

ANNEX

Draft FTA Text on subsidy control

Chapter [] Subsidy Control

Article 1

1. *Any aid granted by an authority of the Member States, the Union or the United Kingdom or otherwise through State resources in any form whatsoever which is limited to certain enterprises, distorts or threatens to distort competition in an appreciable way and which does not further an objective of common interest in accordance with this Chapter shall be actionable. [NTD: ENTERPRISE IS THE WTO SCM TERM ALSO USED IN THE UK ENTERPRISE ACT 2002. UNDERTAKING IS THE EQUIVALENT EU TERM.]*

Article 2

Specificity

1. *Certain enterprises shall mean aid that is specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority. Specificity shall be determined by reference to the general availability of a measure. Including: [NTD: THE FOLLOWING TEXT IS LIFTED FROM ART 2 WTO SCM AGREEMENT]*
 - a. *Where the granting authority or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.*
 - b. *Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.*

- c. If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation*
- 2. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.*
- 3. Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.*

Article 3

Effect on Competition & Trade

- 1. Aid within the meaning of Article 1 shall not distort competition and trade in an appreciable way where:
 - (a) Aid is below €50m per measure per 12 month period. Such threshold shall be indexed once a year to the prevailing rate of consumer price inflation in each jurisdiction or other such indexation or threshold as the Joint Committee shall determine from time to time;*
 - (b) Aid for infrastructure that is competitively tendered and generally available, including infrastructure that can be economically exploited;*
 - (c) Aid for goods or services that are not traded in a material way between the Parties; or*
 - (d) Aid for provision of service of general economic interest.**
- 2. Aid within the meaning of Article 1 above shall distort competition and trade in an appreciable way where:
 - (a) There is no market failure, equity or cohesion concern that the market cannot deliver itself;*
 - (b) The aid lacks incentive effect;*
 - (c) The aid exceeds the minimum needed to induce the additional investment or activity;*
 - (d) The aid is not transparent;*
 - (e) The aid takes place in a market in structural absolute decline provided such goods or services are traded in a material way between the Parties;*
 - (f) The aid causes the beneficiary to close down the same or similar activity in the jurisdiction of the other Party; or*
 - (g) The aid causes, against an evidenced counterfactual, an investment project to move from the jurisdiction of the other Party.**
- 3. Aid within the meaning of Article 1 but not within sub-section 1 or 2 of this Article shall be assessed by the competent authority for the Party concerned on the basis of economic and legal evidence for its effects on competition and trade between the UK and EU.*

4. *Such assessment may take the form of individual notification, group, scheme or block exemption.*

Article 4

Objectives of Common Interest

1. *Aid within the meaning of Article 1 shall pursue an objective of common interest where the Joint Committee has defined such a common interest and where the aid measure achieves or contributes to that common interest with the least possible distortion to competition and trade..*

Article 5

Competent Authorities and Courts

1. *Each of the United Kingdom and the Union shall maintain competent authorities to carry out the assessment described in Article 3 and Article 4 above.*
2. *Such competent authorities shall:*
 - a. *be independent of granting authorities within the jurisdiction of the relevant party;*
 - b. *have sufficient resources to carry out its tasks;*
 - c. *have sufficient powers of investigation to carry out its tasks, including powers to obtain evidence; and*
 - d. *to the extent possible under the constitutional limitations of each Party, be empowered to order the recovery of aid that is found to be in breach of this Chapter from the relevant beneficiary or beneficiaries plus interest at the applicable reference rate agreed by the Joint Committee from time to time.*
3. *Each Party shall maintain a system of appeal to independent courts or tribunals empowered to judicially review decisions of competent authorities.*

Article 6

Standing

1. *Any Member State, the United Kingdom, the Union and any person, enterprise or association of enterprises whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations shall have standing to participate in the procedures of the competent authorities and courts of any other Party.*
2. *Without prejudice to Article 6(1), each Party shall offer national treatment for such rights.*

Article 7

Actionable Subsidies

1. *Each of the Union and the United Kingdom shall be entitled to take the action described in this Article against actionable aid within the meaning of Article 1.*
2. *Should the Union or the United Kingdom consider that actionable aid has been paid or is anticipated to be paid by the other, it may complain to the competent authority of the other Party.*

3. *The competent authority shall acknowledge the complaint under this Article within 5 days and shall open proceedings under or equivalent to those foreseen under Article 108(2) TFEU within 30 days of the complaint, unless such proceedings are already in progress.*
4. *The competent authority shall adopt a decision within 12 months of the opening decision foreseen in Article 7(3) above on the basis of the information available to it at that time. Such time period to be extended by mutual agreement.*
5. *Should the Union or the United Kingdom disagree with the decision of the relevant competent authority, they may request consultations. The Joint Committee shall convene such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution in light of the decision of the competent authority.*
6. *If no mutually agreed solution has been reached within 30 days of the request for consultations, such time period to be extended by mutual agreement, the complaining party may impose countermeasures, provided that:*
 - a. *The party imposing countermeasures has utilised their right to appeal the decision of the competent authority;*
 - b. *Countermeasures are to the fullest extent possible focused on the same beneficiary or sector that received the aid complained of;*
 - c. *Countermeasures are proportionate, meaning they should not exceed the harm caused to competition and trade by the subsidy complained of taking into account any remedies imposed by the competent authority and the extent to which the measures support an objective of common interest; and*
 - d. *Countermeasures shall lapse by automatic operation of law within 14 days of the Parties announcing settlement.*

Article 8

Subsidy Control Dispute Settlement

1. *The United Kingdom or Union may instigate the dispute settlement procedure [cross refer to the generally applicable DSM provisions] in respect of the following disputes:*
 - a. *The competent authority or courts are not complying with their obligations under this Chapter; or*
 - b. *Countermeasures imposed pursuant to Article 7 are not justified or are disproportionate.*
2. *This Chapter shall be without prejudice to either Parties' rights under the WTO Subsidies and Countervailing Measures Agreement.*