OFFICIAL REPORT
AITHISG OIFIGEIL

Economy and Fair Work Committee

Wednesday 12 January 2022

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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ECONOMY AND FAIR WORK COMMITTEE
1st Meeting 2022, Session 6

CONVENER

*Claire Baker (Mid Scotland and Fife) (Lab)

DEPUTY CONVENER

*Colin Beattie (Midlothian North and Musselburgh) (SNP)

COMMITTEE MEMBERS

*Alexander Burnett (Aberdeenshire West) (Con)
*Maggie Chapman (North East Scotland) (Green)
*Jamie Halcro Johnston (Highlands and Islands) (Con)
*Fiona Hyslop (Linlithgow) (SNP)
*Gordon MacDonald (Edinburgh Pentlands) (SNP)
*Colin Smyth (South Scotland) (Lab)
*Michelle Thomson (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor David Bell (European Structural and Investment Funds Replacement Consultation Steering Group)
Professor Steve Fothergill (Sheffield Hallam University)
Councillor Steven Heddle (Convention of Scottish Local Authorities)
George Peretz QC (Monckton Chambers)

CLERK TO THE COMMITTEE

Anne Peat

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Economy and Fair Work Committee

Wednesday 12 January 2022

[The Convener opened the meeting at 09:30]

Decision on Taking Business in Private

The Convener (Claire Baker): Good morning, and welcome to the first meeting in 2022 of the Economy and Fair Work Committee. Following advice that was issued by parliamentary authorities last month, the meeting will be held virtually.

Our first item of business is a decision on whether to take items 3 and 4 in private. Are members content to take those items in private?

Members *indicated agreement.*

Subsidy Control Bill

09:30

The Convener: The main item of business is an evidence session on the Subsidy Control Bill, which is United Kingdom Parliament legislation. The UK Parliament is seeking the consent of the Scottish Parliament, as the bill has an impact on devolved matters and the executive competence of the Scottish ministers. The bill was introduced in the House of Commons on 30 June 2021. Provisions in the bill apply to all of the UK. The bill is continuing its passage through Westminster and I understand that it is scheduled for its second reading in the House of Lords next Wednesday.

The purpose of the bill is to establish a domestic subsidy control regime for the UK following exit from the European Union, and to provide a legal framework for public authorities to make subsidy decisions. The Scottish Government lodged a legislative consent memorandum on 21 October, which has been referred to this committee to consider and report on. The Scottish Government does not recommend to the Scottish Parliament that it give consent to the bill in its current form. The purpose of today's session is for us to hear views on the provisions of the bill and its impact in Scotland, before taking evidence from the Scottish Government next week.

I welcome our witnesses and thank them for joining us. We have with us Professor David Bell, chair of the steering group for the consultation on the replacement to the European structural and investment funds in Scotland; Professor Steven Fothergill from Sheffield Hallam University; Councillor Steven Heddle, environment and economy spokesperson with the Convention of Scottish Local Authorities; and George Peretz QC from Monckton Chambers. As always, I ask members and witnesses to keep questions and answers as concise as possible.

I will start the questions. I thank the witnesses for the written submissions that we have received. The submissions talk about the opportunities in the bill and the need for the bill to be introduced, but say that it seems to create a tension. With the opportunities, there might be inflexibility and the need for authorities to have a degree of certainty. Mr Peretz's submission says that the changes will give us more flexibility and speed and other advantages but, at the same time, it will be a challenge for authorities, which might be risk averse. There is a degree of uncertainty as to how the system will work compared to the European Union subsidy regime that we had previously.

I ask Mr Peretz to go first and to talk about where he sees some of the opportunities and

where the tensions and difficulties lie. How will the subsidy regime operate and what will it mean for those trying to work within it?

George Peretz QC (Monckton Chambers): Good morning, everyone. I will set out the key difference between the two regimes. In essence, the old EU state aid regime operated so that, in practice, you could grant a subsidy if it fitted within the regulations—particularly the general block exemption regulation as well as a couple of other ones. Those regulations set out very formal requirements for various types of subsidy. Typically, they regulated the amounts, the percentage of the costs that were to be met by the subsidy and the purpose of the subsidy, and set all sorts of other conditions. Provided that your subsidy met those conditions, you simply got on with it and the only legal check that you needed to do was that the formal requirements were satisfied.

If, however, you went outside those formal requirements in any way, you were then subject to a typically fairly lengthy process of first persuading the United Kingdom Government—it had to be done through Whitehall—to notify the subsidy to the European Commission, and then getting the European Commission's approval. That process took effort and usually quite a lot of time.

The system under the bill will work somewhat differently. There are a few straightforward prohibitions on particular types of subsidy, which we might come on to discuss but, in general, subsidies are permitted, provided that the authority has addressed its mind to, and come to rational conclusions on, the various principles that are set out in schedule 1 to the bill. The only challenge to that is by way of judicial review in the Competition Appeal Tribunal.

One can characterise the difference between the two systems in this way: the EU system was very good at dealing with routine subsidies, because all you needed to do was to check that what you were doing fitted within the terms of the block exemption regulation, but it was not so good at dealing with anything that was novel or innovative or fell just outside the exemptions. If you just fell outside the exemptions but failed to notify, your subsidy was unlawful.

In contrast, the new UK regime will be much better at dealing with novel subsidies that are, on any view, almost certainly justified on the basis of public interest criteria. It will allow public authorities to take a sensible view. However, there is a problem, in that, if an authority is not comfortable in dealing with that, there will be no check-box exercise that it can do. It will have to go through the thinking process. Smaller public authorities or public authorities that provide fairly routine grants will need to do a thinking process rather than just check boxes, which means that the UK regime will perhaps be less good at dealing with regular subsidies.

It is important to qualify that by saying that the bill contains a mechanism for what are called subsidy schemes and streamlined subsidy schemes. The subsidy schemes could be created by the Scottish Government or by other types of public authority. The streamlined subsidy schemes can be created only by the UK Government. Those schemes might well end up doing some of the job that the block exemptions did in the old EU regime, in that they will set out particular types of subsidy, and the authority will simply need to check that.

We wait to see what the schemes will be. Obviously, that is not set out in the bill. In the case of streamlined subsidy schemes, it will be a matter of UK Government policy and in relation to other schemes, a policy matter for the devolved Governments, the UK Government and some other local authorities.

The Convener: Professor Fothergill, you also commented on issues around uncertainty and the introduction of the new scheme. Do you want to comment on that?

Professor Steve Fothergill (Sheffield Hallam University): Yes. George Peretz's testament is broadly correct. We are moving from a system in which there were some very hard-edged dos and don'ts on what could be done with routine subsidies, to a system in which, until we get some detail on the rules from the UK Government—I suspect that we will not get such detailed rules as we used to get from the EU—or if we do not, an organisation that wants to make a subsidy will have to judge its proposal against a set of principles. Obviously, that is a rather more subjective process than judging a proposed subsidy against some hard-edged criteria.

The problem is that most public sector bodies are risk averse—that certainly applies to the local authorities that I work closely with. They do not want to offer a subsidy and perhaps even give the money, only to find that they have done something that is out of order and is challenged and that they then have to reclaim the money. Potentially, many of the players in this game will have to start hiring consultants and lawyers to make detailed assessments as to whether they can go ahead with a particular subsidy. That is shifting the administrative burden from the central state or Government—or from what was the EU and its detailed rule setting—on to individual players in this game. I think that that will be a real problem as we move forward.

The Convener: Councillor Heddle, mention has been made of local authorities. Under the EU

system, would local authorities typically apply for EU subsidies? I understand that such applications would go through the UK Government, but were you engaged in that scheme? Do you see any opportunities in the new model or do you share the concerns that have been expressed?

Councillor Steven Heddle (Convention of Scottish Local Authorities): Local authorities would make use of subsidies through wider schemes that were developed through our European partnerships in various forms over the years and would also benefit from direct application to structural funds programmes, particularly for infrastructure projects.

Looking ahead to the new regime, there certainly are opportunities because of the flexibility, as you said, but these things are constrained by the issues of caution and capacity, as the two previous speakers have said. Capacity will be required to assess whether a new scheme is compliant with the principles that are outlined and will be elaborated on through guidance, as well as with the multitude of trade agreements that might come in, or the World Trade Organization rules that apply. There is an expectation that public authorities will be aware of those things and will judge any subsidy that they provide against the multitude of constraints. There will be capacity issues in authorities in relation to making those judgments, and that will inherently lead to caution.

COSLA's view is that this caution—it might be best to describe it as uncertainty—would be best addressed through new statutory guidelines for specific sectors and areas. That would be not dissimilar to the block exemptions and other exemptions that have been applied to agriculture and fisheries in the past. Those guidelines need to be co-produced by the UK Government, the devolved Governments and local government to share understanding and make best use of the opportunities.

Another thing that might lead to uncertainty is the bill's proposed UK ministerial discretion to call in a subsidy. It would certainly be to our benefit if that was limited in some way so that the use of the call-in is predictable as we try to make our subsidies.

The Convener: Thank you—you have highlighted some of the issues that other committee members will pick up on as we move through the meeting.

Before I move on, I will give Professor Bell the opportunity to respond to the questions, if he has anything additional to say.

Professor David Bell (European Structural and Investment Funds Replacement Consultation Steering Group): I am not an expert on how the block exemptions worked. Obviously, additional flexibility would be welcome, but the issue of uncertainty and getting clearer guidance from the UK Government seems to me to be very important.

09:45

To pick up on Steven Heddle's point, I note that when we discussed the replacement for the European structural funds, we came to the view that a lot of local authorities would have difficulty with capacity in applying for grants. Some are well placed; others will struggle to keep on filling in forms and finding—and affording—the right consultants and lawyers. We came to the view that the regional economic partnerships should play an important role in bringing together economic development across different parts of Scotland.

Therefore, it has been disappointing that, with the funds that have been released thus far, such as the community renewal fund, the link has been a direct one from the UK Government to Scottish local authorities. Some of those authorities just found the whole process of applying too costly and time consuming and not a cost-effective exercise for them.

I guess that I am reinforcing the idea that, if the process is to go down to local authority level, the local authorities will have to be clear and incur minimal cost in putting together the appropriate documentation for subsidy application.

The Convener: Thank you for all those replies. I will move on to Michelle Thomson, and then other members will pick up on some of the issues that have been raised so far.

Michelle Thomson (Falkirk East) (SNP): Good morning, everybody. We have received quite a few submissions about the bill's potential impact on economic development. In his submission, Professor Bell points out the difference between horizontal and vertical development. It is perhaps a matter of regret that we do not have a representative of the Scottish National Investment Bank on the panel. As you will be aware, the SNIB involves an investment by the Scottish Government of £2 billion over 10 years, which is a serious amount of public money. In its submission, the bank says:

> "It goes without saying that if development banks are to be constrained to operating in areas of market failure, the new UK Subsidy Control Regime must be at least as wide as its predecessor, and/or sufficient discretion to public bodies and devolved administrations afforded."

I want to get your views on the Scottish National Investment Bank in particular, as it seems to be a slightly different model, given that it was set up specifically to aid economic development in Scotland in a key way, not least on net zero. I imagine that, if that is the case for the SNIB, it will

also be an issue for the British Business Bank. Perhaps Professor Fothergill or Professor Bell might like to answer in the first instance.

Professor Bell: It occurred to me while I was writing my submission that it is not clear how the Scottish National Investment Bank will interact with the Competition and Markets Authority as far as investment goes. In my submission, I mention the net zero ambition. It seems to me that that is one of several areas that are left hanging. There needs to be some clarity. That will be necessary for the UK as a whole. You mentioned the British Business Bank; it will need to know how its activities might be affected by the bill.

I do not know how things will pan out, but it seems to me that there is a trade-off here between controlling state aid and other objectives that the UK and Scottish Governments may have. I do not know whether the proposed regime would have an impact on the trade and co-operation agreement. Maybe George Peretz knows.

Michelle Thomson: Before we hear from others, do you think that, if the SNIB is fundamentally constrained to operating in areas of market failure, that could—from a risk perspective—have a cooling-off effect for the bank? Obviously, the bank's risk assessments will be tightly honed, given the nature of what it is doing.

Professor Bell: As Steve Fothergill said, lots of consultants and lawyers will be employed to determine what a market failure is, although there are also distributional issues that can be raised. Nevertheless, if there is a lack of clarity on such matters, as other speakers have said, risk aversion might be the watchword, with the result that the relevant bodies will not take forward schemes that they would otherwise have taken forward.

Michelle Thomson: I see that George Peretz wants to come in.

George Peretz: I am afraid that I am not familiar with the details of the SNIB, but what any public authority that has grant-giving powers will have to do within the framework of the bill is think about the proposal, whatever that is.

Let us say that there is a proposal to give a particular company a tranche of money for training purposes or research and development. The SNIB will then have to go through the principles, which will require it to ask of itself questions, such as, "Will this money be paying for something that would have been done anyway?" If that is the case, the proposal is unlikely to get through the principles.

Other questions will have to be asked, such as, "Will it distort competition?"; "Will it have effects on other businesses that would outweigh the benefits that it would produce?"; "Is it value for money in a broad sense?"; and "Are there less expensive ways of achieving the objective of making sure that people are properly trained?" One way or another, all those questions fit within the scope of the principles. That is what the SNIB would have to apply its mind to.

What is different under the new regime is that unless the particular proposal fell within a scheme that was set up by the Scottish Government, or a streamlined subsidy scheme that was set up by the UK Government, the bank would have to go through that process. Under the old regime, the bank might have been able to say, "This is a training aid that fits within the scope of the training aid exemption in the general block exemption regulation. It ticks all the boxes. We don't have to think in any wider sense about the way in which the general principles apply to this particular aid."

As various commentators have said, there is a problem with saying to local authorities or authorities such as the SNIB that they must think about the problem for themselves. In one sense, it is liberating to be told, "If you reach this assessment, provided that it is a reasonable view, you will be soundly based and immune to judicial review; you will be able to do it." On one level, that is quite liberating. It will not be necessary to get a body that sits in Brussels to approve the proposal.

On the other hand, it is also quite alarming, because it involves a process of reasoning that some authorities are not particularly comfortable with. There might be a demand for expert economists and consultants of various kinds, including, I am afraid, lawyers, to help to guide them through that process. There are pluses and minuses.

Michelle Thomson: How have we ended up in the position in which the bill will go through its second reading later this month—next week, I think—yet we still do not have the necessary level of definition? It is possible that the bill could go all the way through and, under what is proposed at the moment, it will be left to the Department for Business, Energy and Industrial Strategy to make the decisions. I do not want to put words in your mouth, but the bill seems to have the potential for bypassing ministers in the UK Government, never mind the Scottish Parliament, altogether. How on earth have we ended up in this position?

George Peretz: Quite a lot of detail will be filled in. It is also true—we can perhaps discuss this later—that the role of the devolved Governments in that process is in some ways unsatisfactory. I have written about that, which I am sure is a matter of interest to the committee.

What will matter on the ground for a body such as the SNIB or a Scottish local authority will be whether there are schemes, such as streamlined subsidy schemes, that cover what they want to do. That is an unknown, because the bill simply gives to the UK Government and to the devolved Governments the power to make schemes. We will have to wait to see what those schemes are and what they look like. The schemes themselves will have to comply with the principles.

I will give an example. It would be open to the Scottish Government to say that it would be good to have a scheme for granting subsidies for certain types of training. We could imagine such a scheme. Some form of framework would be set out that said that, under the scheme, local authorities in Scotland may make certain types of subsidy award that ticked a number of boxes.

The scheme itself could be subject to challenge in the Competition Appeal Tribunal and it would have to be thought through in accordance with principles such as, "Are we satisfied that the sorts of grants that will be given under the scheme are necessary and do not duplicate what companies would already have done to train their workers?", "Will the scheme distort competition in ways that are unacceptable?" and "Is there a less expensive way of doing this that would not require the expenditure of so much public money?" That sort of thinking process will have to be gone through. To be frank, that is the sort of thinking process that ought to be gone through anyway, because it is good public policy to be satisfied that public money is being spent in the most efficient way possible.

A lot of this is stuff that people should be doing anyway, but it needs to be thought through in a reasonably structured way. Once that had been done, you might end up with a Scottish Government scheme that all Scottish local authorities could simply look up when they were thinking about giving grants to companies to train workers. If a proposal ticked those boxes, they could give a grant. That would be within the control of the Scottish Government. The bill provides a framework for things to be done.

Michelle Thomson: I am keen for others to have the chance to respond. The point that we started with is that, first and foremost, the detail to establish a scheme needs to be in place, and it appears that that detail, whether specifically for the SNIB as regards its role in relation to market failure and beyond, is not yet clearly established.

I am aware that other members want to come in, but before I give way to them, perhaps Professor Fothergill or Mr Heddle would like to respond to my question about the SNIB.

Professor Fothergill: First, I would like to clarify where we are in the legislative process at Westminster. I understand that the bill has received its third reading in the Commons, which means, in effect, that it has been passed, although it will, of course, have to work its way through the House of Lords and there might be some amendments. However, with the majority that the Government has in the Commons, I think that we are looking at an almost finished act of Parliament.

10:00

That being the case, the lack of detail in the bill is very worrying, because a lot hangs on the detailed guidance that ministers will undoubtedly issue as statutory instruments. It is important to impress upon the Westminster Government that, before all the guidance is finalised, it should be put out to consultation. We are talking about the detailed rules that would circumscribe what the SNIB and many other players could and could not do. That is not defined carefully in the bill, and getting to that point will be a big leap from where we are with the bill, which is almost an act, subject to some final rules being issued by ministers.

There is far too much arbitrary discretion, and there has not been consultation, either of the devolved Administrations or of a wide range of interested players. It is important that the Scottish Government impresses upon Westminster that draft guidance should be issued for consultation on all the points that we have discussed.

Michelle Thomson: I noticed that, when you appeared in front of the Public Bill Committee at Westminster on 26 October, you stated:

"From the point of the view of the devolved Administrations, for example, the passage of the Bill will still leave them pretty much in the dark as to what they can and cannot do."—[*Official Report, Subsidy Control Public Bill Committee*, 26 October 2021; c 12, Q8.]

Do you stand by the observation that you made then?

Professor Fothergill: Absolutely. If anything, the discussions, albeit brief, that I have had with civil servants since then worry me even more, because I think that, down in London, they are a bit wedded to saying, "Here are the principles—get on with the job," which is not enough. Although they are talking about issuing at least some guidelines, the wording that I have picked up is that those guidelines will not be anything like as detailed as the old EU rules.

It is all very worrying. There will be guidelines, which it is possible will be issued without consultation, and which will have inadequate detail attached to them. Therefore, the more pressure that is put on Westminster and Whitehall to be

participative in this game, to be open and to seek views, the better I think the outcome will be.

Michelle Thomson: Thank you. I am aware of time, so I will stop there.

The Convener: Thank you. I will move on to Maggie Chapman, who has questions about consultation. I understand that Councillor Heddle would like to come in; I am sure that Ms Chapman will invite you to speak.

Maggie Chapman (North East Scotland) (Green): Good morning, and thank you for joining us. I will follow up the theme of consultation and explore a little bit more from your different perspectives not only what needs to be consulted on but who the key players should be. The Scottish Government has a clear interest; so, too, do local authorities. I want to bring in Steven Heddle, who said earlier that he wanted to respond to that point. In one of your earlier comments, you talked about co-production of the rules and guidelines. Can you unpick that a little bit and maybe give us a better understanding of exactly who the co-producing players should be? What must we do to ensure that rules and guidance are as clear as possible?

Councillor Heddle: Let me first organise my voluminous notes. My comments follow on from the points made by the other witnesses in response to the previous question around the adequacy of the consultation and how the gaps in the guidance will be filled.

COSLA's proposed amendment to the bill is deliberately specific and limited in the hope that it can be accepted. It specifies that the secretary of state should consult the devolved Administrations, local government and other persons.

That position comes from what previously happened under European state aid rules. The development of any changes was subject to extensive consultation and statutory mechanisms were in place that involved local government, particularly through the European Committee of the Regions.

We hope that any arrangements that are made in the Subsidy Control Bill in relation to how it is enacted would be no worse than the previous arrangements. Indeed, in 2018, local government was given an undertaking that the consultative mechanism that is set up would involve us. We are still waiting to see that happen.

On the wider issues at play, so far there has been no conversation about how the common frameworks play into that aspect. We are certainly keen to see more use made of such a mechanism.

It is hoped that this is a developing field. So far, we have been using it in procurement, air quality and waste, which is welcome. However, what is not welcome is the absence of the involvement of local government, because some of the areas under the bill are competencies that are devolved to us. It falls on us to deliver the change and, I would imagine, to deliver the related subsidies.

The system as it stands is not good. We need to beef up the involvement of the devolved Administrations and local government and, beyond that, other public bodies, because the issues that Professor Bell raised earlier about the SNIB, which we hoped would be key to delivering our climate ambition, are equally valid.

As it stands, the process of consultation is completely informalised. We would appreciate it if that could be formalised, so that we know that consultation will definitely happen and not just be in the gift of personalities. Essentially, that is the substance behind our two amendments.

Maggie Chapman: Thank you very much—that is really helpful. I know that David Bell wants to come in, and I am happy to hear from you. However, I also want to pick up on something that you said earlier, and maybe you can address that point as well.

In relation to Michelle Thomson's questions on SNIB, you mentioned—Steven Heddle referred to this, too—strategic decisions around net zero ambitions. Will you tease out for us a little bit about what we need to do to ensure that we can get the legislation that we need: that is, legislation that is open and flexible enough to allow us to make the regional or local strategic decisions that we need to make around industrial strategy, never mind anything else?

Professor Bell: It is not immediately obvious how ambitions towards net zero and the industrial implications thereof marry up with the principles that George Peretz has mentioned, irrespective of whatever schemes are eventually arrived at.

It would be good for the Scottish Government to seek clarity from the UK Government on the very important issue of the how those principles and the UK Government's ambitions towards net zero can be compatible. As everyone else has said, there is a lot that is not said in the current bill.

I was involved with Steven Heddle in the extensive consultation that we did around the replacement for the European structural funds. Nothing much has happened since, because the UK Government has still to specify where that particular train is going.

We have mentioned the SNIB and local authorities. However, it is also true that the economic development structure in Scotland is, in many ways, different from that in England in particular. For example, the development agencies, which we have not yet mentioned, will

be uncertain about what their role will be, as will Skills Development Scotland, which has a big role in providing training.

I note that we heavily involved the Scottish Council for Voluntary Organisations in our consultations, which was heavily involved with the previous EU funding regimes.

How their activities may or may not interact with state aid rules is not clear, but those are the kinds of bodies that should be consulted, in addition to the obvious candidates, which are local authorities, the SNIB and so on.

Maggie Chapman: Thank you—that is helpful.

I will move on to a linked issue. I might have missed this, but one of the—perhaps many—gaps in the bill is that there does not seem to be any way of dealing with disputes. There is no investor and state dispute settlement equivalent or other interregional mechanism. Does Steve Fothergill have anything to say on that? How can we draw in voices to ensure that we get dispute mechanisms and a way of dealing with technical and strategic issues?

Professor Fothergill: When you referred to disputes, I thought at first that you were asking about what the situation would be if, for instance, one part of Britain were to contest what another part of it might do.

One of the principles that the UK Government has set out is that any subsidies should not be damaging to the coherence of the UK internal market. Through that principle, the UK Government is—I think that it has a point—trying to stop the game of subsidy races between different parts of the UK.

The UK Government does not want a situation in which Scotland puts in a bid, offering a certain amount of money, only for Wales to offer more, England to come back with even more and for Scotland then to have to offer even more money. Certainly, everybody in such a game would have to look over their shoulders at the seventh principle in the list, which is about avoiding subsidy races.

However, the real worry about disputes is the one that I was trying to get at earlier. A risk-averse public body will not want to be challenged on its actions. In fairness, under the old EU regime, the general block exemption regulation covered the vast majority of the subsidies that were available from all sorts of public bodies to private sector companies and there was no dispute if you were within the rules. In the absence of something similar, the door is left open to dispute.

There are perhaps two levels to the issue. We definitely do not want subsidy races, but there is a real worry that there will be disputes on individual awards that are being contested.

Maggie Chapman: Thank you very much for that. I will leave it there, convener.

The Convener: Thank you. I will now bring in Fiona Hyslop, who will be followed by Alexander Burnett.

10:15

Fiona Hyslop (Linlithgow) (SNP): Our committee is responsible for deciding whether we want to recommend that approval be given to the legislative consent motion. Therefore, despite the fact that the bill is so far down the line, it is important to all of us in Parliament.

I want to raise three specific points in relation to the bill. The block exemptions are to be replaced by streamlined subsidy schemes, which the Scottish Government will not be involved in establishing. Do the witnesses agree that some potential disputes could be removed if there was co-production?

Secondly, as we have heard, Governments in the UK subsidising particular projects could lead to disputes between them. We need some common way—potentially, that could be through common frameworks—of setting the rules of the game to minimise disputes. Is there anything in the bill that would allow for that? My understanding is that there is not. There needs to be guidance but that has not even been published yet.

The third question—this is particularly for George Peretz, although it is perhaps also for Professor Fothergill—is about individuals or individual companies taking judicial review decisions. What difference would the proposed scheme make to them? Would it make it easier or more difficult for companies that feel that they have been disadvantaged from a competition point of view?

Those are the three areas on which I have questions. Should Scotland be involved in developing the streamlined subsidy schemes? Is there a way of ensuring that the Scottish Government and Scottish Parliament can be involved in the administration of intergeographical disputes? Giving the Scottish Government call-in powers, similar to those that the Department for Business, Energy and Industrial Strategy will have, might be a way of allowing that. What about individual companies deciding that they want to take something to judicial review? Would they be more advantaged or disadvantaged in the new scheme compared with the European set-up?

I will come first to Professor Peretz, and then to Professor Fothergill. I ask that the other witnesses indicate whether they want to come in.

George Peretz: I am not a professor—I do not have as distinguished a status as the other witnesses.

Fiona Hyslop: I am sorry, George—please accept my apologies.

George Peretz: Let me take the questions on those three areas in order.

On your question about the Scottish Government's role in streamlined subsidy schemes, I would make two points. First, it is important to make a distinction. The bill sets out two types of scheme. There are ordinary subsidy schemes, which the Scottish Government has the power to make, as, indeed, do some local authorities and the UK Government. That has the effect that we were talking about earlier of providing a framework in which other authorities, or the Scottish Government itself, can go on to make particular awards that fit under a particular framework.

However, the Scottish Government cannot create streamlined subsidy schemes, which is a particular category of schemes. That can be done only by the UK Government, which has to place the scheme before the Westminster Parliament. That will all be done in London.

The essential difference between the streamlined scheme and an ordinary scheme is that the former never has to go through the Competition and Markets Authority process, whereas an ordinary scheme might need to go through that process, depending on the size of it. That is the critical difference.

The question whether the Scottish Government—and, I presume, the Welsh Government and the Northern Ireland Assembly—would have the power to make streamlined schemes is a political one. The UK Government's position on that is to say that subsidy control is a reserved matter in relation to all the devolved legislatures and therefore it is appropriate that only Westminster have that competence. As I say, that is, ultimately, a political question.

Your second question was about how disputes between Governments would work. One could posit the idea that the Scottish Government might give a subsidy that, for example, the Welsh Government did not like very much because it thought that it might have adverse effects in Wales. What could the Welsh Government do about that?

There are a number of possibilities. It may be that the type of award was one that was capable of being, or had to be, sent to the CMA, in which case I presume that there would be discussion in front of the CMA. It might be something that could be referred by the secretary of state to the CMA. In that case, the Welsh Government would have to go the secretary of state, say that it was concerned about what the Scottish Government was doing and ask, "Would you like to send it to the CMA, please?" The secretary of state could then do that.

Under the bill, the CMA, of course, does not itself decide on, but it issues a report about, the compatibility of the proposed measure with the principles and the way in which—to take my example—the Scottish Government has gone through the process. The CMA's report is likely to be highly influential. It would be quite a courageous decision in most circumstances for a public authority to go ahead with a grant when the CMA has strongly recommended that that was not justified. In principle, the public authority might be able to go ahead, but, in practice, it would be quite brave to do so. That is one way in which you might deal with a dispute.

It may be that, if that process was not gone through and the award was about to be given, the Welsh Government could apply to the Competition Appeal Tribunal for judicial review. When I wrote my article, which I sent you a link to, it was not at that stage at all clear to me that the devolved Governments or, indeed, any subnational authority, such as a local authority, would have the standing to bring challenges to the CAT because of the definition of an interested party in clause 70 of the bill.

As the bill has gone through the UK Parliament, the minister has made it very clear that that definition is not intended to be narrower than the usual definition of who has standing in public law cases. That may be slightly different in Scotland from what it is in England, but the definition is fairly broad.

The minister specifically said that local authorities and devolved Governments would have the standing to challenge the decisions of other public authorities if they were concerned that an award would have effects in their area. Therefore, to take my example again, the Welsh Government would have standing if it could demonstrate that it was concerned about effects on businesses in Wales. The UK Government's position has, I think, put those concerns somewhat to one side. It is another way in which disputes might be resolved.

That brings me to individuals, because the process of challenge in the CAT is also one that is open to individuals who are concerned that an award may have been given that simply does not comply with the subsidy control principle. It is important to emphasise that that is a judicial review challenge, so the question is not whether a public authority got a policy decision wrong; the question is whether it has gone beyond what is a reasonable decision for a public body to have

made. You are looking for a fundamental error in reasoning—that is, something that cannot possibly be right, no matter what view you take—or for an error of law or procedure, which are the basic grounds for judicial review.

It would not be enough simply to say, "We disagree". To take my example of the Welsh Government, or a private party, challenging a decision of the Scottish Government to grant a subsidy, it would not be enough for them just to say, "We disagree with that. We think that the principles should have been interpreted so as to forbid this award". On the contrary, it would be necessary to show that the reasoning of the Scottish Government does not stack up and that a fundamental error has been made.

Quite how the CAT will approach that task will be quite interesting to see. It has tended to take quite a hands-off approach to reviewing decisions by regulators on technical matters of competition regulation such as on motor control, because it is dealing with impartial regulators. The difference in this case is that the CAT will be told by anybody appealing—the appellant will almost inevitably say this—that there were enormous political pressures for the authority to find that the principles were satisfied in this particular case and that the politicians were saying that that was something that they really wanted to do. Public authorities granting aid are not like impartial regulators. They are—quite rightly and obviously—political bodies with political agendas. As I said, it will be quite interesting to see how the CAT will approach its task.

Sorry—I was asked three questions and I tried to answer them all—[*Inaudible*.]

Fiona Hyslop: The BEIS is, of course, in the same position, because it ends up being judge and jury, and also subsidiser.

I would like to bring in Professor Fothergill on that. I would also like to hear from Professor Bell about what the implications might be for net zero and agriculture, as they are devolved competencies.

Professor Fothergill: I will try to answer all three questions that you posed with two answers that apply to all of them.

First, at the core of all this, we need detailed guidance to avert, avoid and minimise disputes. Secondly, we need consultation on the guidance.

I said "consultation" rather than co-decision making. I know that that is probably an issue that is a little touchy in the context of the Scottish Government and the Scottish Parliament, but given that there are so many players in this game who would have an interest in the final rules, there is the question of where we draw the line in who would be brought in for decision making. We would have to get agreements among all four nations of the UK. What about the local authority players beyond the devolved national Administrations and so on?

There should be meaningful consultation, which, of course, requires that Westminster and Whitehall genuinely want to listen to what everybody around the country is saying. Under the old EU state aid rules, there was a lot of consultation. In the context of regional investment, for example, the EU consulted on establishing the rules and, further down the line, the UK Government consulted on drawing up an assisted-areas map. It even consulted on a draft assisted-areas map. Through consultation, people tend to work towards something that, in practice, carries everybody with them. The combination of consultation and detailed guidance should head off a lot of potential disputes.

Is that helpful?

Fiona Hyslop: Yes. Thank you.

I come to Professor Bell. On the decision to include agriculture in the Subsidy Control Bill, although it has previously been separate, it is clear that agricultural subsidy is a devolved matter. The bill is a result of Brexit, but I do not think that even supporters of Brexit would necessarily think that Brexit should remove, limit or reduce powers of devolution. What are your thoughts about the implications of that, particularly as Scottish agriculture is quite distinct, so we need particular subsidies?

Yesterday, the Net Zero, Energy and Transport Committee heard from local authorities that private funding at scale will be needed along with public funding to tackle net zero. It is clear that net zero requires a streamlined subsidy scheme because, to tackle the climate emergency, state subsidy will have to be swift, smart and strategic. From your experience of devolution, does the Subsidy Control Bill lend itself to good policy making and good results for agriculture and net zero?

Professor Bell: I echo what Steve Fothergill said. In a sense, there is stuff in the bill that is not clearly enough defined yet and that we need to engage on. It would be desirable if we engaged in a sequence of meaningful consultations with the UK Government or the BEIS on how that is all going to play out in practice.

I was quite surprised that agriculture was included. It seems to me that the subsidy schemes for agriculture in England and Scotland are going in different directions and that neither of them is entirely clear as yet. It is clear that, in England, the public money or public goods approach is meeting some resistance and that there is significant

debate about how it might change the nature of agriculture.

10:30

We do not know yet what will happen in Scotland but, as you have said, there are significant differences here. Agriculture plays an important social role in our remote rural areas. Whether funding schemes that do not necessarily have a public goods aspect would run into difficulties with the bill as it is currently laid out is not clear, because we have not had consultation or further detail on the scheme.

The same applies to net zero. We do not want to encourage subsidy races between different parts of the UK in getting the renewable sector up and running but, as you have said, it is pretty likely that there will have to be some injection of public funds into the sector to encourage change at speed. Basically, we have to know how that can be done in this particular bill and how it will play out in practice. We just do not have enough detail yet. We do not know how a streamlined scheme that would meet the principles included in the bill and the objective of getting to net zero as quickly as possible might be devised.

Fiona Hyslop: I think that I should hand back to the convener now because of the time. However, I hope that, if Councillor Heddle has any comments on that, he will be able to make them in answers to questions from my colleagues.

The Convener: I will now bring in Alexander Burnett, who will be followed by Colin Beattie. I know that it is unfortunate for members to speak later in the meeting, but I ask members to be concise in their questions. That would be helpful.

Alexander Burnett (Aberdeenshire West) (Con): I apologise to the panel for taking it back to the beginning of the meeting, but my question is a supplementary to the first question. There appears to be a consensus that the proposed rules on state aid are an improvement on the previous rules—obviously notwithstanding any further improvements that could be made. I want to ask two questions, the first of which is to Steven Heddle. COSLA's submission says that the previous EU regime could have a "lowest common denominator" effect that could sometimes constrain public funding. Will you explain a bit more about that, give an example, and say whether that negative effect has been removed under the current proposals?

My second question, which is to Professor Fothergill, echoes Fiona Hyslop's comments on the purpose of this session. You have said that the alternative would be an "unhelpful free-for-all". Will you explain what the impact of not signing up to the scheme would be?

Councillor Heddle: On the lowest common denominator effect, we were simply reflecting the reality that the rules were designed to be applicable to 28 extremely different geographies and economies and, given the way that they were designed, only the things that fitted within them could necessarily go forward. They were necessarily going to be more restrictive than the more permissive regime that we are moving to now, which is applicable only to the United Kingdom.

It is clear that far more flexibility is available under the proposed scheme. The reality of that flexibility will, of course, be completely governed by the regulation and guidance associated with it and the confidence that the public bodies have in bringing forward their own subsidy proposals within it.

The replacement of the state aid regulations by the Subsidy Control Bill is an opportunity that we are excited and optimistic about, although, obviously, that has to be caveated. That opportunity is dependent on the resources that are available to us from either of our Governments, from the perspective of local government.

I am struggling to find an appropriate example to really illustrate the point. From my experience in previous employment, I worked for Highlands and Islands Enterprise, administering a small scheme, so I have some experience of the state aid regulations as they were applied. As we came from an island community, we often ran into the situation in which we would have loved to have applied a subsidy that would not have distorted the common market and would not have even distorted the market in Caithness—I come from Orkney. However, because the rules, as drawn up, were more appropriate to land-based geographies, the lack of distortion was not recognised.

That is a small and very specific example. However, if you wish, we could come back to you with more specific and larger examples.

Alexander Burnett: No—that is fine and very helpful. Thank you very much. As you have said, the guidance is one thing, but the resource behind that will, I am sure, be the subject of debate for many years to come.

Will Professor Fothergill say something about the consequences of not signing up to the scheme?

Professor Fothergill: Yes—if I may. Let us go back to basics. Subsidy control or EU state aid rules are good things. We have to be aware all the time that we are talking about public money being disbursed to private sector companies, and there is a cost to all of that. However, if subsidies are used in a measured and targeted way, they can help to deliver objectives that we would all wish to

achieve, such as more research and development, more training, more investment in growth in less prosperous regions, and the pursuit of the green agenda, for example. There is a role for subsidy control, and we need a system of that sort.

In my written submission, I used the term "free-for-all" for the horrible alternative. Let me explain what that alternative might look like. First, everybody would be operating in darkness, not knowing what they could or could not do. Secondly, the door would be opened to all sorts of back-door political lobbying and favouritism. Those with the best connections and the loudest voice would be best placed to get most money. The door would also be opened to the subsidy wars that I mentioned earlier, with one part of the country trying to outbid another part, and the subsidy being bid up and up. In principle, subsidy control is a good thing.

I have never been a serious critic of the EU state aid rules, which were very useful, but it is undoubtedly the case that, now that we are moving away from them, we have the opportunity to do things rather better, particularly at the edges. However, we must not throw away that opportunity by not including some of the detail that would make the whole system properly operational. Subsidy control is good; a free-for-all is bad.

Alexander Burnett: I do not have any further questions. I do not know whether Professor Bell or George Peretz has anything to add.

Professor Bell: I broadly agree with what Steve Fothergill has just said.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I would like to look at the implications that HIE highlighted around the lack of a definite commitment to an assisted-areas map. I ask the witnesses what the importance is of having an assisted-areas map and how it should be developed, and what the implications are of not having one. I ask Steve Fothergill, who I know has a close interest in the issue, to respond first.

Professor Fothergill: I will do my best. Let me kick off by saying that we had an assisted-areas map long before the UK joined the European Union. The history of assisted-areas maps in the United Kingdom goes back to the 1930s, and we have always used assisted-areas maps as an important regional economic development tool that helps to target investment by private sector companies in the less prosperous places that most need that investment and new jobs. They have been a very useful regional economic development tool over the years, bringing hundreds of thousands of jobs to the less prosperous parts of the country and enabling some of the less prosperous parts of Scotland and the rest of the UK to attract inward investment that might otherwise have gone abroad.

The Subsidy Control Bill, which will soon become an act, does not specify that we should have an assisted-areas map in the future. There again, it does not rule that out. However, it is hard to see how the UK Government can meet its objective of pursuing levelling up, which I interpret as meaning bringing the less prosperous areas closer to the national average, without incorporating some measure that favours investment in some places over others, and which addresses public support for such investment.

If you do not have an assisted-areas map, the honest outcome—and the danger—is that you end up treating, say, Kilmarnock no more favourably than Kensington, or Sutherland no more favourably than Surrey, which gets us no nearer to the objective of helping the less prosperous areas. It is a tool; it is not the only tool that promotes economic development, but it is a very useful tool if we are trying to target development in the less prosperous parts of the country.

Under the old EU map—I am not quite sure whether it is still in force; it may not be—about a quarter of the UK population, and 41 per cent of the Scottish population, was covered at this point in time by assisted-area status and was on the map. If we were moving to a wholly UK driven map, we could increase the percentages quite a bit to reflect the widespread extent of disadvantage. It would not be unreasonable to push it to 60 or 70 per cent in Scotland. We need that mechanism in there to try to target investment at the places where it is needed most. That is the logic behind an assisted-areas map.

Colin Beattie: If Westminster decides not to produce an assisted-areas map, how will we determine the areas where that level of aid should be directed?

Professor Fothergill: In those circumstances, there would be no rules preventing public sector bodies from giving as generous a subsidy in Surrey as is given in the less prosperous parts of Scotland. You would lose that facility to support the less prosperous parts of the country and would be working against the objective of levelling up.

Colin Beattie: David Bell wants to come in.

Professor Bell: I am speaking from Sutherland. How assisted areas are determined is a highly contested area. Some schemes have been drawn up that have been associated with some of the funding that has gone around recently, such as the community renewal fund and the levelling-up fund, and that was done without much consultation by the Ministry of Housing, Communities and Local Government. That explicitly allowed certain parts of the UK preference in the bidding rounds over

other parts of the UK. In one of them, I am sure that Highland was on the same level as the City of London, which seemed to be a bit unusual.

10:45

With assisted-areas maps, there is an issue of who gets to decide the map and what indicators they use to determine the map. Gross domestic product is a common measure that EU used for many years. The Scottish Government now puts an emphasis on wellbeing as part of its overall objectives. If there are lots of indicators and not much clarity about who is making the decisions, you can end up with massive disputes. If you are going to design a map—and I am not saying that you should not, because you might not want to spread your funding too thinly—you must have a robust mechanism. You should also bear in mind that some subsidies might not be area based or place based, although there is a strong case for that approach. Some might be industry based—you might want to support a particular industry, irrespective of where it is located, perhaps because that supports your net zero objective. For example, Grampian is an area that was until recently very prosperous, but is probably an area that you might well want to support because it has huge potential in promoting the net zero objective.

Colin Beattie: You have questioned the criteria that could be used to determine an assisted-areas map. Surely we have templates that were in use previously; we have the EU template.

Professor Bell: Yes. You probably want to do something pretty simple. I suspect that the more you complicate the matter, the more you will end up inviting conflict over decisions. The EU has used GDP per head, and the threshold level of that, for many years. That proposal would certainly be worth arguing about.

Councillor Heddle: I am reasonably passionate about this, although I probably cannot do the justice to this issue that Steve Fothergill and my colleague, Dr Pazos-Vidal did in their submission to the Commons inquiry, which addressed the point very well.

In one of our amendments, COSLA proposes the following definition of an assisted area. It is

"an area that is awarded subsidies to stimulate additional investment or economic activity ... to compensate for severe limitations in attracting and maintaining economic activity."

In making that proposal, we accept that there are regional disparities, and it would seem to be reasonable to map those so that intervention can be targeted in a transparent way.

The idea of levelling up without an assisted-areas map could lead us to a levelling-down lowest-common-denominator situation. That would happen if we do not have a means of achieving the levelling-up agenda in order to achieve territorial cohesion, as it was known back in the EU days.

Associated with that, I notice that the submission from the Law Society of Scotland refers to article 174 of the Treaty on the Functioning of the European Union, which makes specific reference to islands—I speak as an islander. Assisted areas here were not just islands but areas of economic disadvantage. That helps to provide elucidation or a definition of assisted areas.

As Steve Fothergill said, the assisted-areas system is a construct that is not new. It has been on the go for almost 100 years; it could be argued that it was something the UK foisted upon the EU. We accept that the EU assisted-areas maps perhaps were not perfect. That is not to say the UK could not develop a better one, because we certainly have the available data to do so, almost down to street level, in terms of economic data.

The issue is not the quality and availability of the data; it is the arguments around what the indicators should be in determining economic disadvantage. GDP is always chosen because that is the one that everybody uses. In the past, I found myself arguing for the regional connectivity index, although I do not think that today we would want to specify one as being better than the other.

I think that an assisted-areas map would certainly be beneficial. It would aid transparency and avoid the accusations of pork-barrel politics that were associated with the pilots in the levelling-up fund. It would also help us in our potential arguments in the future with the European Union around consultation and systematicness in relation to the schemes that we propose—their rationale. I anticipate that that will happen.

Colin Beattie: Do you agree with the point about the Highlands being given the same status as London? I do not know whether I misinterpreted what was said, but it seems that, in the levelling-up process, the Highlands were put on the same level as London. I see Steve Fothergill shaking his head. Maybe he can clarify.

Professor Fothergill: There are a number of things going on here. First, if we have an assisted-areas map in the future, that does not mean that all subsidies have to be shoehorned into that map. You can have some subsidies in some places rather than others. It would not preclude spending more widely across the whole of Scotland or the whole of the UK on green initiatives, for example.

Secondly, the selection of priority areas that the Westminster Government engaged in for both the community renewal fund and the levelling-up fund

was deeply flawed. If the Highlands and Islands were treated in the same way as large parts of London, that was quite wrong.

The experience of developing and using an assisted-areas map in the UK was quite positive in the past. The key to getting a successful map is consultation on the best principles and the draft map. The maps that we operated with under EU rules were largely, but not exclusively, drawn here in the UK, within a framework that was set by the EU. Through a process of consultation, we basically arrived at something that was broadly acceptable to most people. Not everybody was on the map who might have liked to have been on it, but it was not a huge source of dispute and contention once it was in place. I am sure that we could go through the same process again in the UK if the UK Government was willing to engage in having a map and in consulting on drawing it up.

The Convener: Thank you. Mr Beattie, I am afraid that we must make progress. Jamie Halcro Johnston is interested in asking his questions, so we will move on to him.

The witnesses were initially advised that we would conclude by 11. However, three members still wish to come in, so I hope that they are content to remain with us for a bit longer.

Jamie Halcro Johnston (Highlands and Islands) (Con): Before I ask my main question, I have a supplementary question for Councillor Heddle about engagement and consultation. It is good to see another Orcadian on the panel. I hope that that will continue. The Scottish Government has a position on the bill, and we have the minister coming in next week. What consultation has there been with COSLA or with Orkney Islands Council and the other councils in Scotland on the bill and the Scottish Government's response?

Councillor Heddle: We have been involved in a degree of discussion with the UK Government. However, it is a level of consultation that is not formalised. I return to the point that, as we develop the guidance and the schemes that are associated with it, it will be beneficial to have a degree of consultation that is formalised. That is the substance of two of the COSLA amendments.

On discussion with the Scottish Government, I am sure that there has been extensive officer discussion. The political discussion between me and the Scottish Government has been largely in this forum. COSLA would be happy to discuss the matter further with the Scottish Government. We can always consult and confer better, and I would be happy to facilitate that.

Jamie Halcro Johnston: My main question is for Professor Bell and George Peretz. We have seen hundreds of millions of pounds of Scottish Government money and support, both directly and through loans, going to a number of different companies over the past year, including Prestwick Airport, GFG Alliance and Ferguson Marine, to name but a few. Issues have been raised time and again about scrutiny of those agreements and transparency. How might the bill impact on scrutiny of such deals? Could it impact on existing deals such as those that I mentioned, given that further support is either agreed or likely to be agreed for some of those companies? Is the inclusion of greater oversight in the bill important?

Professor Bell: I will defer to George Peretz on whether those deals might be referred. My guess is that there might be grounds for that after the bill is passed. On the principle, I agree that greater scrutiny is important. There will always be things that do not work. This is not a riskless activity to engage in. However, given that it is public money—taxpayers' money—there are always grounds for such schemes to be fully scrutinised and a case made for how they fit within an overall industrial or economic strategy.

11:00

George Peretz: I am in no position to comment on any of the particular schemes that you mentioned, but I will make two points. First, the bill contains provisions on transparency. There will be a subsidy database in which all subsidies and subsidy schemes will have to be recorded, and the precise information that will have to be placed in the database will be determined by regulations that are made by the secretary of state. In principle, there is provision for quite detailed information to be required to be put in the transparency register. The time limit for challenging a subsidy or subsidy scheme will not begin to run until that information is placed in the register, so there is an incentive for the public authority to get moving and put the information in the database.

In principle, third parties or anybody who is interested should have access to information on what has been given to a particular company and why, and other information about that. That is obviously a good thing. However, precisely what information will go into the database remains to be determined by the secretary of state in regulations.

I have one concern. An issue that often arises with projects of the kind that you asked about is whether the support is a subsidy at all. Often, the public authority says, "This isn't a subsidy, because we're simply giving a loan or support on market terms." Under the state aid regime, that was known as the market economy investor principle. It has an equivalent in the bill. I forget the clause number, but the bill makes it clear that, if a public authority behaves as, for example, a privately owned bank would behave in giving a

loan or investment on market terms, that is not a subsidy.

The problem is often that the dividing line for whether the public authority is really behaving as a private investor would is not free from argument. Experts take different views on the matter depending on the assumptions that they make. It seems to me that there is at least a danger that, in some cases, public authorities may be rather too eager to say to themselves that they are just behaving as a private bank would. They may find an expert to opine that that is the case in circumstances where the judgment is actually open to really serious question and it perhaps ought to be made more public. In such cases, the public authority will say that it is not granting a subsidy so there is nothing to go into the transparency database. One of the problems with the bill is that it is very unclear how that issue will ever be caught.

In the EU regime, the European Commission acts as a sort of universal policeman. If somebody goes to it and says, "We think something has been done that is state aid and it doesn't seem to have gone through the appropriate procedures", the European Commission can and will come down like a tonne of bricks on that, and it has powers of investigation. There is no equivalent to that in the bill. Unless there is an active and engaged complainant who is prepared to dig and spend some money to get information—it will not be available through the transparency database, because the information will not be there—we may have a problem. There are other ways of getting information, such as through the freedom of information legislation, but they tend to be slower.

Jamie Halcro Johnston: Your concern is that there will not be a single body of the type that we had previously to determine that a public authority is not operating in a way that any normal bank would operate in because it is taking on a risk that a normal bank would not take on, or putting in terms that a normal bank would not put in.

George Peretz: Yes. There is no universal policeman with the role that the European Commission has in policing the state aid regime. The CMA has no power to investigate such things. I am talking about a case in which a public authority wrongly says, "This isn't a subsidy at all; we're just behaving as a private investor would." If that assessment is wrong, how will we catch it? We will be reliant on a third party that is acting in its own interests saying that it has objections to what is being provided because it is concerned that it is a subsidy, doing a bit of digging, threatening to take the matter to court and being prepared to take it to court. We will be reliant on a private actor being prepared to put up their own time and money to pursue the case. In some cases, there will be an obvious competitor that is deeply concerned about what is going on, but in other cases there will be none.

Jamie Halcro Johnston: Thank you. That is extremely helpful.

Colin Smyth (South Scotland) (Lab): Good morning. I want to return to the sixth principle in schedule 1 to the bill, which is about competition and investment in the UK, and ask you about clause 18, which prohibits relocation being a condition of a subsidy.

I represent South Scotland. My region contains many businesses that are close to the Scotland and England border, and it is also the gateway to Northern Ireland, so it is not uncommon for businesses to relocate premises on the other side of the border, just a few miles away. As I said, clause 18 prohibits relocation being a condition of a subsidy. What are your views on the extent to which that clause and the sixth principle could have a specific impact on businesses and support agencies that are close to the border?

I put the question to Mr Peretz, as he touches on the matter in his written evidence. If any other member of the panel wishes to comment, I ask them to indicate that in the chat function.

George Peretz: My reading of clause 18, which was confirmed by the minister's statement about what it means in the public bill committee, is that it is fairly limited. It applies only in a situation where the granting authority says, for example, "It is a condition of the money that we are giving you to locate this factory here that you close down your factory elsewhere." If the condition is just that a factory is built, clause 18 does not apply, even if the economic reality is that, because the factory is going to be built in the area of the granting authority, another factory in another part of the United Kingdom is going to be closed down.

The matter is not seen through a lens of economic reality; it is just about the terms of the grant. A case will be caught only if the granting authority says, "You must not only locate your factory here, but close down the factory that you have elsewhere." In practice, that seems to me to be an extremely unlikely scenario. There is no reason why a granting authority would insert such a condition, particularly if it knows that, if it does so, it is likely to attract clause 18. In the end, I do not think that clause 18 is particularly important. Indeed, I rather wonder why it is there.

One has to stand back and remember what the principle on trade and investment in other parts of the United Kingdom is about. If Scottish Borders Council decides to give some money to a company that is planning to locate some activity in Peebles, it has to think about what the effect might be not just on its area, but on Northumberland. It is

required to address its mind to that problem and think about what the effect might be. It then has to look at the principles as a whole and consider whether, bearing all that in mind, it wants to proceed with the grant. The answer can be yes or no.

It could be perfectly rational for the authority to say that it accepts that there will be a bit of an adverse knock-on effect in a neighbouring area but that, looking at everything in the round, proceeding with the grant is the right thing to do to achieve its public policy objectives. If that reasoning is soundly based on proper evidence and things have been thought about, it ought to survive judicial review and scrutiny by the Competition and Markets Authority, which is the only recourse that somebody who is upset about that can take.

Colin Smyth: That is very helpful. I have not seen an indication that any other member of the panel wants to comment on that, so I will move on to my second question.

In its written evidence to the committee, Highlands and Islands Enterprise expresses concerns about how far and at what scale internal market displacement assessments will be needed, because there could be a detrimental impact on smaller community-based projects. South of Scotland Enterprise highlights that the current regime makes it easy to confirm an award as being non-aid but says that the proposals in the bill, and especially principle 7, make a non-subsidy conclusion less likely unless the project is clearly not commercial. The vast majority of projects will be commercial.

What impact could the new regime have on funding for smaller-scale innovative community-based projects? I ask Councillor Heddle to comment, given his experience in the Highlands. If any other member of the panel wants to comment, I ask them to indicate that in the chat function.

Councillor Heddle: Thank you for that question. With your indulgence, I will first add to my response to Jamie Halcro Johnston's question about consultation on the bill. I should have said that I have been in continual discussion with the Scottish Government and its officers on the wider issue of the replacement for EU funding, of which the issue that we are discussing is part, through David Bell's group that is looking at that subject.

The possible impact on smaller schemes, particularly given the requirement for internal market displacement assessments, is indeed a concern. It brings us back to the capacity question. What capacity will smaller bodies in smaller areas have to respond to the requirement and develop subsidies that can be applied to their communities? I admit that I am unclear about how the Subsidy Control Bill will apply to community enterprises and projects. I look forward to the guidance on that.

We can look back to the increased thresholds, which were the equivalent of de minimis. The fact that they are greater is certainly welcome, but they are still cumulative over three years. We are talking about a £300,000 grant being applied over three years, which does not translate into vast subsidy.

It is an issue of capacity, and I note in particular that smaller areas that need to develop schemes will potentially be disadvantaged. That brings me back to our assisted-areas map, use of which would enable things to be progressed more transparently.

We are keenly looking forward to seeing what the guidance says relative to how we progressed things in the past. We will rely on things such as block exemptions or some equivalent to that, or streamlined projects that will be applicable to our areas, in order to keep up with the development of projects for our communities.

The Convener: Thank you. I will bring in Colin MacDonald. I am sorry—I meant Gordon MacDonald

Gordon MacDonald (Edinburgh Pentlands) (SNP): Thanks, convener. I knew who you meant.

I will ask three very quick questions, given the time constraints. The first one is on inward investment. Scotland has been very successful since 2014 in being the most popular area for inward investment outside London. What impact could the Subsidy Control Bill have on Scotland's ability to attract foreign investment, given that we have to take into consideration competition impacts across the UK?

11:15

Secondly, we talked about how the Scottish and Welsh Governments could approach the secretary of state if they had concerns about subsidies being awarded elsewhere. Given that the Scottish Government has responsibility for economic development, will having to go the secretary of state undermine the devolution settlement?

Lastly, how can we ensure that the membership of the CMA subsidy advice unit reflects the four Governments of the UK, and should the devolved Governments have a say on, or input into, membership of that unit? The question is for Mr Peretz first, please.

George Peretz: Some of the questions are political questions, of course. I entirely see the case for saying that the Scottish Government should have powers to refer to the CMA, which is

what we are talking about, in cases where the secretary of state can do so. Amendments to that effect were tabled in the House of Commons by—I think—both the SNP and the Labour Party spokesmen on the public bill committee. The amendments were voted down.

The UK Government's position is that the bill is on a reserved matter, that it is entirely appropriate that the powers be reserved to the UK secretary of state, acting—as it says—in the interests of the whole United Kingdom and that, in a case in which the Scottish Government had concerns, it could go to the secretary of state, who would, we are assured, take those concerns very seriously. Whether you accept all that or not is, essentially, a political judgment.

The subsidy advice unit appointments will be confined to the secretary of state. The point that was made by the minister when amendments were tabled to the effect that the devolved Governments ought to have a hand in appointments to the subsidy advice unit was to repeat the line that the matter is a UK reserved competence. However, the minister did not add that the CMA—as members probably know—now has fairly sizeable offices in Edinburgh, Cardiff and, I think, Belfast. It certainly has them in Edinburgh and Cardiff. As a matter of practice, I am sure that the CMA will recruit people to those offices with an eye on the politics; it will think about staffing and so on and I am sure that it will engage with the devolved Governments. Whether that is enough is, again, a political question.

Gordon MacDonald: Do you have any concerns about Scotland's ability to attract foreign investment projects?

George Peretz: Scotland's ability to do that was always constrained in the old regime by state aid rules. Under the new regime, it would be controlled by the subsidy control rules. As we said right at the beginning of the session, those rules make it easier in some ways for the Scottish Government; it can reach a view, applying the principles, on whether, to put it very broadly, an investment is in the public interest, achieves a public policy objective, is value for money and is not getting somebody to do something that they would have done anyway. All those tests under the principles are good public-policy tests. Provided that the Scottish Government concluded that it was happy that the principles were all being complied with, it could go ahead and give the money. Unlike the old regime, it will not have either to conform with the block exemption regulations, which could be quite constraining, and nor will it have, potentially, to wait for the European Commission to approve subsidy, which could, in the past, take some time. The Scottish Government could just go ahead and do it. If there were to be a challenge, it could defend the decision because the challenge would be on judicial review grounds, which makes it much easier to defend against challenges.

I think, therefore, that it is hard to claim that the bill will necessarily make it harder for the Scottish Government to take measures to attract investment to Scotland. I think that there are pluses and minuses.

Gordon MacDonald: Does Professor Fothergill want to come in?

Professor Fothergill: I will answer on the first two of Gordon MacDonald's questions about inward investment and potential concerns about subsidies elsewhere and how they might fit in. The way forward is to have an assisted-areas map. A key tool in delivering inward investment to the places where it is needed is the ability to offer bigger subsidies in some parts of the UK than in others. That is precisely what an assisted-areas map does. In Scotland, that has been operationalised through, for example, the regional selective assistance scheme that is operated by Scottish Enterprise. That is the tool to ensure that you get inward investment where you need it. It is also the tool for policing what everybody else does in the system. In the absence of an assisted-areas map, there is nothing to stop the most prosperous parts of southern England from chipping in with as generous a financial offer as Scotland might offer. Get the map in place and all that will be easier.

Gordon MacDonald: Thank you very much. If no one else wants to come in on that, that is me done, convener.

The Convener: Thank you very much, Mr MacDonald.

Finally, Mr Peretz said in an answer that the judgments are quite political. I suppose that this question is, too. We will have the Minister for Business, Trade, Tourism and Enterprise in front of us next week. In recommending that we do not approve the legislative consent motion, the minister has said that the first concern is

"sweeping powers of the Secretary of State, which ignore the devolution settlement and do not grant the equivalent powers to Scottish Government and other devolved Administration Ministers."

Is that a fair assessment of the bill, given the discussion that we have had this morning? I ask Professor Bell to comment first. One could argue that there is some hyperbolic language in there. If you strip that out, do you agree with the underlying concern that has been expressed by the Scottish Government?

Professor Bell: That perhaps reflects frustration about the lack of detail—the lack of detail on a pathway to develop and to fast-stream

schemes, and the lack of detail on how people other than the UK minister might be consulted. There is also frustration about, for example, the role of the CMA. It has a presence in Scotland, but in terms of its interactions with the different parts of the UK, it is not entirely clear how responsive it might be to anyone other than UK ministries.

There is no assisted-areas map, which we have talked about. I suspect that part of the reason for the frustration is the lack of detail that we have been speaking about and which, it appears, the secretary of state might be able to provide, at will, after the bill is enacted. That might or might not be detrimental to Scotland, but being in a state of uncertainty clearly might make people defensive.

The Convener: Finally, do you have a view on the question that Gordon MacDonald asked of Mr Peretz on the asymmetry of power when it comes to making complaints to the CMA? I think that Mr Peretz said that the UK Government would argue that it will take forward issues in the best interests of the UK as a whole. However, the concern is that it would focus on English subsidies and that there will be no equivalent power for Scotland or Wales to make representations if they are unhappy with awards that are made in England. The defence of the UK Government appears to be that it will act in the interests of the UK, so nobody should be concerned. Is that the correct understanding of the situation?

Professor Bell: That is my understanding. I cannot comment on whether a degree of scepticism is justifiable or not, but it seems to me that it must be possible for the devolved Administrations to have recourse if they feel that activities in England are undermining their competitiveness or their own markets.

The Convener: Thank you. Councillor Heddle has indicated that he would like to come in before we finish.

Councillor Heddle: I support the statements that Professor Bell has made. In the absence of any detail, of course the devolved Administrations and public authorities are entirely entitled to be circumspect about what might happen. In this discussion, we have all been fairly united in saying that we need better consultation and co-production of how the matter will be taken forward, so that we get the best guidance, the best assisted-areas map and the best implementation of the new subsidy control regime.

The devolved Administrations, local government and other public bodies should absolutely have more input, as appropriate. As to what form that might take, it seems that it would be sensible for those organisations to be allowed input into the subsidy advice unit and the CMA. The idea that the devolved Administrations should have the ability to call in schemes seems to be reasonable. I cannot see their ever having the ability to veto such proposals, but I come back to the point that, if we are to have the best guidance, the best mapping and the best implementation, we need buy-in to and shared responsibility for how the scheme goes forward. That will require the measures that have previously been outlined.

The Convener: Thank you. Mr Peretz wishes to come in. Councillor Heddle mentioned the ability to veto. Could you comment on that? I know that you have previously commented on the issue of asymmetric power.

George Peretz: The point that I was trying to make is that, in a sense, the pass was sold—"sold" is not the right word, because the devolved Governments all resisted it quite strongly—through the Internal Market Act 2020, which made subsidy control a reserved matter. Before that, the position was almost certainly that it was not a reserved matter. It was not listed in the list of reserved matters probably because, with the UK being a member of the EU, it would have been slightly pointless to do so because it was not even a UK competence at that stage. In a sense, what we are seeing is the working out of a legislative step that has already been taken in the Internal Market Act. It is just a logical consequence of that act that subsidy control is a UK competence and the involvement of the devolved Governments is necessarily somewhat reduced.

The Convener: Thank you. That is helpful.

I would like to thank all the witnesses for providing their time and expertise, which are much appreciated.

11:29

Meeting continued in private until 12:04.

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