

**Submission from George Peretz
Legislative Consent on the UK Subsidy Control Bill
December 2021**

In practical terms, how do you see the subsidy control regime, established by this Bill, affecting the delivery of economic development and business investment in Scotland?

It is not clear whether this question invites a comparison with the EU State aid regime or with a counterfactual where there is no subsidy control regime. I assume that the implicit comparison is with the EU State aid regime. Compared to that regime, the new regime avoids some of the rigidities of the State aid rules, which (in that regime) stem from the automatic unlawfulness of all subsidies over a modest de minimis threshold unless they either fall within fairly rigid prescriptive criteria laid down in block exemptions or go through the time-consuming and burdensome process of notification to the Commission for clearance. The new regime allows authorities themselves to take a view as to the economic justification of subsidies and, if they are convinced that the subsidy is justified against the economic criteria set out in Schedule 1, to issue the grant. That will generally afford more flexibility and speed, particularly in cases which do not fit readily into block exemptions..

There are though some general issues and uncertainties with the new regime.

- (a) In cases where grants are plainly unproblematic, the EU regime allowed (in cases falling within block exemptions) complete certainty at minimal cost and effort. Under the new regime, however, the starting point is that any subsidy has to be considered against the principles in enough detail to withstand judicial review. That will always involve some work and some uncertainty as to whether the work has been done properly.
- (b) The problem in (a) will not apply where the grant falls within existing schemes and streamlined schemes. However, ordinary schemes will themselves have to be thoroughly tested against the principles (and streamlined schemes are reserved only to the UK government).
- (c) What is the effect of the principle that “subsidies should be designed to achieve their specific policy objective whilst minimising any negative effects on competition or investment within the United Kingdom”? For example, would that principle require, and if so to what extent would it require, the Scottish Government to consider negative impacts on investment in the north of England of a grant decision to a company considering locating in, or expanding production in, Scotland? (Note too the very limited impact of clause 18 on relocations – a clause that only bites in the rare case where a grant is made expressly conditional on ceasing activity somewhere else (instead of that cessation being just an obvious consequence of the grant).
- (d) In cases where subsidies have to, or can be and are, referred to the CMA, there will be some delay: the CMA time limits for consideration look somewhat optimistic and extensions are likely to be sought in many cases.

- (e) It will not be clear for some time how the CAT approaches its role on judicial review: it may well be more interventionist than it is when dealing with impartial regulators, but will also be conscious that grant decisions involve quite difficult judgments which it may well be reluctant to interfere with. But it will be unclear for some time what level of work and analysis is required to make judgments on the application of the principles that are robust enough to survive judicial review. Guidance from BEIS and the CMA may well be important on that.
- (f) It is also unclear how ready affected parties (or, possibly, public interest bodies such as the Good Law Project) will be to bring judicial review of subsidy decisions, especially given the tight one month deadline (though NB that that can readily be extended by a clause 76 information request). There is a real risk that in cases where no challenge is likely, authorities are less rigorous than they should be about considering the implications of subsidies that in fact are quite harmful, though not in a way that directly and obviously affects a competitor with enough resources and/or determination to bring a judicial review challenge.
- (g) There is also a risk that authorities will be too eager to classify measures that are in fact subsidies as not being subsidies – especially by over-optimistically applying the “private investor” test. The Bill has no real mechanism for identifying such errors: the measure will not be reported on the database and may never become public at all, and there is no body equivalent to the Commission with power to make inquiries, demand answers to questions, and start investigations on its own account.

Do you have suggestions for specific amendments to the UK Bill, including for example, where more detail on the face of the Bill would be preferable to being left to regulations?

I would suggest a number of amendments to the Bill (see also the articles I refer to below)..

- (a) The one month time limit for appeal is too tight, given that news of a subsidy will often come as a complete surprise to an affected third party, so that advice and preparation starts from a zero base.
- (b) The definition of interested party with standing to challenge a subsidy in the CAT risks being too restrictive : standing should simply follow the general rules of standing in English (or, in Scotland, Scots) public law.
- (c) If the limited definition of interested party is to be maintained, then devolved ministers (and probably local authorities) should be added to the list of those with automatic standing (currently just the UK Secretary of State).
- (d) The CMA should be given powers to investigate and report on cases where a measure that may be a subsidy has not been treated as such by the granting authority.

Do you have any other comments?

I would respectfully refer the Committee to my published articles on

- (a) The devolution aspects of the Bill (<https://eurelationslaw.com/blog/the-subsidy-control-bill-and-devolution-a-balanced-regime>)
- (b) The public law aspects of the Bill (<https://ukconstitutionallaw.org/2021/10/29/george-peretz-qc-the-subsidiary-control-bill-part-ii-application-to-legislation-questions-concerns/>)
- (c) The tax implications of the Bill (https://files.monckton.com/wp-content/uploads/2021/10/22171248/TJ_2021_Vol_Issue1547_Oct_TJ_Peretz.pdf)

Those articles amplify, and make further points relevant to, my discussion above.

I also agree with, and would adopt, the points well made about the Bill in this article by Alex Rose and Jonathan Branton: <https://uksala.org/the-subsidy-control-bill-2021-key-questions-for-parliament-to-consider-by-jonathan-branton-and-alexander-rose-dwf/>

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