LEGISLATIVE CONSENT MEMORANDUM

SUBSIDY CONTROL BILL

Background

1. This Memorandum has been lodged by Kate Forbes MSP, Cabinet Secretary for Finance and the Economy, under Rule 9.B.3.1(a) of the Scottish Parliament's Standing Orders, and is supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise. The Subsidy Control Bill ("the Bill") was introduced in the House of Commons on 30 June 2021. The Bill, Explanatory Notes and other supporting documents can be found at https://bills.parliament.uk/bills/3015.

Content of the Subsidy Control Bill

2. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy (BEIS). The United Kingdom (UK) Government's stated policy objective is to implement a domestic subsidy control regime in the UK that reflects the UK's strategic interests and particular national circumstances, providing a legal framework within which public authorities make subsidy decisions.

3. The Bill makes provision regarding the control of subsidies following the UK's exit from the European Union (EU). Up until 31 December 2020, the UK was bound by the EU State aid rules. As of 1 January 2021, that was no longer the case. From 1 January 2021, the UK was required to comply with the provisions of the Trade and Co-operation Agreement with regard to subsidy control, and with any other commitments it has made on subsidy control, including those contained in the World Trade Organisation Agreement on Subsidies and Countervailing Measures; the Northern Ireland Protocol; and any Free Trade Agreements with other countries. The purpose of the Bill is to set out a new domestic subsidy control regime, which binds Scotland, England, Wales and Northern Ireland, and which ensures compliance with the aforementioned legislation. The Bill provides that functions that were previously held at an EU level, are now held at a domestic level by the Secretary of State (BEIS), the Competition and Markets Authority (CMA) or the Competition Appeal Tribunal (CAT).

4. The key provisions of the Bill cover:

a) provision of a baseline legal framework to enable public authorities to award subsidies in line with the subsidy control principles it outlines (see paragraph 30 below). There will be a statutory duty for public authorities to consider these principles and only award a subsidy if the subsidy is consistent with these principles;

b) the extension of the remit of the UK subsidy control regime from the current externally-facing regime to include the UK Internal Market;

c) the introduction of a small number of prohibitions to prevent public authorities granting subsidies with overly distortive or harmful economic impacts;

d) in limited circumstances, provision for various streamlined / fast-track subsidy award pathways, some of which are yet to be defined;

e) the imposition of a requirement for public authorities to use the UK transparency database, to enable basic expenditure monitoring and scrutiny under the regime;

f) the establishment of the Subsidy Advice Unit (located within the Competition and Markets Authority) to provide monitoring and oversight of the new regime. The Subsidy Advice Unit will also possess limited advisory functions for subsidies that it considers to be more likely to distort UK competition and investment and international trade;

g) the empowering of the Secretary of State for Business, Enterprise and Industrial Strategy to refer certain proposed or awarded subsidies (and proposed or made subsidy schemes) to the Subsidy Advice Unit for review, as well as impose limited 'cooling-off' periods post-review;

h) the enabling of interested parties to challenge subsidy decisions on judicial review grounds in the Competition Appeal Tribunal;

i) provision for the Secretary of State for Business, Energy and Industrial Strategy to issue statutory guidance on the application of the subsidy control regime.

Provisions which relate to Scotland

5. The following provisions of the Bill make provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament:

Part 1 – Overview and key interpretation

6. Part 1 of the Bill (at clause 1(7)) requires the exercise of any power conferred by legislation (whenever passed or made) to be read as subject to the subsidy control requirements (except so far as a contrary intention appears in the case of an Act of Parliament). This alters the executive competence of the Scottish Ministers (discussed further at paragraph 35, below).

Part 2 – Subsidy Control Requirements

Chapter 1 – Principles

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

8. **Clause 12** relates to the application of the subsidy control principles and places a duty on public authorities to consider the principles before deciding to give a subsidy. It also provides that a public authority must not give the subsidy unless it is of the view that the subsidy is consistent with those principles. **Clause 13** makes similar provision

about additional principles that apply to subsidies in relation to energy and environment. These provisions impact the devolved areas of economic development and the environment, and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Chapter 2 – Prohibitions and Other Requirements

9. These provisions set out the types of subsidies which are prohibited or restricted, the implications of this, and define what constitutes a Service of Public Economic Interest.

10. **Clauses 14 to 31** deal with: general prohibitions, ailing or insolvent enterprises, other specific prohibitions and requirements, subsidy schemes and subsidies or schemes subject to mandatory referral (to the CMA). The provisions impact the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Chapter 3 – Transparency

11. **Clause 33** places a duty on public authorities to publish certain information in the UK Government's new subsidy database. This provision impacts the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Part 3 – Exemptions

Chapter 1 – Introductory

12. **Clause 35** introduces the exemptions that are detailed in Chapters 2 to 4 of Part 3 (noted below). This has an impact on the devolved area of economic development.

Chapter 2 – Minimal and SPEI Financial Assistance

13. **Clauses 36 to 42** make provision about: minimal financial assistance up to the value of £315,000, assistance to enterprises providing Services of Public Economic Interest ("SPEI"), and assistance given prior to mergers and acquisitions. These provisions impact the devolved area of economic development and functions are imposed by **clauses 36-39** on Devolved Scottish Authorities in relation to subsidies. Whilst **clauses 40, 41 and 42**, covering mergers and acquisitions, exemptions for SPEI assistance, and supplementary and interpretative provisions, do not directly impose functions on those Authorities, the content of those clauses will impact how those Authorities exercise their functions.

Chapter 3 – Emergencies etc

14. These provisions create exemptions which can be used if the Secretary of State (BEIS) publishes a notice declaring that they apply.

15. **Clause 43** makes provision about subsidies given to compensate the damage caused by natural disasters and other exceptional circumstances. **Clause 44** makes provision about subsidies given to respond to a national or global economic emergency. These clauses impact the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Chapter 4 – Other Miscellaneous Exemptions

16. These provisions set out certain other exemptions that will be available.

17. **Clauses 45 to 51** make provision about: exemptions for national security, Bank of England monetary policy, financial stability, legacy and withdrawal agreement subsidies, and tax measures. These clauses impact the devolved area of economic development and functions are imposed on Devolved Scottish Authorities in relation to subsidies.

Part 4 – CMA: Referrals and Functions

Chapter 1 – Functions on Referrals of Subsidies and Schemes

18. These provisions set out the process of referring subsidies and schemes to the CMA for review.

19. **Clauses 52 to 64** cover: mandatory and voluntary referrals to the CMA, the contents of the CMA report and reporting timescales, and post-award referrals. These provisions impact the devolved area of economic development and, with the exception of clauses 58 (call-in direction following voluntary referral), 59 (CMA report following mandatory or voluntary referral) and 62 (CMA report following post-award referral), impose functions on Devolved Scottish Authorities in relation to subsidies.

Chapter 2 – General Functions

20. These provisions set out general requirements in relation to the CMA's role.

21. **Clauses 65 to 67** cover: the CMA's role in monitoring and reporting on subsidy control, the CMA annual report and information-gathering powers. These provisions impact the devolved area of economic development.

Chapter 3 – Subsidy Advice Unit

22. **Clause 68** requires the CMA to establish a committee of the CMA Board to be known as the Subsidy Advice Unit and makes provision about its membership. **Clause 69** makes provision about referring functions of the Subsidy Advice Unit to subsidy control groups. These provisions impact the devolved area of economic development.

Part 5 – Enforcement

23. These provisions set out the mechanism by which the provisions of the Bill may be enforced and set out the powers available to public authorities where a subsidy has been misused.

24. **Clause 70** provides that an interested party who is aggrieved by the making of a subsidy decision may apply to the Competition Appeal Tribunal (CAT) for a review of the decision. **Clause 71** sets out the time limits for making such an application. **Clause 73** makes provision about the CAT's powers on review in Scotland (and states that these are the same as the powers of review of the Court of Session in an application to the supervisory jurisdiction of that court). **Clause 74** provides that the CAT may make recovery orders, giving a public authority the right to recover a subsidy from the beneficiary and requiring it to exercise that right. **Clause 75** makes provision about the right of appeal against decisions of the CAT, which in Scotland will be an appeal to the Court of Session. **Clause 76** provides that an interested party may request information about a subsidy or subsidy scheme from a public authority, and imposes an obligation on public authorities to provide this within 28 days. **Clause 77** gives public authorities the right to recover a subsidy from the beneficiary where it is used for a purpose other than the purpose for which it was given.

25. These provisions impact the devolved areas of justice and economic development and, with the exception of clauses 70 to 73 (review of subsidy decisions, time limits for applications and CAT powers), impose functions on Devolved Scottish Authorities in relation to subsidies.

Part 6 – Miscellaneous & General

Chapter 1 – Miscellaneous

26. **Clauses 78 to 83** make provision about: the application of Schedule 3 (subsidies provided, or subsidy schemes made, by means of primary legislation – which includes an Act of the Scottish Parliament), guidance to be produced by the Secretary of State, rules in relation to the disclosure of information, rules in relation to the modification of subsidies and schemes, the Secretary of State's power to make regulations regarding the determination of gross cash and gross cash equivalent amounts, and amendments to the Financial Services Act 2021.

27. These provisions impact the devolved area of economic development and, with the exception of clauses 82 (gross cash and gross cash equivalent amount of financial assistance) and 83 (minor amendment to the Financial Services Act 2021), impose functions on Devolved Scottish Authorities in relation to subsidies.

Chapter 2 – General

28. These provisions concern general matters in relation to the Bill.

29. **Clauses 86** (power to make consequential provision), **89** (interpretation), **90** (extent), and **91** (commencement) impact the devolved area of economic development.

Schedules

30. **Schedule 1** sets out 'The Subsidy Control Principles'. If a subsidy exists, then the seven principles to determine the lawfulness of each subsidy are that the subsidy:

a) should pursue a specific policy objective to remedy a market failure or address an equity rationale;

b) should be proportionate and limited to what is necessary;

c) should be designed to change the economic behaviour of the beneficiary;

d) should not compensate for costs which the beneficiary would have borne in any case (i.e. should not result in a 'windfall' gain);

e) should be appropriate – i.e. should not be used if the objective could be achieved through other means;

f) should result in a positive contribution that outweighs the negative effects on trade investment between the EU and UK;

g) should be designed to achieve its specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.

31. These seven over-arching principles will apply to all subsidies, and will therefore have an impact on the devolved area of economic development and potentially many other areas of devolved competence. Every time the Scottish Ministers wish to exercise their powers to give funding or support in a particular area of devolved competence, there will be new constraints on these powers. For example, grants to support the tourism industry and grants to public transport providers fall within devolved areas and would now be impacted by the Bill.

32. **Schedule 2** sets out 'The Energy and Environmental Principles', nine additional principles that will apply to energy and environment subsidies. This will impact the devolved areas of the environment and economic development.

33. **Schedule 3** makes provision about the application of the Bill in the case of subsidies provided by primary legislation (which includes Acts of the Scottish Parliament). This impacts the devolved area of economic development and potentially many other areas of devolved competence (as noted at paragraph 30, above).

Requirement for legislative consent

34. Following an amendment to schedule 5 of the Scotland Act 1998 by section 52 of the United Kingdom Internal Market Act 2020, subsidy control is a reserved matter. The Bill applies to Scotland, England, Wales and Northern Ireland.

35. While subsidy control may be a reserved matter, as detailed above the Bill imposes functions on Devolved Scottish Authorities in relation to subsidies and also impacts on a number of devolved areas of competence. Reference is made

throughout this paper to the Bill's impact on the devolved area of economic development, since this is perhaps the most obviously affected area in the sense that the promotion of economic development is sometimes the rationale for giving a subsidy. However, there is the potential for many other devolved areas to be impacted as well, according to the subject matter / objective of any given subsidy. References to the impact on economic development should therefore be read with that in mind. As such, this is a relevant Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently one requiring the consent of the Scottish Parliament.

36. The Bill's impact on the devolved area of economic development, and its potential to affect many other devolved areas of competence, raises some concerns. UK Government has legislated in this way as its preference is to put in place a UK-wide approach to subsidy control. Additionally, BEIS chose to include agriculture in the scope of the regime. Agriculture has its own separate subsidy control arrangements under the EU through the Common Agricultural Policy (CAP), and under the WTO through the Agreement on Agriculture (AoA). The EU-UK Trade and Cooperation Agreement (TCA) has provided interim rules on subsidy control in the UK since we left the EU, however, the TCA does not apply to subsidies that are subject to the provisions of Part IV or Annex 2 of the Agreement on Agriculture – that is most agricultural subsidies. The UK Government has not given a clear reason as to why agriculture should be included in the new regime when it is so often carved out of standard subsidy control regimes.

37. One major concern about the inclusion of agriculture within the scope of this Bill is that the principles set out in Schedule 1 risk constraining our ability to develop future policies that are tailored to the needs of Scottish agriculture. We have very serious concerns about how the regime will work for legacy CAP schemes delivering income payments and coupled support, as they are not mainly intended – even with conditionality – to bring about a change in practice and therefore would seem to be incompatible with the principles. Rather, their purpose is to ensure that farming businesses are economically viable. They provide essential support to remote and constrained rural communities, and as there is a significantly higher proportion of agricultural land in Scotland that is subject to such constraints compared to elsewhere in the UK, it is important that we retain the ability to provide this type of support for our agricultural businesses for the foreseeable future. We do not think that clauses 48 and 81 dealing with legacy schemes provide the assurance we need that we can make any necessary changes to develop and progress our agricultural policies in future.

38. We have further concerns that the application of the new regime to subsidies that are already subject to the WTO AoA would effectively lead to avoidable 'double-banking' of subsidy control schemes, which would add further complexity and enhanced risk of legal challenge. We are particularly concerned that a subsidy that does not unlawfully distort international trade is challenged, successfully or otherwise, on the basis that it does not minimise negative effects on competition or investment in the UK (as set out in Schedule 1 under principle F). This particular principle goes beyond the minimum required under the TCA.

39. We also have wider concerns that including agriculture within the scope of the Bill diminishes the role of the agreed common frameworks process in this area, which was put in place specifically to manage policy divergence within the UK and any

impacts this might have on the UK internal market. In addition, there is a risk that the Bill may prevent us from retaining alignment with the EU if future schemes which we wish to adopt are deemed incompatible with the Bill, and the principle relating to the UK internal market in particular, as they diverge from schemes being put in place elsewhere in the UK.

Scottish Government position on the Bill as introduced

40. The Scottish Government does not accept that the measures proposed in the Bill will sufficiently regulate the provision of subsidies in the UK, particularly given the proposed advisory role of the independent body. The Scottish Government continues to press for the possibility of having proper prior appraisal of awards within a detailed regulatory framework that provides sufficient clarity and certainty on the parameters of what support can be deemed to be compatible with the UK's subsidy control regime for both subsidy awarding bodies and businesses investing in the UK. However, the proposals in the Bill remain high-level and lack sufficient detail to achieve this. This translates into broad powers being given to the Secretary of State (BEIS) to shape the regime in the future with little scrutiny from the UK Parliament and no scrutiny available to Scottish Ministers or the Scottish Parliament.

41. The Subsidy Control Bill empowers the Secretary of State (BEIS) to refer proposed or awarded subsidies and schemes in policy areas of devolved competence to the independent body. Where the subsidy has not yet been awarded or the scheme has not yet been made, a standstill period (so-called 'cooling-off' period) will kick in to delay that. The Secretary of State has a power to extend standstill requirements (so-called 'cooling-off' periods) for referred awards or schemes. If enacted, these powers would undermine the long-established powers of the Scottish Parliament and Scottish Ministers to act in relation to matters within devolved competence such as economic development, the environment, agriculture and fisheries. The Scottish Government has **argued that there should be equivalent powers for the devolved administrations to refer subsidies being made in other parts of the UK (or even by public authorities in their own jurisdiction) to the CMA. There has been no response so far from the UK Government.**

42. We are unable to recommend consent for the provisions in the Bill as currently drafted. Paragraphs 44 to 53 below set out the reasons for that.

43. We have particular difficulties with the following elements of the Bill:

Part 1 – Overview and Key Interpretation

44. Clause 10(4) only allows Ministers of the Crown to make streamlined subsidy schemes to provide general cover for relatively small and routine awards. Given the subsidy control regime impacts upon areas of devolved responsibility, we consider this power should be extended to Scottish Ministers - or at the very least, Scottish Ministers should have some input into the design of streamlined subsidy routes.

45. Clause 10(5) requires that streamlined subsidy schemes be laid before the UK Parliament; the power to raise such schemes should be extended to Scottish Ministers and should therefore be extended to the Scottish Parliament.

Part 2 – Subsidy Control Requirements

46. Clause 31 explicitly prohibits subsidies or subsidy schemes subject to mandatory referrals until the CMA report has been published and the cooling off period has expired. This potentially constrains Scottish Ministers from acting freely in areas of devolved responsibility. Given the intrusion into devolved competency this represents, the Scottish Government considers that the Bill must specify a route to enable Scottish Ministers to overrule such a standstill requirement if there is sufficient policy need.

Part 3 – Exemptions

47. Clauses 43 and 44 outline the parameters under which subsidies can be provided for natural disasters and other exceptional circumstances (clause 43) and national or global economic emergencies (clause 44). A subsidy may only be given under these provisions if the Secretary of State (BEIS) publishes a notice declaring that the exemption applies. The Scottish Government considers that the Bill must extend this power to Scottish Ministers.

Part 4 – CMA; Referrals and Functions

48. Clause 55 empowers the Secretary of State (BEIS) to direct a public authority to request a report from the CMA in relation to a proposed subsidy or subsidy scheme.

49. Clause 60(4) allows post-award referral by the Secretary of State (BEIS) to the CMA and requires that this be done within 20 working days of either (a) the subsidy or scheme being entered on the Transparency database; or (b) in the case of Services of Public Economic Interest (SPEIs), the day on which the subsidy is given or the scheme is made.

50. The Scottish Government considers that both these powers should be extended to Scottish Ministers or, at minimum, the processes by which Scottish Ministers can request such a report and/or declaration and challenge any subsequent Secretary of State (BEIS) refusal should be defined.

51. Clause 61(5) implies that the Secretary of State (BEIS) may reject a CMA request for an extension but does not give any parameters for when such a rejection could be allowable. The Scottish Government considers that the Bill must be amended to outline these parameters accordingly and comparable devolved Ministers should also be empowered to reject CMA requests, or to require that the Secretary of State (BEIS) reject such a request on their behalf.

52. Clause 65(7) requires the CMA to lay before Parliament copies of reports on its five-yearly reviews on the effectiveness of the operation of the Subsidy Control Bill and its impact upon competition and investment in the UK. Given the impact of the regime upon areas of devolved policy, the Scottish Government considers this requirement must be extended to laying of the reports before the Scottish Parliament.

Part 5 – Miscellaneous and General

53. Clause 79(5) requires the Secretary of State (BEIS) to consult those they deem appropriate regarding the development of detailed guidance on the operation of the UK subsidy control regime. The Scottish Government considers that the Scottish Ministers and other Devolved Governments must be specified for meaningful and mandatory engagement.

Consultation

54. The UK Government undertook a consultation on the provisions of the draft Bill during the first half of 2021. The consultation closed to responses on 31 March 2021. The UK Government published their response to the consultation on 30 June. [Government response to the consultation on subsidy control (publishing.service.gov.uk)]

55. Scottish Government Ministers and officials are in contact with BEIS as proposals in relation to the Bill are developed. Contact at official level is relatively regular; however, there are no signs of concerns raised being taken into account.

Financial implications

56. While it is unclear on the face of the Bill we do not expect there to be direct financial implications for the Scottish Government or the Scottish Parliament arising from the new regime set out in the Bill.

Draft Legislative Consent Motion

57. Under Rule 9B.3.3(d) of the Scottish Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 40 to 53 set out the Scottish Government's reasons for not including a draft motion in this Memorandum for the purposes of that rule.

Conclusion

58. At this time, for the reasons detailed above, but essentially due to the potential constraints on Scottish Ministers to act in devolved areas of competence, the Scottish Ministers cannot recommend to the Scottish Parliament that it gives its consent to the Bill. If, during the remaining stages of the Bill, appropriate amendments are provided which address our concerns, a supplementary memorandum with a final position on consent may be lodged.

SCOTTISH GOVERNMENT
October 2021

This Legislative Consent Memorandum relates to the Subsidy Control Bill (UK legislation) and was lodged with the Scottish Parliament on 25 October 2021

SUBSIDY CONTROL BILL – LEGISLATIVE CONSENT MEMORANDUM

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents