



Department for
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Dear Seema,

Subsidy Control Bill Committee: Ability to challenge 'in-scheme' subsidies

Following the Committee session on 16 November, I am writing in response to your request for clarification about an interested person's ability to ask the Competition Appeal Tribunal (CAT) to review a subsidy made under a subsidy scheme.

A scheme is a way of minimising the administrative burden for awarding many subsidies of a consistent type. A public authority must make an assessment of the terms of a proposed scheme against the relevant subsidy control principles, the prohibitions and requirements. Importantly, the authority must not make the scheme unless it decides the scheme complies with those principles, prohibitions and requirements. It will then set out clear terms for the administration of the scheme, which all subsidies granted under the scheme must comply with.

If an interested party considers that the scheme is not compliant with the principles, prohibitions or requirements, then it can be challenged within the normal limitation periods, which generally begin when a full transparency disclosure has been made.

Provided that a subsidy meets the scheme's terms, two consequences follow: first it will comply with the principles, the prohibitions and requirements; second that subsidy cannot be reviewed in the CAT. It is therefore unnecessary for the public authority to conduct separate assessments against the principles, the prohibitions and requirements for each subsidy under that scheme.

You specifically asked for clarity around when a subsidy made under a scheme can be challenged. If a subsidy purports to be part of a scheme but does not comply with its terms, then an interested party may bring a challenge arguing that this subsidy has not been given under the scheme and should not enjoy the protection of the scheme, but is instead a standalone subsidy where the public authority did not consider the subsidy control principles. The CAT could be asked to determine this question. If the CAT finds that the subsidy ought to have been treated as a standalone subsidy, it could also be asked to determine whether other relevant requirements have been met.



Of course, if a decision to give a subsidy within a scheme – or a standalone subsidy – has been awarded in a way that is irrational, biased, or otherwise contrary to general public law principles, then judicial review through the relevant courts is available to any interested party seeking to challenge that decision, even if there is no question of compliance with the substantive subsidy control requirements.

Availability of judicial review in relation to public authorities' use of Clause 76(5)

You also asked for clarification about the possibility of seeking judicial review of a public authority's decision to withhold information under Clause 76(5) when replying to a pre-action information request. Subject to the normal conditions for bringing a judicial review (such as the need to seek the review within the prescribed period, and to have a meritorious complaint), an application for judicial review in the High Court or Court of Session could be made.

The premise for an interested party making a pre-action information request is that the potentially non-compliant subsidy may harm their interests and may not be compliant with the subsidy control requirements. That means that if the interested party was dissatisfied with a public authority's response to their pre-action information request, it would likely be because the response did not shed enough light on whether a subsidy was granted in accordance with the regime's requirements.

In that scenario, I expect an interested party would be more likely to proceed with asking the CAT to review the subsidy itself, rather than a judicial review of the public authority's actions in relation to Clause 76(5).

It is also worth noting that the CAT may take into account the public authority's response to the pre-action information request in its judgment.

I hope that this additional information is helpful. I am copying this letter to other members of the committee and will arrange for copies to be placed in House Libraries.

Yours sincerely,

PAUL SCULLY MP

Minister for Small Business, Consumers & Labour Markets
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