stakeholders that the UK regime use the UK-EU TCA wording so that it is aligned. Additional points were also made by individual stakeholders. These included a suggestion that this should only include competition effects within the UK and a potential issue around using the terminology "could have" due to the EU legal interpretation that almost all subsidies "could have" a distortive effect on trade.

38% of respondents answered question seven on whether there should be a designated list of bodies subject to the new regime. Of those that responded, 60% said 'No'.

Government Response

In response to consultation feedback, we have made adjustments to our definition of a subsidy to represent better our policy intention. Our overarching aim is to define subsidies in a way that is easy for UK public authorities to recognise so that these authorities can easily apply the definition, and we will publish guidance to assist them in doing so.

The definition must also be consistent with our international agreements. We have made changes such as replacing "financial contributions" with "financial assistance", which is

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 declaration in the Joint Committee 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.

beneficial because it more accurately describes the broad ways in which a subsidy recipient can financially benefit, and also reflects the language of the UK-EU TCA. This is desirable as the UK-EU TCA is broader in scope than the UK's other international commitments, such as the WTO agreement on subsidies. We are using "enterprise" in our domestic definition to refer to subsidy beneficiaries, which is both precedented in UK law and has a commonly understood meaning that is also consistent with the UK-EU TCA's conception of an "economic actor".

We will clarify the fourth characteristic so that it reflects the impacts on trade or investment internationally and on competition or investment within the UK. This will be maintained to ensure that the UK continues to meet its international commitments, as well as ensuring that the new regime safeguards domestic competition and the UK internal market. It is not our intention to reference any specific government policy objective or scheme into our definition of a subsidy, such as by mentioning net zero carbon emissions. This would risk unnecessarily limiting the definition. For similar reasons we do not currently intend to publish a definitive list of public authorities to whom the subsidies definition would apply. The benefit of certainty created by such a list is outweighed by the risk that it would quickly become out of date and require near constant review to remain relevant.

Scope

Question 8

Do you think agricultural subsidies in scope of the Agreement on Agriculture (AoA) and fisheries subsidies should be subject to the proposed domestic arrangements? If so, what obligations should apply?

Consultation position

The UK is subject to international rules for agricultural and fisheries subsidies. This includes the WTO Agreement on Agriculture (AoA) which provides rules for subsidies to agriculture. The WTO's Agreement on Subsidies and Countervailing Measures (ASCM) applies to fisheries subsidies; the sector-specific WTO agreement for fisheries is still being developed.

Agricultural subsidies in scope of the AoA and subsidies related to trade in fish and fish products are not subject to the subsidy control requirements in the UK-EU TCA. However, other subsidies in support of wider agriculture and fisheries policy not covered by the AoA or related to trade in fish and fish products, will be subject to the UK-EU TCA subsidy control obligations.

The consultation sought views on to what extent fisheries subsidies and those agricultural subsidies in scope of the AoA should be within scope of the domestic regime.

Summary of stakeholder responses to consultation

20% of respondents answered this question. Of these, 81% agreed that one or both of these subsidies should be included in the scope of the domestic regime.⁷ Of these:

- 66% explicitly supported both agricultural and fisheries subsidies to be in scope; 4% explicitly supported including fisheries subsidies without clearly stating an opinion on agricultural subsidies, and 9% explicitly supported agricultural subsidies to be within scope without mentioning fisheries subsidies.
- 2% explicitly supported fisheries subsidies being in scope but explicitly did not want agricultural subsidies to be in scope. No responders explicitly wanted agricultural but not fisheries to be in scope.

Of the remaining 20%, 11% explicitly wanted neither to be in scope and 9% wanted agriculture to not be in scope without explicitly mentioning fisheries subsidies.

Respondents who answered felt these sectors should be included for simplicity and fairness. One respondent also noted that “the historic distinctions that justified separate regimes for agriculture and fisheries are less relevant today”.

Respondents that answered ‘No’ stated that these sectors should be excluded from the future regime to ensure that UK agriculture and fisheries are not disadvantaged compared to international competitors who are exempt from subsidy controls. A few respondents also noted that as agricultural subsidies are subject to the AoA they should not also be subject to the domestic regime.

Government Response

Agriculture subsidies in scope of the AoA and fisheries subsidies will be included within the new domestic regime, and so all spending on agriculture and fisheries policy will be within scope of the same rules.

The UK is no longer bound by the EU common agriculture and fisheries policies. Each of the Devolved Administrations – and the UK Government in England - has the freedom to pursue their own policy choices. Consequentially, inclusion in the domestic subsidy regime balances the need to, on one hand, minimise risk of distortions to UK competition and investment and ensure consistency across sectors with, on the other hand, retaining the flexibility for government to develop the regime appropriately to support domestic policy ambitions. Devolved administrations will continue to be responsible for devolved spending decisions for agriculture and fisheries.

⁷ Figures may not sum to total due to rounding.

As part of this, consideration is being given to whether any specific arrangements should be applied in order to accommodate the needs of UK-wide agriculture and fisheries policy. For example, the government will consider further:

- whether the threshold to exempt minimal financial assistance subsidies from the subsidy control requirements should be different to that for other subsidies;
- how guidance to support interpretation of the subsidy principles can meet the needs of agriculture and fisheries; and
- how we can use streamlined routes, that ensure compliance is even simpler than the process of principle-by-principle, in these sectors.

Further detail on streamlined routes is given in the ‘protecting the UK internal market’ section of this consultation response.

Question 9

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

Consultation position

The audio-visual sector is excluded from the provisions of the Subsidies Chapter in the UK-EU TCA. The Government sought views on whether this exclusion should be replicated in the domestic regime.

Summary of stakeholder responses to consultation

21% of respondents answered this question. Of these, 82% said audio-visual subsidies should be subject to the domestic regime.

Respondents that answered ‘Yes’ believed that inclusion would avoid potential for undesirable competition across the UK and ensure consistency with other sectors. Inclusion would promote openness and transparency. It was also noted that this would help the UK when working with international partners as it will provide reassurance that the European market will not be distorted in favour of the UK.

Two respondents suggested that the sector should be included in the domestic regime but there should be a bespoke approach due to distinct market failures in the sector.

Respondents that answered ‘No’ stated that this was in recognition of the distinct financial risk within the sector. The opportunity to provide greater flexibility to fund UK content was also referenced as a reason for audio-visual not to be included in the scheme. Finally, respondents noted that not including the sector in the scheme would also maintain competitiveness with the EU.

Government Response

Audio-visual subsidies will be included within the scope of the new domestic regime. This approach balances the need to ensure consistency across sectors whilst retaining the flexibility to develop specific interventions appropriate to this sector. As part of this, consideration is being given to whether any specific arrangements should be applied for this sector, for example to reflect different international arrangements.

The government will consider whether streamlined routes may be appropriate for this sector. Further detail on these more streamlined routes is given in the protecting the UK internal market section of this consultation response.

Subsidy control principles

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?

Consultation position

The Government presented seven main principles to be used as criteria for evaluating possible subsidies, these are outlined in Table One. Six of these principles were agreed under the UK-EU TCA. These principles ensure that taxpayer money is used effectively and efficiently and were agreed because they aligned with our strategic objectives for the domestic regime. A limited number of additional principles will apply to energy and environment subsidies, where appropriate and in line with the UK's international commitments.

To ensure that the domestic regime best supports the specific needs of the UK economy and our internal market, the Government also proposed an additional principle, specifically focus on protecting the UK internal market (UK competition and investment) by minimising the distortive effects on competition.

The consultation sought views on the inclusion of principle six and whether there should be any additional principles included within the regime.

It was also noted that there would be a legal obligation placed on public authorities to meet the terms of these principles. To support this, the Government would issue guidance on how to demonstrate compliance, as well as a template for public authorities to record how they have complied with the principles in designing their subsidy. Respondents were also asked to provide views on what level of guidance or information would be helpful to public authorities in making this assessment.

Table one: the seven main principles proposed by government in the subsidy control consultation for use as criteria for evaluating possible subsidies,

Principle	Explanation
1. Subsidies are provided to meet a specific public policy objective to remedy an identified market failure or to address an equity concern.	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.
2. Subsidies are proportionate and should be the minimum size necessary to achieve the stated public policy objective.	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 the least possible disruption in pursuit of the public policy objective.
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.	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.
4. Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.	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.
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.	Alternative policy levers that are likely to cause less distortion to competition should be considered before turning to subsidies.

Principle	Explanation
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.	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.
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.	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.

Summary of stakeholder responses to consultation

Stakeholder responses to questions 10 and 11 are given in figure one.

44% of respondents answered the question on whether a principle focused on protecting the UK internal market should be included. Of those that responded, 78% said 'Yes'. Respondents who believed the additional principle should not be included felt that it was unnecessary due to the inclusion of principle 7 that requires authorities to weigh up the overall benefits and costs of a subsidy including its distortive impacts on the internal market, that it would increase burden for public authorities and that it would lead to a more risk-averse culture within the public sector. 38% of respondents answered the question on whether other additional principles should be included. Of those that answered, 64% said 'No'.

Of those that responded to the question on guidance, the majority wanted more detailed guidance on the principles.

Responses to consultation questions 10 and 11 on 'subsidy control principles'

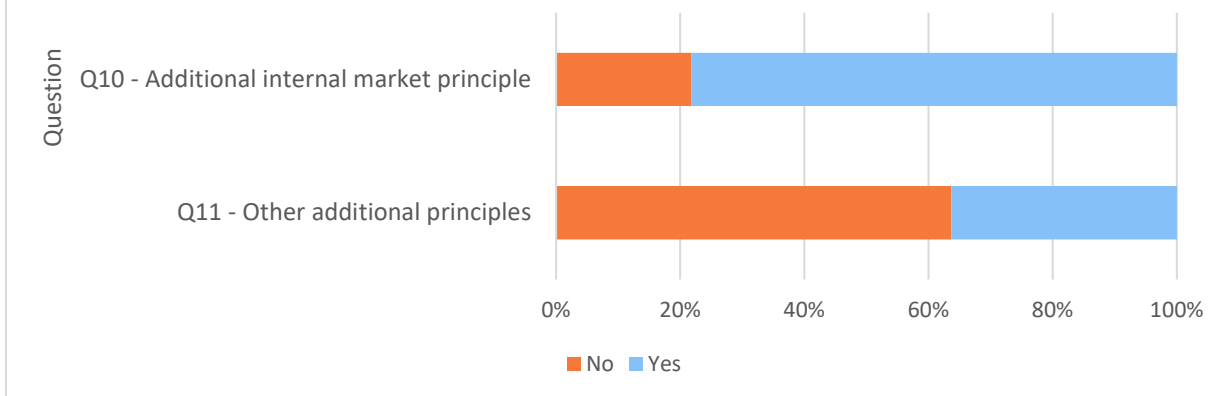


Figure one: responses to questions 10 and 11 of the subsidy control consultation.

Government Response

As proposed in the consultation, the Government will introduce an additional 'principle', (principle six), which will focus on protecting UK competition and investment domestic market by minimising the distortive effects of subsidies. Any domestic impacts will also need to be considered in assessing the other principles where relevant. A limited number of additional principles will also apply to specific categories of energy and environment subsidies, in line with the UK's international obligations.

We will publish guidance to help authorities assess these impacts and therefore their compliance with the principles. This guidance will set out how public authorities should consider impacts on other areas in the UK, including the impact of new investments not going to these other areas. This will be intrinsic to ensuring subsidies promote the levelling up agenda and the economic development of relatively disadvantaged areas, as well as protecting UK competition and investment against subsidy races and other harmful distortive effects of subsidies.

Exemptions

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?

Consultation position

The Government proposed the introduction of specific exemptions to ensure the lowest risk and most time-critical subsidies can proceed without public authorities first having to ensure they meet the subsidy control principles.

The Government proposed exemptions for small amounts of financial assistance (or minimal financial assistance), from the legal duty to respect the subsidy control principles. This was in recognition of the fact that lower value subsidy awards are less likely to distort significantly international trade and investment, or competition in the UK internal market.

The Government also proposed a partial exemption for minimal financial assistance subsidies from the prohibitions and conditions of the domestic regime. Under this proposal, minimal financial assistance subsidies would still have to comply with the WTO prohibitions for goods. These relate to subsidies that are contingent on export performance and subsidies that are contingent upon the use of domestic over imported goods.

The consultation sought views on whether the threshold for exemption for minimal financial assistance subsidies should replicate the threshold in the UK-EU TCA of 325,000 Special Drawing Rights (SDR) over a three-year period and, if so, if this should be fixed at an amount of pound sterling.

The Government also sought views on whether subsidies awarded to compensate for exceptional circumstances, such as floods or the immediate economic impact of a pandemic, should also be exempt from provisions on principles, prohibitions and conditions in the subsidy

control regime. Under this proposal these subsidies would still be subject to transparency obligations and challenge through the courts.

Summary of stakeholder responses to consultation

Stakeholder responses to questions 13, 14 and 15 are given in figure two.

45% of respondents answered the question on whether thresholds for minimal financial assistance subsidies should replicate the UK-EU TCA threshold of 325,000 Special Drawing Rights over a three-year period. Of those that responded to the question, 92% said 'Yes'.

39% of respondents answered the question whether thresholds should be fixed in GBP. Of those that responded, 88% said 'Yes'.

41% of respondents answered the question on whether minimal financial assistance subsidies should be exempt from all obligations under the domestic regime except WTO prohibitions. Of those that responded, 93% said 'Yes'.

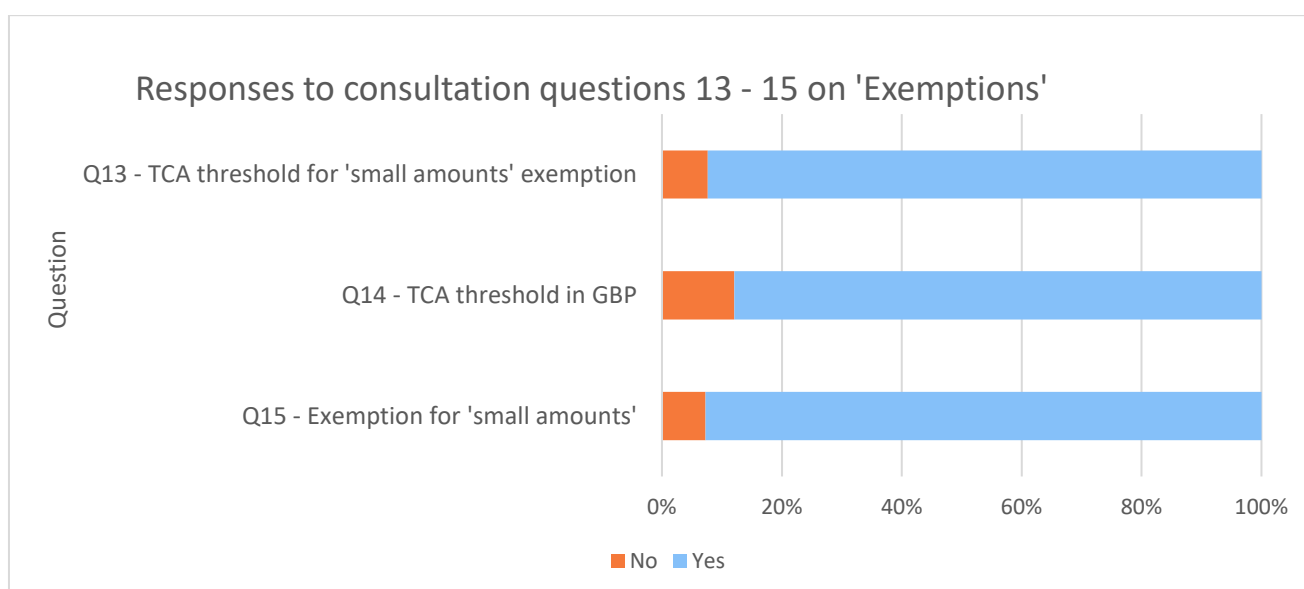


Figure two: responses to questions 13, 14 and 15 of the subsidy control consultation.

Stakeholder responses to questions 16 and 17 are given in figure three.

44% of respondents answered the question on whether relief for exceptional circumstances should be exempted from the principles, prohibitions and conditions of the regime. Of those that responded, 89% said 'Yes'.

42% of respondents answered the question on whether temporary subsidies to address national or global emergencies should be exempted from the rules on prohibited subsidies and SPEIs. Of those that responded, 86% said 'Yes'.

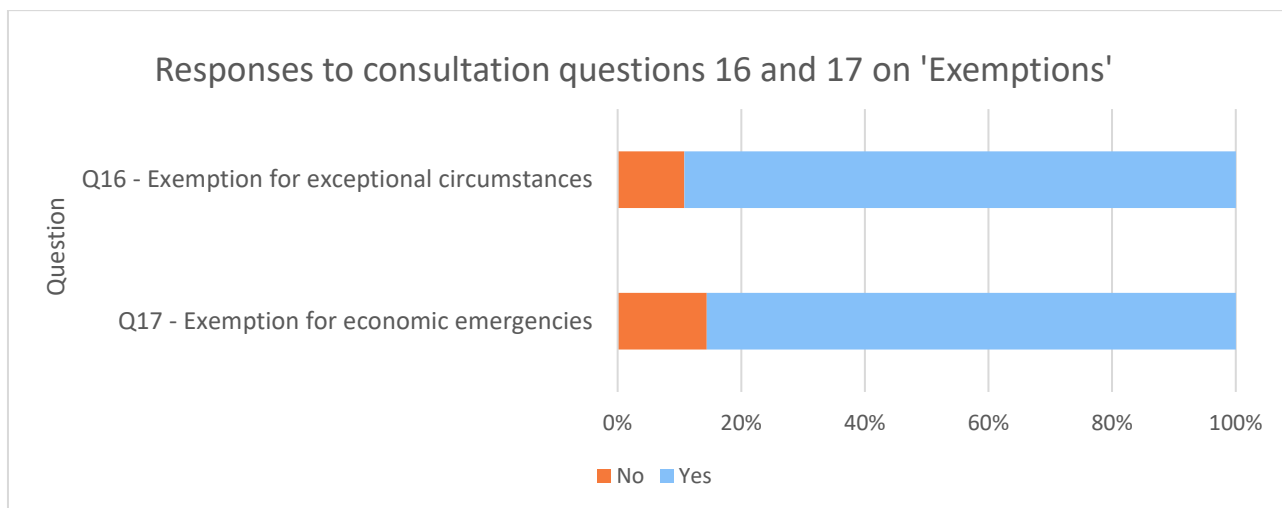


Figure three: responses to questions 16 and 17 of the subsidy control consultation.

Government Response

The Government will adopt the approach proposed in the consultation. Minimal financial assistance subsidies will be exempt from all obligations under the domestic regime except the WTO derived prohibitions as they apply to subsidies relating to goods. As proposed in the consultation, this threshold will be set at the value of 325,000 SDR over a three-year period for most sectors, and will be fixed in GBP rather than SDR – at the time of writing this was approximately £334,000. This has been fixed at a lower amount, £315,000, to allow for exchange rate fluctuations.⁸

We propose to take a power to set and amend the minimal financial assistance thresholds in the domestic regime. Amendments could be needed to ensure we are honouring our existing international commitments, to reflect any new or amended commitments in UK FTAs or in response to any substantive, sustained changes in currency valuation. Subsidies valued below that amount will be exempt from the domestic regime, although we will be clear that they are still subject to WTO requirements and those stemming from certain FTAs, where relevant, and that as a result public authorities should be prepared to provide information on subsidies falling below the minimal financial assistance threshold when requested to do so. For agricultural and fisheries subsidies, the government will consider further whether the appropriate level for these sectors should be different to that for other subsidies, and we may also set different thresholds for other sectors if necessary.

The Government will adopt the approaches proposed in the consultation for exemptions for subsidies for exceptional circumstances and for national and global emergencies. As some of our international reporting obligations can cover relief under these circumstances, the Government may require the public authorities to share historic information on these subsidies.

⁸ Fixing the amount in GBP 4.5% below the exchange rate (subject to rounding) allows the regime to have a stable threshold providing certainty for public authorities and recipients. The same approach has been taken for other thresholds that have been converted from SDR into a fixed GBP amount.

This will only be in instances where the specific information has been requested by the Department for International Trade.

As outlined in the consultation document, the government will also implement an exemption for subsidies where they are required for the purpose of defence or safe-guarding national security.

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)?

Consultation position

The UK-EU TCA sets out specific exemption thresholds for subsidies aimed at SPEIs. The subsidy chapter does not apply to SPEIs below 750,000 SDR over a three-year period. There is also a specific exemption for SPEIs related to transparency, where the subsidy chapter does not apply to SPEI subsidies below 15 million SDR per task. The Government sought views on whether these thresholds should be set at a lower level and whether they should be fixed at an amount of GBP.

Summary of stakeholder responses to consultation

Stakeholder responses to these questions are given in figure four.

38% of respondents answered the question on whether the threshold for exemptions for SPEIs should reflect the terms of the UK-EU TCA. Of those that responded, 95% said 'Yes'.

34% of respondents then answered the question on whether SPEI thresholds should be fixed at an amount of GBP. Of those that answered, 87% said 'Yes'.

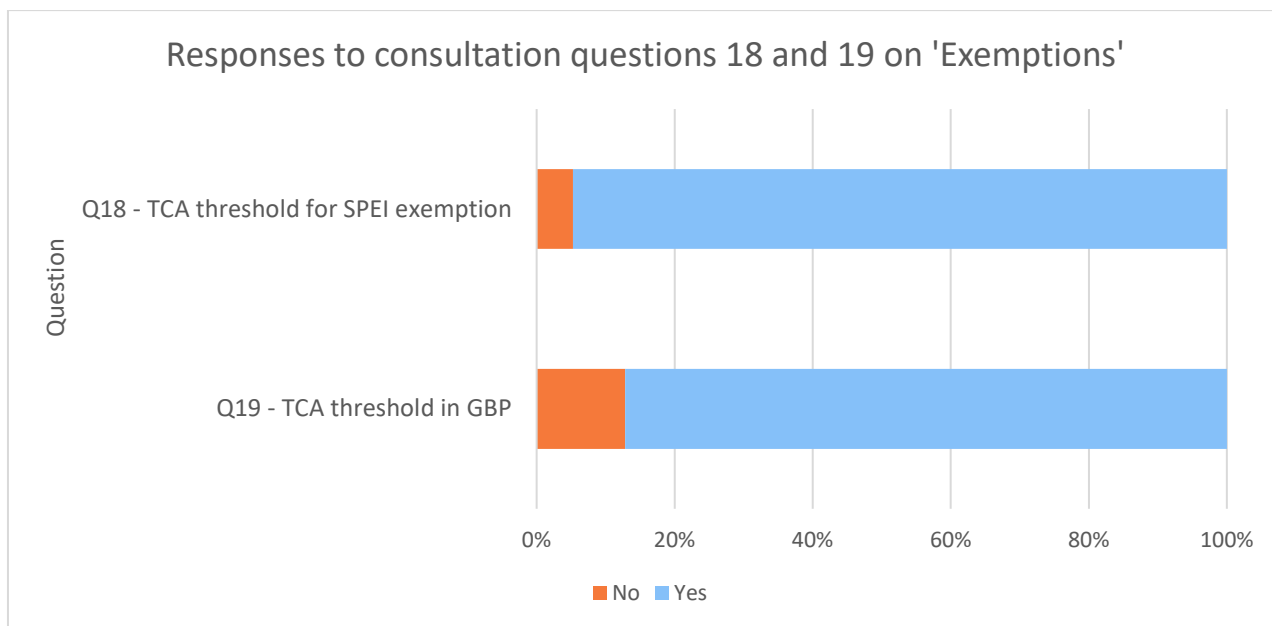


Figure four: responses to questions 18 and 19 of the subsidy control consultation.

Government Response

The Government will adopt the approach proposed in the consultation. The threshold for SPEI subsidies will replicate the relevant thresholds in the UK-EU TCA at 750,000 SDR over a three-year period. They will be fixed in GBP - at the time of writing this was approximately £770,000 over a three-year period. This has been fixed at a lower amount, £725,000, to allow for exchange rate fluctuations. Transparency exemptions will also apply to SPEI subsidies below 15 million SDR. This will be fixed in GBP - at the time of writing this was approximately £15.4 million per task. This has been fixed at a lower amount, £14.5 million per task, to allow for exchange rate fluctuations. We propose to take a power to set and amend these thresholds.

Prohibitions and conditions

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?

Consultation position

The consultation presented a limited number of subsidies that the Government is proposing are prohibited under the domestic regime. These prohibitions will ensure that the Government meets its international obligations. These were:

- Subsidies that are contingent upon export performance. The ASCM prohibits these subsidies for goods.
- Subsidies contingent upon the use of domestic over imported goods or services. The ASCM prohibits these subsidies for goods.
- Subsidies in the form of unlimited state guarantees to enterprises. These subsidies are prohibited under a number of the UK's FTAs, including the UK-EU TCA.
- Subsidies granted to "ailing or insolvent" enterprises where there is no credible restructuring plan. These subsidies are prohibited under a number of the UK's FTAs, including the UK-EU TCA.

The consultation also presented proposals to make several categories of subsidies subject to specific conditions. Restructuring subsidies (subject to an applicable exemption or exception) for certain financial institutions such as banks will only be allowed in specific circumstances to ensure the continued stability of the financial system. Subsidies granted to an airline carrier for the operation of routes and subsidies granted in the context of large cross-border or international cooperation projects will also be subject to additional conditions.

Views were sought on these proposals and whether other types of subsidies should be prohibited or subject to additional conditions. Respondents were also asked whether more detailed definitions of the terms used would be useful to ensure consistency and proportionality.

Summary of stakeholder responses to consultation

36% of respondents answered the question on the Government's proposals for prohibitions and conditions. Of those that responded, 82% agreed. Respondents suggested prohibitions should be placed on subsidies that encourage relocation within the internal market or distort competition, and reliefs for national or locally declared emergencies should be subject to additional conditions.

Respondents also made suggestions that restructuring subsidies should have a condition that they are only made available as a last resort, that there should be a one year limit on the subsidy and that there should be limit on the number of times a business can be awarded a restructuring subsidy.

34% of respondents answered the question on whether more detailed definitions of the terms used in the section of the consultation would be useful. Of those that responded, 87% said 'Yes'. Specific definitions were suggested for eighteen terms. Detailed suggestions were also

provided by 14 respondents relating to the definition of “ailing or insolvent enterprises”. This included suggestions that the definition should reference the Insolvency Act 1986. A few respondents believed that there should not be rigid definitions of “ailing or insolvent” to ensure that there is space for an assessment to be made on a case-by-case basis, accounting for the characteristics of specific sectors.

Government Response

The Government will adopt the prohibitions and conditions proposed in the consultation. The Government will also introduce a prohibition on subsidies explicitly contingent upon relocation within the UK internal market.

Protecting the UK internal market

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?

Consultation position

As discussed in the principles section of this consultation response, the Government has proposed the introduction of an additional principle (principle six), specifically focused on protecting the UK internal market by minimising the distortive effects on competition. This chapter of the consultation sought views on whether the Government should consider additional measures, over and above the inclusion of principle six, as a means of ensuring protections are provided to the UK internal market.

Summary of stakeholder responses to consultation

27% of respondents answered question 22. Of those that responded, 66% agreed that the Government should consider additional ways to protect the UK internal market over and above the specific principles.

In addition to this, individual respondents suggested further measures including utilising competition impact reviews, monitoring and evaluation of outcomes, mandatory ex-ante notifications, ex-ante approvals and ex-ante reviews.

A few respondents referenced the international systems identified in the consultation document: Australia, Canada, Switzerland and the United States. Adopting a similar system to Canada was suggested most frequently, in particular Canada’s measures to prohibit relocation subsidies using an internal agreement between Canada’s provinces and territories.

Government Response

As proposed in the consultation, we will introduce an additional principle (principle six), which will focus on protecting the UK domestic market by minimising the distortive effects on competition. This will be in addition to the six principles agreed within the UK-EU TCA and therefore will be implemented through the design of the subsidy control system in domestic law. These principles are outlined in table one.

To support public authorities to comply with this principle when granting a subsidy, the Government will publish guidance on how to assess these impacts. The combination of additional principle and guidance will seek to reduce the risk of “subsidy races” between authorities by setting out how authorities should consider impacts on other areas in the UK (including the impact of new investment not going to those other areas).

Measures set out below on taking a proportionate, risk-based approach to subsidies at risk of causing harmful distortion (questions 23-25) and on prohibiting subsidies explicitly contingent on relocation (question 26) will also protect the internal market.

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?

Consultation position

The Government sought specific views on whether to include an additional process to evaluate subsidies which could be considered to be at high risk of causing harmful distortion to the UK internal market. This additional process would be in addition to the proposed requirement for public authorities to assess potential impacts on the internal market in order to judge compliance of relevant subsidies against principle six. Views were also sought on whether the scope of this additional process should also include impact on trade and investment with other countries as well as the UK. Respondents were asked to provide views on whether public authorities should be obliged to make any competition impact reviews publicly available and whether there are any circumstances when competition impact reviews could be overridden.

Summary of stakeholder responses to consultation

Stakeholder responses to these questions are given in figure five.

27% of respondents answered the question on whether an additional process for high risk subsidies would add value to the proposed principles. Respondents were divided in their opinions with 53% responding 'Yes' and 48% responding 'No'.

Respondents that responded 'Yes' considered an additional process was needed because of the potential for high risk subsidies to harm competition in the UK without additional safeguards. Respondents saw a role for the new independent body in managing this risk, prior to the award of the subsidy, with views on this role including pre-award advice or reviews. This is reflected in the responses to later questions on the role of the independent body, as discussed in the oversight and enforcement section of this consultation response.

Those that responded 'No' felt additional processes would increase burden and potentially cause confusion, and that the assessments needed to assess compliance with the principles, including the additional UK internal market principle, were sufficient to address the risks.

28% of respondents answered the question on whether public authorities should be obliged to make competition impact reviews public. Of those that responded, 78% said 'Yes'. Respondents disagreeing with this proposal raised concerns on the administrative burden of this requirement and managing the commercial sensitivities of the information. One respondent raised concerns that publishing the information could put the UK as a whole or specific regions, at a competitive disadvantage compared to others internationally.

32% of respondents answered the question on whether public authorities should be permitted to override competition impact reviews in cases when there was exceptional economic circumstances or emergencies. Of those that responded, 75% said 'Yes'.

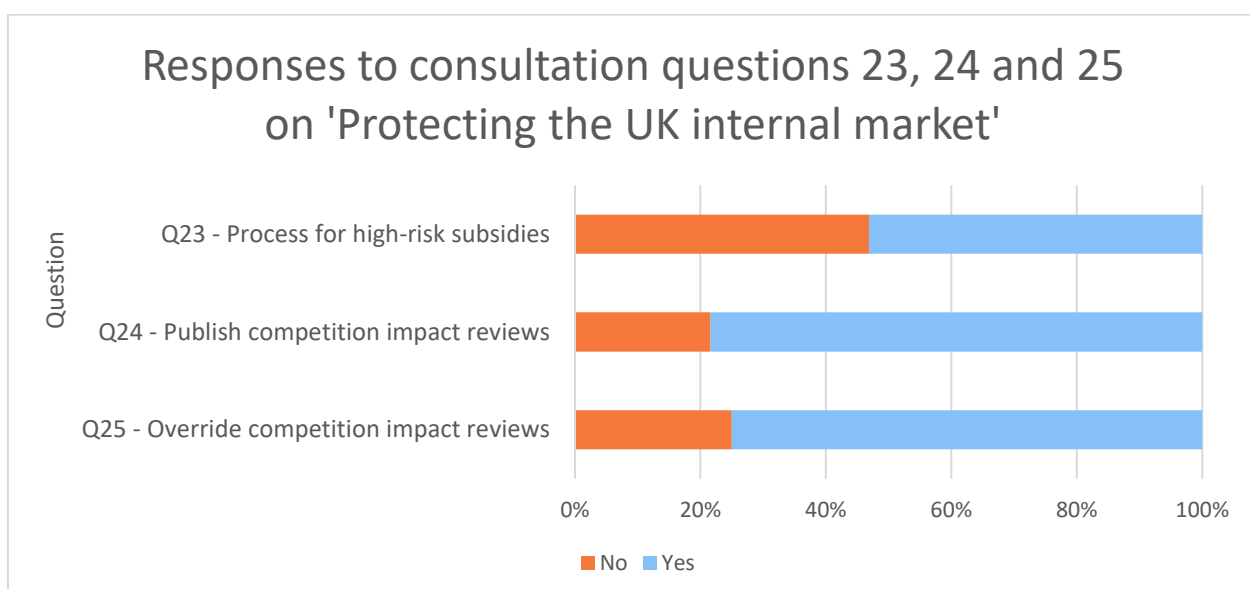


Figure five: responses to questions 23, 24 and 25 of the subsidy control consultation.

Government Response

The Government's aim is to develop a proportionate risk-based approach that balances the potential risk of distorting the UK internal market and not complying with our international obligations against any potential increased burden to public authorities.

The foundation of this new regime is a clear, proportionate and transparent set of principles supported with guidance, that will ensure public authorities fully understand their legal obligations and embed strong value for money and competition principles. The great majority of subsidies can be granted as long as they can demonstrate compliance via one of two self-assessment routes.

Subsidies at low risk of causing market distortions, that promote our strategic policy objectives, and which the Government judges to be compliant with the principles of the regime will be able to be delivered through streamlined routes. These routes will be designed to ensure authorities are able to deliver these subsidies with the minimum of burden, but authorities will need to demonstrate that the criteria of the streamlined route are met. Further detail on streamlined routes is given in response to questions 27 and 28. The second route requires public authorities to undertake a principles-based assessment of compliance against the subsidy control principles. This route will be taken for any subsidies that do not meet the criteria for streamlined routes, and as outlined before, for Subsidies of Interest or Subsidies of Particular Interest.

To ensure that additional attention is given to subsidies that are more likely to cause negative effects to competition and investment within the United Kingdom, we will create two further categories of subsidy: Subsidies of Interest, and Subsidies of Particular Interest.

We will develop specific criteria for identifying Subsidies of Interest and Subsidies of Particular Interest, which will aim to make it simple for authorities to determine whether or not a particular subsidy fits within one of these categories. Thresholds will be based on publicly available or easily accessible information, which could include the subsidy's absolute value and the sensitivity of the sector in which the beneficiaries of the subsidy operate. Both categories will be a small proportion of the overall number of subsidies granted under the new domestic regime.

Under these proposals, public authorities whose subsidies fall into the categories of Subsidies of Interest or Subsidies of Particular Interest will be encouraged to undertake a more extensive and involved analysis, similar to the competition impact reviews proposed in the consultation, as part of their assessment of compliance. The Government will publish guidance to give authorities greater clarity on how to carry out this more detailed assessment.

We anticipate that there will be a very small number of Subsidies of Particular Interest. For these subsidies the independent body would be required to review the public authority's assessment of compliance before the subsidy could be awarded. The independent body would publish a report containing its findings. For Subsidies of Interest, the public authority will also have the option of requesting the independent body review their analysis resulting in a published report. In both instances, the findings of the independent body will be non-binding. Further detail on the proposed role of the independent body in providing pre-award advice is given in the oversight and enforcement section.

Question 26

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

Consultation position

The consultation sought views on whether there should be additional measures to prevent subsidies that encouraged uneconomic relocation of activity between England, Scotland, Wales and Northern Ireland.

Summary of stakeholder responses to consultation

27% of respondents answered question 26. Of those that responded, the majority, 63%, agreed that there should be additional measures to prevent subsidies that encourage uneconomic migration of jobs between the four nations.

A few respondents referenced the need to balance the considerations around protecting the UK internal market with the levelling up agenda. Of these respondents, the majority referenced producing new UK "Assisted Area" maps as a way to achieve this.

Government Response

One of the Government's key priorities is to help those regions that have been left behind and level up prosperity across the UK. Along with other interventions, subsidies will be important levers as all levels of government work together to address regional imbalances. However, it is important that this vital support is delivered in a way that protects the UK internal market.

To support this ambition, we will introduce a prohibition on subsidies contingent on relocation within the UK, which are designed to 'poach' economic activity and jobs from one area to another. The principles will also reduce the risk of subsidy races and the uneconomic migration of jobs by ensuring that distortive impacts are fully taken into account, and the Government will publish guidance to support public authorities to demonstrate how these principles should be applied in practice as public authorities assess the compliance of their subsidies. This guidance will promote considerations intrinsic to the levelling up agenda, and the importance of promoting economic development of relatively disadvantaged areas.

The functioning of the new regime does not require any map prescribing disadvantaged areas. Further information on our approach is covered in response to questions 29 and 30.

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?

Consultation position

The consultation presented a proposal that the Government could set out categories of subsidies that are considered to be in compliance with our legal objectives and principles. These provisions would provide public authorities with a route of designing subsidies that are presumed to be compliant with the principles and so could be considered "low risk". Respondents were asked to share views on whether additional measures could be helpful in ensuring these lower risk subsidies could proceed with maximum legal certainty and minimum bureaucracy. The Government also asked what guidance or information would be helpful to assist public authorities when designing lower risk subsidies.

Summary of stakeholder responses to consultation

34% of respondents answered question 27. Of those that responded 91% agreed that additional measures would be helpful for ensuring lower risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy.

There were mixed opinions on whether block exemptions or guidance should be utilised. A number of respondents felt a UK equivalent of the EU General Block Exemption Regulation (GBER) should be established. In contrast, other respondents felt replicating GBER would "remove much of the hard-won innovation potential and flexibility the UK has achieved in the UK-EU TCA".

Respondents requested clear guidance on the criteria that should be used to assess different types of subsidies to mitigate against distortion to the UK internal market. Suggestions on the types of guidance that should be made available included: worked examples, checklists, toolkits, decision trees and detailed guidance on 'safe harbours', tailored to specific sectors.

Government Response

The Government's aim is to develop a proportionate risk-based approach that balances the potential risk of distorting the UK internal market and not complying with our international obligations against any potential increased burden to public authorities.

The foundation of this new regime is a clear, proportionate and transparent set of principles supported with guidance, that will ensure public authorities fully understand their legal obligations and embed strong value for money and competition principles. The great majority of subsidies can be granted as long as they can demonstrate compliance via one of two self-assessment routes: either by undertaking a principles-based assessment of compliance against the subsidy control principles or through streamlined routes.

The Government will create streamlined routes to demonstrating compliance for categories of subsidies at especially low risk of causing market distortions, that promote our strategic policy objectives and which the Government judges to be compliant with the principles, prohibitions and conditions of the regime. The purpose of these routes will be to provide a process for demonstrating compliance that is even simpler than the process of principle-by-principle assessment. Through these routes, authorities will only need to demonstrate that they meet specific parameters for that route. This will ensure that public authorities are able to deliver these subsidies with the minimum of bureaucracy and maximum certainty.

Streamlined routes will be considered for any sectors or types of subsidy where they will add clarity for public authorities and make the assessment of compliance simpler. This will include the audio-visual and agricultural and fisheries sectors, as set out above. The routes will be reviewed and adjusted over time to meet the needs of public authorities and to ensure that they are aligned to the Government's strategic priorities.

The Government is not replicating the General Block Exemptions Regulation from EU State aid rules. We are instead taking a bespoke UK approach, which provides greater flexibility for public authorities and businesses.

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?

Consultation position

The Government understands that some sectors of the economy, and types of subsidies, may require specific provisions to deliver wider public policy objectives. Respondents were also asked what sectors, or categories of subsidy, would benefit from tailored provisions or specific guidance. In particular, the consultation sought views on specific provisions relating to energy and environment projects.

Summary of stakeholder responses to consultation

33% of respondents answered the question on what rules should apply for energy and environment subsidies. Views were mixed with 46% of the respondents to the question believed the rules should apply to the domestic regime more generally. 19% explicitly wanted the minimum rules to comply with the UK-EU TCA.

In addition to this a wide range of specific sectors and categories of subsidy were also suggested. The most frequently suggested were related to R&D, levelling up, skills, transport, and culture and heritage. Suggestions on the nature of provisions included “safe harbours”, having clear criteria for when a subsidy is used and developing new UK “Assisted Area maps”.

Government Response

The Subsidy Control Bill will include specific provisions on energy and environmental subsidies that take account of the UK’s various international obligations. These specific provisions include a set of additional principles that energy and environment subsidies will have to meet, depending on the type and purpose of the subsidy, on top of the seven main subsidy control principles. These principles will not apply to nuclear energy subsidies. We will also use guidance and the creation of streamlined routes to reflect the specific nuances for different sectors and categories of subsidies, including transport, R&D, skills, disadvantaged areas and culture and heritage subsidies. The flexibility of a primarily principles-based regime will allow us to tailor the guidance and streamlined routes appropriately and as needed, to give confidence and, where appropriate, legal certainty to public authorities who are providing subsidies in these areas.

The Government will ensure that the new regime will allow authorities to address inequality and disadvantage within regions, as well as between them. We will develop an approach that ensures that disadvantaged areas have maximum freedom and reassurance to receive levelling up subsidies that best meet the characteristics of the area. As previously noted, a map prescribing disadvantaged areas is not required for the functioning of the regime. However, we will further consider if any future UK map may be relevant to consideration of disadvantaged areas for the purposes of the subsidy control system.

Transparency

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?

Consultation position

The consultation proposed and sought views on rules for transparency in the UK Subsidy control regime. The proposed thresholds were 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:
 - it is below the value of minimal financial assistance given to a single enterprise over a three-year period; or
 - it is below the value set for transparency for SPEIs.

Summary of stakeholder responses to consultation

38% of respondents answered question 31. Of those that responded, 81% agreed with the Government's proposed approach on transparency.

31% of respondents answered question 32. Of those that responded 65% agreed that transparency thresholds should replicate the thresholds set for minimal financial assistance subsidies and for SPEIs. Some respondents that were opposed commented that there is a risk that transparency thresholds could be 'gamed'.

Where respondents did not agree with replicating the transparency thresholds, the consultation asked for views on whether the transparency threshold should be lowered to £175,000 over a three-year period to cover all reporting obligations for FTAs. 19% of respondents answered this question. Of those that responded, about half, 52%, stated they did not want the threshold lowered to £175,000 over three years. Reasons for this included the associated administrative burden and wanting to maintain consistency with the EU's State aid regime.

The consultation also asked for views on whether there should be a minimum threshold of £50,000 below which no subsidies have to be reported. 14% of respondents answered this question. Of those that responded, 64% agreed there should be a minimum threshold of £50,000. Some felt that £50,000 was too low and some suggested it should instead match the 325,000 SDR across three years in the EU-UK TCA. Others thought that information on all subsidies should be recorded in order to ensure accountability and transparency.

Finally, the consultation proposed placing an obligation on public authorities to upload information to the transparency database within six months of the commitment to award a subsidy. 15% of respondents answered this question. Of those that responded 74% agreed with this proposal. Those that disagreed commented that six-month period was too generous and could be shorter, alternatives suggested ranged from between 10 days to 3 months was proposed as an alternative.

Comments were also provided on the information that should be required. It was suggested that public authorities should not be obliged to provide any more information than was required under the EU State aid regime. Some responses also noted that public authorities are required to publish information on subsidies in other places and would be better if all reporting obligations could be done in one place.

Government Response

The Government will set a minimal financial assistance threshold (below which subsidies will not be in scope of the obligations for the regime), that will also apply to transparency obligations so that only subsidies over the minimal financial assistance threshold have to be uploaded to the transparency database. Subsidies valued below this minimal financial assistance threshold will not be in scope of the regime. As proposed in the consultation, this threshold will be set at the value of 325,000 SDR over a three-year period for most sectors, and will be fixed in GBP rather than SDR – at the time of writing this was approximately

£331,000. This will be fixed at a lower amount, £315,000, to allow for exchange rate fluctuations. Under the terms of the UK-EU TCA any subsidies awarded to a single recipient below the value of 325,000 SDR over a three-year fiscal period are exempt from all obligations contained in the subsidy control chapter.

In a very small number of cases, in order to fulfil the UK's reporting obligations under some FTAs and at the WTO, the Government may require the public authorities to share historic information on subsidies which fall below the minimal financial assistance threshold or which have been given as relief for natural disasters or other exceptional circumstances. This would only be in instances where the specific information has been requested by the Department for International Trade. The Government will keep these types of requests under review and may consider adjusting the transparency threshold if it is considered necessary.

Public bodies will be obliged to upload information within six months of the commitment to award a subsidy.⁹ This aligns with the UK's commitments under the UK-EU TCA. 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.

Currently, each subsidy award of £500,000 or more that is provided under a scheme must be entered onto the database.

Ad hoc subsidy awards (i.e. those provided on an individual basis, outside schemes) must be declared if the award would result in the recipient having received more than minimal financial assistance threshold of non-scheme subsidies in the preceding three years.

Compensation above the threshold, £14.5 million, for SPEIs must also be declared on the database.

Interested parties will have the right to apply for a review of the granting of a subsidy by a public authority within one month of the required information being uploaded to the database. The uploading of the required subsidy information will allow 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 UK-EU 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 principles. This will be subject to any proportionate restrictions which pursue a legitimate objective, such as commercial sensitivity, confidentiality or legal privilege. Where such information has been requested, interested parties will have one month from the date on which it is provided to apply for a review.

⁹ For subsidies in the form of tax measures, the information shall be made public within one year of the date the tax declaration is due.

Oversight and enforcement

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.

Consultation position

The government is committed, under the terms of the UK-EU TCA, to the establishment of an independent body that will have an appropriate role within the UK subsidy control regime. The consultation sought views on what role the independent body should play within the UK subsidy control regime. It was noted that there are a broad spectrum of options for the functions of the independent body.

Summary of stakeholder responses to consultation

Many respondents agreed with each of the proposed functions for the independent body, over the functions this ranged from 90% of respondents to this question agreeing with a role for information and enquiries to 69% agreeing that the body should have a role for enforcement. This is summarised in table two and figure six.

Table two: responses to question 36 of the subsidy control consultation.

***of the responders who answered**

Function	Agree*	Disagree*	Neither agree/disagree*	Did not answer
Information and enquiries	90%	2%	8%	63%
Review and evaluations	89%	7%	5%	63%
Subsidy development advice	87%	5%	8%	63%
Post-award review	81%	14%	5%	64%
Enforcement	69%	18%	13%	64%

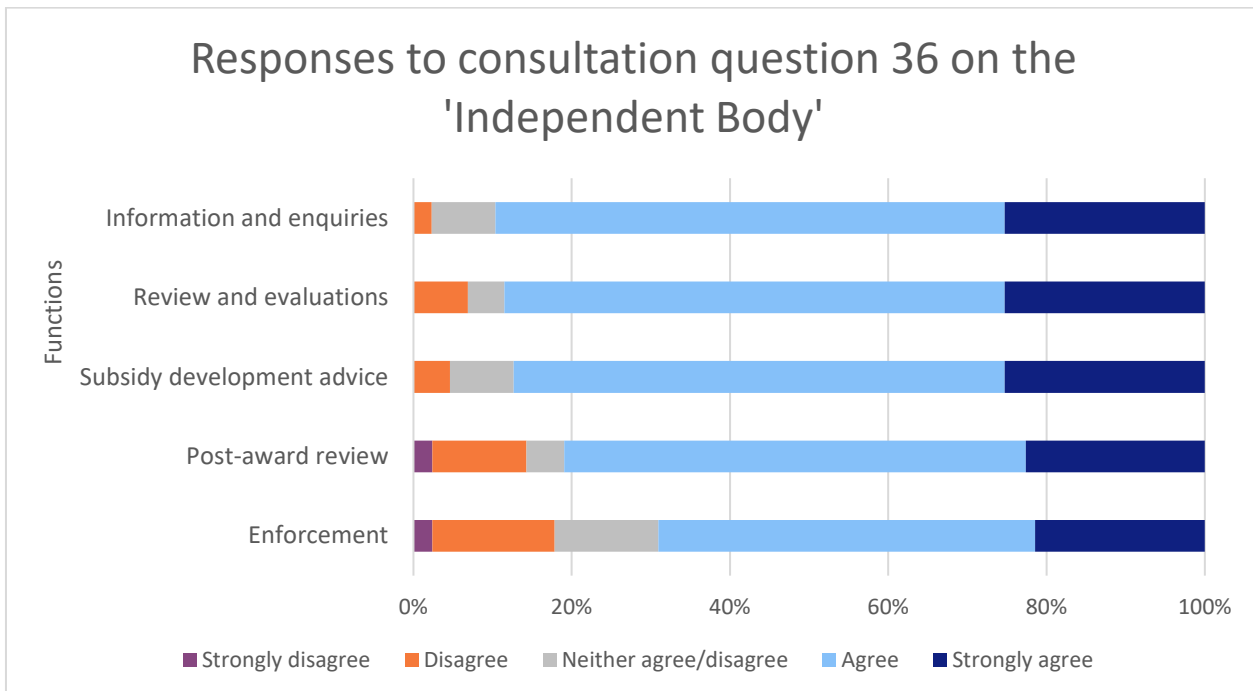


Figure six: responses to question 36 of the subsidy control consultation.

Government Response

As agreed under the terms of the UK-EU TCA, the Government will establish an independent body. Further detail on the role that the independent body will play and its functions are provided in response to questions 37 to 41 below.

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 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?

Consultation position

Views were also sought on specific options for each potential function. This included the potential review function, what advisory role the independent body should play before a subsidy is given, the type of complaints the body could receive and from whom, and what enforcement powers the body should have. Respondents were also asked to suggest how the independent body could be established to ensure its independence and impartiality when delivering its functions.

Potential functions 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.

Independence

The consultation noted there are a range of available options on which body would carry out the work and its governance. This included establishing a new Committee, a new statutory or non-statutory body, or subsuming the functions within an existing body. Different elements of the regime could also be overseen by a combination of bodies.

Summary of stakeholder responses to consultation

36% of respondents answered the question on whether any review of a subsidy should consider all principles. Of those that responded, 95% said ‘all principles’ and 5% said ‘only some principles’. Responders were asked which of these principles should be considered if only ‘some’. No responders gave a specific set of principles, but two mentioned that the oversight body should have flexibility / discretion to decide which principles to assess against.

Pre-award review and advice

The consultation asked what role, if any, should the independent body play in advising public authorities and reviewing subsidies before they have been awarded. Of those that responded 47% mentioned a role for advice, 12% mentioned a role for review or approval, 37% mentioned some mixture of both of these functions or another function and 4% explicitly did not want a pre-award role for the independent body.

Of those who mention another function, a few respondents suggested that review and approval should only apply for some subsidies. Other suggested roles include undertaking informal discussions with the public authority on subsidy design, leading information campaigns, undertaking spot checks and facilitating engagement with stakeholders.

Post-award review

16% of respondents answered the question “if the independent body is responsible for post-award review, what types of complaints should it be able to receive and from whom?”. Opinions were mixed on the types of complaints, with responses ranging from “none” to “all complaints”. The most frequent suggestion from respondents was that the independent body should have a limited complaints role for subsidies which are of a high value or which pose a high risk of having harmful or distortive effects. Of those respondents who offered a view as to “whom” would be able to launch complaints, the majority said this should be any affected party of stakeholder. The second most frequent suggestion was “anyone”.

Enforcement powers

On enforcement powers for the independent body, the consultation asked ‘which, if any, enforcement powers should the independent body be given?’ Opinions were mixed across respondents, including limited or non-binding powers, regulatory review, the ability to make recommendations to relevant Ministers and a pre-authorisation list of public authorities found granting non-compliant subsidies. Very few respondents wanted the independent body to have strong enforcement powers, such as all of the powers mentioned in the consultation, or pre-award prevention. The most frequent suggestion was a power to recoup, clawback or recover funding (46% of respondents), followed by the ability to issue fines to awarding bodies (13% of respondents), and powers to modify a subsidy or future subsidies within the same scheme (12% of respondents). Other suggestions included the ability to halt funding (8% of respondents) and bring a judicial enforcement through the courts or tribunal (8% of respondents). Five respondents believed that all enforcement powers set out in the consultation should be implemented.

The consultation then went on to ask ‘under what circumstance could the independent body use these enforcement powers?’ Opinions were also mixed on this question. Suggestions included following a review by the independent body, where subsidies are improperly awarded, following a formal complaint, in cases where subsidies are viewed to be distortive. Two respondents also suggested that this should be in any circumstance.

Independence

Respondents were asked for views on how to best guarantee the independence and impartiality of the independent body. The most frequent suggestion was that this would be achieved by making the CMA the independent body. Other suggestions included making the independent body an arms-length body, a non-ministerial department, a non-departmental body and an executive agency. Respondents also believed that the independent body should have representation across UK geographies and sectors. Other suggestions included expertise of staff, ensuring guaranteed funding and suggestions that the body’s powers should be enshrined in law.

Whilst there was no specific consultation question on which body should perform the role of the independent body, it was noted that there were a range of options available. As noted above,

in their responses many respondents suggested that this should be led by the CMA. In addition to this, four other bodies were specifically mentioned, these were the Information Commissioner's Office, the National Audit Office, and the Office for Investment. In addition to this, one respondent suggested we consider sector specific regulators such as the Office of Road and Rail.

Government Response

The independent body will have an appropriate role that is tailored to the UK's unique economic and legal character. It will not be an EU-style regulator with extensive approval and enforcement powers. We propose that the independent body will have a role offering expertise and challenge to UK public authorities, focusing on the most potentially distortive and harmful of subsidies. This places the emphasis firmly on public authorities to decide, on balance, whether the potential risk of providing a subsidy or scheme is outweighed by the public policy benefits.

The functions of the independent body will be carried out by a UK Subsidy Advice Unit in the CMA. The CMA has the relevant experience and expertise to act as an authoritative, objective body for subsidy control. Where appropriate, the CMA will engage with sector-specific regulators. The Subsidy Advice Unit will have two core functions: monitoring and oversight, and providing pre-award and post-award advice.

Monitoring and reporting

The Subsidy Advice Unit will have a role in monitoring and reporting on how the regime is working as a whole. There will be a duty for the Subsidy Advice Unit to review and periodically report on the operation of the regime including its impact on competition and investment within the United Kingdom. This will support the Secretary of State in determining whether changes should be made to the regime to ensure its continued effectiveness in delivering the government's objectives. These reports will generally be required every five years.

Advice

As outlined in the protecting the UK internal market section of this consultation response, we are proposing to create two categories of subsidy that will merit additional attention: Subsidies of Interest and Subsidies of Particular Interest. These will capture subsidies which are more likely to have harmful or distortive effects. We will develop specific criteria for these categories, as set out in the section in response to questions 23 to 25. Both categories will be a small proportion of the overall number of subsidies granted under the new domestic regime.

For Subsidies of Interest, public authorities would be encouraged to undertake a more extensive and involved analysis as part of their assessment of compliance with the principles. To support public authorities to undertake this assessment, they will have an option to request a pre-award review of their assessment from the Subsidy Advice Unit who would publish a report on the subsidy containing the findings of its review.

This review will be non-binding. It will consist of an evaluation of the public authority's assessment of its proposed subsidy's compliance with the principles, prohibitions and other requirements, and may make suggestions on how its analysis and subsidy design could be improved, where appropriate.

For Subsidies of Particular Interest, public authorities will have an obligation to have their assessment of compliance reviewed by the independent body and will need to wait for a short cooling off period (once the report has been published) before the subsidy can be granted. The nature of the Subsidy Advice Unit's non-binding advice would be as described above and will likewise be published.

The Secretary of State will also be able to require that other prospective subsidies are reviewed by the independent body before they may be granted. This call-in power will only be used in limited circumstances, for example, where the subsidy may risk having negative effects on competition and investment within the United Kingdom. If a proposed subsidy is called-in by the Secretary of State, the Subsidy Advice Unit would report on the subsidy in the same way as for a Subsidy of Particular Interest and the public authority will likewise have to wait for a short cooling off period before being able to grant the subsidy.

The Secretary of State will also have a power to call in subsidies after they have been granted. This will trigger a report by the Subsidy Advice Unit which will evaluate any assessment of compliance which was carried out by the public authority before the subsidy was given. If no assessment was undertaken by the public authority then the independent body will simply report that fact.

Enforcement

Respondents suggested a broad range of potential enforcement powers in response to the consultation questions, however there was no clear consensus on the role that the independent body should play in its enforcement and post-award roles. There was little support for the independent body having very strong enforcement powers.

In some instances, responses to certain questions did not align with responses to others. For example, in response to question 39, the majority of respondents suggested limited and focused post-award complaints roles, for example on high value, high risk subsidies. While in response to question 40, 55% of responses were in favour of the independent body having powers such as ordering recovery or issuing fines which may require the independent body to hear challenges to subsidy schemes and awards. However, in response to question 43, 79% of respondents noted a preference for a specialist judicial forum to hear challenges.

In designing the role of the independent body in enforcement of the regime we have drawn on the diverse range of opinions that consultation respondents shared. Many of these responses included elements that have been either wholly or partially captured within the wider functions of the independent body, such as undertaking monitoring and oversight and making appropriate recommendation to Ministers, and in the provision of non-binding pre-award advice, which can include suggestions to modify subsidies or schemes.

Given the wide-ranging, and conflicting, opinions on independent body’s enforcement and post-award roles we have considered these responses with the overall picture in mind, for example the strong support for the regime to be as flexible as possible, and that it maximises legal certainty whilst minimising administrative burden. Having considered this broader picture, we believe the regime will be best served with enforcement by interested parties through judicial reviews to be heard by the specialist Competition Appeal Tribunal (CAT). Judicial reviews heard by the CAT will address specific concerns about enforcement raised by stakeholders regarding a “UK-wide uniform approach”, to “ensure public authorities are subject to the same checks and balances” and to “ensure a level playing-field across the UK”. The CAT will have the power to hear challenges and may order the recovery of improperly granted subsidies. Judicial enforcement and the role of the CAT are covered in more detail below in response to questions 42 and 43.

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?

Consultation position

Judicial enforcement

Decisions by a public authority to award a subsidy will be open to judicial challenge for breaches of the new subsidy control statutory duties and other public law principles.

The UK committed within the UK-EU TCA to maintain a court and tribunal enforcement system which is analogous with the UK’s judicial review process: the procedure for challenging the process by which decisions are made by public authorities.

The UK has also committed to providing a recovery power for the courts, in limited circumstances, in order to undo the effects of an unlawful distortive subsidy. The recovery remedy is discretionary and is only available within the specified time period set out in the UK-EU TCA.

The consultation also proposed the possibility of an alternative judicial forum to the administrative courts, such as a specialist tribunal, being given jurisdiction over the new subsidy control regime.

Alternative judicial forum

Views were also sought on whether an alternative, specialist judicial forum would be more appropriate, than the use of judicial review, to hear challenges to subsidy awards and schemes.

This could reflect the technical nature of subsidies and potential legal implications of their impact, under which circumstances a judicial forum with more specialist economic and legal knowledge may be more appropriate. The consultation also noted that whilst the relevant parties get used to implementing the new regime, considerations may need to be given to the volume of work that may be generated for the administrative courts.

Summary of stakeholder responses to consultation

Judicial enforcement

19% of respondents answered the question on the recovery power. Of those that responded, 67% agreed that there were further considerations beyond time limits. The following additional considerations were mentioned: the interest rate of recovery, that there should be a right of appeal, and that there should be a cost-benefit analysis of any enforcement action. Other suggestions included the impacts of the subsidy on competition. Several respondents also referenced considerations that should be made on potential negative impacts of recovery to the recipient of the subsidy and wider society.

Alternative judicial forum

25% of respondents answered the question on whether specialist judicial forums should hear challenges to subsidy schemes and awards. Of those that responded, 79% believed that the CAT, or a similar specialist forum, should hear challenges. This was in recognition of the existing expertise that the CAT has dealing with competition cases.

Those that disagreed noted the cost of a specialist court, the desire for enforcement to be undertaken through the independent body alone, and the broader nature of subsidy cases versus competition law. A few respondents were clear that they believed the High Court would be effective in enforcing the new regime. One respondent also mentioned the inconsistency between challenge periods for awarding a subsidy and any other decision made by a public body.

Government Response

The Government will confer jurisdiction on the CAT to hear challenges to decisions to award subsidies. This will involve assessing whether a subsidy meets the subsidy control principles, prohibitions and other requirements. The CAT will apply the judicial review standard when hearing challenges to the award of a subsidy. This means the CAT will not be asked whether the public authority made the 'correct' decision, but whether it was a decision within the authority's powers, procedurally fair, and rational.

The CAT has the advantage of being a UK-wide tribunal that has expertise in related area of competition law. It is, therefore, well suited to hearing challenges to the award of subsidies for compliance with the subsidy control regime. The tribunal is well regarded by practitioners and has experience in applying the ‘judicial review standard’ as part of its current jurisdiction.

The CAT will have remedies available to it which will be equivalent to those available to the courts on an application for judicial review.

In addition, the CAT will have discretion to award an additional remedy of recovery. A challenge to a subsidy decision in the CAT will need to be brought within a limited time period which will generally be one month from when the subsidy was published on the transparency database (with the period extended if, for example, a pre-action request for information is made within that period). The Government expects high levels of compliance by public authorities throughout the UK. We therefore anticipate that it will rare that subsidies are challenged and recovered through legal proceedings.

Annex A: List of Respondents to the Subsidy Control Consultation

A total of 234 responses from organisations and individuals were received, of which:

26 requested their responses not be shared on confidentiality grounds;

16 Responses came from individuals (including academics and professionals in a personal capacity).

Aberdeenshire Council

Access - the Foundation for Social Investment

Adam Smith Institute

Addleshaw Goddard LLP

ADS Group Ltd

Advanced Propulsion Centre

The Aerospace Technology Institute

Airbus

Airto

The Airport Operators Association

Anthony Collins LLP

Ardtornish

Argyll and Bute Council

Arts Council

Associated British Ports

The Association for Commercial Broadcasters and On-Demand Services

The Association for UK Interactive Entertainment

The Association of Convenience Stores

The Association of Investment Companies

June 2021

Axillium Research
Barnsley Council
The BBC
BDO UK
Bio Industry Association
The Bosch Group
British Airways
The British Chamber of Commerce
British Destinations
The British Film Commission
The British Film Institute
The British Heart Foundation
British Hydropower Association
The British Ports Association
The British Private Equity & Venture Capital Association
The British Retail Consortium
British Screen Forum
The British Vehicle Rental and Leasing Association
Charity Finance Group
Charity Retail Association
The Charity Tax Group
The Centre for Public Data
City of Derry Airport
Clifford Chance LLP
Competere Advisory Council

The Confederation of British Industry
Connected Places Catapult
The Country Land and Business Association
Cornwall Council
Coventry Council
The Convention of Scottish Local Authorities
Cumbria Council
Dentons
The District Councils' Network
Drax Group
DWF Law LLP
East Ayrshire council
Easyjet
EDF Energy
The Energy Intensive Users' Group
Energy UK
The Engineering and Machinery Alliance
Enterprise Holdings
The Enterprise Investment Scheme Association
The European Marine Energy Centre
Fair 4 All Finance
The Federation of Small Businesses
First North Law
Gide Loyrette Nouel
Glasgow City Council

GMB Union

Green Alliance

Growing Mid Wales

Highlands and Islands Agricultural Support Group

Highlands and Islands Enterprise

Historic England

Hitachi Europe

Hull City Council

Hutchison Ports

The Independent Games Developers' Association

Industrial Communities Alliance

The Institute of Chartered Accountants in England and Wales

The Institute of Directors

The Institute for Government

International Airlines Group

Imagination Technology

Joint Working Party of the Bars and Law Societies of the UK on Competition Law

Knowsley Council

Laing O'Rourke

Lancashire County Council

Law Society of Scotland

Lawyers in Local Government

Leeds City Council

Legal and General Group PLC

Linklaters LLP

June 2021

Liverpool City Region Combined Authority
The Local Enterprise Partnership Network
The Local Government Association
The Low Carbon Contracts Company
Make UK
Mineral Products Association
The Motion Picture Association
The National Centre for Universities and Business
The National Farmers' Union
The National Farmers' Union Cymru
The National Farmers' Union Scotland
The National Federation of Fisherman's Organisations
The National Lottery Community Fund
The National Lottery Heritage Fund
National Trust
Natural England
New Anglia Local Enterprise Partnership
Nissan
The North East Fund Limited
The North East Local Enterprise Partnership
The Northern Ireland Executive
North of Tyne Combined Authority
Nuclear Decommissioning Authority
Oil & Gas UK
Opportunity North East

Oxera

Pembrokeshire County Council

Plymouth City Council

Post Office

The Producers Alliance for Cinema and Television

Rail Forum

Rail Freight Group

Railway Industry Association

The Regional and Business Airports Group

Reservoir Dynamics Ltd

Responsible Finance

Rolls Royce

RWE Group

Scottish Council for Development and Industry

Scottish Enterprise

Scottish Fishermen

The Scottish Government Scottish Land and Estates

Scottish Local Authority and Economic Development Group

Scottish National Investment Bank

Scottish Power

Scottish Salmon Producers

Seafood Scotland

Shearman & Sterling LLP

The Sheffield City Region Mayoral Combined Authority

Shetland Islands Council

Shropshire Council
Sizewell C
Social Enterprise UK
Social Investment Business
The Society of Maritime Industries
The Society of Motor Manufacturers and Traders
Somerset West and Taunton Council
South Lanarkshire Council
South of Scotland Enterprise
South Tyneside Council
Space Growth Partnership
Sport England
Stirling Council
Stoke-on-Trent Council
Strathclyde University
Surrey Borough and District Councils
Tata Steel
Tax Payer's Alliance
Tees Valley Combined Authority
Teledwyr Annibynnol Cymru
Tourism Management Institute
Toyota
Trades Union Congress
Transport for Greater Manchester
Trowers & Hamlins LLP

University of East Anglia – Centre for Competition Policy

Ulster Farmers' Union

UK Major Ports

UK Screen Alliance

UK Steel

UK Research and Innovation

UKspace

Van, Bael and Bellis LLP

Venture Capital Trust Association

Vodafone

Wales Council for Voluntary Action

Welsh Government

Welsh Local Government Association

West Bridge Consulting

West Midlands Growth Company

West Yorkshire Mayoral Combined Authority

Western Fish Producers' Organisation Ltd

Western Isles Council

Whitmuir Organics

Wiltshire Council

Worcestershire County Council

Wyre Forest District Council

Yorkshire Universities

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