JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UK ON COMPETITION LAW

RESPONSE TO BEIS CONSULTATION PAPER "SUBSIDY CONTROL: DESIGNING A NEW APPROACH FOR THE UK"

31 March 2021

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I. OVERVIEW

(1) The Joint Working Party ("**JWP**")[1] welcomes the opportunity to comment on the BEIS consultation on the future of the UK subsidy control regime.

(2) We have, in this response, concentrated on those issues where our experience as legal practitioners in the field of State aid and subsidies law is likely to be of most weight: we have not therefore attempted to respond to all the questions raised. We also note – and draw BEIS's attention to – the two webinars organised by the UK State Aid Law Association in March 2021 (to which several of the authors of this paper also contributed), links to which are available on www.uksala.org.

(3) We note that the Government intends to implement a new regime by way of primary legislation rather than by using its powers under the EU (Future Relationship) Act 2020 ("**EUFRA20**") to implement provisions of the Trade and Cooperation Agreement ("**TCA**") by secondary legislation. We welcome that, as it is in our view plainly right that such important legislation should be fully debated by Parliament, with opportunities for amendments to be proposed. We would, however, suggest that – notwithstanding the urgency of this legislation – the Bill should be published in draft so as to allow at least some opportunity for further comment: this will be novel legislation that will raise a number of difficult legal and in some cases constitutional issues, and a number of the suggestions made in the consultation document will require detailed thought if and when they are fleshed out.

(4) We would highlight the following themes of our response.

a. The current interim regime, based on (essentially) giving direct effect to Article LPF.3 of the TCA by means of section 29 of EUFRA20, is causing considerable difficulty and uncertainty, given in particular the lack of any definition of key terms in Article LPF.3 and the uncertainty as to how the relevant courts would approach the review jurisdiction they now have under Article LPF.3.10 read with section 29. The net effect has been to make many granting authorities and beneficiaries reluctant to move away from the familiar approach under the EU State aid regime. The sooner a new regime is in place, the better.

b. The new regime will need to provide guidance – whether in the form of legislative definition, statutory guidance or otherwise – as to the meaning of key terms found in Article LPF.3. Merely by way of example, in the absence of guidance or statutory language as to the way in which the question of effect on trade under Article LPF.3.1(b)(iv) should be approached, there will be a tendency to apply the State aid case-law on "effect on trade" (especially given the "or could have" wording and given the absence of the "significant negative effect" language that appears in Article LPF.3.12).

c. The Independent Body ("**IB**") will play a key role. We consider that it should play a formal advisory, and enforcement, role in considering subsidy decisions. We do not think that a body that does not consider cases in any detail but simply carries out general review functions would

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be valuable. But an IB that was involved in cases – particularly the more significant ones – would provide a valuable role in improving the analysis of the trade-offs inherent in any major subsidy proposal, as well as building confidence in the UK's trading partners and potential investors as to the robustness of the UK's approach to subsidies. We think that the CMA is bast placed to carry out that role.

d. We consider that the Competition Appeal Tribunal ("**CAT**") should exercise the function of reviewing subsidy control decisions.

II. SUBSTANTIVE ISSUES

1. *Q3: Do you agree with the Government's objectives for a future subsidy control regime? Are there any other objectives* that *the Government should consider?*

(5) A paramount consideration for authorities considering the provision of subsidies, potential beneficiaries and others involved (such as lenders) is legal certainty. Without the ability to take commercial decisions on a sufficiently secure basis, investment will be jeopardised.

(6) At present, the absence of detailed provisions and guidance on the operation of the United Kingdom's new subsidy regime is giving rise to legal uncertainty. Many critical terms in Article LPF.3 (which has effectively been given direct effect in UK law by means of section 29 of EUFRA20) are undefined, with the only certainty being that it is not safe to assume that they mean the same thing as do corresponding terms in EU State aid law. Grantors and beneficiaries may already consider that the absence of such implementing provisions affords them additional latitude, and this may in turn give rise to an increased risk of costly and disruptive legal challenges.

(7) The JWP considers that the early publication of such detailed provisions and guidance should therefore be a priority, if necessary on an interim basis.

(8) The new UK subsidy regime will need to comply with the relevant obligations set out in the TCA and other international agreements to which the United Kingdom is party. Clear guidance on the interpretation of those obligations as implemented into UK law would reduce the risks of litigation in those instances in which the size of the project would justify the legal costs involved in judicial review and mitigate the risk of an absence of effective remedy in other cases.

(9) The regime will need to address any uncertainties that might result for grantors, beneficiaries and others from the evolution of the future UK/EU institutional arrangements, including the novel mechanisms in the TCA relating to the retaliation mechanism.

(10) We also note that, under section 52(1) of the UK Internal Market Act 2020 ("**UKIMA20**"), subsidy control is a reserved matter under the devolution statutes only to the extent that it controls "distortive or harmful" subsidies. That phrase, as defined, would appear extend to subsidy control that aims to avoid the distortion of competition or harm to businesses (including foreign businesses): but it will be important to make sure that the regime as developed is consistent with the reservation – and the definition of "subsidy" needs to be framed with the terms of that reservation in mind.

(11) We also consider that the new regime needs to facilitate interventions that deliver of the strategic interests of the devolved Governments (and indeed local authorities throughout the United

Kingdom) as well as on those of the UK Government. It is not clear from paragraphs 27-29 whether that is accepted: the language seems to acknowledge that devolved and local governments will have their own strategic interests, but only UK government strategies are referred to (and the headline refers only to "UK strategic interests".

2. ***Q6: Do you agree with the four key characteristics used to describe a support measure that would be considered a subsidy? If not, why? (Also covering Q22: Should the Government consider any additional ways to protect the UK internal market, over and above the inclusion of a specific principle to minimise negative impacts? If so, what?)***

(12) We note that if – as we agree it should – the new regime requires consideration of the effect of a subsidy on competition in the UK internal market, then limiting the definition of "subsidy" to measures that have a harmful or distortive effect on international trade (the fourth principle) seems hard to justify: it would leave out of the scope of the regime support measures that have no harmful international effect but which caused major distortions in the UK internal market (and we note that the "effect on international trade" test is likely to be a real test rather than the very low threshold test applied in EU law, so that there is a real likelihood of support measures that have significant domestic effects not being caught by that test). It would therefore seem to us right in principle to extend the fourth characteristic so as to include any measures that had an appreciable harmful effect on competition within the UK (and we note that guidance might be needed so as to move away from the tendency in EU State aid law to assume that any aid to any player on a market necessarily affects competition on that market).

(13) We also note that the first principle refers to "a financial contribution": the terms of the reservation for subsidy control in section 52(1) of UKIMA20 include assistance "whether financial or otherwise". The legislative definition needs to be clear as to whether there is an intent to limit the definition to "financial" contributions (though the definition of subsidy in neither the TCA nor in the WTO SCM Agreement would appear to be consistent with such a limitation).

3. ***Q7: Should there be a designated list of bodies that are subject to the new subsidy control regime. If so, how could that list be constructed to ensure that it covers all financial assistance originating from public resources?***

(14) We see little to be gained from a designated list (that will require frequent updating). In this area, we see no reason for not carrying over the familiar EU rules as to what counts as "state resources", which have in practice caused little difficulty in the UK.

4. ***Q9: Do you think audio-visual subsidies should be subject to the domestic regime? Please provide a rationale for your answer.***

(15) If the view is taken that the new subsidy regime should take account of the effect of subsidies on competition within the UK internal market, we see no principled reason for excluding audio-visual services from the scope of that regime: indeed, one well-known area where damaging "subsidy races" could well occur between different parts of the UK is in the area of tax breaks and grants for filming and locating film studios. We also note that excluding the audio-visual sector would require a legal definition of that sector, which may well not be straightforward given the overlap with various digital services, and provision to deal with grants that fell partly within that sector and

partly outside it. Since there may be or have been subsidies granted to the sector between 1 January 2021 and the date the new regime comes into force, the change should be prospective only.

5. ***Q12: What level of guidance or information would be helpful for public authorities to assist with their compliance with the principles?***

"High impact" cases

(16) We refer to our response to Question 23 below where we set out what further processes are required for "high impact" cases that are at a high risk of distorting the UK internal market and/or international trade and investment. As detailed, we consider that the UK regime should include a requirement for a transparent, prompt and individualised assessment by the IB (or at least by the granting authority after consulting the IB) in high impact cases. In any event, the UK government should provide clear guidance on what the criteria for subsidies in high impact cases should be to assist public authorities to identify those cases that require a more detailed assessment with respect to the legality.

(17) In addition - as further detailed in response to Question 23 - clear and detailed guidance on how such an assessment should be carried out by the granting authority or relevant independent body would ensure an efficient and transparent regime that generates certainty for the UK government and private stakeholders.

Generally

(18) The JWP would support the provision of guidance or information on the following:

a. The circumstances in which the absence of a subsidy can safely be assumed, for example where the support is provided on market terms pursuant to a rigorous competitive process.

b. The application of the de minimis threshold under domestic law and the WTO rules.

c. Services of public economic interest ("**SPEI**").

d. The application of the criteria against which the legality of subsidies will be assessed.

e. Subsidies that are deemed to be low risk.

f. Subsidies that might benefit from a presumption of compatibility with the subsidy rules.

g. The treatment of "high impact" subsidies. The JWP considers that these ought to benefit from a mechanism providing legal certainty in advance, without which investors, lenders and others are unlikely to be willing to proceed with major investments (e.g. in relation to large infrastructure projects) (see [ ] below).

h. The treatment of certain categories of subsidy pending the adoption of exemptions and/or guidance relating to individual sectors. Such guidance might, for example, formalise the current practice adopted by some granting authorities of relying de facto on the GBER in the absence of any specific UK guidance. A temporary regime, applicable until, for example, the end of 2022, could allow the government sufficient time to adopt new rules tailored to its objectives, whilst affording grantors, beneficiaries and others a greater degree of legal certainty and predictability than is presently available.

i. The treatment of individual sectors, including sector-specific exemptions. The JWP considers that guiding principles should include:

    i. Legal certainty and predictability; and

    ii. A relatively high threshold for intervention in terms of "good subsidies".

j. The position of SMEs and their ability to seek advice from the independent authority.

k. Subsidies that are prohibited or subject to conditions under the TCA. (e.g. unlimited public authority guarantees of the liabilities of an economic actor) as well as forms of subsidy where special rules apply. The latter include:

l. Subsidies in the energy, environmental and aviation sectors; and

m. Rescue and restructuring aid to both non-financial and financial services companies.

n. The operation of relevant provisions of the TCA, including in relation to the following:

    i. Enforcement;

    ii. The "level playing field";

    iii. Section 29 of the EU (Future Relationship) Act 2020.

o. Specific types of subsidy that are excluded from UK regime (to the extent that they are excluded), for example:

    i. Subsidies to compensate for damage caused by natural disasters or other exceptional non-economic occurrences;

    ii. Temporary subsidies granted to respond to a national or global economic emergency;

    iii. Subsidies in relation to agriculture and fisheries (for which special rules apply); and

    iv. Subsidies to the audio-visual sector.

6. ***Q13: Should the threshold for the exemption for small amounts of financial assistance to a single recipient replicate the threshold in the UK-EU Trade and Cooperation Agreement at 325,000 Special Drawing Rights over a three-year period? If not, what lower threshold would you suggest and why? Q14: If you consider the small amounts of financial assistance threshold should replicate the UK-EU Trade and Cooperation Agreement, should it be fixed at an amount of pound sterling (GBP)? Q15: Do you agree that subsidies under the proposed small amounts of financial assistance threshold be exempt from all obligations under the domestic regime, except for the WTO prohibitions? If not, why?***

(19) We consider that it would be preferable to specify the threshold in sterling, in the interests of easy understanding and application (particularly important in relation to smaller grants): we accept that that would mean that the threshold might have to be set somewhat below the SDR 325.000 level in order to give some room for exchange rate movements. We do not see a case for reducing that threshold any further: although it is higher than the EU *de minimis* limit, that limit is almost certainly far too low. We agree that the effect of being under the threshold should be that only the WTO prohibitions should apply.

(20) Although we have not separately answered the parallel questions (QQ18 and 19) in relation to the *de minimis* threshold in relation services of public economic interest, we think that the same points apply there, *mutatis mutandis*.

7. ***Q20: Do you agree with the Government's approach to prohibitions and conditions? Should any types of subsidy be added to either category? If so, why? Q21: Would more detailed definitions of any of the terms set out in this section, including the definition of "ailing or insolvent enterprises" be useful to ensure a consistent and proportionate approach to compliance? If so, what should these be?***

(21) We agree with the Government's approach. In the absence of definition of key terms – such as "ailing or insolvent enterprises" – that will generate substantial uncertainty and, in practice, it is very likely that practitioners and ultimately courts will simply follow the definitions of corresponding terms in EU State aid rules (at least as they stood at the end of 2020): if the Government wishes different definitions to be used, it will need to set them out in legislative definitions or statutory guidance. We note in this regard that even BEIS's own March 2020 guidance on the Local Authority Discretionary Grants Fund simply imported the EU definition of "undertaking in difficulty" into the scheme conditions.

8. ***Q23: Would an additional process for subsidies considered at high-risk of causing harmful distortion to the UK internal market add value to the proposed principles? If so, how should it be designed and what criteria should be used to determine if the subsidy is at high-risk of causing distortion?***

(22) In principle, there will be two levels of legal risk in relation to a UK state subsidy, both of which should be accounted for in the design of the UK's subsidy control regime: (i) that a subsidy is unlawful as a matter of the UK domestic law; and (ii) that, even if lawful as a matter of UK domestic law, a subsidy does not comply with the UK's international obligations in relation to subsidy control under Free Trade Agreements and the WTO regime. These risks are linked, and are likely to come under close scrutiny in "high impact" transactions engaging multiple private sector stakeholders. Those cases are not only at high risk of causing harmful distortion to the UK internal market, depending on the relevant markets and stakeholders such subsidies are also at high risk of distorting international trade and investment.

(23) We set out below where these risks are likely to crystallise, why additional processes should be incorporated in the UK regime to provide certainty, comfort and transparency and our recommendations for the UK regime in light of this.

(24) We see such cases as having some or all of the following characteristics: the (alleged) subsidy is large, the potential competitive effects are significantly favourable for the beneficiary and unfavourable for its competitors, the beneficiary's private sector lenders, suppliers and other contractual counterparties are concerned about the strength of the beneficiary's credit, and procedural routes are readily available to mount a rapid legal challenge to the subsidy.

(25) Examples of high impact transactions, discussed in further detail below, include:

a. potential subsidies resulting from large-scale public procurement;

b. bail-outs for large corporations, including emergency subsidies to support the UK economy;

c. large value subsidies, particularly in high risk sectors such as infrastructure;

d. state support measures for services of public economic interest;

e. M&A activities (including privatisation); and

f. significant tax subsidies cases.

(26) Private sector stakeholder uncertainty about the lawfulness of UK subsidies in such cases could: (i) chill private sector investment in the UK; (ii) threaten the competitiveness of UK markets; and/or (ii) ultimately stymie the efficient use of public funds for the promotion of policy objectives. We do not consider that it would be enough simply to rely on the transparency provisions plus the limited period in which a recovery order could be applied for, for the following reasons: -

a. it effectively re-creates a stand-still period during which it will be very risky to implement a high-profile scheme where challenge is a real possibility – and vital commercial counterparties may not be prepared to tolerate a conditional arrangement with a wait to see what happens;

b. if litigation is commenced, it will typically take time to resolve (probably slower than a decision from the IB); and

c. the risk in many cases is not just a recovery order: the risk of other public law remedies will also be a major factor (see (96) below).

(27) This uncertainty would be further heightened by an *ex post* regime under which the UK's independent body offers only informal guidance for the assessment of a subsidy's lawfulness. Such a regime would critically lack transparency and leave continuing uncertainty about the risk of legal challenge. As a result, beneficiary corporations, their creditors and contractual counterparties will struggle to find comfort that relevant subsidy awards are not at risk of challenge. This, in turn, could lead to the delay in the efficient deployment of government resources and a significant cooling of investment in British businesses who have been (potential) beneficiaries of subsidy.

(28) The design of the UK regime should therefore mitigate these risks. The objective of a flexible light-touch regime for the benefit of smaller, lower risk subsidies should not come at the expense of clarity for the bigger, higher impact cases where the use of government resources will have a greater market impact. In particular, the Government's objectives for the regime should be considered holistically, without focusing on certain objectives (e.g. protecting the UK internal market) at the expense of others (e.g. acting as a responsible international trade partner). The Government should also provide clear guidance on what the criteria for subsidies in high impact cases should be. These criteria should not be applied mechanically but as part of an individualized, case-by-case assessment.

(29) In many cases, the UK regime will require a balancing exercise between a subsidy's policy objective and its effects on domestic competition and international trade and investment. Clarity will be required on how such a balancing exercise should be calibrated by granting authorities, or the relevant independent body, while meeting the UK's international obligations. In our view this should include a requirement for a transparent, prompt and individualised assessment by the granting authority or a relevant independent body in high impact cases. Such an assessment will often be

complex given the need to balance different objectives and will therefore require experienced and qualified personnel and sufficient resources.

(30) These features of a regime would materially reduce the risk that awards are subjected to judicial review merely because an appropriate assessment was not undertaken by the granting authority. It will not be possible to exclude all scope for challenge. But a subsidy regime should not by design rely on the courts to legislate in place of a clear framework, applied in a coherent and transparent manner with a sufficient degree of analysis for high impact cases that are more likely to be subject to challenge.

(31) Nor should it be left to the domestic courts to ensure the UK's international obligations are met: the UK regime should already account for such international obligations. Without such provision, British businesses will be left holding the risk and suffering the consequences of competing government policy objectives and its international agreements.

(32) Set out below are a number of high-impact transactions where clarity of the UK regime is paramount.

Large-scale public procurement (including high value and long-term government contracts)

(33) Public procurements often give rise to subsidy-based challenges over whether a competitive process was properly conducted. It will be vital for the UK regime to align cohesively with applicable public procurement rules and regulations. Without alignment, government contracts are at risk of unnecessary challenges requiring detailed assessment as to whether a subsidy has been awarded and potential distortive effects.

(34) Such challenges can act as a severe roadblock to efficient functioning of government and its pursuit of legitimate objectives, causing delay and uncertainty to the execution of government contracts. By way of example, Eurotunnel's challenge to the UK Department for Transport's ferry contract awards resulted in uncertainty regarding the government's Brexit preparedness and wide-reaching disclosure requests of sensitive government material, in addition to a financial settlement to bring litigation to an end.

(35) The UK government's pursuit of social and economic policy objectives to support the UK internal market must not blind issuing authorities from compliance with the UK's international obligations on subsidy control. Legitimate procurement objectives could face challenges where there is doubt as to whether the subsidy control regime is engaged. For example, procurement conditions favouring UK businesses or products could constitute a prohibited subsidy under the TCA as one that is contingent on use of domestic over imported goods or services. Government counterparties, and their own private sector third-party suppliers or creditors, will require certainty that any condition of a Government tender does not leave the procurement open to challenge as an unlawful subsidy which would result in lost or increased costs in the delivery of the relevant contract.

Bailouts for large corporations, including emergency subsidies to support the UK economy

(36) The Government's policy position is that it will not revert to 1970s-style bailouts of unsustainable companies; and that it will uphold competition. But any State support to bail out large corporations through "rescue and restructuring" subsidies is potentially high impact and therefore subject to

challenge. Such support measures are, by nature, distortive of market conditions where a firm is saved from exiting the market as result of prevailing market conditions. In addition, bailing out British businesses is particularly susceptible to challenge where beneficiaries compete with foreign firms who may suffer a disadvantage as result of potentially distortive effects on international trade and investment.

(37) Clear parameters are therefore required on: (i) when the Government will intervene to rescue economic actors facing financial difficulties; (ii) the conditions for any rescue, including adequate restructuring plans for longer-term support measures as well as burden sharing requirements for investors; (iii) clear timelines for the different stages of the process and (iv) safeguards to maintain effective competition in the UK markets affected by the support measures, as well as avoiding an undue distortion of international trade and investment. The chosen parameters should leave no room for purely politically motivated interventions.

(38) The assessment of companies which should benefit from bailout should be based on objective criteria, transparently applied; and not leave room for uncertainty and challenge where winners and losers are determined based on inconsistent metrics. The financial position of subsidy recipients in such cases is by definition precarious. The mere fact of legal challenge to the subsidy - even before the case is resolved - can therefore exacerbate their commercial difficulties.

(39) Furthermore, responding promptly to address the damage and losses caused by economic emergencies and natural disasters are essential to maintaining stability and providing for long-term recovery of the UK economy. It is therefore vital that the regime affords a degree of flexibility to granting authorities to mitigate the impact of economic shocks resulting from such disasters and emergencies while providing comfort to financial institutions relied upon to administer subsidies. State aid given during the Global Financial Crisis and the COVID-19 pandemic were cases in point.

High value awards - most notably in infrastructure sectors - where the potential for distortive effects on competition is great

(40) In particularly controversial or high value cases, sophisticated private sector companies and financial institutions will not be satisfied if there is a lack of transparency surrounding state support. A clear and accessible assessment of lawfulness will be required for key stakeholders and market operators to measure commercial risk.

(41) Such assessments should be undertaken by the granting authorities or an appropriate independent body. This will avoid uncertain self-assessment by the private sector and ensure that the courts are not, by default, the administrators of the UK regime.

(42) Absent such assessments, the uncertainty for the private sector will increase the risk of legal challenge. This will ultimately cause delay to legitimate subsidy schemes designed to benefit the UK economy. By way of example, the Tempus challenge to the British Energy Capacity Market scheme resulted in the effective suspension of the UK Capacity Market.

SPEI

(43) By their nature, SPEI are paramount to the functioning of the UK economy. Accordingly, any delay caused by uncertainty regarding support measures to ensure such services should be avoided.

(44) At the same time, support measures in the context of SPEI require careful evaluation given the risk of cross-subsidisation by beneficiaries and potential distortive effects. It is therefore vital that a full and transparent review is undertaken for such support measures, including why a particular service constitutes SPEI and how the design of awards avoid any distortion of competition. Without such an assessment, conflicting interpretations and challenges could cause delay to the delivery of essential projects for the benefit of the UK public.

(45) By way of example, the subsidy for the nuclear power plant in Hinkley Point C was beset with delays, soaring costs and uncertainties/financial difficulties for beneficiaries as a result of challenges alleging that it did not go far enough to protect against the distortion of competition.

(46) Even if there are judicial challenges and complaints by third parties the UK regime should ensure that such cases are dealt with swiftly and without unnecessary delay given the importance of SPEI to the UK economy, improving upon the EU State aid regime on this regard. For example, in relation to support given to the former Tirrenia group (Italian ferry operators) the EU Commission launched a formal investigation in 2011 (after having started to investigate the case in 1999). Yet it took until 2020 for the Commission to conclude that certain elements of public service compensation granted to these operators were in line with EU State aid rules while it found that aid for a specific route constituted illegal State aid which had to be recovered.

Government M&A activities (including privatisation)

(47) Clarity surrounding the UK subsidy regime will be paramount where the Government acts as a market operator in high-value M&A activities, including privatisation. Counterparties will require comfort that legitimate commercial transactions are not at risk of challenge on subsidy grounds. This will be particularly true in high-value M&A where a private investor will - as standard - require assurance that the value of its investment is not at unnecessary risk by challenge.

(48) Clarity and risk assurance for private investors is particularly key as under EU privatisation principles it is up to the State seller to organise State aid-compliant sales processes, such that bidders have no or limited influence on ensuring compliant process design. Moreover, contractual warranty protection from the Seller against breaches of EU State aid rules is itself liable to constitute unlawful aid; and the private investor's right to rescind the privatisation contract will often not be attractive or feasible. This leaves private investors largely unprotected in such situations, which may discourage them from participating in the privatisation process altogether. The UK regime should avoid putting investors in such a situation.

(49) Without a transparent and clear assessment providing the level of comfort commercially required, the Government will face uncertain contractual counterparties, inefficient negotiations and aborted transactions. Notably, uncertainty and an in-depth review of the UK's proposed sale of the Tote resulted in approximately three years of stalling and, ultimately, the abandonment of the deal. Excessively long subsidy investigations without the perspective of a clear outcome (e.g. in the Tirrenia case) may also make assets significantly less attractive to investors.

Tax subsidies cases

(50) Clear guidance should be given as to when tax benefits constitute a subsidy under the UK regime. In a number of high-profile cases (e.g. *Apple, Starbucks, Fiat*), the EU Commission has interpreted State aid rules very broadly and introduced novel concepts.

(51) Guidance would in particular be needed on the criterion of specificity: under EU rules, de facto selectivity cases, i.e. those that in principle apply to all but whose effects only benefit certain groups of undertakings, are particularly difficult to identify. By way of example, the new corporate tax regime for Gibraltar that was the subject of the ECJ's Gibraltar decision was formulated to apply for all companies, but as the tax base partly depended on the size of business premises and the workforce, foreign holding companies hardly paid any tax. Since Article LPF.3.2(a) appears to "carry over" the ECJ's approach to the question of whether general tax measures are selective into the approach to the question of whether a subsidy in specific under the TCA, the default position is likely to be that ECJ case-law will continue to be applied to that question, in default of any contrary domestic provision.

(52) Also, more weight should be put on whether the tax subsidy could have distortive effects in order to identify the most relevant cases. In the EU, the criterion of distorting competition or threatening to distort competition is interpreted so broadly in the application of the law that it risks failing to have a delineating effect of its own.

(53) Finally, under EU rules, regardless of whether a fiscal measure amounted to State aid from the outset, the aid has to be paid back retrospectively for a period of 10 years. Under the TCA, the recovery of subsidies is only foreseen in limited circumstances when ordered by a UK court following judicial review, and not at all "where a subsidy is granted on the basis of an Act of the Parliament of the United Kingdom". Whilst we are not in favour of a "black and white" recovery approach that does not take into account legitimate expectations of companies trusting in tax legislation or individual tax rulings, there could be high-impact cases (e.g. significant tax breaks for SOEs) where stronger recovery powers would be justified. We also note that, in cases where a subsidy contained in a tax measure causes harm to competitors of the beneficiary of those subsidies, a failure to provide for recovery from beneficiaries could strengthen claims for damages that such third parties may have against the tax authorities.

9. ***Q27: Could additional measures help ensure that lower-risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy? What should be included within the definition of 'low risk' subsidies?***

(54) Lower-risk subsidies may be awarded by bodies with varying levels of subsidy expertise, and to organisations who will often not have the resources to take legal advice. Thus, while it is attractive in principle to ask authorities to pay subsidies free of the previous EU framework, uncertainty would create two principal risks:

a. Authorities may continue to adhere to EU law in shadow form and in particular the General Block Exemption Regulation ("GBER") and associated Commission guidance, since complying with EU law would also mean compliance with the UK's obligations under the TCA. This already reflects the experience of JWP members advising on these issues since the new year.

b. Inconsistency of approach, with some authorities reluctant to award a subsidy absent specific guidance to confirm they can do so (fearing a court challenge) while others become expansive and award funding absent an effective assessment. This would create a lack of foreseeability, increasing execution risk in small projects and potentially chilling investment. If regional variances start to emerge in the approach to self-assessing subsidy awards this could hamper the Government's 'levelling up' agenda or the UK internal market.

(55) The JWP therefore considers that replacement rules or guidance are required to address a lacuna in relation to lower-risk subsides that would otherwise arise between new UK measures concerning:

a. Small amounts of financial assistance not comprising a subsidy.

b. 'Good aid' that might benefit from a presumption of compatibility with the subsidy rules, for example by reference to certain government policy objectives.

c. Significant projects where it is clear that a detailed self-assessment or a reference to the IB would be required.

d. Specific subsidy areas. We note from the consultation document that guidance is being contemplated at least in relation to (i) energy & environmental; (ii) development of disadvantaged areas; (iii) transport; and (iv) R&D. We comment in response to Question 30 below on other areas that would benefit from specific rules and guidance.

(56) It should be possible to develop safe harbour measures, to supplant GBER, which would allow authorities to clearly identify that a subsidy could be presumed legal. The suggestion at paragraph 88 of the consultation document that this could comprise a statutory framework within which low-risk subsidies could be designed seems sensible and designed in the spirit of simplification.

(57) We are conscious of the "straitjacket" effect of GBER: GBER could be unnecessarily stifling of innovation and efficiency because it relied on the drafters of the instrument having foreseen very specific scenarios where subsidy might be required some years in advance, with no flexibility to amend this subsequently. However, the problems caused by GBER were largely due to the fact that any aid that failed to meet its conditions automatically had to be notified: that element will not be a feature of the UK system. We therefore think that there is some room to lay down some "bright line" safe harbour rules, given that where subsidies fall just outside those rules it will typically be possible for a view to be taken that the subsidy is likely to be consistent with the principles in any event (compare agreements that almost but not quite satisfy the conditions of a block exemption under Chapter I of the Competition Act 1998). However, we also agree that some of the very detailed and prescriptive GBER provisions are not the right precedent, even in that different context. The new framework might need to be dispersed such that:

a. To the extent any subject-specific measures are produced for subsidy areas (such as energy, environmental or transport) both high and low-risk subsidy frameworks should be addressed in the same measure, in the interests of clarity.

b. If subject areas will be addressed as low-risk subsidies only, these could be grouped into a single item of secondary legislation (perhaps a "Presumed Compliant Subsidy Regulation" or "**PCSR**").

(58) If a subsidy fell outside the scope of a low-risk subsidy framework, there would be no automatic assumption that it was illegal. It would merely fall to be individually assessed and the subsidising authority could take comfort that the closer they were to the position in the framework, the more likely that the subsidy would be compliant. With a sound rationale to deviate and a brief assessment that the subsidy complied with the criteria at Article 3.4 TCA, an authority could feel reasonably confident that there would not be a challenge.

(59) Thresholds should be indicated for the maximum subsidy payable under the low-risk framework. This would make clear to authorities when they need to refer to it and when they do not. These should be lower than any thresholds set for seeking guidance from the IB in order to allow self-assessment of more complex subsidies for projects in between the two thresholds.

(60) Outside the realms of special-interest sectors (discussed in response to Question 30 below) where such rules may be unavoidable, we suggest exploring the possibility of a general catch-all presumption being included in any PCSR that a subsidy meeting certain financial metrics, irrespective of subject matter, is compliant. These metrics could draw on existing objectively measurable concepts such as:

a. Maximum subsidy percentage - a greater subsidy as a proportion of project cost could be permitted at earlier stages of projects. This has worked well for R&D aid to date, but the concept could be extended to other subsidy types.

b. Eligible costs - the concept of identifying which spending is actually necessary for a project to succeed, in order to calculate the subsidy percentage should be a simple one.

c. Anti-cumulation - the principle that a subsidy should not be received twice to support the same action.

(61) In order to insert discipline into these assessments, ad-hoc audits or spot-checks could be undertaken by the IB.

10. ***Q28 – what guidance or information would be helpful for public authorities to assist on lower-risk subsidies?***

(62) Any low-risk subsidy framework should be accompanied by guidance tailored to the needs of authorities awarding these lower-risk subsidies. While the Government's interim subsidy guidance of 31 December strikes the right tone, it is insufficiently detailed. Replacement guidance should include case studies and examples. The following topics should be addressed as a minimum:

a. What comprises a subsidy, on the assumption that low-risk subsidies will not stray too far into the more subtle nuances such as e.g. tax measures.

b. The circumstances where support would not comprise a subsidy because it is on market terms.

c. How to identify subsidies which are unlikely to have a material impact on trade or significantly distort the UK single market. The threshold indicated should be materially higher, for example, than the notification thresholds set out at Article 4 of GBER.

d. How the six principles set out at Art. 3.4 TCA to identify permitted subsidies might be self-assessed where they just exceed the scope of any statutory low-risk subsidy authorisation framework.

11. ***Q29 – should the specific rules on energy and environmental subsidies apply only in so far as they are necessary to comply with trade agreements? Or should they apply under the domestic regime more generally?***

(63) Given the Government's stated desire to avoid subsidies damaging the UK internal market as well as its ambition to demonstrate global leadership in the renewable energy transition, it seems inevitable that there will be a desire to award energy and environmental subsidies that go beyond those already sketched out in the TCA.

(64) Furthermore, to limit rules only to those necessary to comply with trade agreements would lead to an artificial energy subsidy policy that follows the compromises inherent in an international agreement, rather than responding to the UK's needs and requirements.

(65) The JWP therefore favours an integrated, holistic approach to energy and environmental subsidy legislation that concentrates rules in one place to the extent possible. This should cover at least each of (i) TCA obligations; (ii) specific rules for larger energy subsidy schemes; and (iii) any separate framework considered necessary and sensible for low-risk subsidies.

12. ***Q30 – which sectors or particular categories of subsidy (such as for disadvantaged areas, R&D, transport, skills etc) would benefit from tailored provisions or specific guidance on subsidy control? If so, why, and what should the nature, extent and form of the provisions be?***

High impact cases

(66) We refer to our response to Question 23 above where we set out the key characteristics of "high impact" cases, together with key examples of subsidies that are "high impact". Such cases are at a high risk of distorting the UK internal market and/or international trade and investment and therefore more likely to be subject to legal challenge, causing uncertainty for the UK government and private sector stakeholders.

(67) As detailed in our response to Question 23, we propose that the UK regime provides for additional processes for "high impact" subsidies, including a detailed case-by-case assessment of the legality of a relevant subsidy by the granting authority or IB. In our view, such an assessment will be required to ensure certainty for the UK government and private stakeholders alike, to the benefit of the UK economy.

Generally

(68) Authorities and economic actors alike valued the predictability and certainty offered by the previous framework in relation to the areas proposed in the consultation and this certainty should be preserved so far as possible.

(69) Relevant provisions should be presented as an integrated package by subject area. That may mean specific guidance/rules for the individual assessment of larger bespoke subsidies could be presented alongside a clearer-cut framework for lower-risk subsidies.

Disadvantaged areas

(70) We agree that the development of disadvantaged areas, to support the Government's 'levelling up' agenda, would benefit from tailored provisions. This will be particularly necessary to guard against the development of subsidy races between different nations and regions of the UK as they seek to attract investment in the absence of the previous EU framework.

R&D

(71) A tailored suite of R&D principles for subsidy is desirable. This should sit at two levels, setting out key principles for self-assessment for larger more bespoke projects but also providing some more binary rules to enable lower-risk projects to proceed without the need for detailed assessment. In relation to lower-risk projects, the R&D provisions in GBER were particularly heavily used and there will be a desire from many businesses and authorities for rules in its place, albeit simpler and less arbitrary. We agree that it is important to guard against subsidies being used to poach investment from different parts of the UK.

(72) We note that aid for feasibility studies was permitted under GBER alongside fundamental research, industrial research and experimental development but that this is not referenced in the Government consultation as a candidate for subsidy. We see no particular reason why this category should be omitted from any framework, but if this is intentional the Government should explain its reasons.

Transport

(73) Given the importance of the public sector and of subsidy in the construction and operation of transport infrastructure we support the introduction of specific provisions with respect to transport. While many larger schemes may be individually assessed, there is likely to be a continued role for a framework on lower-risk subsidies granted in respect of regional airports, maritime ports and inland ports which was previously covered by GBER.

Skills investment

(74) Training subsidies are low-risk and may play a particularly useful role in the future as part of packages of regional subsidies under the levelling-up agenda. It would therefore be worth including guidance on the award of these subsidies within the framework.

(75) It is unclear whether the Government intends to replicate previous EU rules within GBER on subsidies for recruiting and retaining disadvantaged workers or those with disabilities. It may be that incentives via subsidy are not required now that employers are obliged under statute to make more provision for these categories of workers.

Other areas

(76) In our view, there would already be merit in addressing at least the following known subsidy areas, which previously enjoyed a degree of legal certainty under the EU regime:

a. Subsidies to support SMEs and start-ups, including their access to finance - this is a group of businesses who in our experience particularly value clear-cut foreseeability on available subsidies. Simplified guidance should be provided to replace the fairly complex provisions that existed under GBER.

b. Broadband infrastructure - significant subsidies will be required to support the UK's move towards a full gigabit-capable national network. While there is no mention in the consultation document, we assume that specific nationwide TCA-compliant subsidy schemes and guidance will be published as required.

c. Culture and heritage conservation - this category of projects is unlikely to have an effect on international trade or to trigger significant interest from the EU. Given that heritage and cultural projects will often be driven at a local level and subsidies usually play a significant role in progressing them, national guidance may be helpful.

d. Audiovisual (to the extent that they are included in the subsidy control regime).

e. Sport and multifunctional recreational infrastructures - the EU's previous guidance explained where authorities could invest in community facilities also used by professional sports clubs. This appeared to provide useful clarity although it is unclear how often it was used.

(77) As with the other measures we have proposed above, the optimum legal certainty and flexibility could be created by developing a framework under secondary legislation for public authorities to use when designing subsidies in each of these areas, either on a standalone basis or as part of any PCSR. The system should reserve sufficient flexibility to create new guidance or rules as additional subsidy use cases arise.

III. INDEPENDENT BODY AND COURTS

1. *Q36: What should the functions of the independent body be? Should it be responsible for any of the following: information and enquiries; review and evaluations; subsidy development advice; post-award review; and/or enforcement.*

(78) There is limited guidance in the TCA on the intended functions of the IB. The UK therefore has some flexibility in determining its functions. In our view it is important to the overall coherence of the regime, as well as ensuring value for money from the investment that will need to be made in the IB, that it is given a meaningful role and the ability to discharge its functions effectively. Such a role will also provide reassurance to third parties - both in the UK and internationally - as to the professional and appropriate operation of the UK subsidies regime.

(79) Whilst there are some constitutional complexities to be navigated with a purely domestic regime, we do not see these as creating fundamental barriers to the operation of a meaningful regime and we note that there are other examples of public bodies that provide a credible role in scrutinising the actions of Government and other sector bodies (e.g. the NAO, the CMA, the HSE).

(80) In designing the role of the IB, there is in our view a balance to be struck between on the one hand ensuring that the flexibilities of the new regime are realised, which means for example, that we do not think it should be a requirement to obtain a formal IB approval in advance of implementation of a subsidies award, whilst at the same time ensuring that the IB has sufficient exposure to, and experience of, decision making on a case-by-case basis. This will ensure that it is able to build up a substantial body of experience and understanding, such that it is able to perform a role of acting as a centre of expertise for public authorities and third parties alike.

(81) We also see opportunities, in creating the role of the IB, to design a process that works better from the perspective of third parties. A repeated criticism of the EU State aid regime has been that it has struggled to give an effective voice in the process to aid beneficiaries (who in practice have the most to lose from a finding that a subsidy is unlawful) and other third parties (who may have different perspectives that have not otherwise been taken into account). We would encourage [the Government/BEIS], in designing the overall regime, also to consider the process from the point of view of each of these interested parties.

(82) Taking all of these considerations into account, we would make the following comments on the proposed roles for the IB that are set out in the consultation paper:

a. Information and enquiries - this should be part of the role of the IB, including the provision of general published advice on designing subsidies that are compliant with the regime;

b. Review and evaluations - the IB could have a statutory responsibility to keep the regime under review (with the relevant legislation potentially specifying when such reviews should take place) and to make published recommendations to Government on future changes to the regime. To the extent the regime incorporates instruments similar to the block exemptions that exist under EU State aid law (e.g. the General Block Exemption Regulation) or general competition law (e.g. the Vertical Agreements Block Exemption Regulation), the IB's functions could include the review of these instruments at a specified date, with the possibility of published recommendations to Government on appropriate changes;

c. Subsidy development advice - we think that the IB, given that it is intended to be a centre of knowledge and excellence, should be available to awarding authorities to provide informal ex ante advice on the design of schemes and individual awards. As this is informal advice we envisage that this would be a private process although it may be appropriate in certain cases for other parties such as the potential beneficiary or co-investors to be able to participate, We would see this as supplementing the role that has historically been taken on by the BEIS State aid/subsidies team (although we would not envisage that the IB would have a role in deciding overall Government policy e.g. on subsidies priorities);

d. Post-award review - we suggest that the IB should be given powers to conduct reviews of schemes and of individual awards, either of its own motion or in response to a request from a public authority, beneficiary or a complainant. The IB should be obliged to investigate in the event that it has reasonable grounds to suspect that a subsidy has been awarded in breach of the UK's international obligations. This review should be subject to specific processes and timelines, involving appropriate consultation with all interested parties. The review would not have the effect of imposing any standstill on implementation of the measures in issue (a party seeking this form of relief should apply to the courts);

e. Enforcement - to be meaningful, it will be important that the ex post review carries some powers of intervention. In the event that the IB finds that there has been any breach of relevant law, it

would (subject to an exception for primary legislation[2] where its powers can only be declaratory) be able to negotiate, and ultimately to require, changes to the operation of aid schemes. However, these changes would be on a prospective basis only. For individual awards (not under a scheme), remedies could include modifications to subsidy; replacement, removal or modifications to any conditions to the subsidy; or (in the most serious cases) recovery of all/part of the subsidy. However, the aim would not be to restore the status quo ante (e.g. through awards of interest) and there would be no element of penalty (other than procedural sanctions e.g. penalties for the provision of misleading information). Decisions of the IB on these types of review would be published and would be subject to challenge by way of judicial review in the normal way.

(83) In addition to the above, and as discussed in response to Questions 23 and 30 above, we think that the IB should have a formal ex ante role in relation to those categories of case where there is a particular need for legal certainty: such as high value high profile projects, or structural projects with commercial co-investors. See further the response to Question 38 below.

2. ***Q37: Should any review of a subsidy by the independent body consider all the principles, and the interaction between them, or only some principles, and if so which ones?***

(84) We see it as important that the independent body acts as a single centre of expertise on this topic and so it should review all of the principles as part of a holistic assessment.

3. ***Q38: What role, if any, should the independent body play in advising public authorities and reviewing subsidies before they have been awarded?***

(85) For the reasons explained in response to Questions 23 and 30 above we see it as important to the smooth operation of the regime - both for public and private sector parties - that the IB has a formal ex ante role in relation to those categories of case where there is a particular need for legal certainty such as high value high profile projects, or structural projects with commercial co-investors.

(86) In relation to these types of projects there should be an obligation on the award giver to consult with the IB in advance of the award and to obtain written advice from the IB. There would need to be specific processes and timelines for the IB to deal with these applications. We would envisage the thresholds for this duty to provide advice to be calibrated in a way that would only capture a handful of cases per year, bearing in mind the need to strike a balance in minimising delay/bureaucracy, but also minimising the risk of subsidies that are awarded in breach of the principles where such subsidies are high value and/or significantly distortive of competition.

4. ***Q39: If the independent body is responsible for post-award review, what types of complaints should it be able to receive and from whom?***

(87) For the reasons explained in response to Question 36, we would like the IB to have the ability to conduct post-award reviews of its own initiative, or at the request of a public authority, beneficiary or a third party.

[2] Although the UK Parliament might be able to legislate so as to give the IB power to require changes to legislation passed by the Scottish Parliament, the Senedd or the Northern Ireland Assembly, such a proposal would give rise to a number of difficult and controversial issues under the devolution settlements as well as practically, and would require very careful consideration.

(88) Assuming that there is an effective private redress option available to complainants via the courts, we would expect the IB to be able to apply prioritisation criteria to any complaints that it receives (in the same way that the CMA approaches CA98 cases) and would not be obliged to pursue complaints. Accordingly, and bearing in mind the nature of the remedies that we envisage the IB administrating, we would not see a need to be overly prescriptive in terms of the standing of the complainant or, for example, to impose a requirement to demonstrate specific harm. We envisage that the IB would publish and keep under review the prioritisation criteria that it is applying.

5. ***Q40: Which, if any, enforcement powers should the independent body be given? In what circumstances could the body deploy them? What would be the routes of appeal and the interaction with judicial enforcement?***

(89) See the response to Question 36 above. Broadly speaking, what we would envisage is that (subject to an exception for measures in the form of primary legislation) the IB would have appropriate powers to enable it, in circumstances where it is satisfied that an aid scheme or individual award is incompatible with the UK subsidies rules, to negotiate and, ultimately, to require that steps are taken to bring the arrangements into line with the subsidy rules. However, these powers would essentially be prospective only - there would be no expectation that the IB would restore the status quo ante (e.g. through allowances for interest) or award compensation, although in the most serious cases of an individual award, it could order repayment of part/all of the subsidy. A claimant seeking a remedy such as compensation would need to pursue its action in the courts.

(90) Provision would need to be made for the interaction of timetables in the event that a complainant wishes to complain to the IB without losing its ability to pursue a remedy in the courts. Given the short time limits that apply for judicial review applications it is unrealistic to expect that the IB would be able to reach a decision in all cases prior to the expiry of the relevant limitation periods. Accordingly we would expect that parties would need to commence proceedings with provision for them to then be stayed to allow a reasonable timeframe for a decision from the IB.

6. ***Q41: How should the independent body be established in order to best guarantee its independence and impartiality when exercising its operational functions?***

(91) In our view the CMA is the body that would be best placed to house the IB. The CMA has international credibility as an independent competition agency (which will give its conclusions weight in the event of disputes at international level as to the consistency of particular UK subsidies with its international obligations) and housing the IB within the CMA will give it access to resources (e.g. specialist economic support) that it will need. It would also have the flexibility to move deploy staff in and out of the section dealing with subsidies as needs require: an important point given the likely uncertainty, until the regime has bedded down, as to the workload of the IB. We therefore see this as a better and more cost-effective approach than creating a standalone IB. We do not think there is any other organisation that would be better placed to take on this role. We do not think the functions of the IB should be split between a number of different bodies as we think this would make it hard for it to build its role as a centre of expertise.

(92) Consideration would need to be given to the exact constitution of the IB within the CMA. It would be possible for it to be constituted such that it can operate with a degree of independence within

the CMA if that was thought to be helpful to its role. We note that the IB will have an unusual role in that unlike the rest of the CMA, which is primarily (but not exclusively) focused on the actions of private businesses, the IB will be primarily (but not exclusively) focused on the activities of the public sector. This may bring with it a need for strengthened provisions around independence and appointment in order that the decision making can be seen as impartial. The existing panel structure of the CMA might be one way to achieve this.

(93) We note that the CMA is already facing a greatly increased workload as the result of acquiring powers and jurisdiction over international competition cases and large mergers that were exercised by the European Commission until the end of the transition period, as well as its likely acquisition of new consumer powers. It may also be seen as a London body. However, if it is sufficiently well-resources, it should be able to meet the additional challenge: and it already has an office in Edinburgh, which could presumably be expanded.

(94) We note that the Trade Remedies Authority ("TRA") will also need to decide on the question of the existence and effect of subsidies (foreign subsidies said to have an adverse impact on UK producers). Though the WTO subsidy rules will not necessarily mirror the domestic subsidy rules in any respect, it would be sensible for the IB and the TRA to liaise so as to avoid any inconsistencies in approach to common issues that could cause difficulty.

7. ***Q42: In addition to the application of time limits, are there any other considerations for implementation of the recovery power?***

(95) We note that a one month time limit for challenge from publication or explanation in a case where recovery is sought is a very tight limit, especially as (in contrast to eg merger cases subject to a one month time limit in the CAT) the prospective claimant may not have had any prior involvement in the decision-making process (or even have been aware of it). In any event, there should be a provision to allow extension in exceptional circumstances.

(96) We also note that the usual suite of remedies available on judicial review, including quashing orders (or, in Scotland, reduction), are likely in practice to be as almost as concerning to public authorities and beneficiaries as a recovery order. Many subsidies involve grants being given over a period: so that an order that results in further payments no longer being possible is likely to be as commercially disruptive as an order that payments already made should be recovered. Further, even in relation to payments already made, the effect of a quashing order or reduction rendering the decision a nullity may well give rise to questions as to whether the beneficiary has a liability in restitution to repay money granted under the (now void) decision.

(97) One approach – which could be made in CAT rules if the CAT were the tribunal to be charged with determining judicial reviews in this area – would be to provide for a single time limit for all judicial reviews raising subsidy control issues of, say, two months, whatever remedies were sought.

8. ***Q43: Should a specialist judicial forum such as the Competition Appeal Tribunal hear challenges to subsidy schemes and awards? If not, why?***

(98) The JWP is of the clear view that challenges to subsidy schemes and awards, and indeed any other challenges to decisions under the new regime, should lie by way of judicial review before the CAT.

(99) Absent special provision, such challenges would be brought by way of a claim for judicial review before the Administrative Court of the High Court under part 54 of the Civil Procedure Rules, or under the equivalent procedures in the Court of Session in Scotland and High Court in Northern Ireland.

(100) Leaving challenges to be dealt with by way of the general procedure for judicial review has considerable drawbacks.

(101) Under the former EU State aid regime, challenges to State aid decisions were normally brought by way of judicial review in the relevant jurisdiction in the UK. However, the ground for review was typically the threshold question of whether a measure constituted notifiable State aid under Article 107(1) TFEU and was therefore unlawfully granted because it had not been notified to the European Commission in breach of the obligation to do so imposed by the final sentence of Article 108(3) TFEU and was not otherwise exempt from that obligation to notify.

(102) Any further challenge to the assessment of the compatibility of the aid with Articles 107-108 TFEU or with a block exemption would necessarily involve challenging a decision of the European Commission before the European Court. It would not be a matter for the UK's courts.

(103) The European Court has, as a result, built up a substantial body of State aid jurisprudence, so that it - particularly the EU General Court - is effectively a specialist tribunal in this area.

(104) Under a UK new regime, the UK authorities will be taking decisions equivalent to those previously taken by the European Commission and reviewable by the European Court.

(105) It would seem desirable for the UK to seek to follow the experience (not the jurisprudence) of the EU General Court and develop judicial expertise in subsidy control matters within a specialist tribunal.

(106) This cannot easily be done in the Administrative Court, Court of Session or High Court in Northern Ireland as allocation of cases to judges is determined by the vagaries of each Court's listing system. Listing is essentially determined by judicial availability at any particular time. Judges deal with a broad range of administrative matters and therefore it would be difficult to develop judicial expertise in subsidy control in any systematic manner.

(107) The CAT has the advantage of being a UK-wide tribunal. It decides at the outcome of any case whether the proceedings are to be treated as being in England and Wales, Scotland or Northern Ireland, which then determines to which appellate court further appeals lies (i.e. the Court of Appeal in England and Wales, the Inner House of the Court of Session in Scotland or the Court of Appeal in Northern Ireland).

(108) The CAT has the advantage that its judges are trained in competition law, which is a related discipline, and they have assistance from specialist judicial assistants (referendaires) employed by the Tribunal. The Tribunal is understood previously to have carried out internal training exercises in EU State aid law in preparation for potential conferral of this jurisdiction on it, and doubtless would carry out training under the new subsidy control regime.

(109) The CAT is familiar with judicial review as it exercises judicial review powers over a variety of matters, notably in the field of merger control and market investigations under sections 120 and 179 of the Enterprise Act 2002 respectively.

(110) It has exercised its judicial review powers in the fields of merger control and market investigations with a notable degree of restraint. It operates under the principle that "the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker": *BAA v Competition Commission* [2012] CAT 3, §20(6).

(111) The CAT also now has jurisdiction to hear claims for damages for breach of competition law. A number of High Court and Court of Session judges are appointed to the Tribunal so expertise in damages litigation is already 'hardwired' into the CAT.

(112) The CAT is also not under the same listing pressures as the Administrative Court and should be able to carry out reviews over considerably shorter time periods, for which provision may be made in the relevant legislation.

(113) Finally, the CAT is well-regarded by practitioners who would have confidence in its ability to exercise review powers under the new subsidy control regime. John Penrose MP in his recent independent report on competition policy Power to the People also recommended (at page 58) that all appeals against regulators' decisions in the competition and regulatory sphere should lie to the CAT.

(114) Consideration will have to be given to the interaction between decision making by the IB and proceedings before the CAT, but this would seem to be capable of being addressed by conferring appropriate case management powers on the CAT so that its review powers do not cut across proceedings before the IB.

(115) It would seem to us to be sensible for the IB to have a right to intervene in all subsidy control cases (as, under the TCA, does the European Commission). We also suggest that the Secretary of State and the devolved governments have the right to intervene in all cases: at least in the early stages, it is likely to be of considerable assistance to the CAT to be able to hear from all sides with a strong interest in the development of the new regime.

(116) Further consideration would also have to be given to cases where subsidy control accounted for some of the grounds of challenge to a granting decision but where that decision was also being challenged on general public law grounds such as excess of powers or apparent bias. In practice, we suspect that the CAT is likely to be able to deal with cases much more quickly than the Administrative Court or Court of Session, so the right approach might simply be to leave non-subsidy control grounds to be dealt with after the CAT has ruled on the subsidy control ones (just as, in cases where a complainant who has exercised a statutory right of appeal on some grounds also seeks judicial review of the same decision on other grounds not within the statutory appeal mechanism, the judicial review proceedings are typically stayed pending the statutory appeal).

JWP
31 March 2021