

## **Subsidy Control - Designing a New Approach for the UK – Response to Public Consultations**

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### **Question 1: What types of subsidies are beneficial to the UK economy?**

1. The UK economy would certainly benefit from a stable, effective subsidy regime that creates clear expectations for economic actors with minimal bureaucracy.
2. Subsidies that build innovation capabilities, such as education and training subsidies and research and development (R&D) incentives, would benefit the UK economy. The UK is well positioned to dominate frontier sectors. To do so requires access to highly educated labour. Subsidies for education and training as well as subsidies that help to build knowledge systems and create networks would ensure a deep pool of high-skilled labour. Subsidies that aim at internalising knowledge spill overs would also benefit the UK economy. Knowledge spill overs typically occur between related activities located in the same geographical cluster.<sup>1</sup>
3. Whilst the government should not be in the business of bailing out unsustainable companies, there is a role for government support for economic actors negatively impacted by discrete global economic shocks. The US, for example, funds financial assistance for workers and firms negatively impacted by trade via the Trade Adjustment Assistance (TAA) program. The European Globalisation Adjustment Fund co-finances assistance together with national governments to support subsidies for active labour market programs that assist workers harmed by globalisation. Similar programmes would benefit the UK economy by minimising the impact of localised economic shocks, such as plant closures that result from globalisation. More generally, subsidies that fund a lifelong ladder of opportunity that gives all citizens the skills, knowledge, and human capital necessary to adapt to the forces of globalisation would benefit the UK economy.

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<sup>1</sup> K. Warwick, “*Beyond Industrial Policy: Emerging Issues and New Trends*”, OECD Science, Technology and Industry Policy Papers, 2013, No. 2, OECD Publishing.

4. Subsidies targeted to select regions may benefit the UK economy. Although long-standing efforts to equalise economic performance in East and West Germany, as well as Northern and Southern Italy, using subsidies have had limited success, many governments continue to use selective economic incentives in an attempt to equalise economic opportunities across regions. In Norway, for example, the State Secretary to the Minister of Local Government and Modernisation states that “The main objective of subsidies is to achieve value creation and economic growth in all regions of Norway”. Norway’s efforts have met with mixed success.<sup>2</sup> But because the impacts of globalisation increasingly vary across regions within countries because of their different employment and production profiles, place-based subsidies may benefit the UK economy. In this context, it should be noted that a EU-UK TCA Joint Declaration on Subsidy Control Policies acknowledges the importance of state intervention as to address regional disadvantages and leaves a wide margin of discretion to the parties how to develop policies to tackle such disadvantages. Likewise R & D is also singled out as ‘good’ subsidy.<sup>3</sup>
5. Subsidies may be productively used to promote a social good. However, the definition of “social good” may change as governments change. In this scenario, businesses may not be confident in their ability to obtain financial assistance following a turnover in party leadership or the party in government. It may also leave subsidies open to rent-seeking behaviour on the part of economic agents. Decisions about subsidies should be insulated as much as possible from politics and rent-seeking. As Chapter 3 LPF of the TCA leaves each Party to determine how to design their own system of subsidy control, as long as it is ‘effective’ (Article 3.4.1 LPF), spending decisions could be delegated to an independent agency. In Norway, for example, an independent agency is responsible for allocating subsidies to firms within sectors and “supporting companies in developing their competitive advantage and enhancing innovation” while “achieving value-creating business development throughout the country”.<sup>4</sup> The government retains control over the total subsidy budget for each sector of the economy.

## **Question 2: What types of subsidies are potentially most harmful and distortive?**

6. There is significant literature and evidence showing which subsidies are potentially most harmful and distortive.<sup>5</sup> The exact outcome depends on a mix of characteristics of the subsidy and the market. In 2004, the Office of Fair Trading (OFT) noted, “[a]lmost all subsidies can cause some sort of competition distortion. The extent of this distortion will, however, depend on the design of the subsidy and the characteristics of the market. Subsidies that are large, provided only to selected firms and provided on a recurring basis are more likely to generate

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<sup>2</sup> S. Rickard, *Spending to win: Political institutions, economic geography, and government subsidies* (2018) Cambridge University Press.

<sup>3</sup>Declarations TCA pag 4.

<sup>4</sup>Innovation Norway (2014) Annual Report. <https://www.innovasjon Norge.no/globalassets/0-innovasjon Norge.no/om-innovasjon-norge/organisering-og-tall/arsrapport/innovation-norway-annual-report-2014-in-english.pdf>

<sup>5</sup> See, for example, OECD, *Policy Roundtable – Competition Policy in Subsidies and State Aids*, 2001, DAF/CLP (2001) 24; OFT, *Public Subsidies*, November 2004 (OFT 750); OFT response to the European Commission’s Action Plan on state aid reform, September 2005 (OFT 820); OFT, *European State Aid Control*, November 2005 (OFT 821); R. Nitsche and P. Heidhues, “*Study on Methods to Analyse the Impact of State Aid on Competition*”, Report prepared for the European Commission, Directorate General for Economics and Financial Affairs (Final Report ECFIN/R/2004/004): Bruxelles (2005); OECD, *Policy Roundtable – Competition, State Aids and Subsidies*, 2010, DAF/COMP/GF(2010)5.

*large distortions. Subsidies provided to firms that have market power are also likely to generate substantial distortions”.*<sup>6</sup>

7. If the extent of the distortive effect of subsidies largely depends on the characteristics of the subsidy and the market, there are certain forms of subsidies that are generally considered to be distortive, not simply on economic grounds, but also on political economy considerations. There are, therefore, good policy arguments to discourage or prohibit all these subsidies as they may indeed, impact negatively the UK internal market. First, export subsidies and subsidies contingent on the use of local inputs feature prominently among these ones, and are strictly prohibited in the WTO, the main reason being because they directly interfere with trade. Second, subsidies to ailing companies with no serious prospect of recovery and unlimited guarantees may also be particularly distorting. So can be financial support in sectors characterised by serious over-capacity or international competition. Chapter 3 LPF of the TCA is largely consistent with such delineation.
8. As to the question of “location subsidies”, that is, subsidies to attract investment in a particular part of the UK, it has been argued that allowing competition between jurisdictions subject to non-discrimination is beneficial.<sup>7</sup> At the same time, as the Consultation Document acknowledges, in a domestic setting, this competition may lead to a waste of public resources and subsidy races.<sup>8</sup> Accordingly, it is at the very least doubtful as to whether this form of regional competition would be appropriate for the UK or indeed, an adequate means of furthering the Government’s “Levelling Up” objective.

**Question 3: Do you agree with the Government’s objectives for a future subsidy control regime? Are there any other objectives that the Government should consider?**

9. Yes, we do. The Government’s objectives are clear and appropriate. Maintaining a competitive and dynamic market economy is of paramount importance to preserving the UK’s position in the global order as an open economy which encourages efficiencies and innovation and where businesses can thrive on the basis of fair play. These principles would seem to us to be crucial in the shaping of a domestic subsidy control regime.
10. The clear corollary to this approach is that, domestic subsidy control policy must seek to protect the UK internal market from regional subsidy races. Without rules restricting subsidy competition between the four nations (or indeed, regions within the four nations), subsidy wars are likely to ensue. In the US, for example, where there is no regulatory system governing subsidies, states spend an estimated USD 80 billion a year on subsidies to attract firms and jobs from other states to their state.<sup>9</sup> Despite the large sums involved, subsidies do not appear to play a major role in firms’ location decisions; rather, firms look for favourable labour markets.<sup>10</sup> Still, if US states were to cooperate and refrain from competing via ever more generous subsidies, manufacturing real income in the US would be 3.9 per cent higher.<sup>11</sup>

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<sup>6</sup> OFT, *Public Subsidies* in November 2004 (OFT 750), Chapter 3, page 13.

<sup>7</sup> See OECD, Policy Roundtable – Competition Policy in Subsidies and State Aids, 2001, cit., page 19.

<sup>8</sup> See also OECD, Policy Roundtable – Competition, State Aids and Subsidies, 2010, cit., pages 27-29.

<sup>9</sup> R.Ossa, “A Quantitative Analysis of Subsidy Competition in the US,” NBER Working Paper, 2017, <https://www.nber.org/papers/w20975>.

<sup>10</sup> N.M Jensen, and E.L. Malesky “Incentives to pander: How politicians use corporate welfare for political gain.” (2018) Cambridge University Press; M.Midelfart-Knarvik, K. Helene, and H. G. Overman “Delocation and European Integration: Is Structural Spending Justified?” *Economic Policy* (2002) 17 (35): 321.

<sup>11</sup> Ossa, cit. above.

**Question 4: We invite respondents' thoughts on further sources of evidence that would help to strengthen our analysis of policy impacts.**

11. Data on subsidies are generally sparse and of low-quality, particularly at the local or regional level. Despite WTO notification requirements, WTO Members are notifying fewer subsidies and with greater delays. The percentage of Members that did not submit notifications on subsidies rose from 27% in 1995 to 44% in 2013. As by the end of 2018, nearly half of all WTO members had not made the subsidy notifications that were due in 2017.
12. Global Trade Alert (<https://www.globaltradealert.org/>) is an independent initiative led by academic economists that compiles data on barriers to trade, including subsidies. Since 2009, GTA has documented over 20,000 policy measures affecting trade by G20 members, with subsidies accounting for more than 50 per cent of all measures. GTA reports subsidy data by sector but not by sub-national units.
13. Sub-national subsidy data is relatively high quality in Germany, particularly for subsidies that entail expenditures. Budgets at the federal level and in the sub-federal Länder typically include all subsidy programs that entail expenditures. Most Länder also compile detailed subsidy reports. See, for example, the subsidy report of the state of Rhineland-Palatinate at <https://fm.rlp.de/de/themen/finanzen/finanzhilfebericht/>. The best overview of data on federal and Länder subsidies in Germany can be found in the official data bank "Förderdatenbank" at <http://www.foerderdatenbank.de>.
14. In the US, data on local or regional subsidy awards can be found at <https://www.goodjobsfirst.org/subsidy-tracker> This is a company-specific database that reports economic development subsidy awards, gathered from federal, state and local programs by a NGO.
15. OECD compiles sub-national data for select countries on sector-specific subsidies, such as fossil fuels. At the sub national level, subsidies for fossil fuels are available from the OECD for the US, Australia, Canada and Germany. See here <http://www.oecd.org/fossil-fuels/countrydata/>

**Question 5: We invite respondents' views on whether our proposed subsidy control regime, including the way it functions, may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) or sexual orientation), in different ways from people who don't share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.**

16. It seems to us that the proposed subsidy control regime is 'fit-for-purpose' for two main reasons. First, because its scope is sufficiently limited so as not to encompass those traditional measures that governments usually employ for redistributive purposes. For example, by limiting its scope to 'financial measures', the proposed subsidy control regime seems to leave sufficient leeway for public authorities to adopt 'tax schemes' aiming at rebalancing existing societal inequalities so as to ultimately deliver a more equitable and inclusive market economy.
17. Second, because the new UK subsidy control regime explicitly acknowledges the role that subsidies can play in addressing market failures and equity imbalances and encourages their responsible and proportionate utilisation to meet specific public policy objectives, such as improving social equality or levelling up all parts of the UK. Although 'discriminatory

subsidies' are not expected to be a major challenge for the new UK subsidy control regime due to both its intrinsic features and the government's more general awareness and sensitivity over these issues, it would still be advisable that the government takes certain precautionary measures to mitigate potential unintended consequences.

18. Ultimately, whether the UK subsidy control regime would affect protected classes of individuals will very much depend on how the regime is enforced in practice, on a case-by-case basis, rather than on its abstract design. As such, we set out below steps which might help mitigate unintended 'discriminatory harm'. First, as part of the duties imposed on granting authorities under Principles 5 and 6 (i.e. demonstrating the proportionality of any given subsidy and adopting precautions to minimise any harmful or distortive effects on competition), the Government could also mandate public authorities to consider: (i) the existence of any unintended 'discriminatory harm' that could arise from subsidy initiatives; (ii) the proportionality of the 'discriminatory harm' arising from a subsidy vis-à-vis its policy objective and its cost in terms of distortion of competition; (iii) the counterbalancing precautions that could be taken to mitigate the 'discriminatory harm' arising from the subsidy. This could be built into a wider impact assessment as part of the competition impact assessment and/or PSED duty, which would ensure that such considerations are taken into account before the measure is adopted. It would also ensure that there is a satisfactory "paper trail" and audit record to defend the measure in any subsequent litigation.
19. Moreover, the government could collect data and run data analytics to monitor the direct and indirect market effects that subsidies may cause either individually or at an aggregated level. In this regard, it would be useful to assess the unintended indirect effects that certain subsidies - especially those most significant in terms of value and volume - could have on protected classes. For instance, it might be possible that a given subsidy or a 'subsidy scheme' granted to support a given sector, might ultimately and unintentionally dis-favour disproportionately a given protected class (e.g. women, elderly, race minorities, etc.). Accordingly, it would be advisable, that, as part of its duty to report on the operation and effectiveness of the system 'as a whole', the independent regulatory body should also have the task of verifying and assessing the substantial effect of subsidies on protected classes in its regular/annual reports. Similarly, for certain subsidies that could create significant distortions or harm, the government could also consider the possibility of mandating a pre-award 'discrimination impact assessment' released by the independent regulatory body to measure the direct and indirect effects of high-risk subsidies on protected sub-groups in the UK population.
20. Finally, to ensure that the accountability and mitigation duties are seriously taken into account by granting authorities, the government should also consider attributing specific enforcement powers to the independent regulatory body to correct or prevent any potential misbehaviour. The independent regulatory body may be equipped with the power to force granting authorities to adopt specific actions to mitigate the 'discriminatory harm' which could ultimately arise from their subsidy measures.

**Question 6: Do you agree with the four key characteristics used to describe a support measure that would be considered a subsidy? If not, why?**

21. Yes, we do, subject to the comments below. The four key elements used to define a subsidy (i.e. financial contribution, benefit, specificity, negative impact on trade or investment) largely correspond to the standard global benchmark. This definition is also essentially aligned with the one provided in the EU-UK TCA.

The first characteristic

22. The first characteristic in paragraph 49 of the consultation document would seem to define a “subsidy” by reference to the question of whether the body which makes a “financial contribution” is a “public authority”. By contrast, the definition of a subsidy under the TCA provides for financial assistance which arises from “government resources”. This would seem a broader test which is not concerned solely with the question of the standing of the body which grants the subsidy but with the question of whether the grant involves the use of public money.
23. Accordingly, the TCA requirement that a subsidy involves the use of “government resources” would be met even where the entity granting the subsidy does not constitute a public authority but it, nonetheless, makes a grant at the direction of a public authority using government resources.
24. If a subsidy is defined by reference to the standing of the body making that grant, the risk would be that government resources could be channelled to entities which do not constitute “public authorities” so that they are then made available, at the direction of a public authority, to a beneficiary providing goods or services on the market.
25. Accordingly, if the government wanted to follow the TCA approach, our recommendation is that the first characteristic is defined in a manner which makes it clear that what is relevant for the purposes of the definition is not solely the question of which entity grants the “subsidy” but whether the grant involves the use of government resources.
26. In this case, the legislation should make it clear that the requirement that the grant of a subsidy is made “by a public authority” is met also where the subsidy is granted *indirectly* by a public authority (which should then capture the circumstances described above). Indeed, we note that this is the approach adopted in Part 7 of the Internal Market Act 2020.
27. The UK can, in fact, go even further and use the TCA flexibility so as to adopt a slightly different approach, one that would achieve the objective of following the prevailing international trade law practice, strongly rooted in WTO law, while also ensuring the respect of the commitments entered into by the UK in the TCA.
28. In line with the definition of Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM) in the WTO, ‘financial contribution’ simply means a transfer of economic resources (irrespective of whether these are public or private).<sup>12</sup>
29. On the basis of such an approach, there would be no reference to the origin of the resources used in the financial assistance. This would result in a slightly broader concept of subsidy covering also those forms of financial contribution provided by ‘any other person’ under the direction of a public authority but without the use of public money. This wording would have the distinct benefit of being in line with the definitions commonly used in Preferential Trade Agreements (which usually refer to Article 1 of the ASCM) while, at the same time, ensuring compliance with the specific notion included in the TCA. It should be noted that, in practical terms, there may be no essential difference in scope between the two notions but the broader

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<sup>12</sup> L. Rubini, “*The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective*” (2010) Oxford University Press, Chapter 4.

concept would be easier to apply. Additionally, a definition close to the one in the WTO would facilitate the UK's duty of notification under that legal system.

30. Another important benefit is that the adoption of a broader concept would spare UK authorities the difficulties in applying the 'state resources' concept which the European Commission and EU Courts have consistently encountered in EU state aid law practice.<sup>13</sup>
31. Similarly, the attribution link of the conduct of 'any other person' with the 'public authority' could be clarified by adding the words "directed by" and also deleting the words "providing financial assistance" which, in light of the changes suggested above, would become redundant.
32. The interpretation of the term 'directed by' can be left to the judicious clarification of the government in any guideline explaining the interpretation of UK subsidy laws or, alternatively, to UK courts. What should be determined are the types of conduct that, falling short of specific and explicit instructions, may nonetheless satisfy the requisite legal standard of attribution. A close analysis of WTO practice in this respect may be useful.<sup>14</sup> In any event, the comparative experience of WTO and EU law shows that the term "direct" is certainly easier to construe than the "state resources" language.
33. If the government is minded to follow this approach, which is based on WTO law and the prevailing practice in international trade agreements, we would suggest that the first part of the definition in paragraph 49 of the Consultation Document be replaced as follows:

"1. It must constitute a financial contribution provided by a 'public authority', including, but not limited to, central, devolved, regional or local government, **or any other person directed by a public authority**, ~~providing financial assistance originating from public resources. ...~~"

#### *The fourth characteristic*

34. Separately, we agree fully with the proposal to incorporate within the definition of a "subsidy" considerations that relate to its potentially distortive effects on the UK's own internal market. This avoids the risk of the use of government resources escaping regulation on the basis of an analysis which concludes that the employment of government resources in particular circumstances do not have, or could have, an effect on international trade, whilst disregarding the actual or potential effects of such measure on domestic competition.
35. As to the most appropriate manner in which to incorporate such considerations in the definition, it would seem to us that the definition should differentiate between *distortive* effects on domestic competition and *effects on* international trade.
36. As to the latter, we would recommend that the reference is to an actual or potential "effect on international trade" rather than a reference to an actual or potential "harmful" effect on international trade to make it clearer that the concern here is with an "effect" on trade rather than with the question of "harm" on trade. The reason for this is that, looking at this issue from

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<sup>13</sup> See A. Biondi 'State Aid is falling, falling down: an analysis of the concept of 'aid' in the acquis of the EU Courts', in 50 Common Market Law Review, 2013, 1719.

<sup>14</sup> See L. Rubini, "State Aid and International Trade Law" in L. Hancher and J. Piernaz-Lopez (eds.), *Research Handbook on European State Aid Law* (2021) Edward Elgar, 103.

a purely UK perspective the grant of a subsidy could be deemed to have a *positive* effect in displacing investment from other parts of the world to the UK.

37. As to the question of the effects domestically, we consider that it would be more appropriate to make a reference to a subsidy's potentially *distortive effects on competition* within the UK. This would seem preferable to a formulation which refers to harmful or distortive effects on "trade or investment" within the UK. The reason for this is that, the former formulation makes it clearer that, domestic subsidy control is (also) concerned with regulating subsidies which might affect *fair competition* in the UK internal market and it is also consistent with references in UK competition law.
38. The legislation could also avoid making repeated references to "investment" by clarifying that references to trade also include references to investment.
39. In line with the above, we would recommend that the fourth characteristic of the "subsidy" definition could be defined as follows:

"4. It has, or could have, a distortive effect on competition within the UK or has, or could have, an effect on international trade."

**Question 7: 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?**

40. The approach of creating a definitive designated list of bodies that are subject to the new subsidy control regime risks the potential exclusion of bodies which do give financial assistance originating from public resources, which may not be aware of the subsidy control regime or its implications. Experience suggests that there is low level awareness of subsidy control and services of general economic interest and their interaction with public procurement. That creates risks for erroneous decision-making and subsequent challenge, which could be mitigated through the dissemination of user-friendly guidance.
41. Another reason why this is potentially problematic is because this approach will not cater for the setting up of new public bodies, which we assume will not necessarily be added to such list at the same time as they would start performing public functions, including granting subsidies. In those circumstances, the bodies in question may fall within the scope of the TCA but, as matter of domestic law, might not yet be subject to subsidy control obligations.
42. Similarly, there may be public authorities using public-private finance powers for the first time or designating new entities with responsibility for particular activities, that may not be aware of the wider regime. There are also hybrid public bodies which might perform some functions which are public in nature and some which are private in nature. Some bodies of that type will be created by way of special purpose vehicles and their creation may require them to be added to the list. Such vehicles may involve a broad range in terms of financial value of subsidy given.
43. In some circumstances, certain steps an authority takes may give them the opportunity to grant a subsidy. For example, if a planning authority which has not previously charged the Community Infrastructure Levy introduces a Charging Schedule it may then be in a position to give a subsidy. The Planning Authority may, of course, be included in the designated list for

other reasons. However, if it were not, there would be a risk that the relevance for subsidy law reasons of the step of introducing the Charging Schedule may be missed.

44. For those reasons, if a definitive designated list were to be put in place, it would probably have to be updated very frequently and will not cope with organic development as new policy initiatives are introduced. It may be too rigid and inflexible to cope with different activities carried out by public or hybrid entities, which will be very fact and context specific.
45. An alternative to a designated list may be to give comprehensive guidance as to which types of activities might attract the application of the subsidy control regime and which types of entities might give financial assistance arising from the resources of the UK, which might include reference, for example, to a definition of public authorities already in statute books as an indication of those likely to be within the ambit of the regime. It would, nonetheless, be necessary to make clear that other bodies may also fall within the scope of the regime, so while some certainty can be achieved by use of a designated list, full certainty cannot be achieved that way.

**Question 8: Do you think agricultural subsidies in scope of the AoA and fisheries subsidies should be subject to the proposed domestic arrangements? If so, what obligations should apply?**

46. In principle, agricultural subsidies and fisheries subsidies should both be subject to the general principles and rules (as, for example, happens for agricultural subsidies in the WTO) since subsidies can cause distortions also in those markets. It is known, for example, how distortive aid that boosts production can be. Equally, it is common knowledge that aid that is ‘de-coupled’ from production, that simply supports income, that creates incentives to achieve high sustainability standards or support rural development, is generally not distortive and should hence be permitted. The specificity of AoA and fisheries sectors should be considered by introducing specific exceptions. Inspiration could be drawn from EU law and, above all, to ensure full compliance with UK’s international obligations, from WTO law. In particular, in EU law, agricultural subsidies are granted within the framework of the EU’s common agricultural policy and are subject to ad hoc rules.<sup>15</sup> Another good template is provided by the general and specific conditions of Annex II to the Agreement on Agriculture (the so-called “Green Box”).<sup>16</sup> A comprehensive discipline on fisheries subsidies, which attempts to balance the protection of competition and sustainability, is currently being negotiated in the WTO.<sup>17</sup> Given its closeness to the agricultural sector, any resulting WTO disciplines can also offer a model for the UK.

**Question 9: Do you think audio-visual subsidies should be subject to the domestic regime? Please provide a rationale for your answer.**

47. Yes, in principle, they should be subject to the domestic regime since they can distort markets that are competitive. However, given the important cultural and public services goals often present in these sectors, and the need to target specific market failures (for example, the

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<sup>15</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 OJ L 347, 20.12.2013, p. 671–854, Art 211.

<sup>16</sup> See R. Melendez-Ortiz, C. Bellmann and J. Hepburn (eds) *Agricultural Subsidies in the WTO Green Box – Ensuring Coherence with Sustainable Development Goals* (2009: Cambridge University Press).

<sup>17</sup> See [https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/fish\\_e.htm](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm).

protection of linguistic minorities or the performance of public services), the availability of special and proportionate exceptions should be considered.

48. Subsidies in the audio-visual sector are also excluded in many PTAs, including the TCA. At the international level, these subsidies (which operate in services sectors) are not subject to any specific subsidy discipline (the ASCM only applies to goods; the GATS does not have any specific rule on subsidies) and are only indirectly regulated subject to GATS scheduling.<sup>18</sup>

**Question 10: Do you agree with the inclusion of an additional principle focused on protecting the UK internal market by minimizing the distortive effects on competition?**

49. We agree entirely with the need to ensure that the applicable subsidy control analysis should be concerned with first, identifying and then, taking into account, the potentially distortive effects that a subsidy could have on domestic competition. Indeed, it would seem absurd that a domestic subsidy control regime is concerned with effects on trade internationally but not to have any regard as to how it might affect fair competition domestically. It is also important to ensure compliance with the aims of the Internal Market Act 2020 and to ensure that there is no distortion between Great Britain and Northern Ireland (particularly where the latter will remain subject to EU state aid rules in relation to goods).
50. However, as we explain below, domestic competition considerations may be imported into the subsidy control analysis by amending one of the existing principles rather than by introducing an additional principle.
51. In more detail, the current proposal provides for the introduction of a new sixth principle as follows: *“Public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that might arise from a subsidy.”*
52. First, we are concerned with the reference to “should seek”. This is on the basis that, if all UK public authorities merely have to demonstrate that they have *sought* to minimise distortions on domestic competition rather than have an obligation to design a subsidy in a way which minimises such distortions, over time, the harmful effects of subsidies on competition in the UK internal market could be substantial. In the alternative, the current formulation does not add anything which is not already captured under the second principle which provides that “subsidies are proportionate and should be the minimum size necessary to achieve the stated public policy objective.” If the second principle is met, then, by implication, the currently proposed sixth principle should also be met.
53. In view of the above, we consider that a more rigorous approach, which is protective of UK domestic competition, and attains the aims of the Internal Market Act 2020, can be achieved by combining the second and currently proposed sixth principle, and by removing the reference to “should” which might suggest that the achievement of this objective is merely desirable but not obligatory, so that a combined new principle provides for the following:

“Subsidies must be proportionate and limited to the minimum necessary to achieve the stated public policy objective so as not to distort unduly competition within the UK internal market.”

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<sup>18</sup> See L. Rubini, “*State Aid and International Trade Law*” cit.above.

**Question 11: Do you think there should be any additional principles**

54. As already noted in our submission, we consider that a key aim of the domestic subsidy control regime should be the protection of fair competition in the UK internal market. We have also explained in our response to question 10 above how such considerations may be by imported by combining the second and currently proposed sixth principle, so that there should not be any need to introduce a separate principle.
55. Subject to our comments in response to Question 22 below, once considerations about domestic competition have been incorporated into the subsidy control analysis, we do not consider that there is a need for any other additional principles.

**Question 12: What level of guidance or information would be helpful for public authorities to assist with their compliance with the principles?**

56. The principles listed in Article 3.4 TCA are not going to be easy to apply as a self-standing code. These correspond to the principles of compatibility of aid as developed over sixty years by the European Commission in relation to the interpretation of Article 107(3) TFEU concepts such as market failure, equity rationale, proportionality, incentive effect and have also been ‘codified’ in extensive and detailed rules, “soft law” communications and guidance that are specifically tailored to the specificities of different economic sectors. In the absence of any UK specific guidance, there will be a temptation for legal advisers and advocates to simply extend the familiar concepts used by the European Commission to add flesh to the bones of the TCA.
57. Whilst recognising that it would be challenging for the UK to start the task of providing appropriate and timely guidance from scratch, we also recognise that the UK does not have to follow wholesale the EU’s approach in this context. Indeed, there is an opportunity for the UK to simplify and streamline existing EU state aid rules policy provisions.
58. Ultimately, a key point in this context, is a recognition that in seeking to ensure the correct application of the Article 3.4 TCA principles, there would be a need for a body of guidance, communications and other soft laws to ensure consistency of approach and indeed, provide granting authorities with valuable support in the correct application of these principles.
59. More specifically:
  - a. The decisions of public authorities are subject to public law principles. Even if enforcement of subsidy law lies with a specialist court or tribunal (such as the CAT), questions as to the grant of subsidies may arise in the courts in other contexts. For example, issues of subsidies often arise in the context of public procurement claims before the TCC; wider issues of subsidy control may arise in judicial review proceedings before the Administrative Court. Not providing detailed guidance as to the application of subsidy law could result in the development of case law which fills the gap of how the principles should be applied. That would be unattractive for two reasons. First, the development of that case law may take some time and cannot be easily predicted in advance. Second, by giving detailed guidance rather than permitting case law to fill the gap, the government has the opportunity to develop criteria that are coherent with UK-specific policy objectives for the regime. That will also assist non-specialist judges apply the law and maintain consistency if subsidy related matters arise during other court proceedings.

- b. Providing detailed guidance as to the application of the principles which applies at a national level ensures uniformity of application across the UK, which is important for the objectives of the Internal Market Act 2020 and maintain uniform conditions of competition internally within the UK to prevent “subsidy races”.
- c. Providing detailed guidance at national level is also more likely to ensure uniform and coherent application of the rules on subsidies across different regulatory regimes, such as across the UK’s nine economic regulators.
- d. Detailed guidance is also likely to provide publicly available evidence of the careful implementation of the UK’s subsidy regime and is therefore likely to enhance the reputation of the robustness regime, and is likely to reduce the risk of criticism of the regime.
- e. Guidance will also reduce legal costs for both public authorities and beneficiaries and reduce the risk of challenge from competitors or other interested parties.

**Question 13: 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?**

- 60. First, we agree that there should be a single threshold so as to provide for legal certainty to all operators. At the same time, we also agree that it would be important to consider carefully the question as to whether that threshold should mirror the value which is currently set out in the TCA and which has been determined by reference to the (maximum) value which a subsidy could have over a three-year period without it having a material effect on trade between the Parties. The potential concern here is that this maximum amount, *could* nonetheless have an effect on competition in the UK internal market. Ultimately, this requires an appropriate economic analysis but, in principle, we would consider that a prudent approach would be to limit the amount of subsidies which is exempt from subsidy regulation under domestic law to £175,000.
- 61. This figure is closer to the amount which was available to UK businesses as *de minimis aid* under EU State aid law. Such an approach would also have the benefit of limiting the risk (and the need to consider each time the possibility of such risk) of a small amount subsidy having an effect on trade which is subject to Article 10 of the Northern Ireland Protocol and which could then give rise to a separate and additional set of considerations under EU State aid law.
- 62. The amount of £175,000 over a three-year period is also consistent with the government’s proposal for triggering transparency/reporting obligations at this level to ensure compliance with commitments under WTO and other Free Trade Agreements. (See further our response to Question 33 on this point.)

**Question 14: 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)?**

- 63. As noted in our response to question 13, we consider that it would be preferable to adopt a lower threshold than that which is permissible under the TCA for small amounts of financial assistance. Such lower threshold could be expressed in pound sterling without undue concerns

about the possibility of currency fluctuations leading to the breach of the UK's TCA commitments.

**Question 15: 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?**

64. We generally agree with this but, in line with our comments in relation to question 33 and 34 we consider that it would be prudent to provide for a reporting obligation in relation to such subsidies and only exclude from reporting obligations subsidies which, as per the government's proposal, are below the much smaller value of £50,000.
65. To be clear, where a public authority decides to award small amounts of financial assistance to one business but not another that decision would (and should) remain subject to judicial review (for example, in terms of that decision's rationality) irrespective of whether the subsidy principles apply.
66. Separately, the UK government should lay down some transparent guidelines on the methods of calculation so as to ensure proper quantification ex ante and so as to alleviate local authorities and other generally smaller public bodies from excessive burdens.

**Question 16: Should relief for exceptional occurrences be exempted from obligations regarding principles, prohibitions and conditions in the subsidy control regime?**

67. Art 3.2.1 TCA exempts subsidies granted to damage caused by natural disasters or other exceptional non – economic occurrences. The 'non-economic' in nature is a new specification, which better delineates the application of the provision. Evidence from the times of the COVID-19 pandemic has shown the need for rapid financial intervention from the State in order to support both the economy as well as more generally the efforts to protect public health. Conditions applicable to this kind of relief could be restricted to those required by the transparency requirements under Art 3.6 TCA.
68. At the same time, nothing prevents the UK subsidy control system from imposing certain express obligations that ensures that subsidies are not granted in a potentially haphazard manner so that exceptional occurrences subsidies do not lead to undue distortions of competition in the domestic market as a result of decisions to subsidise one business but not its direct competitors, for example, or one sector of the economy but not another. Domestic legislation should also make it clear that subsidies in this context should seek to address the consequences which flow from an exceptional occurrence and should not provide the basis for the grant of subsidies that seek to address pre-existing issues, such as in relation to ailing companies the precarious position of which pre-dates and is not directly linked to the exceptional occurrence.
69. Accordingly, domestic legislation should, among other things, provide for a requirement to verify that the damage for which the compensation is granted is the result of the exceptional occurrence and that the subsidy granted must be limited to seeking to rectify the damage caused by it.<sup>19</sup> This will potentially offset some of the risk of poorly designed subsidies being awarded,

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<sup>19</sup> See by analogy Article 50 of the General Block Exemption Regulation: see Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU [OJ L 187, 26.6.2014, pp. 1–78].

given that they will not be, as such, subject to the same level of scrutiny as non-emergency subsidies. This is all the more important given that an exceptional occurrence might be deemed, in principle, to justify the grant of very large amounts of subsidies. We consider that a clear set of rules needs to be set out to carve out this exception, which needs to be both rule of law compliant and provide for enough flexibility for the authorities in tailoring the exemption to the exceptional occurrence.<sup>20</sup>

70. As to the question of compliance with the rule of law, the framework rules should include, as proposed in the consultation documentation, transparency obligations and the possibility for judicial review. In addition, we would encourage the government to align the exemption system as much as possible with the Civil Contingencies Act 2004. This is to ensure that the definition of ‘exceptional occurrence’ is properly calibrated with primary legislation and that it should not be at the behest of individual public authorities to decide themselves whether or not an exceptional occurrence has taken place. Furthermore, the exemption measures should be aligned to the emergency regulations as adopted under Section 20 of the Civil Contingencies Act 2004. Separately, the framework rules should appropriately delegate to the independent regulatory authority in charge of subsidy control the powers necessary to implement the exemption should an exceptional occurrence take place. This could include for instance the duty to scale the impacts of the subsidies and to establish accordingly the provisions relevant subsidies would be exempted from (as suggested at in the consultation documentation). Second, it will be useful to embed flexibility to tailor the exemption from subsidy control to the requirements of the exceptional occurrence. Thus, in case of an exceptional occurrence, the independent authority in charge with subsidy control should be able to issue swiftly guidance detailing the criteria that need to be met by a subsidy measure to benefit from an exemption. This will allow further clarity for subsidy recipients as well as for granting authorities.
71. These criteria would of course apply to those subsidies aimed at compensating an affected economic actor (or groups of economic actors) from operating an otherwise viable economic activity. Other ‘indirect’ economic effects may be excluded from the exceptional occurrence “exemption” framework; for instance, effects such a general lower aggregate demand or restrictions on capacity.<sup>21</sup> In addition, mechanisms should be put in place so as to avoid overcompensation and conditions are incorporated into grant agreements which enable a granting authority to claw-back subsidies which are proven to have amounted to overcompensation.

**Question 17: Should subsidies granted temporarily to address a national or global economic emergency be exempted from the rules on prohibited subsidies and any additional rules set out below?**

72. Our concern with exempting this type of temporary subsidies from the rules that apply to prohibited or conditional subsidies (Art 3.5 TCA) is threefold. First, subject to the second point below, disapplication of these prohibitions and conditions, granting authorities can inadvertently find themselves awarding subsidies which breach the UK’s obligations under the ASCM or indeed, commitments under the UK’s bilateral free trade agreements. For example,

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<sup>20</sup> On the tensions between rule of law compliance and flexibility of the EU Temporary Framework on COVID-19 aid see O Ştefan, “*The Future of European Union Soft Law: A Research and Policy Agenda for the Aftermath of COVID-19*”, *Journal of International and Comparative Law*, 2020, 7(2)

<sup>21</sup> See by analogy Art 15ter EU Temporary Framework for State aid [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/TF\\_informal\\_consolidated\\_version\\_as\\_amended\\_28\\_january\\_2021\\_en.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf).

we note that the UK-Japan FTA prohibits subsidies which provide for unlimited guarantees and subsidies to ailing companies without a credible restructuring plan.

73. Second, it is not entirely clear how it might be possible to apply the subsidy principles correctly but at the same time disregard the prohibitions and conditions set out in Art.3.5 TCA. For example, it would seem difficult to argue the case that unlimited guarantees would be proportionate and limited to what is necessary.
74. Third, we are concerned that disregarding these prohibitions and conditions, could lead to substantive distortive effects on the UK internal market, not least in circumstances, where it would be for each and every public body to decide how to design and grant a subsidy in these circumstances.
75. On this basis, our clear view is that as a matter of domestic law, temporary subsidies should be subject to the prohibitions and conditions set out in Art 3.5 TCA.
76. Separately, we note that Chapter 3 TCA does not specify what ‘temporary’ means. As to the effect of such temporary subsidies, it should be possible to establish by means of an economic assessment whether any potential distortion of competition is likely to have a permanent effect or simply be observed for 1-2 years. As the relief needs to be ‘targeted, proportionate and effective’ we would argue that some criteria and guidelines are necessary so as to ensure compliance with the subsidy principles as well as the prohibitions and conditions set out in Art 3.5 TCA (see further our answer Q. 22). Afterall, these subsidies should address an ‘economic’ emergency by channeling these forms of relief through predetermined criteria that may favour an eventual return to normal market efficiency within a reasonable period of time.
77. Ultimately, where necessary, the government can decide to bypass the Art 3.5 TCA restrictions in appropriate circumstances by either granting subsidies by means of primary legislation or providing in the subsidy control legislation for the possibility for the Secretary of State for the Department for Business, Energy & Industrial Strategy having the right to disapply some or all of these prohibitions and conditions for the purposes of this category of subsidies where s/he considers this to be appropriate. (Please see further our response to Question 22.)

**Question 18: Should the threshold for the exemptions for Services of Public Economic Interest replicate the relevant thresholds in the UK-EU Trade and Cooperation Agreement at 750,000 Special Drawing Rights over a three-year period, and for transparency obligations at 15 million Special Drawing Rights per task? If not, what lower threshold would you suggest and why?**

78. First, we agree with the principle that the relevant threshold for the exemptions for Services of Public Economic Interest (SPEI) and related transparency obligations should be set at lower levels than those provided for in the TCA. The reason for this is that whilst the levels set out in the TCA might be deemed adequate from the perspective of the risk of this type and level of subsidy giving rise to a (significant) negative effect on UK-EU trade and investment, but at a domestic level, the risk of such subsidy distorting competition in the UK internal market is likely to be higher.
79. Whilst ultimately, the question of the appropriate level at which this lower threshold should be set is an economic question, it would seem reasonable that this should be at or in the region of £450,000 over a three-year period. This is broadly consistent with the €500,000 of *de minimis*

aid which was available over the same period under EU State aid rules for the provision of services of general economic interest whilst the UK was a member of the EU (with no concerns ever expressed about the effects of such aid on domestic competition). That would also ensure consistency with the position in Northern Ireland, where special tasks may be entrusted relating to the production or distribution of goods, which would be subject to EU state aid rules

80. As to the transparency obligations, the figure of 15 million SDR seems particularly inadequate for the purposes of promoting and protecting domestic competition. We are of the view that transparency obligations should be triggered in relation to any SPEI subsidy which is at least above the threshold for the application of the SPEI exemption (but see further our response to Question 33 below).
81. In this context, we also note that it would be important for the legislation to make it clear that as a matter of domestic law, judicial remedies are available in relation to SPEI subsidies which are granted inappropriately, because the SPEI subsidy:
- (a) was deemed exempt but it was not; and/or
  - (b) did not comply with the subsidy principles despite the fact that compliance with these principles would not have obstructed the performance in law or fact of the particular task assigned to the economic actor concerned; and/or
  - (c) did not comply with the conditions set out in Art 3.3(2) TCA, including because the subsidy was not limited to the minimum necessary or because it allowed for cross-subsidisation.
82. In this context we also note that, Article 3.3 TCA speaks of compensation below 15 million SDR *'per task'*. On the other hand, the SGEI compensation in EU state aid law is now calculated per annum. Accordingly, a UK SPEI provider entrusted with multiple tasks can actually receive a total compensation which is higher than 15 million SDR. However, as explained above, we consider that from a domestic competition law perspective, it would be desirable to provide for stricter obligations and lower thresholds.

**Question 19: If you consider the SPEI thresholds should replicate the UK-EU Trade and Cooperation Agreement, should they be fixed at an amount of pound sterling (GBP)**

83. Please refer to our response to Question 18 in which we express the view that the SPEI thresholds should be lower than those provided in the TCA. At the same time, we consider that it would be simpler and more convenient for these lower thresholds to be expressed in pound sterling.

**Question 20: 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?**

84. Yes, the government's approach is essentially in line with what could be said to be the prevailing 'common law' in the field represented by the practice of the WTO, FTAs (including

the TCA) and the EU.<sup>22</sup> It is also in line with current law reform discussions (see, for example, the Trilateral Initiative between US, EU and Japan).<sup>23</sup>

**Question 21: 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?**

85. Article 3.5.3 TCA broadly reflects the EU Rescue and Restructuring Guidelines (R&R Guidelines).<sup>24</sup> Based on the European Commission practice, the following points may be taken into account. One of the difficulties in the application of the R & R is the fact they apply to any types of undertakings, even those that hardly fit; for instance, those without legal requirements on capital. It would be thus useful to coordinate the criteria on R & R to those future provisions providing for safe harbours for SME or micro and small companies. The other main concern has always been legal certainty. The expression ‘*ailing or insolvent economic actor*’ is excessively vague. Thus the imposition of more precise conditions seems necessary. Article 2(18) of the GBER could provide a much better benchmark as it provides for clearer guidance than the R & R Guidelines- (insolvency, net losses exceeds 50% of the subscribed capital, and very importantly criteria such as the right EBIT/EBITDA interest coverage ratio).
86. Separately, conditions such as the necessity for the concerned undertaking to set out a credible and detailed exit strategy, including a plan on the continuation of the beneficiary’s activity, the use of funds invested by the State and a repayment schedule may also be necessary. It could also be useful to clarify that different criteria need to apply to companies where the State is an existing shareholder and all other companies.
87. Emphasis should be placed on a comprehensive counterfactual assessment as to avoid any presumptions on the effect of the economic impact of a company’s difficulties. A strict counterfactual analysis would be equally necessary so as to ‘tailor’ the severity of remedial measures.
88. Finally concerning what specific measures could be adopted to limit a subsidy’s anti-competitive effects in this context, there are some useful examples in the EU COVID 19 Temporary Framework (TF) which, drawing on merger control tools, requires beneficiaries to provide certain behavioural and structural commitments.<sup>25</sup>

**Question 22: 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?**

89. In line with our earlier comments, we believe strongly that a key, if not the primary, objective of a domestic subsidy control regime should be to maintain to the extent possible a level playing

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<sup>22</sup> See Rubini, “*State Aid and International Trade Law*” cit. above.

<sup>23</sup> See Joint Statement of the Trilateral Meeting of the Trade Ministries of Japan, the United States and the European Union, Washington DC, 14<sup>th</sup> January 2020, available at [https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc\\_158567.pdf](https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf).

<sup>24</sup> Communication from the Commission ‘Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty’, (OJ C 249, 31.7.2014, p. 1–28).

<sup>25</sup> Temporary Framework for State aid at Section 3.11.6 para 72, that refers to the Notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (OJ L 133, 30.4.2004, pp. 1–39).

field in the UK internal market by keeping to the minimum necessary any distortions on domestic competition to which subsidies give rise.

90. To that end, we consider it necessary to ensure that none of the subsidy principles is formulated in a way which might render it capable of an interpretation that compliance with it is desirable, or in any event an objective which public authorities should merely *seek* to attain, but without it being necessary for them to take the necessary steps to *ensure* that each of the objectives set out in the subsidy principles is in fact attained.
91. Accordingly, any references to “should seek” (contained In principles 2, 4 and 6 as currently formulated under para 61 of the Consultation Document) should be replaced with a reference to “must” or the simple present tense.
92. In this regard, we note our recommendation (including suggested wording) in our response to Question 11 for combining principles 2 and 6. Separately, we acknowledge that the reference to “should not normally” in principle 4, reflects the wording of Art 3.4(1)(d) TCA. However, on the basis that protecting domestic competition is a key objective of domestic subsidy control legislation, it is our clear view that this more permissive formulation should be amended for the purposes of domestic legislation and a more rigorous approach is adopted by removing both the reference to “should” and “normally” so that the fourth principle provides:

“Subsidies must not compensate for the costs the beneficiary would have funded in the absence of any subsidy.”
93. Any other approach would seem to us to be likely to compromise the objective of keeping distortions of competition in the UK internal market to the minimum necessary to achieve public policy objectives.
94. Another important question in this context, is the question of who defines the public policy objectives which UK subsidies can pursue. We are concerned that if it is for each public authority in the country to determine what should constitute a “public policy objective” that this can easily lead to a “localistic” approach whereby each public authority defines public policy objectives by reference to local concerns which from a local perspective are deemed sufficiently important so as to justify (under the last principle) potentially significant distortions on domestic competition and effects on international trade.
95. Under judicial review principles, it would be very difficult for an interested party to seek to challenge such conclusion other than where this is demonstrably unreasonable.
96. Over time, such “localistic” approach to the grant of subsidies can lead to significant distortive effects on competition in the UK internal market. Accordingly, we consider it necessary that it should be for the Government to issue binding directions as to the “common” UK public policy objectives that subsidies can (only) pursue.
97. No doubt, within such framework, it would be possible for local objectives also to be pursued. However, by defining clear directions and a framework within which common UK policy objectives can be pursued, the risk of subsidies being pursued and assessed with purely local considerations in mind should be mitigated.
98. For example, to the extent that the reduction of unemployment is a common UK public policy objective, the Government could set out directions specifying whether this is an objective

which each public authority can pursue or whether this objective may only be pursued (under certain conditions) by public authorities in areas where unemployment is higher than the national average. The Government would then also set out the framework, and the conditions that must be met, in pursuing each UK public policy objective. For example, the Government could indicate that the pursuit of a particular objective should not compromise other common public interest objectives or Government policy, such as the climate change agenda.

99. In this context, the subsidy principles should also be defined appropriately. In particular, the first and last (currently seventh in the Consultation Document, but sixth under our proposal set out in our response to Question 11) principles should be reframed as follows:

“Subsidies are provided to meet a specific common UK public policy objective to remedy an identified market failure or to address an equity concern.”

...

7. “Subsidies’ positive contributions to achieving a UK public policy objective outweigh any negative effects, in particular the negative effects on domestic competition and international trade.”

(As noted in our response to Question 11, the legislation could clarify that references to trade in this context also includes a reference to investment.)

100. Finally, it is important that in applying the subsidy principles, public authorities understand they need to carry out an appropriately in-depth legal and economic analysis so as to reach an informed view, and be able to demonstrate, why the grant of a subsidy is an appropriate policy instrument and how it complies with each of the subsidy principles.
101. We are concerned that at least some of the transparency notices that have been published suggest that the legal and economic analysis has not been carried out to the required level. This renders the subsidies more prone to challenge in the domestic courts but ultimately, also by the EU at a horizontal level. At the same time, if less thorough subsidy control analyses were to become the norm, in time, these could lead to a significant distortive effect on domestic competition, as competition distortive effects are regularly underestimated or overcompensation granted as a matter of course on the basis of such analyses.
102. Recognising that not all public authorities have the necessary resources to carry out the required legal and economic analysis so as to design subsidies which are always consistent with the subsidy principles, we consider that it would be appropriate for the Government or the independent regulatory body, to define guidance which sets out the conditions which, if met, would lead to a subsidy being deemed to be compliant with the subsidy principles. Such guidance would effectively function as safe harbours, akin to the general block exemptions under EU State aid rules, but with the possibility to provide, where appropriate, for simpler rules and more generous amounts of subsidies.
103. Subsidies which fall outside such safe harbours should then be subject to the necessary detailed legal and economic analysis but with the option for the granting authority to submit that analysis to the independent regulator so that it can confirm whether that analysis is correct or the amendments to the subsidy measures that need to be effected in order to render it compatible with the subsidy principles.

104. It is also possible for the Government to opt for a system which *requires* the notification of all subsidies which fall outside the scope of the safe harbours. However, such a system would by implication be less flexible, although at the same time, more robust from the perspective of legal certainty.
105. Ultimately, it seems to us that an appropriate balance between flexibility and legal certainty may be achieved by a domestic subsidy control system which provides for:
1. Safe harbours (appropriately defined so that the overwhelming majority of subsidies in the country can be granted under them).
  2. The option but not obligation for granting authorities to notify a subsidy which falls outside the safe harbours, to the independent regulator for a (binding) opinion on whether the proposed subsidy is consistent with the subsidy principles and if not, the conditions which would render it consistent with these principles.
  3. The obligation to notify to the independent regulator for approval before implementation certain defined categories of subsidies which are deemed to be at particular risk of giving rise to:
    - (a) a significant distortive effect on domestic competition, or
    - (b) significant negative effect on trade (or investment) with the EU.
106. To be clear, the type of analysis which the independent regulator would need to carry out in relation to subsidies which fall under the category of 3(b) above, would not relate only to an assessment of the subsidy's compliance with the subsidy principles but also so as to take a view on whether there is a real risk of a subsidy giving rise to significant negative effect on trade (or investment) with the EU. Where the independent regulator concludes that a subsidy which falls under the category 3(b) above, is consistent with the subsidy principles but nonetheless there is a real risk that it will have significant negative effect on trade (or investment) with the EU, the subsidy should not be automatically unlawful under domestic law. Instead, it should be for the Government to determine whether it considers it appropriate for the subsidy to be granted despite the risk that the EU might seek to impose remedial measures.
107. Separately, as an exemption to (3) above, where a subsidy is of a type which would normally require prior notification, such obligation should not arise where:
- (a) the subsidy in question constitutes urgent subsidy to respond to a national or global economic emergency; or
  - (b) the Government has specifically consented to a request by the relevant granting authority for such subsidy to be granted before notification.
108. Where such an exemption applies, the subsidy should be notified to the regulator for it to assess *post-facto* compliance with the subsidy principles with the possibility for such subsidy to be fully or partly recovered or otherwise amended where the independent regulator considers this necessary in order to ensure compliance with the subsidy principles. In relation to a category 3(b) subsidy, it should once again be for the Government to determine, in the light of the independent regulator's conclusions, whether a subsidy which otherwise meets the subsidy

principles, should be recovered or otherwise amended, where there is a real risk that the subsidy in question creates the risk of the EU seeking to impose remedial measures.

109. Finally, again, in seeking to ensure that the domestic subsidy control regime limits distortions of competition to the minimum necessary, it would seem to us appropriate to require that for the purposes of domestic law, subsidies which are granted:
- (a) to compensate the damage caused by natural disasters or other exceptional non-economic occurrences; or
  - (b) on a temporary basis to respond to a national or global economic emergency

must comply with the subsidy principles and prohibitions and conditions set out in Art 3.5 TCA but with the possibility for the Secretary of State for the Department for Business, Energy & Industrial Strategy to disapply both or one of these requirements partly or fully (and in line with what is permissible under the TCA, other bilateral FTAs and WTO commitments) where the specific circumstances are deemed to justify the greater distortions of competition which the partial or full disapplication of either or both of these requirements would entail.

**Question 23: 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?**

110. We consider that these type of subsidies (which should be defined by the independent regulator or the Government) should be subject to a prior notification obligation to the independent regulator before implementation, as detailed further in our response to Question 22 above.
111. In line with our proposals in our response to Question 22 above, in order to limit the risk of the EU seeking to apply remedial measures on the basis that a subsidy has significant negative effects on UK-EU trade (or investment), categories of subsidies which are deemed to be at particular risk of giving rise to significant negative effect on UK-EU trade or investment, should also be subject to a prior notification requirement.

**Question 24: Should public authorities be obliged to make competition impact reviews public? If not, why?**

112. Yes, they should. Publication of competition impact reviews are not new and have been a mainstay of the CMA 50 Guidelines<sup>26</sup> (and their predecessor) or some time. The steps set out in the CMA 50 Guidelines provide a useful framework for ensuring that there is an evidence-based “paper trail” to justify the scheme and ensure its necessity and proportionality. This is helpful to support the rationality, proportionality and reasons for the scheme and protect it from challenge.

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<sup>26</sup> The CMA 50 Guidelines, issued in September 2015, are in two parts – Part 1: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/460784/Competition\\_impact\\_assessment\\_Part\\_1\\_-\\_overview.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/460784/Competition_impact_assessment_Part_1_-_overview.pdf) and Part 2: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/460787/Competition\\_impact\\_assessment\\_Part\\_2\\_-\\_guidelines.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/460787/Competition_impact_assessment_Part_2_-_guidelines.pdf)

113. Publication is likely to reduce challenges from competitors as the information provided in them is likely to help competitors to consider at the outset the merits (or otherwise) of their potential claim. Otherwise, competitors may consider it necessary to issue proceedings and obtain more information during the course of those proceedings, which may be a waste of resources for both the relevant public authority and the beneficiary of the subsidy, as well as the competitor. Challenges such as these can also have additional costs where a project or transaction is put on hold while the litigation is pursued, and can have unfortunate consequences where the subsidy supports an element of private funding which is put at risk by litigation. Those risks could also be mitigated by the publication of competition impact reviews.
114. Publication of competition impact reviews may also help other bodies considering similar awards of subsidies in considering whether they may be able to provide similar subsidies. In the context of local authority plans to regenerate or engage in commercial projects, the shared knowledge from a competition impact review may help other authorities in their decisions about what they wish to do.
115. From a broader perspective, the publication of competition impact reviews also provides a way in which the proper application of subsidy law in the UK can be demonstrated, and it may enhance perception of the robustness of the UK's subsidy law system. Competition impact reviews ensure that subsidy principles can be seen to be respected.
116. Indeed, the mere fact that there is an obligation to disclose such analysis, should provide an additional incentive for granting authorities to ensure that they consider carefully a subsidy's impact on competition and comply with subsidy control obligations more generally, thereby also reducing the risk of litigation.

**Question 25: Should public authorities be permitted to override competition impact review e.g. in the case of emergencies? If so, why?**

117. We do not consider that this would be appropriate on the basis that subsidies which are granted without an adequate competition impact review, can lead to disproportionate, substantive or long-term distortions of competition in the UK internal market.
118. At the same time, if the overall consensus is in favour of some flexibility when it comes to emergencies, for example, we would propose that instead of removing the requirement for a competition impact review altogether, this requirement could be lessened in certain specific circumstances, such as in an emergency, in order to permit the relevant review to be completed in the short time available to act.
119. If this approach were to be adopted, it would be appropriate to make clear what amounts to an emergency, and the duration for which the need for detailed competition impact reviews may be reduced. For example, an immediate emergency with a relatively short-term impact, such as a landslide which has happened as the result of weather conditions, and which is likely to have a predictable end point, is different to something like a financial crisis.
120. Similarly, the need for urgency even within an emergency may change (such as in relation to the shortage of PPE and ventilators at the beginning of the Covid pandemic, as compared to good supply of those now). It would also be appropriate to specify what conditions a reduced competition impact review should still meet and when, if the need for the subsidy goes beyond the time anticipated, it should be reviewed more fully.

121. In seeking to identify and mitigate further the competition distortive effects of subsidies awarded on this basis, we consider that these subsidies should be subject to a *post-facto* compulsory review by the independent regulatory body. Such review should then provide for the possibility of the independent regulatory body requiring that a subsidy be partly or fully recovered or made subject to additional conditions where the review concludes that this would be necessary to ensure compliance with the subsidy principles, including so as to ensure that any distortions of competition are kept to the minimum necessary to achieve an appropriate public policy objective.

**Question 26: Should there be additional measures to prevent subsidies that encourage uneconomic migration of jobs between the four nations?**

122. In line with earlier comments, we consider that such additional measures would be essential in ensuring that distortions of competition in the UK internal market are kept to the minimum necessary and subsidy races are avoided. As to how to effect this, the legislation could expressly require that subsidies cannot be made conditional on the relocation of a production activity or of another activity of the beneficiary from another UK region.<sup>27</sup>

**Question 27: 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?**

123. Clearly, the requirement here is for a definition which can be applied by public authorities with ease and achieves the best possible balance between legal certainty and minimum red tape.
124. As a general principle, low risk subsidies could be defined as those subsidies that, due to their nature and characteristics, as well as the nature and characteristics of the market or markets on which they have an impact, present a low risk for trade and competition within the UK and internationally.

**Question 28: What guidance or information would be helpful for public authorities to assist on lower risk subsidies?**

125. We agree that these, and other elements, should be used by the Government to develop a framework of assessment to be used by public authorities.
126. We believe that various elements could contribute to reducing the risk of subsidies causing undue distortions on competition. One could be the relatively small size of the subsidy and the lack of problematic conditions in the measure/programme (e.g. towards exports or use of local goods/services). Another, as noted in the Consultation document, could refer to the unlikelihood to produce a material impact on trade or significantly distort the UK single market. This could depend on the geographical size of the market and on the degree of competition within it.

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<sup>27</sup> See by analogy Article 16 Ter of the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 outbreak (Consolidated version: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/TF\\_informal\\_consolidated\\_version\\_as\\_amended\\_28\\_january\\_2021\\_en.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf)).

**Question 29: Should the specific rules on energy and environment 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?**

127. There are two interrelated aspects to this question. First, is it preferable for the UK system to adopt a set of rules for subsidies for the energy sector and environmental protection? Second, if such rules are adopted, should they integrate the specific rules on energy and environment as laid out in the TCA? Both questions should be answered in the affirmative. This is for the following reasons.
128. First, as illustrated by research, the achievement of national environmental targets is impossible in the absence of a comprehensive trade policy.<sup>28</sup> National subsidies to energy and environment are thus closely linked to trade commitments.
129. Second, if the UK were to introduce specific rules for energy and environment subsidies, it would be preferable that the same set of rules applies to subsidies that might have an impact on trade and investment with the EU and to subsidies that can only have a national impact. This will ease the application and the interpretation of the rules in practice and will enhance legal certainty and transparency. The UK is required, under the TCA, to comply with the specific obligations for energy and environmental subsidies where such subsidies may materially affect UK-EU trade. The notion of effect on UK-EU trade is yet to be established. However, it is likely that such assessment will to be done when drawing up *any* national schemes (at least as per TCA, Annex ENER-2 (1)), and it is preferable that national rules clarify the exact criteria for such assessment in relation to energy projects.
130. Third, whilst the UK is no longer part of EU's internal energy market, the TCA provides for future arrangements to be negotiated with regards to trade in energy. For example, ENER 13 provides for the conclusion of a multi-party agreement on the compensation for the costs of hosting cross-border flows of electricity. UK's negotiating position would be much stronger if it shows that clear rules exist regarding energy subsidies, which are mindful of the impact of such subsidies on the competitive functioning of the wholesale energy markets and the efficient use of energy interconnectors.
131. Fourth, subsidies will surely play an important role in the context of the 2050 commitment to bring the greenhouse gas emissions to net zero. In that regard, the rules set in the TCA appear to be fair baseline that the national regime can draw on and develop. This will benefit both the UK internal energy market and will help the UK achieve its own climate change targets. Indeed, subsidising certain projects, such as renewables, is known to produce distortive effects on the energy markets. It is important to create a coherent and transparent system of rules which will avoid the funding through taxpayer money of projects which would create imbalances on the internal UK energy market. Furthermore, tensions might arise in the aftermath of the COVID-19 crisis, prompting long-term subsidies for emission intensive industries, such as airlines. Investing in coal exploitation can similarly undermine national environmental commitments as well as the TCA (for instance LPF Art 7.4). Subsidy rules should thus be drawn up to enable the UK to fulfil its commitment towards a clean environment.

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<sup>28</sup> E Lydgate and C. Anthony “*Coordinating UK trade and climate policy ambitions: A legislative and policy analysis*”, *Environmental Law Review*. 2020; 22(4): 280.

132. Fifth, publishing a clear set of rules that are followed when subsidising energy is important in the light of the current debate regarding the transparency of the UK system with regards to fossil fuels subsidies.
133. Such set of rules should be drawn up by the new authority in charge with State aid control following public consultations, in line with Government priorities, and kept under constant review. This will allow for sufficient flexibility that would provide both leeway in international negotiations and would allow for necessary exemptions at the national level. While the TCA rules can serve as a baseline for UK's own rules related to energy and environmental subsidies, the national system could allow for possible derogations in limited circumstances for projects that would not have an impact on investment and trade with the EU.

**Question 30: 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?**

134. Different sectors face varied economic challenges. It may therefore make sense to tailor guidance on subsidy control for specific sectors. However, sector-specific provisions increase the complexity of the regime and must be balanced against their potential benefits.
135. Subsidies for R&D, as well as skills and education should be deemed generally permissible.
136. Subsidies for transport may require specific guidance. It may not be commercially viable to provide flights to certain cities or bus routes to rural areas. In these instances, subsidies may be warranted. However, the subsidies should be seen as temporary measures that aim to induce changes in the incentive of recipients in a way that meets the policy goal.
137. The fishery sector may require specific provisions. Some types of fisheries subsidies can have negative impacts on the environment.<sup>29</sup> To minimize environmental damage, provisions for fisheries subsidies may prioritize funding for less-damaging subsidies. Subsidies for inputs such as gear, boats or ice, reduce the costs of doing business and may lead to over-capacity and subsequently over-fishing. Funding for these types of subsidies could be restricted. Income support for fishers could be de-coupled from catch amounts. Provisions regarding fisheries subsidies could also encourage support for environmentally-sustainable programs, such as research and development and the management of fish resources

**Question 31: Do you agree with the proposed rules on transparency? If not, why?**

138. Yes, we do. Article 3.7 TCA makes transparency requirements central. Both parties are committed not just to mere reciprocal notifications but to a full disclosure of the legal basis and policy objective or purpose of the subsidy, the identity of the recipient, all details of the grant and, of course, the amount of it. Both parties would need to ensure the effectiveness of this new regime. Despite the apparent asymmetrical application (duty to disclose for the UK- less intense obligation for the EU) these rules would oblige the European Commission and EU Member States to considerably improve the transparency requirements especially considering that the new provisions will extend to any subsidy and not – as it is the case now – to those aids which fall within the scope of the GBER. Further it is doubtful that the current transparency standards on European Commission decisions when dealing with aid schemes

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<sup>29</sup> S. U. Rashid, V. Lam, et al. “*Global fisheries subsidies: An updated estimate*”. Marine Policy (2016) 69,189

will be TCA complaint.<sup>30</sup> An increased transparency on the EU side would benefit UK companies.

**Question 32: Do you agree that the thresholds for the obligation on public authorities to submit information on the transparency database should replicate the thresholds set for small amounts of financial assistance given to a single enterprise over a three-year period and for transparency for SPEI?**

139. We disagree with this proposal. Within the UK internal market it is possible for seemingly small amounts of subsidies to affect competitors. Accordingly, a transparency obligation which is triggered at lower levels than those which apply for the exemption of small amounts of financial assistance to a single enterprise over a three-year period would seem desirable from a domestic competition perspective.
140. A transparency obligation which is triggered at lower levels should provide an additional incentive for granting authorities to consider carefully the appropriateness of granting a subsidy to one business and not another
141. It is true that this type of concern was not addressed under EU State aid rules at a time when EU law was applicable to the whole of the UK. However, it seems to us that this in itself does not constitute a sufficient reason to disregard local competition concerns under a domestic subsidy control regime.

**Question 33: If not, should the threshold be lowered to £175,000 over a three-year period to cover all reporting obligations for Free Trade Agreements, enabling all of the UK's international subsidy transparency obligations to be met through one database?**

142. For the reasons which we have set out in our response to Question 32, we consider that this would be a more appropriate approach which should create greater incentives for granting authorities to consider carefully the appropriateness of a decision to grant a subsidy, to whom, as well as the extent and nature of that subsidy.

**Question 34: Should there be a minimum threshold of £50,000 below which no subsidies have to be reported?**

143. Yes, we would agree that it would be appropriate to assume that below a certain level, subsidies are likely to be too small to give rise to competition concerns in the UK internal market so that it would be proportionate to exempt them from the transparency obligation.

**Question 35: Do you agree that the obligation should be to upload information within six months of the commitment to award a subsidy?**

144. We do not agree with this timescale as it is comparatively long and, therefore, can lead to legal uncertainty. For example, in principle, a granting authority may choose to publish a subsidy transparency notice at the end of that period, which would mean that a challenge may arise seven or eight months after the subsidy has been granted. That would present an intolerable level of risk and legal uncertainty for the beneficiary, who may face an order for recovery some

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<sup>30</sup>See the deficiencies highlighted in the *EC Fact-finding study on the implementation of the transparency requirements under the GBER and relevant guidelines* at <https://ec.europa.eu/competition/publications/reports/kd0120640enn.pdf>

time after the grant and then have to unravel finance or other arrangements that it has entered into in reliance.

145. It is true that granting authorities *can* decide to publish the transparency notice much earlier within this six-month period. However, as a question of public policy, we consider that it would be preferable to *require* granting authorities to publish transparency notices within a shorter timeframe, for example, within 30 days from the grant of a subsidy. There is no obvious reason as to why the lengthier six-month period should be necessary. Indeed, there has been some debate as to whether a system which provides for the publication of a transparency notice *before* the grant of the subsidy (effectively treating the publication of the transparency notice as triggering a standstill period) would be preferable from the perspective of flushing out any potential challenges in the domestic courts before the subsidy has been granted.
146. Ultimately, such system might not be fully consistent with TCA requirements and in any event, an obligation to publish the notice within 30-days from the grant of a subsidy could lead to beneficiaries and granting authorities agreeing to treat the first month following the publication of that notice as a *de facto* standstill period in cases where, in the light of particular circumstances, there might be some concern about a potential challenge or inquiry being made about the grant of the subsidy.
147. Given that public authorities are generally familiar with obligations under domestic procurement legislation to publish contract award notices within 30 days after a contract's award, it would seem to us that this approach would also be familiar to them and simplify compliance considerations.

**Question 36: What should the functions of the independent body be?**

148. The functions suggested (information and enquiries, review and evaluations, subsidy development advice, post-award review, and enforcement) could all be valuable functions of an independent body.
149. However, in our view, not all of those functions should rest with the same body. For example, it would be preferable for the independent body not to mark its own homework, i.e. it would be preferable if it were not responsible for both evaluation before the subsidy is granted, and the subsequent enforcement of any such award. If the same body is responsible, then there would be a need for appropriate information barriers and other information restrictions to ensure impartiality and due process.
150. Specifically in relation to information and enquiries, there may be value in other relevant government departments contributing to or working with the independent body in relation to updating and maintaining any relevant guidance, as it may be useful to have sector specific guidance.
151. As to subsidy development advice, a key question will be the extent to which the recipient of the subsidy may rely on the advice of the independent body. While it is stated that the public authority awarding the subsidy would still be responsible for deciding whether to proceed following any pre-award discussions, it is not clear whether the discussions with the independent body are intended to amount to a representation on which the public authority could rely. This is of particular relevance if it is intended that the independent authority carries out this advisory function, as well as post-award review or enforcement powers.

152. The extent to which subsidy development advice is intended to function as a way in which to achieve certainty is also important. If the intention is to provide a mechanism to approve a scheme in advance which would bind the independent body in relation to its conduct of the matter in future, then that could provide certainty for subsidy recipients prepared to go through such a procedure.
153. It may be appropriate to consider also whether advance subsidy development advice could be given to different levels of subsidy, with a proportionate amount of resource expended on such advice by the independent body.
154. There may also be situations in which a specialist body may be better equipped to deal with aspects of the subsidy in its particular context. We explain this point further in relation to question 42.

**Question 37: 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?**

155. It would be impractical for an independent body to consider anything less than all principles as that would artificially split principles which are not unrelated. The decision needs to be taken in the round in light of all relevant circumstances. Furthermore, there is a risk if the principles are split between different bodies that review of them would be inconsistent between those bodies. It could also result in a situation in which principles must be considered by both bodies either at the same time or consequentially, both of which have disadvantages, and no obvious advantages. A subsidy control analysis would involve by necessity a balancing exercise where the benefits to be achieved and the harm to be caused by a proposed subsidy must be assessed and weighted against each other before a position is reached as to the appropriateness and indeed, legality of that subsidy.
156. This exercise cannot be carried out properly if different bodies were responsible for different principles and the decision might be exposed to judicial review on rationality grounds if relevant considerations had not been properly taken into consideration or too much weight had to been given to certain factors without regard to other valid considerations. If the principles involve specialist input from certain expert bodies (e.g. Treasury or Defra) then it would be better to establish cooperation procedures where the independent body could consult the relevant bodies that need to assist.

**Question 38: What role, if any, should the independent body play in advising public authorities and reviewing subsidies before they have been awarded?**

157. This question is addressed by the answers above.

**Question 39: If the independent body is responsible for post-award review, what types of complaints should it be able to receive and from whom?**

158. A post-award review could provide a useful additional method of ensuring the subsidy regime is complied with.
159. Complaints from those who are competitors to the subsidy recipient would seem to be the most immediate for consideration, although they will have the possibility of bringing proceedings. However, the ability for complaints to be brought by competitors in addition to their ability to

bring proceedings may be particularly relevant for SMEs who may not have the resources to pursue litigation but still wish for the issue to be addressed, even if it does not result in the outcome for them litigation might achieve.

160. It may also be valuable for those who do not have standing to bring an action under subsidy enforcement mechanisms to be permitted to make a complaint to the independent body. An example might be where a campaigner or not-for-profit organisation may wish to complain about the effect of a subsidy in relation to its particular area of interest, but may not otherwise have standing to bring proceedings (or intervene in them).
161. However, in our view, if the power of post-award review is limited solely to the independent body being able to issue guidance to help them improve in future, that would be of limited compulsion. A more powerful mechanism may be achieved by providing the independent body with the additional power to impose a fine or seek recovery in certain circumstances, such as where there have been material or serious failings. It will be necessary to consider how these powers interact with other current powers for government bodies to audit compliance of other bodies (such as MHCLG's powers to audit local authorities' compliance with procurement law and state aid law).

**Question 40: Which, if any, enforcement powers should the independent be given? In what circumstances could the body deploy them? What would be the routes of appeal and the interaction with judicial enforcement?**

162. As explained above, our view is that an independent body which holds powers in relation to pre-award steps and reviews should not have the opportunity to enforce subsidy rules.
163. A similar system to how the CAT currently operates may be appropriate.

**Question 41: How should the independent body be established in order to best guarantee its independence and impartiality when exercising its operational functions?**

164. Most independent bodies of this genre are set up by statute with clearly defined statutory powers and duties, which are important to provide clarity about their remit. An analogy may be drawn with the CMA, which is an independent non-ministerial department or independent regulators such as Ofcom or the CAA, whose work is overseen by a Board, and led by the Chief Executive and senior team. Investigations are run by a case team, headed by a senior team member and a process of peer review to minimise the risk of confirmation or other bias. The CMA or other regulators are often assisted by Standing Counsel, appointed from the independent Bar, who help to provide objectivity and risk assessment for policy and legal developments and litigation risk. The ultimate decisions being made by an independent panel, with expert members recruited externally. There is also the option of appeal to an Ombudsman or equivalent of a Hearing Officer for procedural issues, such as access to the file or right to a fair hearing.
165. The CMA is highly regarded internationally, particularly for its independence and impartiality, and an important feature of that is that in practice it exercises its functions in a way which is perceived to be independent, and not to favour other government bodies. It is subject to statutory duties guaranteeing its independence and ensuring that decisions are taken with a view to ensuring a prescribed list of statutory policy objectives and principles.
166. As explained elsewhere in our response, we consider it necessary to the proper functioning of

the independent body that the operational functions (such as guidance and assistance prior to the adoption of the measure) should be separate from its enforcement functions, and this is important also in the context of ensuring the body's independence and impartiality.

167. Independence is also assured through a statutory appeal procedure, to a specialist tribunal such as the CAT or the Administrative Court, applying the principles of judicial review.

**Question 42: In addition to the application of time limits, are there any other considerations for implementation of the recovery power?**

168. Yes, there are. A number of relevant conditions and considerations should be introduced so as to ensure an effective recovery. It should be clarified that recovery must include the payment of interest. This would remove the competitive advantage arising from the availability of the subsidy funds, over a period, free of charge. The interests would have to start to run on the date at which the unlawful subsidy was put at the disposal of the beneficiary.<sup>31</sup>
169. Further specific provisions may also be included so as to allow the possibility of alternative means of recovery. For instance, the offsetting of genuine legal claims. Guidelines may also be useful as to support courts in the calculation of the specific amount of recovery and in the identification of the beneficiary, a particular complex operation in cases of a beneficiary being part of a group or in cases where ownership of the beneficiary might have changed.
170. There may be some other considerations which are relevant in relation to areas of subsidy where there is also a statutory mechanism which may be relevant. A good example is in relation to tax where at present state aid is recovered using the Tax Tribunals. The need for the Tax Tribunal to deal with state aid is underlined by the fact that other aspects of a tax computation may be affected by the recovery of the aid and amendments to the tax assessment for the year consequential to the recovery of the aid may be required.
171. Another example may be in procurement challenges before the TCC, where claimants have sought recovery of subsidies.<sup>32</sup> An important factor there was not just the vertical relationship between the granting authority and the claimants, who were dissatisfied tenderers for the subsidised rail franchises. The interests of third parties (in particular the successful bidders) were also important along with the wider public interest and potential disruption for rail passengers and rail employees, who were contributing members of the rail pension scheme. In that case, the procurement competition was found to be lawful but the TCC indicated that even if there had been some technical procedural error, it would have refused to set aside and order recovery but the claimants' remedy would have been limited to damages only (presumably for the loss of opportunity) because of the wider disruption to third party interests, through no fault of their own.
172. It is anticipated that in relation to the recovery of subsidies similar considerations will apply. As such, a specialist tribunal such as the Tax Tribunal or Competition Appeal Tribunal may be better placed to deal with the recovery of a subsidy, particularly where there are allegations of distortion of competition from the unlawful grant.
173. The alternative would be for the independent body to consider discrete questions as to the

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<sup>31</sup> See further T. Kotsonis, "The Squaring of the Circle: Subsidy Control under the EU-UK TCA", European State Aid Quarterly 20 (2021) 15.

<sup>32</sup> See e.g. in the recent *Stagecoach Rail Franchising Litigation* [2020] EWHC 1568 TCC.

recovery of the aid and remit consequential issues to the relevant specialist tribunal. However, such a split of powers may be unattractive from a timing perspective and may also be an artificial split between the two elements. One such question which may be difficult to deal with in circumstances such as these is, for example, whether reliefs or losses may be set off against a liability to recover aid. It is not clear whether the independent body or the Tax Tribunal would consider such a question if the regime were to be split between two tribunals.

**Question 43: Should a specialist judicial forum such as the Competition Appeals Tribunal hear challenges to subsidy schemes and awards? If not, why?**

174. Yes, it should. The CAT has a wealth of experience to draw upon and would be well equipped to hear such challenges, given its expertise in analysing relevant markets and distortion of competition and efficiencies, necessity and proportionality. The Tribunal's composition with a Panel composed of a specialist competition judge with an economist and an experienced lay member with industry expertise produces high quality and prompt judgments. Certain members of the Tribunal have specialist expertise in subsidy control (e.g. Mr Justice Roth and Mrs Justice Bacon). It also has public law and regulatory framework expertise through its remit in regulatory appeals, on judicial review principles, against decisions relating to telecoms, aviation, energy and utilities (which are areas that often overlap with subsidy issues). Exceptions to this might be where, for example, specific points of public law arise which could be dealt with by the Administrative Court, or where specific issues such as tax arise.