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Public Bill Committee

SUBSIDY CONTROL BILL

Second Sitting

Tuesday 26 October 2021

(Afternoon)

CONTENTS

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Saturday 30 October 2021

The Committee consisted of the following Members:

Chairs: † Caroline Nokes, Mr Virendra Sharma

† Baynes, Simon *(Clwyd South)* (Con)
† Benton, Scott *(Blackpool South)* (Con)
† Blackman, Kirsty *(Aberdeen North)* (SNP)
† Bowie, Andrew *(West Aberdeenshire and Kincardine)* (Con)
† Buchan, Felicity *(Kensington)* (Con)
† Esterson, Bill *(Sefton Central)* (Lab)
† Fletcher, Colleen *(Coventry North East)* (Lab)
† Flynn, Stephen *(Aberdeen South)* (SNP)
† Hollinrake, Kevin *(Thirsk and Malton)* (Con)
† Kinnock, Stephen *(Aberavon)* (Lab)
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
† Millar, Robin *(Aberconwy)* (Con)
† Mortimer, Jill *(Hartlepool)* (Con)
† Scully, Paul *(Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy)*
† Stafford, Alexander *(Rother Valley)* (Con)
† Tomlinson, Michael *(Lord Commissioner of Her Majesty's Treasury)*
† Whitley, Mick *(Birkenhead)* (Lab)

Kevin Maddison, Bradley Albrow, *Committee Clerks*

† attended the Committee

Witnesses

Dr Roger Barker, Director of Policy and Corporate Governance, Institute of Directors

George Peretz QC, Monckton Chambers

Jonathan Branton, Partner, Head of Public Sector, Head of EU Competition, Leeds, DWF Group

Alexander Rose, Director, Newcastle, DWF Group

Richard Warren, Head of Policy and External Affairs, UK Steel

Daniel Greenberg CB, Parliamentary Counsel for Domestic Legislation, House of Commons

Rachel Merelie, Senior Director for the Office of the Internal Market, Competition and Markets Authority

Ivan McKee MSP, Scottish Government Minister for Business, Trade, Tourism and Enterprise

Public Bill Committee

Tuesday 26 October 2021

(Afternoon)

[Caroline Nokes *in the Chair*]

Subsidy Control Bill

Examination of Witness

Dr Roger Barker gave evidence.

2 pm

The Chair: We will now hear from Dr Roger Barker, director of policy and corporate governance at the Institute of Directors, who is appearing virtually. We have until 2.30 pm for his evidence. Will the witness introduce himself for the record?

Dr Barker: Certainly. My name is Roger Barker. I am director of policy and governance for the Institute of Directors.

The Chair: Would you like to make an opening comment?

Dr Barker: I would, yes. Probably the most important comment I can make to start is that, from IoD members' perspective, we are seeking a subsidy regime that is easy to navigate; does not result in too much delay; and has predictable outcomes that are reasonably legally certain and are not challenged or reversed too often. Of course we want a nimble system, but we do not want one that is so nimble that decisions are vulnerable to challenge because the public body has perhaps not followed the right process. That would make the whole system too uncertain and unpredictable. That is the basic point underlying our perspective.

Q44 Seema Malhotra (Feltham and Heston) (Lab/Co-op): It is a pleasure to serve under your chairship, Ms Nokes.

Thank you for giving evidence to us today, Dr Barker. I shall start with a more general question about your view of the Bill and the regime as a whole. Where do you see the opportunity for small businesses to work towards the Government's objectives of levelling up and net zero that have been talked about?

Dr Barker: I do think this is an opportunity. It provides a framework to undertake the type of policy approach that you describe, but as to whether it will actually be used for that purpose is still somewhat uncertain. Historically, the UK has granted subsidies to companies much less than the EU, for example. EU countries, the United States and Asian countries continue to use subsidies in a major way to encourage key areas such as semiconductors, artificial intelligence and quantum computing—the industries of the future. Despite the difficult historical experience that we had in trying to pick winners during the 1970s, we probably have to ask what it is that our more successful competitors have realised about the use of subsidies that we have not.

From the IoD's perspective, our view is that we should recognise that an effective subsidy regime does have an appropriate role to play for small and medium-sized enterprises to build a tech revolution in the UK, and a green industrial revolution. That will require Government and business to work together, as to some extent they have during the pandemic. The subsidy regime will be part of that—the changes will not just happen spontaneously.

Q45 Seema Malhotra: You have said this week that grants—or subsidies—made under the global Britain investment fund should have more conditionality associated with them to ensure that they support long-term commitments into the UK as well as levelling up. Do you believe that that Bill does enough to set out those goals? Is even net zero sufficiently enshrined in how subsidies should be used and their impact evaluated?

Dr Barker: I do not think it does. At the moment, the framework that is being described is like an empty husk that could be used in a variety of ways. It does not really indicate how it will be used in a more detailed policy sense. Some aspects of the structure of the framework could get in the way of some of the policy agenda. The particular area where we have some concerns relates to compatibility with the levelling-up agenda. There is a clear principle in the Bill that any subsidy should not displace investment or business activity from one part of the UK to another, but you can see that having some potential conflict with the levelling-up agenda, which is trying to promote disadvantaged regions of the UK. You can see the potential for legal challenges occurring as one region says "Well, actually, you are not creating new business here, with these subsidies; you have actually displaced business activity from our region." I think we could benefit, within the Bill, from more clarity to prevent that type of conflict from happening.

Q46 Seema Malhotra: In your view, how and where do you think that could be strengthened in the Bill? We have also heard from other witnesses on whether there should be an equivalent, or a successor, to the assisted areas map, which is currently used in the EU, and which we also had, in some form, as a predecessor. Do you think that, at the very least, we need something tighter around areas of economic disadvantage, and a definition of what that might be—levelling up also may be within regions, as well as between regions—to provide some clarity for businesses that may be in smaller areas of disadvantage, but in a region that is more prosperous?

Dr Barker: Yes. I think there should be scope to do that within the framework of the Bill. I do not have a very specific proposal on the wording of the legislation, but that displacement principle should certainly be qualified to the extent that it allows this kind of regional policy—or levelling-up agenda—to actually take place.

Q47 Seema Malhotra: Do you have any concerns relating to transparency? There is a sort of de minimis threshold suggesting that under £315,000, those subsidies will not be subject to the controls in the Bill; they will not be reported. Do you have concerns about what that could mean for knowing whether subsidies have actually been implemented—subsidies that may be supporting particular enterprises without the visibility of that for other businesses?

Dr Barker: We would like to see transparency throughout the system. It is important for everyone to have trust in the system. That applies to all the different processes that one might go through to win a subsidy; there are different processes identified, depending on the nature of the subsidy, from those requiring quite a detailed due-diligence process from the Competition and Markets Authority to those that, as you state, are on a kind of fast-stream process to subsidy.

Transparency is incredibly important. Competitor firms and other enterprises want to be able to see what sort of subsidy is being granted to their competitors; they want to see how that is justified and whether they might want to make some kind of legal challenge against that decision. If any of this process is seen as happening within a black box, where each subsidy decision is not properly justified and explained, that will simply create mistrust in the system and undermine it.

Q48 Seema Malhotra: Finally, on that point, do you think that £315,000 or £500,000 as a threshold for subsidies under a subsidy scheme is too high?

Dr Barker: I would not say whether it is too high or too low. I think that there should be transparency at every level of subsidy, but I think it is reasonable to have a threshold in defining a faster-track decision-making process. That seems reasonable but, regarding transparency, I do not think that should be related to the size of the grant.

Q49 Simon Baynes (Clwyd South) (Con): Thank you for your time this afternoon, Dr Barker; it is much appreciated. I wanted to look at the part of the Bill to empower local authorities, public bodies and central and devolved Governments, particularly the public bodies aspect. Do you see this as a welcome broadening-out of the routes by which subsidies can be brought to business, not only through central devolved Governments but through local authorities and public bodies?

Dr Barker: That is potentially welcome, but now we are extending subsidy-granting powers to a large number of bodies—about 500 in total. That will create a requirement that each of those bodies understands the principles for granting the subsidy and the processes that need to be gone through. They need to have some degree of expertise to guide business through the process in a confident way. In practice, that will probably mean that the subsidy advice unit in the CMA will be called on a good deal from a lot of those bodies for advice, information and to try to get an indication of whether the process being followed is the right one.

I am slightly concerned that consulting the subsidy advice unit may become a kind of quasi-obligatory stage in the subsidy approval process. The question is, will that delay things? Will it take away the nimbleness of the system? Does the subsidy advice unit have the necessary resources to deal with the hundreds of public bodies that will be consulting it? That is an uncertainty and a concern.

Q50 Stephen Flynn (Aberdeen South) (SNP): Thank you for your helpful answers and input so far, Dr Barker. I think earlier you alluded to—those who gave evidence this morning certainly alluded to it—the lack of detail behind the Bill, the lack of guidance and the powers that sit with the Secretary of State. That prevailing situation is unlikely to change before the Bill comes into law. Do you think that is a help or a hindrance to businesses as it stands?

Secondly, we know that historically the UK's spend when it comes to state aid, as it is more commonly known, has fallen well below that of European partners. Do you think the Bill will change that in any way, shape or form? Is there any indication in the Bill as it stands that it will change, certainly from a business perspective?

Dr Barker: I do think that more clarity is needed around a number of the concepts in the Bill. The need for more detail increases with the number of public bodies that are being empowered to grant subsidies. To give some examples, there is uncertainty around what would constitute a subsidy of particular interest, which is a subsidy that requires much more detailed pre-assessment by the CMA. Will that apply to a significant proportion of potential subsidies, or will that be done just on an exceptional basis? The answer will affect the nature of the entire system. At the other end of the spectrum, I think we still lack detail about the streamlined subsidies that can benefit from fast-track approval.

Another area that is important, particularly for IoD members, is the extent to which this regime can facilitate the support of start-ups, particularly those companies that do not have a long-standing financial track record and are still some way from generating profit or even revenue. I think that the proposed regime in this respect is preferable to the previous European Union regime, which had a prohibition over supporting undertakings in difficulties, which really ruled out start-ups. Within this measure, the only thing that is ruled out is the support of ailing or insolvent companies, which increases the scope of what can be supported. However, we still need clarity about what kind of going-concern assessments will be conducted to ensure that a potential recipient is eligible.

To answer your first question, there is still some way to go to provide all the interested parties with more clarity about how the system will operate. With your regard to your second question—do I think that this framework indicates that we will have more state support of business?—in itself, the answer is no. As I said before, it provides a framework in which that kind of policy could be pursued, but there is nothing about it that necessarily implies that it will be pursued. As I have said previously, in certain sectors there is a need for a changed approach to match those of our key competitors. That is really how the IoD is viewing it—is it going to be useful for that purpose? The answer is that it could be.

Q51 Bill Esterson (Sefton Central) (Lab): Good afternoon, Dr Barker. I would like to go over a few things that you said and put them back to you to see if you have answers to the questions that you put to us. You began by talking about ideally having a system that is easy to navigate with enough certainty that businesses and awarding bodies are not going to be challenged. First, what is your top priority in the legislation that you would like to see strengthened or changed? Secondly—this comes back to a point that you made a couple of times about international comparisons; you talked about what our competitors are doing—what is the top thing that you would like to learn from which is going on internationally? On your point about the subsidy advice unit, is your big concern about lack of capacity in the Competition and Markets Authority?

Dr Barker: Yes. To address your first point, the factors that will ultimately make this most predictable include, first, guidance on the principles under which subsidies will be granted. It is a tricky balance between providing guidance that is too prescriptive, which becomes difficult to penetrate and understand, and, on the other hand, principles and advice that are too sparse and which try to be nimble but leave too much uncertainty on the table in specific instances. It is about finding the balance.

Secondly, it is about the subsidy advice unit operating effectively and being really useful, informative and timely in being able to assist the various parties and point them in the right direction. The third part of the process is the tribunal. One would hope that the number of cases coming to tribunal is minimised, but at least it provides timely, transparent and understandable rulings that assist parties in future in how they assess their ability to give subsidy. Those are my answers to that question.

Q52 Bill Esterson: Sorry to interrupt—I am trying to tease out the issues. That is interesting. I think that you are suggesting that this is going to evolve through practice—that is what you are looking for. Is that a fair characterisation?

Dr Barker: I think that that is reasonable. It will need to evolve. As it evolves, hopefully confidence in the system will grow, along with predictability based on past rulings and decisions. That is the key thing that we are trying to get to—a degree of predictability so that everyone concerned knows how it is going to work and whether or not it is going to work without having to resort to a more legal framework.

On your second question, yes, we do need to learn the lessons of other major countries that seem to be doing a better job than the UK in terms of building technology companies and science-intensive-type enterprises. What is it that they are doing that we are not? I do not think they have achieved their success entirely by business acting alone and Governments simply stepping out of the way. A lot of the industries of the future are those that require very close collaboration between business and Government. Certainly, the green industrial revolution that we are all seeking to work towards in order to achieve net zero is also something that will require a lot of partnership between business and Government, so for me, an effective subsidy system can be part of that.

Q53 Bill Esterson: Do you have a specific example from another country that brings this to life for us?

Dr Barker: Certainly in the United States, which on the face of it is a free market-oriented economy, there is still a significant degree of public subsidy going into sectors such as artificial intelligence and quantum computing, for example. The EU is subsidising to a high degree the development of semiconductor manufacturing capability, and of course Asian countries also provide many examples.

Q54 Bill Esterson: Thanks. On the point about the SAU and CMA capacity, I think you were saying that your concern there is that you want confidence that there are enough staff to answer the inquiries in a timely fashion, otherwise the whole thing grinds to a halt.

Dr Barker: That is right. The CMA is increasingly playing a central role in many aspects of our economic life, and we are asking it to do more and more, not least in the digital space. It would be incredibly beneficial to this new regime if the CMA and its advice unit had the capacity to really assist the process.

Q55 Stephen Kinnock (Aberavon) (Lab): Dr Barker, may I ask you about your members who are based in Wales, and whether you have had any conversations with them, or feedback from them, about this new legislation? Have they raised any concerns with you about the potential confusion that might exist between the different levels of government, particularly given that they are working in areas that they have come to know as devolved policy areas where their main interface is with the Welsh Government? Have they raised any concerns about this issue with you, or has it not really come on to their radar screens yet?

Dr Barker: They are aware of this issue in each of the devolved nations. The IoD as a whole does not take a view, for example, on whether the subsidy regime should be a devolved matter or a reserved matter for the UK central Government, but they certainly are concerned to ensure that that does not get in the way of a levelling-up agenda that could be very needed in, and very beneficial to, a country such as Wales.

Q56 Stephen Kinnock: Do I have time for one more, Ms Nokes?

The Chair *indicated assent.*

Stephen Kinnock: Thank you. It is a question about aid intensity: you will be well aware that under the European Union rules, there were ceilings for how much state aid could be put into businesses, particularly small and medium-sized enterprises, according to certain themes. If you look at the regional aid theme, for example, the ceiling for SMEs was set at a 10% to 20% supplement. Do you think that the ceilings for aid intensity should be raised in the legislation—that is obviously not in the Bill and will probably end up being in the guidelines—so that you can make the kind of contribution that would make a difference to the business choices and models that are being put in place, rather than just putting money into something that would probably be happening anyway?

Dr Barker: I feel that this framework should permit the flexibility to allow those kinds of changes. Policy priorities will change over time and the Bill must not be so rigid so as not to permit that. It needs to offer a flexible framework.

The Chair: I will bring the Minister in now—I ask him to be conscious that Kirsty Blackman also wants to come in.

The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Paul Scully): I am happy to let Ms Blackman go first.

Q57 Kirsty Blackman (Aberdeen North) (SNP): Thank you, Ms Nokes, and thank you, Minister. Dr Barker, you seemed to say that pretty much all of the subsidies should be declared—that there should be transparency about all subsidies. Can I check that was what you said there?

Dr Barker: That is what I said, yes.

Q58 Kirsty Blackman: Okay. Perfect. You are in the unusual position where you represent both those people who may receive subsidies and those who may challenge subsidies. Do you feel that the balance is right? Do you feel that, given how the Bill works, your members are likely to be able to challenge subsidies that they feel are disadvantaging them or their organisations?

Dr Barker: This is why I was arguing for transparency. Transparency is an important part of that. A lot will depend on how quickly and effectively the system operates and how much trust there is in the system. If you are potentially a competitor and you can see that there is a clear justification, based on widely understood principles, for a subsidy—it is something that is not being covered up and that is openly stated—and if you have trust in the decision-making process, the system is going to work well, and there is probably going to be less legal challenge from competitors. But as soon as that trust is lost—because things are taking too long, because there is a lack of transparency, because decisions are being made on a very unsafe basis, or because officials do not understand how to apply the principles—that is going to build mistrust and that will then lead to more legal challenge and more problems from the system. It is very important that all the components of the system have the right resources and the right clarity in terms of guidance, and that there is transparency.

Q59 Paul Scully: Dr Barker, you rightly mention guidance—that you want to give certainty, but not be too prescriptive. I take your point about that, and we need to make sure it works for the whole of the UK. We have a more permissive approach, with the seven principles. Assuming that we set and define subsidies that are of particular interest to your satisfaction—perhaps just the most distorting, rather than the wider definition you were worried about—will that give enough certainty to businesses and the flexibility that they need to be able to prosper in the UK without the more prescriptive system of EU state aid?

Dr Barker: Yes. For us, it is very much about finding the balance. We absolutely do not want a highly prescriptive, bureaucratic regime. We really do see the benefits to our members of nimbleness. It is finding that balance between being nimble and not too nimble, such that decisions are made that then subsequently fall through. It is finding that sweet spot that we need to search for.

Q60 Paul Scully: You talked about appeals and taking things to the court. Presumably you think the Competition Appeal Tribunal is the best place for that, with the expertise that is required to hear these kinds of cases.

Dr Barker: Yes, we do. I realise that various options were considered, but we agree with that option.

The Chair: That brings us to the end of this panel. I thank Dr Barker for his evidence this afternoon.

Examination of Witness

George Peretz QC gave evidence.

2.30 pm

The Chair: We will now hear from George Peretz QC from Monckton Chambers in person. We have until 3 o'clock for this session. Could the witness please introduce himself for the record? If you would like to make a brief opening statement, please do so.

George Peretz: I am George Peretz QC. I practise at Monckton Chambers. I was the co-founder of the UK State Aid Law Association a few years ago and am currently also co-chair of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law, and we have contributed to the debate on subsidy control as well.

Q61 Seema Malhotra: Thank you for coming in. I have a couple of questions that I want to put to you. I want to understand your view of the CMA's powers in the Bill, such as whether the CMA should have the power to instigate an investigation or report on its own initiative. Currently, it is able to act only on those that are referred to it. Would it be desirable for the CMA to have further powers and, in your opinion, why would that be beneficial?

George Peretz: There is an issue about the position of subsidies that are not recognised by the granting authority as subsidies. It has always been true under EU state aid rules and World Trade Organisation subsidy rules, and it will be true under the definition of subsidy in the Bill, that there is room for considerable disagreement and argument about whether certain types of measures are subsidies at all. Two well-known examples are tax measures decisions by the tax authorities as to the tax treatment of particular corporations. If those are over-generous, they give rise to subsidies under WTO rules, EU rules and under the Bill. You also have situations where Government bodies enter into commercial transactions—loans, contracts or grants—that are over-generous. They are not the sort of transaction that a market operator would enter into, but the public authority wants to claim that they are the sort of transaction that a bank or another market operator would be prepared to enter into.

You will appreciate that there is scope in both of those areas for considerable argument and for genuinely different views to be taken about whether what is being done is a subsidy at all. You can certainly have such a situation, and these situations will arise fairly frequently when public authorities have to take a view as to what they are doing in granting a loan, or in the case of Her Majesty's Revenue and Customs deciding on the tax treatment for a particular company, is a subsidy at all. They will quite often take the view that it is not, but that view will be contestable. Sometimes the view is completely wrong and the measure is in fact a subsidy. Those cases will not be placed on the transparency database, and it seems to me that there is a bit of an enforcement gap in dealing with them.

We have an obligation under the trade and co-operation agreement to ensure that things that are subsidies are dealt with properly as subsidies, so I think that there is a bit of a weakness. One thing that the CMA could be given the job of doing is, probably most easily, investigating on its own initiative, rather than necessarily in response to a complaint, cases where it looked as if there may have been a subsidy, but where a subsidy was not in fact placed on the transparency database. That would have to be on its own initiative because the whole starting point in the Bill is that things go on the transparency database, so if they have not other mechanisms do not really kick in.

Q62 Seema Malhotra: That raises quite a serious issue about possible gaps in the regime. Under clause 55, there is the opportunity for the Secretary of State to call

[Seema Malhotra]

in a proposed subsidy or subsidy scheme. Do you think that is sufficient under the scenario that you have outlined, whereby there may be an example of tax treatment that has the same effect as a subsidy but is not on the transparency database? In such a scenario, do you interpret the wording of clause 55 to be enough for the Secretary of State to call that in, or do you think the wording needs to be tightened to allow it to be clearer? For example, it might be something that appears to be a subsidy and would therefore go to the CMA, rather than what might happen under clause 71, which would be for it to go to the tribunal.

George Peretz: There is a lot in that, yes. It is also worth looking at clause 60, on proposed award referrals, because quite often these cases will arise after the measure has come into effect, so it will be a post-award referral. Clause 60 and clause 55, on call-in directions, both talk about the power of the Secretary of State to request a report in relation to a proposed subsidy or subsidy scheme. It is not entirely clear what happens in a case where the Secretary of State thinks there might be a subsidy scheme but is not actually sure. It is possible that he could make a reference in that situation. The first question for the CMA in either case would be, "Is what we are dealing with really a subsidy?" The granting authority will be saying, "No, it isn't." If the intention is for the Secretary of State to have powers to catch things that are subsidies but have not, for one reason or another, been placed on the transparency database, it would better for the wording to say something like, "a proposed subsidy or subsidy scheme, or something that the Secretary of State considers to be a subsidy or subsidy scheme."

There is a second point behind both those provisions: whether it is right for that power to be held only by the Secretary of State, who is of course a politician. Realistically, politically, in what circumstances is the Secretary of State likely to be keen to scrutinise decisions of central Government? He may or may not, but clearly politics will come into that in a way that might not be entirely desirable. There is a wider argument, which I think I have made elsewhere, that it might be worth widening out the category of people who can make post-award referrals and call in directions, at least to include the devolved Ministers, but that is a slightly separate issue.

To return to your question, it seems to me that it is worth looking at the wording of clauses 55 and 60. Then there is the broader question of whether it should just be the Secretary of State who has that power.

Q63 Seema Malhotra: May I ask a final question on that? I think that has highlighted what seems to be the asymmetry between the powers of the Secretary of State and of the devolved Administrations in being able to call in and challenge subsidies. Do you think it is important to look at amending this area of the Bill? I am thinking about the need to have an integrated and lasting four-nation settlement. What do you think the consequences of not doing that will be?

Secondly, public interest bodies that you might normally expect to be able to look at and challenge decisions are currently not defined as interested parties. How important do you think it is to revisit the definition of interested parties?

George Peretz: There are two points there. One is the position of the devolved Governments, particularly in relation to clauses 55 and 60, vis-à-vis the position of the United Kingdom Government. The whole point of clauses 55 and 60—you can see it in the text—is that a reference is made to the CMA in situations where the measure creates a risk of negative effects on competition or investment within the United Kingdom. Plainly, the power is intended to catch a situation whereby the Secretary of State considers that a measure undertaken by the Scottish Government or Welsh Government creates highly distortive effects in England. One can see the possibility of that, but if that is the intention, it is hard to see why sauce for the goose is not sauce for the gander. In a situation where an English local authority, the Secretary of State or another UK Government body acting as an English Department does something that is designed to benefit England but causes serious concern in Scotland or Wales, why should the Welsh or Scottish Ministers not be able to do the same thing if the concern is with competition or investment within the United Kingdom? I find it slightly hard to see what the argument against that is.

A second, slightly different point is about the definition of "interested party", which is in clause 70(7). This says that

"interests may be affected by the giving of the subsidy".

"Interest" is a wide phrase—what does it cover? Is it just financial or commercial interests? I think any court, in construing that, will look at paragraph 6 of article 369 of the trade and co-operation agreement, which seems to be where this comes from. That refers to both parties being obliged to make sure that interested parties have a right to challenge. It then defines interested parties as including competitors, trade associations and a couple of other things. However, they are all people with very direct commercial interests in subsidies, most obviously competitors who feel that the subsidies will make life difficult for them when they compete.

When one goes back to article 369, the argument that we have put is that it does not cover bodies such as concerned next-door local authorities and the Scottish and Welsh Ministers. The Secretary of State is automatically defined as an interested party, so it is not a problem for him, but it would be a problem for any other Government authority in the United Kingdom that has concerns. There is then also an issue about whether the wider bodies concerned with public interest litigation would be able to claim an interest; it looks as if the intention is to exclude those from having the right to go to the CAT.

I say "right to go to the CAT" because there is a subsidiary question, which is if the definition of interested parties is confined to and is rather narrower than the caste of people who would normally have the ability to challenge public law decisions such as this in the judicial review courts, as I think it may be, there would be an argument open to someone who was not an interested party—a public interest group—to go to the High Court and say they have a right to challenge this decision as a matter of ordinary public law. They would say that because they do not have standing under the Subsidy Control Bill to go to the CAT, they have no alternative remedy. It seems to me to be quite likely that the courts would accept that argument. I am not entirely certain

that that is what is intended. If it is intended that all subsidy control appeals go to the CAT, I am not sure that is really achieved.

Q64 Stephen Kinnock: I have two questions, Mr Peretz. The first is around the idea of assisted area maps; do you think there is a connection between the need for an assisted area map and the commitments that were made in the TCA? The joint declaration on subsidy control policies within the TCA says:

"Subsidies may be granted for the development of disadvantaged or deprived areas or regions. When

determining the amount of subsidy, the following may be taken into account: the socio-economic situation of the disadvantaged area concerned; the size of the beneficiary; and the size of the investment project."

I would be interested in your view as to whether that constitutes an actual obligation to have an assisted area map, or some way of defining disadvantaged areas based on the terms of the TCA?

My other question was around article 10 of the Northern Ireland protocol; I am sure you will not be surprised to hear that, we have discussed it many times. What is your sense now of the state of play around article 10 of the Northern Ireland protocol? To what extent could it be interpreted so broadly as to effectively drive a coach and horses through this legislation?

George Peretz: I will deal with the regional aid map first. The schedule to the TCA is permissive. It allows the parties to do things: it does not require them to do anything. If the UK Government just did not think that regional aid was appropriate at all, they are entirely free not to do it—ditto the EU. There is also a bit of a danger in holding on to old state aid law thinking. The position of regional aid maps in the state aid law regime was there because there was a basic prohibition on state aid unless it went through the process of going to the Commission and getting cleared, unless it fell within block exemptions. Regional aid maps played their role within the block exemptions. They meant that if you were giving a grant that fell within the conditions of regional aid in certain areas, you could give grants in an area that benefited from assisted area status that you would not be allowed to give, for example, in Guildford without going through the process of notification and clearance. If you did it in an assisted area, you could just do it without going through that process.

Structurally, that does not really fit into the new regime, because it does not have that basic prohibition element in it. Instead, it requires all public authorities to think about the principles, which will inevitably apply in a somewhat different way. They are bound to be affected by the region in which they are given. For example, the principle in paragraph A(b) of schedule 1—

"address an equity rationale (such as social difficulties or distributional concerns)"—

will apply very differently in the Welsh valleys than in Guildford, because the social difficulties and distributional concerns are different.

One possibility that could arise under the structure of the Bill is that the Government might well issue streamlined schemes that make reference to the areas concerned—something that a streamlined scheme could certainly do. They could say, "This scheme applies," and effectively there is automatically no risk of the CMA having to look at it, and you do not have to go through the process of thinking about the application of the subsidy control principles for grants in Pontypridd, as you would were you making the grant in Guildford. That is where something like the regional aid map might come back in, but it is not in the Bill; it will depend on what the Government decide to do about streamlined subsidy schemes.

I have probably written far too much on article 10. The current state of play is that, if I am advising a client such as a local authority or a subsidy recipient, my immediate problem is that I have to look at two sets of guidance—one issued by the European Commission and one by the Department for Business, Energy and Industrial Strategy—that in some important respects tell me very different things. If I am advising a client who is the prospective recipient of a grant from an English local authority, but my client sells a significant quantity of goods in Northern Ireland, the Commission guidance essentially tells me that article 10 is likely to apply. The BEIS guidance tells me that it is unlikely to apply. I am capable of making up my own mind about that, but I would obviously have to draw my client's attention to the different guidance, and if it ever got to court the court would be entertained with the different guidance and would have to decide what to do, so there is a difficulty.

The fundamental problem is the effect on trade test. Assuming that it is meant to mean the same sort of thing as it means in the EU state aid law rules, which is probably, though not certainly, right, it catches an awful lot of things. It famously caught the question of whether taxi cabs in London could drive in bus lanes, according to the European Court, even though one might struggle to see quite why that affected trade between member states.

The real problem is that the European Court has consistently upheld reasoning on effect of trade, which is extremely thin, based on assumptions, and it does not really include much of what any economist would recognise as economics. An effect on trade has been deduced and that makes it a bit difficult. The boundary line is therefore just obscure. The Bill effectively says that anything that falls under that regime is excluded from the Bill, but you do have the problem that the boundary line is not very clear.

Q65 Bill Esterson: Good afternoon, Mr Peretz. You have been giving a lot of the very detailed challenges and saying how some of the problems might come out and be addressed. Can I ask you to look at the Bill as presented and give an overview of what you think the Committee's top priorities to address in the Bill might be?

George Peretz: We have touched on a couple of the main issues. The devolution issue that we have discussed is quite important. There is an issue with enforcement, particularly in relation to measures that are not regarded by the public authority as being subsidies, but are just a grey area—and that view could simply be wrong—and how those are dealt with. The Bill does not really address on its face how those will be dealt with. One can sort of work out how they are likely to be dealt with but it would be better if that situation was more expressly catered for and dealt with.

There is an enforcement problem in that, ultimately, unless the Secretary of State decides to refer things to the Competition and Markets Authority—of course, there will be cases where things have to go to the

CMA—the mechanism does very much rely on private enforcement by, at the moment, interested parties, who are going to be commercial operators and probably not public interest ones or local authorities. You cannot always rely on commercial operators to enforce things like this. There are all sorts of reasons why they may not. Quite a lot of commercial operators are hoping for the same subsidy themselves, so they will keep quiet, or they get the same subsidy themselves and will therefore be quiet, whereas actually there is a real public interest problem.

You will get situations with quite small companies who are concerned about subsidies being given to a much bigger competitor. They will understandably be reluctant to annoy both the granting authority, probably, and the bigger competitor. There are also the inevitable costs and risks of litigation. In a new regime, those costs and risks are greater, because various points have to be sorted out and decided in the first few cases until you get some case law on it. So inevitably the risks and costs are greater. There is more chance that you will end up in the Court of Appeal on a point than there would be once the regime has bedded in.

All of those will be quite off-putting to a lot of private enforcement. Ultimately, that is the keystone on which the whole enforcement mechanism depends, because if nobody brings challenges to this, public authorities will often get away with pretty sloppy reasoning and genuflection to the principles rather than serious engagement with them. I think that is a concern.

Q66 Kirsty Blackman: I have a couple of questions. In the event that BEIS is the granting authority, the only person, realistically, who can make a referral to the CMA to look at it is the Minister, who is in charge of the granting authority. Is there an argument for other people to be added so that a conflict of interest does not arise?

George Peretz: That is absolutely a fair point. If the subsidy measure comes from central Government or even if it is BEIS that is the granter, is it realistic to expect the Secretary of State to call it in or make a post-award referral? You are obviously going to be concerned, from a Scottish perspective, with the possibility that you have a BEIS decision—there is serious concern about this in Scotland—that has an adverse effect on the Scottish economy in some way or another. That is the point I was making. It does seem to me right, as matter of principle, that in those circumstances the Scottish Ministers at least—and potentially other people—would have the right to send the matter off to the CMA to consider.

Bear in mind that the CMA report is not binding, so in a situation where the Secretary of State wanted to say, "Well, I hear what the CMA says, but I just disagree: I still think that this measure is wholly compliant with the principles and the CMA has just got it wrong in suggesting that I change it", he can go ahead. It is then a risk of litigation—it might be better if the Scottish Ministers had a clear right to bring that litigation too, but that is the current position.

Q67 Kirsty Blackman: That is helpful. I have a couple of additional questions following on from Stephen Kinnock's question about the Northern Ireland protocol. We have heard already that granting authorities in the UK tend to be fairly risk averse. Given their risk-averse nature, would a situation where most of the granting authorities in the UK are advised that they have to apply state aid rules as well as the Subsidy Control Bill rules make it more difficult for them to put in subsidies in the way that the Government are hoping?

George Peretz: It certainly generates work, so I look at it not entirely unfavourably, but yes, from anyone else's perspective it is a bad thing. There is certainly an issue, and not much that the Bill can do about it. Given the way article 10 stands, the Bill does the only thing that can be done, which is simply to exclude from the Bill measures falling within the scope of article 10, but you do then have that issue.

When we were members of the EU in the old days, you would advise on something that was state aid, or was certainly likely enough to be state aid that the beneficiary—they tend to be quite cautious because they do not like to receive money that they then have to pay back—said, "We are rather concerned that it is state aid, but it does not seem to fall within the any of the block exemptions and has not been notified and cleared." In the old days, if the grant were a from local authority, the beneficiary would go off to BEIS, which would take a look at it, and if there was a real risk that it was state aid, they would be notified. That happens now, but there is a bit of a suspicion that BEIS will take a somewhat conservative view of what article 10 covers, because that is the UK party line. That is fine, but the UK party line may not actually be right and may not be what a UK court would decide.

If you are the beneficiary of a grant from a local authority in the situations that I have described, and you are concerned that your competitor may challenge that as an article 10 measure in the UK courts, as they are entitled to do, the BEIS guidance says that it should be fine, and although the court may read that guidance, it certainly would not be bound by it. Ultimately, if a UK court is uncertain, it will refer the matter to the European Court of Justice, about which we have heard rather a lot in recent days, and it will decide, or at least decide the parameters within which that decision is to be taken. It is all a bit of a mess.

The Chair: I will bring the Minister in because we will have a hard stop at 3 pm.

Q68 Paul Scully: When you were talking about interested parties and the two definitions, including the Secretary of State, did you define a person whose interests may be affected by the giving of a subsidy as a company boss? Is that what you were suggesting?

George Peretz: No, not a company boss. I think a company, a competitor, would.

Q69 Paul Scully: But when you define that, are you restricting yourself just to a competitor and not a Minister, in a Government, in a devolved Administration?

George Peretz: That is a live question. It seems to me that any court, when reading clause 70(7)(a), is likely to go back and have a look at the trade and co-operation agreement because the concept of "interested party" is a concept of that agreement, as it contains a definition of "interested party". I do not have the provision before me and cannot remember the exact words off the top of my head—

Q70 Paul Scully: Sorry to cut in, but the only reason I say that is because the Secretary of State clearly might not have a direct interest, so why is he being specified—

George Peretz: The Secretary of State is automatically an interested party because of clause 70(7)(b). The Secretary of State does not have to demonstrate a role; all he has to do is say, "I am the Secretary of State"—he has an interest.

Q71 Paul Scully: But a Minister in a devolved Administration could be a person whose interest is affected by the grant.

George Peretz: That may or may not be right. That seems to be an issue. Other local authorities, or other sub-governmental bodies, are not listed in the relevant provision of the TCA—

The Chair: Order. I am sorry, but that brings us to the end of the time allotted for the Committee. I thank the witness very much for his evidence.

Examination of Witnesses

Jonathan Branton, Alexander Rose and Richard Warren gave evidence.

3 pm

The Chair: We will now hear from Jonathan Branton, partner at the DWF Group; Alexander Rose, director at the DWF Group; and Richard Warren, head of policy and external affairs at UK Steel. They are all here in person. We have until 3.40 pm for this session. Can the witnesses please introduce themselves in turn for the record—perhaps we will go left to right, starting with Mr Rose—and give a brief opening statement? I will then move to Seema Malhotra for questions.

Alexander Rose: I am Alexander Rose. I am a director at DWF working day to day on subsidy control.

Jonathan Branton: Hi. I am Jonathan Branton, a partner at the DWF Group. I have been head of competition and practising in this area for over 20 years. I have spent a long time in Brussels.

Richard Warren: I am Richard Warren, head of policy and external affairs at UK Steel, which is the trade association representing the steel industry in the UK. The steel industry is a recipient of various forms of state aid approved under the EU regime, so we have an active interest in the system that replaces it.

Q72 Seema Malhotra: Thank you to our witnesses for coming in today. We are very appreciative of your time. I will ask two questions to cover the areas that you have commented on. First, I am interested to know your view on the question of transparency in the Bill around decisions that are made on how challenges might be brought if there are concerns about subsidies and their impact. Secondly, more positively, what might the opportunities be for the Bill and its regime? What would success look like in terms of how it positively affects the areas that we, on both sides of the House, are interested in, such as levelling up and the transition to net zero? Will the scheme actively support delivering them?

Richard Warren: I would probably be best placed to start with the opportunity side of things, rather than transparency. As we see it, the opportunity for the Bill, briefly, is that it creates a more flexible and light-touch regime, which I am sure many of your witnesses have already spoken about.

The EU system, certainly the way we view it, effectively says, "State aid or subsidy is banned, except for a list of things that you're allowed to do." The new UK regime seems to take the opposite approach and says, "Basically everything is allowed apart from a select list of things that we ban." At least ostensibly or theoretically, the Bill, as we see it, sets out a regime that will give us considerably more flexibility and room for manoeuvre in what we are able to do.

Some of the regimes that we are recipients of—the most beneficial for the UK steel sector—are around some of the subsidies and exemptions we receive on the costs of renewables and carbon taxes in relation to electricity prices. That is a really big issue for the steel sector. The UK steel sector pays between 80% and 100% more for its electricity than its counterparts in the EU. Those exemptions have reduced our electricity prices. There is a still a big gap, but they are really important to improving competitiveness in the UK.

The system in the EU has a very complicated, convoluted way of saying, "You can do this. If you introduce this scheme, you have to follow this rule. You can't do this. This is the percentage that you are allowed to reward, etc. etc. etc." Now the UK may choose to follow that, and it may not simplify the rules, but at least theoretically it can say, "I don't have to follow any of your rules. I have a complete clean slate to redesign the process," and award the compensation or the exemption in a targeted fashion that is most beneficial to the UK sector. Without giving too many other examples, although I have a long list if people want to hear them at a later date, the main benefit is that the framework is transparent.

The second element is the process for providing approvals if a local authority or national Government want to introduce a scheme. From our perspective, it is a lot more light touch and a lot more straightforward. There are a number of examples that we can give where the UK introduced or tried to introduce a system to benefit the steel industry. It was either blocked by the EU Commission or it said, "You need to go back and change this regulation." You have actually got examples where state aid had been stuck in consideration or investigation for two years before eventually being given up on by member states. The process where you can actually approve schemes should be a significant benefit.

The final thing I would say before handing over to others on the panel is that that is all theoretical and I am sure questions will be posed at a later point. I think probably the biggest barrier to the use of state aid in the UK has not necessarily been the EU rules, although they have proven tricky at times. It has perhaps been a culture in the UK that says that state aid is not necessarily what we want and perhaps a last resort. The data bear that out; we tended to use about a third of the amount of state aid that Germany has and about half the amount that France has used. The proof of the pudding will be more in the answer to whether there is a different approach or a different cultural approach within the UK to wanting to use state aid.

Jonathan Branton: Shall I pick up? First, to talk about the opportunity, it is really important to set the context of the Bill in the fact that we already have a new regime away from the EU regime. The opportunity of

the Bill is to take forward the regime that has come out of the trade and co-operation agreement, which is already in force and in use. The fundamental point is how the Bill takes that and improves upon it to help to pursue the UK's interests in a safe and secure way.

The TCA has already diverged massively from the EU state aid regime and created a whole lot of flexibility and ability to do things at speed, which is supposedly what the UK is particularly interested to secure. In terms of the opportunity presented by the Bill, there is an opportunity to improve upon that framework to make it better fit for purpose to monitor and secure a subsidy-controlled platform in the UK in a way that preserves competition, but also enhances the ability of Government and various different public authorities up and down the land—I do not just mean central Government, but regional government and local government—to influence policy and to make active interventions in order to achieve positive outcomes. There is an enormous opportunity to do that better, but also a risk of compromising some of the freedoms and flexibilities that have been achieved by the TCA in the first place. It is important to put that in context.

In terms of transparency, that is one of the bedrocks of an effective regime if you look at it from the perspective of maintenance of competition and the ability of third parties to come forward and to be able to challenge that subsidies have been carried through in a clear and effective way, through sound decision-making and appropriate thought as per the commitments within the TCA to respect the common principles that have been set out.

For the level playing field to be preserved, if you like, it is vital that there is a remedy, an enforcement system. That system can only come out when there is public knowledge of what is going on. Such public knowledge is also generally seen to enhance decision making on account of the scrutiny that it necessarily brings to the process as a result. Primarily, the main point of the transparency is to enable people to come forward and say, "Okay, this particular subsidy has created a negative effect," and make sure that that is scrutinised by a suitably empowered authority, in this case the national courts.

Transparency is super important to that process. What has happened already is that there are commitments to transparency via the TCA—those are minimum commitments that the UK has made—and they must be respected because they are international commitments. What has happened in practice, however, is that a national transparency register has been established, but when you look at that register and at the relevant rules around it, you do not see that it is functioning well.

A lot of the entries there at the moment look somewhat incomplete, and you will notice that lots of the entries have a zero for the amount of money that is committed, all of which leads to an inability for the market to be able to see what is actually going on. If you cannot see what is going on, you do not know what to challenge, or even if to challenge.

The other point about the transparency register is its brevity, frankly. Given how long the new regime has been in force, which is the best part of 10 months, and given the number of public authorities that are out there making interventions on this, that and the other form, it is clear that not everything that has been awarded in that 10 months is in that register—not by a long shot. Something is going awry in terms of the implementation of that particular transparency register.

Q73 Seema Malhotra: Specifically on what is in there—I am conscious of the time—are there recommendations you would make, based on that experience, around what may need to be tightened up within the Bill? That would be quite helpful, because there are questions about the de minimis threshold, about whether an entry should take six months, and about how long things should be open to challenge.

Jonathan Branton: On the challenge point, I think one month is too short, because that requires people to be extremely alert about checking things. The database is not readily searchable. It does not send prompts when particular information is put on at a sectoral level. If you were keeping an eye on it, you would have to be checking it every other day to see that something was coming forward about which you were concerned.

In terms of searching for amounts and dates on which things have been recorded, all that is not regulated. What we really need—I will hand over to Alex in a second as I know he has strong views on this—is something that sets out in very clear detail exactly what needs to come in on every entry. Then, in practice, when you actually come to making those entries, it must require you to put in the correct answers to those questions in order for the entry to go live on the website. If that does not happen, you should get pushed back. That is clearly not working well enough.

Alexander Rose: As Jonathan says, essentially, the key piece of information on that website is the date the entry is made, and the reason that is so important is that the challenger has as little as a month to challenge once that information is placed on the website. To put some numbers on what Jonathan said, first and foremost there are only 501 entries. There are a lot of subsidies, so there is no way that only 501 subsidies have been awarded since 11 pm, 31 December 2020.

Secondly, of those 501, some 257 are recorded as having a zero or nil value. In order to bring a digital review—

Q74 Kevin Hollinrake (Thirsk and Malton) (Con): How many, sorry?

Alexander Rose: Two hundred and fifty seven out of 501. In order to bring a digital review challenge, you are probably going to have to spend between £25,000 and £40,000, so if you are seeing a nil value, you are very unlikely to bring a claim.

Some of those are going to be schemes, and I will bring out some of the schemes on that website at the moment. SC10261, the Tees Valley Capital Grant Scheme, is listed as having been posted on the website on 1 April 2020, but the website did not exist on 1 April 2020. SC10388 is a real estate grant of £675,000 in Girton in Cambridgeshire—I picked this one because it is the last—and that one does not have a date at all. There is no way that somebody wanting to challenge would be able to know that date unless, as I have personally done, they have been saving the spreadsheets and comparing them.

Now, essentially, what we have here, therefore, is a mousetrap that is lacking a spring. Unfortunately, the Bill does not fix that. The way to fix it is at clause 32,

which relates to the database, and it must expressly say that there needs to be two things. First and foremost, that information has to be included—the date it is actually entered and/or modified. Secondly, I think you need to end up having a search function that gives you three pieces of information. You need to have the date an entry was entered or modified; the name of the funder, because that is currently not searchable; and the name of the beneficiary, which is on there at the moment. Those are the three key pieces of information. The other element is, in order to capture that scenario where people simply are not putting into the database, you need to have some sanction if you fail to put it on.

The other issue that needs to be considered is that, at the moment, you have up to six months to put that information on the database. A large enough subsidy could make a business insolvent within that six months, so it feels to me that the period needs to be shorter. Likewise, the period to challenge needs to be longer. There is no obvious reason for having a shorter period for what is rightly described as the most important piece of post-Brexit legislation than for a planning permission judicial review. It should be longer. The next point is that there should be some level of sanction if that information is not put online. For example, maybe a sensible level would be the challenge period is extended to six months.

Jonathan Branton: The challenge period is not validly started if the right information is not put online. That is one way of looking at it. If it is not validly started, it never ends.

Q75 Stephen Flynn: Thank you all for that very helpful information. There are perhaps two different elements of discussion in relation to the Bill going on here. Richard referred to the Bill perhaps providing more of a light touch in that regard, and it may well be beneficial. We heard from individuals earlier today in relation to the lack of guidance or understanding as to how the Bill will operate. How do you get to that conclusion, notwithstanding the lack of guidance that sits behind the Bill that is due to come from the Secretary of State in future? Ultimately, do you foresee a situation where the Bill will actually provide an increase in state aid, as I am sure your organisation would like to see?

Alexander and Jonathan, if I may say so, you gave quite a devastating indictment of current practices and we would all hope that the Bill will improve on that situation. Do you think it will, as it stands?

Alexander Rose: First and foremost, I think that the general structure of the Bill is good. I think it is quite sensible. My concern is in terms of those details. I think there is capacity to refine the Bill so it is better. I agree that transparency is a concern.

The other area I am very concerned about is the ability to create schemes because the schemes can then only be challenged in the period they are set up. Why that nil point is so important is that, essentially, you have got a situation where there is an unlawful aid—an unlawful subsidy—but you can only challenge it within the month the subsidy is set up. I struggle to see how an organisation could ever really know that it is going to be affected by that subsidy scheme unless it identifies the competitors who are going to get a subsidy and the amount.

Clause 70(2) needs to be amended to add some wording at the end along the lines of providing that, at the time of entry of information about the subsidy scheme on the subsidy database, sufficient information has been made available for an interested party to make an informed decision as to whether and to what extent their interest may be affected. To my mind, the transparency database and the addressing the schemes point are the two issues that will most damage the award of subsides in future if not rectified.

Jonathan Branton: I would second that. The transparency register is relatively easily fixed, I would have thought. The schemes point is a potential loophole that, if not closed, could lead to some frankly bad schemes being adopted and then being impervious to challenge on the basis that the time had passed since the scheme had been published, but the actual awards pursuant to that scheme were somehow protected.

That is at odds with the fundamental principle that interested parties ought to be able to see what is out there and affecting them so that they may challenge it, and they cannot see that until an actual award has been made to a competitor or another party in which they are interested. Until cash is parted with, they do not see that, and that is arguably at odds with at least the spirit of the TCA provisions around schemes, and I think that could be very much tightened up.

Broadly, the Bill does a good job. It will help the regime to mature and become more effective, but it must be recognised in huge part that it puts in place a framework to achieve a whole load of things that have not yet been decided. There is talk of streamlined subsidy schemes, referrals to the CMA and so on, but the Bill does not say what will be in a streamlined subsidy scheme or what will be the subject of a referral, so all those details will come in the future. I absolutely applaud the creation of the framework to be able to implement a streamlined subsidy scheme. What will matter—the proof of the pudding—will be what is actually within that scheme in due course.

A final point: a lot of people have mistaken the detail of the Subsidy Control Bill and the subsidy control framework regarding their effectiveness for remedying, levelling up, or whatever might be the question of the day. The Bill does not set the division of funding to different places and activities, which is a fundamental part of the redistribution of wealth. A lot of misconceptions suggest that the Bill should achieve all that, but the fundamental point of how the cash is carved up and distributed is not necessarily a question for subsidy control law.

Richard Warren: Just to go back to the question about problems that might arise with a light-touch approach, from our perspective the difficulties we have had with the system that we are replacing—the European system that we removed ourselves from—have been on the more prescriptive side. When we have asked the Government to introduce x, y and z, the response has often been, "The EU doesn't say you can do it, so we assume you can't."

Other Governments have taken a different approach. When we proposed to the Government that they should provide an exemption from the cost of the capacity market within electricity pricing, BEIS said that as EU state aid law did not provide explicit rules on that, it could not introduce an exemption. The Polish Government

took a different approach, saying, "We'll come up with one and introduce it." The more prescriptive approach in the EU has been limiting, certainly as the UK Government approached it, so we feel that we will be more empowered as industry to bring forward proposals with greater confidence that they will be within the UK scheme for subsidy control because, as I said in response to a previous question, everything is allowed apart from what is explicitly not allowed, so we will be in a stronger position to be confident of saying, "Actually, this is allowed by UK subsidy control rules."

My final point is that the biggest barrier has probably been the UK's culture of not using the power. Time and again, the reason why we cannot do x, y and z that has been given by either Ministers or officials is that the state aid rules will not allow it. We have often taken a different view, but that excuse has been an almost permanent barrier to doing things. The new regime might reveal whether the excuse has been something to hide behind, or if there is a general culture of preferring not to use state aid rules or subsidy. That is probably a more important point for the steel sector than the Bill, which broadly provides the right framework—we have no major concerns about it.

Let me briefly touch on the regional point that Jonathan made. It is valid, in that the new system opens up a huge amount of flexibility for regional development. Historically, the UK has not done a huge amount of regional development. If we look at the split of what we have spent in the past few years, barely anything has been spent by the UK on regional development in terms of state aid. The system gives us an awful lot of flexibility to redefine which areas we want to give regional development to.

Under the EU system, the map of which areas of the UK were considered to be category A was pretty limiting. One of them happens to be where Port Talbot is based, but it has been a slightly moot point because it has not received a lot of regional aid anyway. The point is: the Government can redesign it, and that will be a key element if they are to use their new subsidy control regime to the maximum flexibility to pursue their levelling-up agenda.

The Chair: Before I bring in Simon Baynes, may I remind panellists that five more Members wish to ask questions? Could we keep the answers succinct, please?

Q76 Simon Baynes: One quick question. I think it was Mr Rose who said that the transparency register would be relatively easy to fix. Is there any comparable register that we could look at to learn from? This is perhaps not applicable, but from my own experience as a trustee of arts and heritage organisations, the requirements of the Arts Council and the lottery are very stringent in terms of transparency and what information you have to provide. Is that a comparable situation?

Alexander Rose: Absolutely. In terms of improving, you are starting from a relatively low base, so it is quite easy. There are plenty of databases, but ultimately it is about service functions. For example, I receive updates every day from Government on what they are doing. That kind of technology is there and it is ready to be put in place.

Jonathan Branton: I would second that. It is really difficult to argue against transparency and say, "Why wouldn't you have transparency about the dispensation of public money in this way?" There is an overwhelming case for having a strong database that is searchable by whatever means anybody wants to search it, quite frankly. You can insist on that and be very plain. All the enforcement and strength flows from that later.

Q77 Stephen Kinnock: Just zooming out for a second, I know that you all have an interest in this levelling-up agenda. The stated priorities of the Bill are to be able to drive forward both the levelling-up agenda and the transition to net zero. Mr Rose and Mr Branton, do you think it is possible to achieve the levelling-up agenda without an assisted areas map or some way of actually focusing resources? There is also the issue that relocations are prohibited. What impact does that have on the levelling-up agenda?

We will achieve net zero in this country only if our steel industry transitions towards it. Mr Warren, what kind of state aid support do you think would be needed for that? Do you think there should be more explicit guidance in the Bill about how to achieve the transition to net zero as part of this overall strategy?

Jonathan Branton: I will start with the levelling-up question. I think you were asking whether it is possible to do something there without the equivalent of a regional aid map. The short answer is yes. You do not have to have a map of the country with shades of different colours for different levels of qualification in order to do something similar. The point is to give some form of preference or favouritism to areas based on some kind of measure of comparative disadvantage.

You could quite easily do that if you established a series of criteria. If you found that a given area had exhibited one or more of those criteria—and there would obviously need to be quite some thought given to what they were—that would be a means establishing that somewhere is regionally disadvantaged. Obviously, you can layer that with all sorts of different complications and grades of disadvantage, if you wish. That might be complicated or overly political, but you can establish the fundamental point of something being disadvantaged or not by reference to, I would like to think, a set of criteria, which would not be too hard.

For the relocation point, the wording in the Bill talks about something prohibiting subsidy that was given as a condition of relocation. In some ways, to my mind, that invites somebody to give a relocation that is not a condition, but achieves it anyway. Maybe that is just lawyers being cynical. Perhaps it is not fit for what it seeks to achieve, but is that a good thing anyway? I have seen a number of situations where a relocation has taken place, which has been positive for several reasons—perhaps someone relocates to make physical space for an infrastructure project, for example. Linking that back to levelling up, relocations can be advantageous and good in the grand scheme of things, and definitely positive for redistributing wealth. Having a prohibition in the Bill, even a badly worded one, is potentially too blunt a tool, which might backfire.

Alexander Rose: I have a slightly different position on clause 18. I think the way to resolve it would be to put in a value figure—maybe £20 million. I also agree that relocations can be hugely beneficial. Schedule 1 outlines the common subsidy principles and paragraph F is designed essentially to avoid competitions developing within the internal market.

I think that the issue trying to be resolved here is avoiding what would be regarded as a distortive subsidy. The way to deal with that is to define distortive subsidy and say that that would then be referred to the CMA, or however that works. That leaves you with the potential to include a replacement additional principle—you mentioned levelling up and net zero. I note that the strategy announced last week requires all civil servants to take account of net zero, yet these rules will be used by more than 550 public bodies. That is a great opportunity to instil that kind of thinking in every single subsidy.

Jonathan Branton: Without necessarily preventing them.

Richard Warren: To answer very briefly, yes, undoubtedly decarbonisation of the steel sector will require considerable subsidy or state aids, however we wish to term it. In sectors such as the power sector, we see billions of pounds' worth of subsidy to decarbonise, and the steel sector will need precisely the same. Net zero or low-carbon forms of steel production will add anything from 30% to 50% to the costs of steel production, depending on which route you go down. If other countries are not moving at precisely the same speed or putting the same constraints on their industries, you will need some sort of intervention to correct that market failure.

There are two key areas where we would like to see additional movement. Again, I come back to competitive electricity prices. Fixing the issue there will require some sort of intervention. Secondly, we need pretty hefty support for capital investment in carbon capture and storage, hydrogen or even new electric arc furnaces. That will require hundreds of millions of pounds of investment.

On your final point about whether we need anything further in the Subsidy Control Bill to direct us towards that, I think that the light-touch approach is the right way to go. It does not exclude the Government from doing anything and it leaves open a huge number of options.

For example, the clean steel fund of £250 million that we hope will be confirmed in the spending review tomorrow is perfectly legitimate under the current regime. Maybe under the EU system, which says, "You can do this, you can't do that", you would have had to go through a more complicated approvals process. By the time you start introducing explicit requirements for certain industries, you will get a bunfight where everyone wants something mentioned in the Bill. You may end up down a route of, "If it's not mentioned, maybe we shouldn't be doing it", so I think that the light-touch approach is the best way to go.

Q78 Kevin Hollinrake: In terms of the thresholds for reporting—I think it is £500,000 and the minimum financial assistance threshold is £315,000—are they the right level to achieve the transparency you are looking for?

Jonathan Branton: I think probably yes. In terms of the small amounts of financial assistance, it is basically double what the EU's de minimis has been. The feedback I have had so far across the piece is that the doubling has been a sensible, long overdue move. Frankly, that has been set by reference to what the TCA sets anyway, so we do not have a lot of flexibility to play around with that. Setting it at a fixed, sterling level is immediately sensible. There can be no debate about that.

In terms of the transparency, yes, you have to draw the line somewhere and the £500,000 seems like a sensible, rounded figure. I certainly do not have a strong view that it should be put at a different level—not yet, anyway.

Alexander Rose: The £500,000 is for schemes. I think that the question ultimately is that if you amend clause 70(2) in order to address this gap in terms of, essentially, accountability, you will need some level of incentive to use schemes. It appears that transparency has been chosen as that route.

Personally, I think that the £500,000 seems quite high, but you do need some kind of incentive; otherwise, people will not go down the route of using schemes, when clearly a decision has been made that that is a good idea.

Q79 Bill Esterson: I want to ask Mr Rose and Mr Branton about this. You have both talked about building the framework and the additional details have to come later. Are there any elements of the additional details that you think should be in primary legislation? I think that Mr Warren has ruled that out, but he may want to comment on that.

Looking at the other things you have said, rather than saying in general terms that the reporting period should be less than six months, do you have a particular figure in mind? Similarly, do you have a figure in mind to replace the one-month opportunity to appeal?

Jonathan Branton: I will take those questions in reverse order. There is the clearest possible case for extending as soon as possible the period in which someone can appeal—but not to more than three months, which is the standard time limit for judicial review. I think that is relatively clear.

On the six months, I have yet to hear a really persuasive case for why you need that long to publish the fact that you have made a award. Why do you need six months to get yourself together to publish that something has been done? I would think that that could possibly be as much as halved.

Bill Esterson: Two lots of three months, then.

Jonathan Branton: Yes—without compromising anything, it seems to me.

In terms of other bits of the Bill that ought to be in primary legislation, that gives rise to the question: what would the streamlined subsidy schemes be? There is certainly a case for making a number of different ones. The obvious thing is to go down the path of the old block exemption—the general block exemption regulation, or GBER—which made non-controversial interventions easy. That was the good thing about that regime: you knew that if you were well within those limits, you could just get on and do it and you were not blocked from anything. If anything has been lost in the new regime, it is that those easy interventions now seem more difficult and require more thought and more risk, in the sense that nobody is quite sure if they have ever hit the mark or not.

You could go into some quick and easy streamlined subsidy schemes. I am thinking of areas like arts and culture. Regional aid and levelling up is possibly more complicated and will require a bit more thought, but

something like arts and culture is easy and obvious. Research and development is easy and obvious—I think everybody agrees that that is a priority. Employment, training and skills are also the sorts of areas in which you might do it. I do not see why we would need to wait around and overthink those. The key with a streamlined subsidy scheme is to make it quick, easy and simple.

Alexander Rose: I completely agree with what Jonathan has said. On the elements where it would be useful for there to be greater clarification, presumably in primary legislation, I think there is a gap in terms of the interested party. It would be useful for public bodies to be able to challenge. If, for example, employment in their area is going to be significantly affected by an unlawful subsidy, it feels right that they should have the ability to challenge in that scenario. It would be good to address that.

Another element is the issue in clause 55 whereby only the Secretary of State can call in these subsidies. At the moment, that seems to be rather strangely limited to prospective subsidies, which does not seem particularly sensible. You could almost end up in a cat-and-mouse game whereby subsidies are issued quickly, so that no one can be called in. That does not seem like a good idea.

Likewise, however, it does not seem particularly sensible to limit the ability to call in the subsidy to the largest awarder of subsidies in the country. Therefore, it would seem that we need some kind of alternative—

The Chair: Order. I am sorry to have to cut you off, but that brings us to the end of the time allotted for this panel. I am sorry to those Members who did not get to ask questions. I thank the panel for their evidence, and we will move on to the next witness.

Examination of Witness

Daniel Greenberg gave evidence.

3.40 pm

The Chair: We will now hear from Daniel Greenberg, Counsel for Domestic Legislation at the House of Commons. We have until 4 pm for this session. Will you introduce yourself, Mr Greenberg, and perhaps outline which areas you are able to talk on for us, please?

Daniel Greenberg: Chair, thank you. Yes, I am Daniel Greenberg, Counsel for Domestic Legislation. I was given an indication that the Committee would like me to talk about some of the technical aspects of the devolution interest in the Bill. I am happy to give that and any other technical analysis that the Committee would find helpful. Obviously, I am not here to defend or attack the policy of the Bill in any way.

The Chair: Thank you. I will move to Seema Malhotra, please.

Q80 Seema Malhotra: Thank you, Mr Greenberg, for coming to give evidence. We have had some representations to suggest that there could be an incompatibility between, for example, the economic competence of devolved Administrations and the way in which the Bill's regime is set out. What is your view of the schedules, the interpretation of economic competence and, in schedule 3 I think, the application of principles and the definitions of what is included in primary legislation—which can obviously be more than Westminster—in relation to devolved Administrations and the Bill?

Daniel Greenberg: Thank you. Chair, would it be convenient if I answered that question by contextualising it in the overall structure of the Bill and said a few words about how devolution appears in the Bill not on the surface, but underneath it, and requires to be brought in in relation to the principles mentioned?

The Chair: I think that would be very helpful, thank you.

Daniel Greenberg: Where I would like to start is to look at the shape of the Bill by reference to the concept of subsidy as set out in the Bill. I hope that the Member who asked me the question forgives me: this is an answer to your question. It will be slightly long, but I am hoping that at the end I will have answered most of the questions on devolution that Members have.

To take you back to what a subsidy is, we can see in clause 2 that the focus of the Bill is inevitably on things that affect the United Kingdom as a whole, or things that go on within the United Kingdom between the different components and parts of the United Kingdom. If we look at subsection (1)(d)—page 2, lines 16 to 21—it explains a lot about the shape of everything that follows in the Bill.

I keep mentioning "shape", because I want the Committee to understand that the Bill inevitably reflects macroeconomic policy. That is what it is there to do. Inevitably, there will be lots of connections, co-ordination, consultation and interaction of lots of different kinds—I will come back to some specifics soon—under the surface of the Bill. It may be that the question I have just been asked and other questions on devolution arise because, on its surface, the Bill is arguably a little short on explanation of some of the systems and mechanisms that will inevitably be required to go on underneath the surface in order to reflect the economic competencies of the devolved Administrations and the devolved legislatures.

To put it in a nutshell, everything that is required by way of accommodating, reflecting and understanding those devolved competences and powers is capable of taking place with the shape of the Bill as it is now, but it perhaps needs to be brought out more, either on the face of the Bill or in the explanatory materials.

Chair, I hope I am not yet trespassing on your patience. Am I still close enough to the question to be allowed to continue?

The Chair *indicated assent.*

Daniel Greenberg: I mention explanatory materials because I expect that as well as the principles in schedule 3, you may want to ask me about the relationship between the United Kingdom Internal Market Act and this Bill, and indeed the relationship between this Bill and the Northern Ireland protocol, all of which are key devolution areas. It is arguably surprising that the relationship between the Bill and the internal market Act is not addressed more expressly on the face of the Bill, but whether or not it is addressed expressly, the shape of the Bill allows it to be accommodated. I do not know whether as a Committee, as you move forward, the interplay between the sides will encourage the Government to put more of this on the face of the Bill, but what I do think is that all members of the Committee may consider

whether the explanatory notes could helpfully be enlarged to explain how these different mechanisms fit together.

Coming back to the specifics of the question, because the shape of the Bill is about subsidy that is macroeconomic, it has to focus on international obligations, and international obligations are obligations of Her Majesty's Government. That brings us to the next point: throughout the Bill, you see "Secretary of State, Secretary of State, Secretary of State"—all powers of HMG—and you think, "Hold on, the devolved institutions are also public authorities. They appear in the list of public authorities in clause 6, so why is it that they do not also share Secretary of State powers?" The answer is very simple: when you are dealing with international obligations of the UK, that has to be dealt with by central Government but, again, doesn't that have to be done in consultation with the devolved Administrations? Of course it does. With co-ordination with the devolved Administrations? Of course it does. With mechanisms for encoding that co-ordination and consultation into the way the Bill operates? Of course.

At the moment, I am absolutely sure that the Government intend that to work under the Bill, and it can work under the Bill. Whether that could be shown more on the surface of the Bill or in the explanatory notes is a matter for the Committee. Does that help at all?

Q81 Seema Malhotra: Yes, that is very helpful. Just coming back to the specific point that we have heard from the Welsh Government about whether there can be interference with the economic competence that the Welsh Government have—that is one example—is your view that it need not be incompatible, but that needs to be made clearer?

Daniel Greenberg: The extent to which it needs to be made clearer is obviously for the Committee as it proceeds through the Bill. That is why I specifically mention explanatory material, because I would remind the Committee that it is so much easier to have things made clear in explanatory notes, explanatory memorandums, memorandums of understanding, quasi-legislation generally and explanatory material than it is to secure an amendment to the shape of the Bill, particularly because the simple answer to the question you were implying—"Could these powers be used to interfere with devolved autonomy?"—is "Of course they could. No question." The question for you, therefore, is "Are there mechanisms by which they will not be used to do that?" Clearly, this sits alongside the United Kingdom Internal Market Act. It does not repeal that Act. It sits alongside the Northern Ireland protocol. Clearly, the Government expects and intends for them to operate in unison. The question for you is: can that dovetailing be addressed more expressly?

Seema Malhotra: I had a question about the Northern Ireland protocol, but I am conscious of the time.

The Chair: I will bring in Kirsty Blackman and come back to you if there is time.

Q82 Kirsty Blackman: You spoke about the generalities of where it says Secretary of State quite regularly in the Bill, Daniel. Clause 70 specifically talks about interested parties and those people who are able to call in a subsidy; it mentions the Secretary of State, but also persons

"whose interests may be affected".

In your view, could we ensure that Scottish Ministers, Northern Irish Departments or Welsh Ministers have that ability by amending that section, by the Minister saying in Committee that that is the case, or by changing the explanatory notes? Would those all be routes that would allow those three authorities to have the ability to refer as well?

Daniel Greenberg: From a purely technical perspective, I think that is on the cusp of the things that I would be comfortable encouraging you to simply put in the explanatory notes. It either is an interested party or it is not. If it is not, saying in the explanatory notes that you hope it is may not be enough to get you over the line, in contrast to the Minister helpfully saying so to the Committee.

If I may briefly speak about the difference between explanatory notes and a Pepper *v.* Hart statement, Chair? The official explanatory notes are a source that the courts will have regard to in determining doubts and questions about the law. A Pepper *v.* Hart statement is the law: it is part of the legislative intention when the Act is passed, so it is more powerful.

However, if the Act says "dog" but the Minister says to the Committee, "We meant cats as well", that will not help. You can have all the ministerial statements you like, but if it don't go woof, it isn't covered. However, if you have a clear understanding that it is expected that interested parties are to include the devolved Administrations, then the Minister saying that that is the Government's legislative intent in using that phrase gets you well over the line. Would you then need an amendment? No.

Q83 Kirsty Blackman: Another additional question on that—the other thing that has concerned me, as well as a number of the witnesses today, is the amount of stuff that is in regulation and guidance, not in primary legislation. Do you feel that the balance has shifted towards more things being done by guidance and regulation in recent years? Do you feel that there is a significant portion of the Bill that is being done by regulation and guidance, rather than through primary legislation, or even by affirmative procedure?

Daniel Greenberg: Yes, okay, there is a bit of a shift, but it has been quite slow. People have been complaining about the increase in skeleton Bills by successive Governments since I started in public service 150 years ago. So, there is an increase, but it has been gradual.

However, if I may say so, you should not be complaining about that here. My whole point is that this is inevitably a Bill about structure and shape. Those of you considering the devolved institutions and other interests want to ensure that you have the flexibility to move forward while balancing everybody's interests. The best way to do that without having to come back to Parliament each time is to ensure you have powers with a mechanism for consultation and co-ordination. Then, you know that that process of co-ordination will have the powers necessary to give effect to it through subordinate legislation and quasi-legislation. You should not be complaining on this occasion, because the Bill needs to be skeletal in

order to give the flexibility for the ongoing relationships between the different powers concerned by the substance of the Bill. Does that help?

Kirsty Blackman: It does, thank you.

The Chair: Thank you. Seema Malhotra, did you want to come back in?

Q84 Seema Malhotra: I did. You referred to one of the contextual pieces of legislation. There is the Northern Ireland protocol as well. There has been some debate about whether the Bill is compatible and whether there could be legal challenges to subsidies, particularly in Northern Ireland, and whether that could have an impact on subsidy schemes that are UK wide. I would be grateful for your interpretation of the legal framework on that.

Daniel Greenberg: You are not asking me for a compatibility opinion, and I would not give you one, but I will draw your attention and the attention of the Committee to a point for your consideration as you go forward, which is to be sure that you understand the focal points of the protocol in relation to this Bill.

Primarily, we have to have regard to article 6 of the protocol and remind ourselves that the protocol is designed to ensure that it does not prevent market access within the UK and that the international requirements and commitments are protected. One of the issues about article 6 is that it does have the kind of mechanism that we were discussing before, because the protocol has of course the Joint Committee, which is going to be very significant.

So you start off by looking at article 6. You ask yourself, "Will those protections be consistent with this Bill, and how will the Joint Committee be capable of applying its mechanisms in a way that join up with the mechanisms that you develop in relation to the Bill?"

Then we move to article 10, which in substantive terms is the key article for you, because it deals with state aid. The question to ask in relation to compatibility is this: is there anything in the Bill that insists upon a measure, in respect of measures that affect trade between Northern Ireland and the Union, that being the test in article 10? As I have already said—I am perhaps slightly risking something close to an opinion here—I do not see anything, because the mechanisms of the Bill are deliberately so wide.

Perhaps it is helpful to say that we often have this in law. You look at something and you say, "Hold on—the Minister could exercise that in a way that is incompatible with human rights and the protocol." That does not matter—that is not the question. The question is, "Would the Minister be obliged to exercise it in a way that is incompatible?" If the Minister would not be obliged to exercise it in a way that is incompatible, then in itself it is not incompatible, and your next question is, "Do we have mechanisms built in to make sure that the powers are only exercised in the way that is compatible?" That is article 10.

Finally, on the article 16 safeguards and the exception, which was of considerable controversy earlier on this year, that looks at economic, societal or environmental difficulties that are liable to persist and allows unilateral action as safeguarding measures in relation to those difficulties. I think you will want to ask yourselves, not is this compatible—it clearly is—but how continued compatibility would be assured in a case where the article 16 safeguards were being invoked. For me, that is the more interesting question for you.

The Chair: Thank you very much for your contribution, Mr Greenberg. That brings us to the end of the session.

Examination of Witness

Rachel Merelie gave evidence.

3.59 pm

Q85 The Chair: We now hear from Rachel Merelie, senior director for the Office for the Internal Market at the Competition and Markets Authority, who is appearing virtually. We have until half-past four for this session. Could the witness please introduce herself and give a few short opening remarks?

Rachel Merelie: Thank you for the opportunity to appear in front of this panel. As you say, I am the senior director for the Office for the Internal Market at the Competition and Markets Authority, but perhaps more relevant for you today is that I am the senior responsible officer for the project to set up the subsidy advice unit, should the Bill make its way through Parliament in its current form.

I want to make a couple of opening remarks. Obviously, we will operate within the framework set by the Government and by Parliament. The role that we have been given is an advisory one. I know that Members understand that, but it is really important and relevant to us. We have two particular roles to fulfil. One relates to the review function. We will have a very targeted review of the most complex and potentially distortive subsidies that we are asked to look at. The second is a more general and wider monitoring function. We will look at the way in which the regime is operating on a five-yearly basis, so that will enable us to look more generally at the subsidy control regime.

My second point is that in order to fulfil our functions we need to ensure that we have access to the appropriate information. We will have information-gathering powers in relation to the wider monitoring function, and we believe that with appropriate definition of the information to be supplied by the public authorities we should have the appropriate information to undertake our review functions. Should our role change, we would want to ensure that we had the appropriate powers.

Q86 Seema Malhotra: Thank you for giving evidence today. May I ask a couple of questions on the CMA's current powers, and whether there is arguably a case for some extension of them? In relation to the CMA not having the power to instigate a report or investigation by its own initiative, would there be circumstances in which you could see it as beneficial for the CMA to proactively undertake an investigation? For example, something may not be explicitly described as a subsidy by a public authority but seems to have the same effect and is therefore potentially in question. Secondly, what is your assessment of the additional resource and capacity that the CMA will need to fulfil its obligations under the new regime, and do you have any concerns on that?

Rachel Merelie: As you know, that wider role is not what is currently envisaged. Under the current proposals, we can look only at the subsidies of interest and subsidies of particular interest that are referred to us, although as I mentioned in my opening remarks we have a wider monitoring role, which will allow us to take a broader view on the regime as a whole. We can, of course, also look at subsidies that are called in by the Secretary of State, so that might to some extent help to address the question of subsidies that we might want to look at, as you referred to.

Were we take on a broader role, looking at things under our own initiative, as you were discussing, we would have to really understand the implications of that in terms of resources, as you mentioned, and the powers that we have. Ultimately, of course, it is not really for us to decide. It will be for Government and Parliament to decide whether that is a role that you want to give us. I think that was your first point. Could you remind me what the second point was?

Seema Malhotra: It was about whether there is sufficient resourcing.

Rachel Merelie: Yes, of course. We have been given money in the 2021-22 settlement to take on a number of new functions. Previous witnesses referred to the fact that the CMA has three new functions that we are currently setting up. We have the Office for the Internal Market, the Digital Markets Unit, and potentially the subsidy advice unit. We were given a sum of money in the 2021-22 settlement to start to staff up and resource all three of those functions. We now have a bid in for the spending review for the next three years, and we should hear more about that formally tomorrow.

Q87 Seema Malhotra: To follow up, in relation to the internal market and the digital services market, is their membership drawn in the same way, solely from within the CMA? Do you have the option of involving external experts to fill any gaps? I have a slightly different question: when you talk about the access to information that you might need, are there sufficient mechanisms to ensure the accuracy of information posted on the database? Do you have views about what information needs to be on the database? Should there be an auditing process, whether random or otherwise, to ensure the accuracy of the information that is being put there?

Rachel Merelie: Perhaps I will start with the second question. The database is being set up by the Department for Business, Energy and Industrial Strategy and it is not something that the CMA or the subsidy advice unit will be operating—at least at the moment there is no intention for that to be the case. Our focus will be on those very specific, more complex subsidies—the subsidies of interest and of particular interest—rather than the wider set of subsidies that are contained on the database, although you are right that we will want to look more broadly when we undertake our monitoring role. Because we have the information gathering powers we have been given for that, I think we will be able to gather relevant information when we need to, to get a wider understanding of the subsidies that have been awarded.

Your first question was around governance and the way in which the Office for the Internal Market and the subsidy advice unit had been set up. You are right that they are slightly different, in the sense that the Office for the Internal Market has a chair and a panel that are in the process of being appointed by BEIS. There is an opportunity for the devolved Administrations to offer their views on the appointments of the chair and the panel members. That is entirely appropriate; we are talking about a function that is inherently involved in understanding the trade and relationships between the four nations.

For the subsidy advice unit, what is currently envisaged is a sub-committee of the board, so we would have the opportunity to draw on board members, non-execs, panel members and others, as well as the staff from around the four nations. It is important to emphasise that the CMA does have staff in all four nations, and a growing presence across the UK. We think that is incredibly important to be able to run the subsidy advice unit properly.

Q88 Seema Malhotra: May I come back on two brief points? There is not a requirement to have representation from all four nations, as far as I understand. That seems to be slightly at odds with the UKIM set-up, which has been a cause of concern for what needs to have a four-nations approach and buy-in. Would it be a concern to you if there was that requirement in the Bill? Secondly, the question I do not think I heard an answer to was, where should there be a function for either audit or checking of the accuracy of information put on the subsidy database? Would that need to be within BEIS rather than the CMA?

Rachel Merelie: Perhaps, again, I will pick up on the second one first. Yes, at the moment, given that the database sits within BEIS, it would be most appropriate for that sort of checking function to be part of its remit. Obviously, if it were decided for that database to sit with the CMA, we would need to have the requisite resources and powers associated with it.

On representation from all four nations, as you say, there is currently no formal requirement in the Bill. The CMA, as I said, is a pan-UK body. It does have good relationships across all four nations, and is very used to working with them. We are not the policy makers here—that is important to underline—we take on board and do our best to implement the policy set by the Government and by Parliament.

Q89 Kevin Hollinrake: If you have a monitoring requirement, you would think the obvious place for you to go to look at would be the database, yet we heard evidence earlier that fewer than half the entries on that database even have a figure for how much subsidy has been allocated. Is that not a concern to you, because how else will you gather the information other than looking at the database?

Rachel Merelie: That is a very good question. I think we will need to understand how that database is operating, and I am sure you are right; that will be one of the ways in which we will gather information. We may also be going directly to public authorities to ask them questions. I guess we would also be doing some market analysis, some desktop analysis, and so on, of how the subsidy regime is operating more widely. I think there will be a number of different ways in which we gather information, but you are absolutely right—the database will be an important part of that.

Q90 Bill Esterson: You mentioned the monitoring role, and I think you have just given a bit of further information there. I wonder, when you identify things that are not going right, what will you do with that information? If you could answer that, I will then come back to some other questions.

Rachel Merelie: Sorry—I did not quite understand. Did you ask what we will do with information that we get when our monitoring role identifies things that we are doing right?

Bill Esterson: If things are not working, or you identify a problem, what will you do with the information?

Rachel Merelie: Well, in our monitoring role, we will be producing a report on a five-yearly basis, which will be published. That will give information about our understanding of how the regime is working. It will then be for Government to decide whether they want to make any adjustment—for example, to the definitions of the subsidies of interest or particular intertest, or to the streamlined groups, or any other mechanism—based on both what we identify in our monitoring report and, of course, other information that they may also choose to look at.

Q91 Bill Esterson: Five years seems like a bit of a long time to wait if there are specific examples of inappropriate applications of subsidies. I wonder if there might be a way for the information you are gathering to find its way into an investigation or a challenge.

Rachel Merelie: There are also the enforcement mechanisms that will be in place for subsidies to be challenged in the tribunal. That will be a more immediate way of looking at the impact of individual subsidies. If we are asked by the Secretary of State to provide insights sooner than that, we can do that too, so I think the opportunity to offer advice more quickly than that is there. Again, we are the disposal of BEIS, if you like, on that.

Q92 Bill Esterson: Sorry to continue with this, but it feels as though, if you identify something that is wrong on an individual subsidy level, that will only really get anywhere if somebody asks you about it, so they will have to identify it separately to you. It seems that your process is lacking a proactive part, unless I am really missing something.

Rachel Merelie: There are two parts to our process. First, there is the review mechanism on the individual subsidies, on these particular subsidies of interest and particular interest. On that one, we will be assessing the assessments carried out by the public authority against the subsidy principles and, where relevant, against the environmental and energy principles. On those ones, there is a rapid, 30-day process that we have to operate. We have to publish a report within that timescale on the specific subsidy of concern. That is the sort of short-term mechanism—

Q93 Bill Esterson: That is if you have been asked to investigate, isn't it?

Rachel Merelie: Absolutely right.

Q94 Bill Esterson: I was asking about if you identify something when you are carrying out your monitoring role. There seems to be a gap there in you referring information. That is the concern I am raising.

Rachel Merelie: I do understand that concern. I think what you are saying is that at the moment we do not have any powers to look at specific subsidies under our own initiative where there might be an issue, other than through that broader monitoring role.

Q95 Bill Esterson: Thanks for clearing that up; I do appreciate it. Coming to your points about the budget and the settlement, you have talked about the 2021-22 settlement, and there is a fund available for the three new functions. How much has been allocated for the subsidy advice unit?

Rachel Merelie: The figure that I think we have publicly is that there is around £20 million for the three new functions in '21-22. Obviously the majority of that is not for the subsidy advice unit, because we are only just setting that up now. I think it will be more relevant to look at the numbers that we get through the spending review, which will be agreed tomorrow.

Q96 Bill Esterson: Okay, so you cannot really say how much at this stage. You mentioned bringing in board members and other members of staff from around the four nations to fulfil your responsibilities; the reason for asking the question, really, is just to understand what your expectations are of the level of work as compared with your capacity to meet it. An earlier witness said that there is a concern that it could really slow things down if the workload was too high. I appreciate that it is difficult to say because you are not yet in operation, but what is your sense of how flexibly you will be able to address that concern?

Rachel Merelie: It is a very good question. As you say, it is difficult to get a reliable estimate of the workload. The BEIS impact assessment has so far estimated that if the current definitions of subsidies of interest or particular interest were applied to the last few years' worth of data, we would be looking at, I think, between five and 20 in each of those categories. However, it is quite difficult to know the extent to which subsidy giving will change under the new, more flexible, faster and more agile regime that is being put in place, so that is one question.

Also, there may be a tendency for public authorities to choose to send subsidies of interest to us, even though those are not mandated. In the early days they might be cautious about awarding subsidies without going through the advisory process with us. There are therefore quite a few uncertainties about our likely workload, but we have modelled our requirements based on the upper end of each of those—so assuming that we might get around 40 references a year. With the recruitment plans that we are putting in place, we think that we will be able to service those, alongside performing our longer-term monitoring role.

Q97 Bill Esterson: Two final thoughts. How long do you think an investigation is likely to take? And, on your point about local authorities, have there been representations as part of the consultation from local authorities to say that they are more likely, or for that matter less likely, to make referrals?

Rachel Merelie: On the second one, it was BEIS carrying out the consultation. We have not actually been in the frontline of engagement with stakeholders yet, partly because we are at this quite early stage of the

Bill's passage through Parliament. We will obviously be engaging with public authorities much more actively post Royal Assent, and perhaps in the run-up to Royal Assent as well. We do not yet have that information; BEIS may be able to answer that question.

On the question about how long an investigation would take, we have a very tight deadline for the reviews that we are undertaking of subsidies of particular interest. We are being asked to do those in 30 days, so there will be a bit of a run-in period—a pre-notification, to make sure that we have all the relevant information. Once we have published, I think there is a five-day cooling-off period and then the ability for the public authorities to implement their subsidies. They are quite tight timescales. You could imagine a team having a maximum of a couple of months on a particular review, then moving on to another one.

Q98 Simon Baynes: Just a quick question. We have talked rather a lot in this session about the four nations, but the terms of the Bill are such that the devolved Administrations take their place alongside local authorities, public bodies and central Government in being involved in delivering the subsidies to businesses. Therefore, do you agree that they are of equal importance in this endeavour and that, in a sense, the whole point of the Bill is that it spreads the responsibility across the UK and across different levels of government?

Rachel Merelie: Thank you for the question. It is really important that all granting authorities are treated fairly and equitably, regardless of whether they are in the devolved nations or in England. Yes, certainly the spreading of the load across the different granting authorities, and the ability for the subsidy advice unit to engage with each of those on an equal footing, is very important.

Q99 Kevin Hollinrake: On the minimal financial assistance, how are you going to monitor that? It is up to the company to record the assistance it receives. A company could receive assistance from numerous local authorities if it has premises in different parts of the country—for example, through the business rate grants that we saw last year. Those items will not be recorded anywhere. How would you monitor that?

Rachel Merelie: We will be taking the submission from the public authority, and it will be assessing its subsidy against the seven principles that are set out. It will then be for us to look at whether it is providing the evidence that we need to take a view on the strength of its assessment against those principles. That is what we will be relying on in order to do our assessment. Where necessary, we will be able to ask questions of third parties, but in the time available, we will be largely reliant on the public authority giving us the information we need.

Q100 Kevin Hollinrake: I realise that your primary focus is going to be very large schemes—not hundreds of thousands of pounds, but millions of pounds. Nevertheless, somebody has to monitor the smaller stuff as well to make sure that people are not abusing the system. I do not see how anybody can monitor that. To monitor that, you would have to monitor every local authority in the country and stitch all their contributions together against a certain entity.

Rachel Merelie: In the way the Bill is currently set up, that wider monitoring on a day-to-day basis is not something that we will be involved in.

Q101 Seema Malhotra: I want to come back on a couple of points. This is in relation to helping make sure that there is a regime that commands confidence and provides the information to public authorities, which are engaging with some of this activity for the first time. To what extent do you think more needs to be done to engage with public bodies and prepare them to be able to grant subsidies effectively and efficiently to enterprises under the regime? It is likely that a lot of that burden could end up with public bodies approaching the subsidy advice unit. Are you factoring that in to how you see the unit working, or do you think that some of that needs to be done elsewhere?

Rachel Merelie: That is a very good question. I am sure that you are right—there will be quite a process to educate and support the public authorities as they embrace the new regime. I think that a lot of this will come from central Government and the guidance that they will publish. The subsidy advice unit, I suspect, will need to flesh out that guidance with respect to the very large subsidies and the information that we will need to carry out our assessment. We are keen to work with public authorities to make sure that they understand what will be required. Yes, we are aware of the need to do that guidance, which is one reason why, I suspect, it will take a little time between Royal Assent and the commencement of the Act, as there will be a need to get that guidance and detail out there and give confidence to those who want to operate under the regime to do so.

Q102 Seema Malhotra: Would you see that being done in a slightly more structured way through the guidance? Otherwise, the likelihood is that you will have a lot of approaches and potentially more voluntary referrals than you might expect, because the earlier information, advice and guidance is not helping to address some of the questions. Public bodies will engage with this—local authorities in particular give rise to concern—and will be doing this for the first time.

Rachel Merelie: I think the guidance will be incredibly important. Doubtless, there will need to be a series of roundtables and communication with public bodies to ensure that there is as good an understanding as there can be. The other point to emphasise is that this is going to be a bit of a learning experience for everyone in the first days of the operation of the new regime. We cannot expect it all to work entirely smoothly from day one, although we will do our very best to make that happen. There will be a need as time goes on to adjust, to iterate and to develop our processes.

Q103 Seema Malhotra: On fast-cycle learning and the effectiveness of the scheme, do you think that there are merits in the five-year report being produced to a shorter timetable, with greater frequency—for example, three years? You may have a view on that—I am just raising it as an issue. Five years seems a long time, particularly with a new regime, in which to look at how well it is working.

Rachel Merelie: Yes, I can see that as a question. At the moment, the Bill allows for the Secretary of State to ask for advice more frequently or when required. There may be an argument that says that we will provide some

advice on a shorter timescale than five years, with the set point being the five-year report. Again, that is a question that we are entirely open to discussing further.

Q104 Seema Malhotra: I am conscious that we have only two minutes so, while I can, I will ask whether you have concerns about your ability to scrutinise subsidy schemes if subsidies under those schemes are less likely potentially to be on the database. Do you have concerns about the transparency of subsidy schemes from the perspective of any single role?

Rachel Merelie: I think that this is an area where quite a lot more work needs to be done to understand the relationship between the subsidy schemes, the individual subsidies and the information that we will have to analyse. I do not have concerns at the moment, but that is partly because this is a pretty early stage in articulating how that will work.

The Chair: Thank you, Ms Merelie, for your evidence this afternoon. That was beautifully timed, and we will now move on to the final panel.

Examination of Witness

Ivan McKee gave evidence.

4.29 pm

The Chair: We are going to hear from Ivan McKee, the Scottish Government Minister for Business, Trade, Tourism and Enterprise, who is appearing virtually. We have until 5 pm for this session. Would the witness introduce himself for the record and give us a few opening comments?

Ivan McKee: Thank you very much, Ms Nokes. Thank you for the opportunity to set out the views of Scottish Ministers on the proposed legislation. For the record, my name is Ivan McKee. I am the Scottish Minister for Business, Trade, Tourism and Enterprise.

I look forward to taking questions, but would like to briefly outline a few concerns that the Scottish Government have about the Bill. The first is the sweeping powers of the Secretary of State, which ignore the devolution settlement and do not grant the equivalent powers to Scottish Government and other devolved Administration Ministers. The second concern is the absence of formal regulatory and enforcement arrangements. The third is the inclusion of agriculture and forestry in the provision. Those are our main concerns, but I am happy to take questions from members of the Committee.

Q105 Seema Malhotra: Thank you very much, Mr McKee, for giving evidence to our Committee today. First, what is your overall view of the regime? Do you see any advantages in moving away from the way the EU state aid regime operates? Could there be more freedoms for devolved Administrations?

Secondly, what do you see as the impact of moving away from more formal assisted areas on the ability of the Scottish Government to support more deprived regions? Would you say that there could be flexibility in the Bill to enable you to make those decisions as you might wish, in line with Scottish Government objectives?

Ivan McKee: First, for the record, it is well known but it is worth stating that leaving the European Union was a mistake and we look forward to the day, hopefully in the not-too-distant future, when we can rejoin the European Union and all the advantages that it gave to Scotland and, frankly, the rest of the UK.

As for the specifics of the Bill, given that we are where we are, we recognise the need for a Bill, notwithstanding the concerns I have raised already. Many of the specifics have still to be nailed down. As we see the final shape of it emerge, we will comment on the specifics.

As for being able to support different parts of Scotland, given that we have responsibility for economic development in Scotland, clearly we are keen to be able to do that. The EU rules obviously allowed different parts of Scotland to be treated differently depending on the circumstances and allowed us to make decisions on how we saw fit to spend money and take action within those rules. It was a slightly different system, but we do not see any specific advantages to the current proposals in this Bill.

Q106 Seema Malhotra: Thank you very much for those answers. As you will be aware, concerns have been raised that the role, voice and powers of the devolved Administrations within the regime may not be strong enough, particularly for a four-nations approach. It has been suggested that that should be addressed and the Bill strengthened. Are there specific areas that you would say need to be strengthened?

Ivan McKee: A four-nations approach clearly has to take recognition of areas of devolved responsibility, be that for agriculture, forestry, fisheries, environment, economic development and so on. A range of areas on which the Bill impinges are devolved under the settlement. So clearly that is a concern.

I suppose another concern about the Bill's general operation is the lack of the option, or requirement, under the EU regime for pre-notification or advance approval. In advance of an award or a subsidy being made, that gave certainty that it was aligned with the rules in place. The absence of that in this Bill creates a great deal of uncertainty as to what is allowable and what is not in advance of any subsidy decisions being made.

Q107 Robin Millar (Aberconwy) (Con): It is a pleasure to be here with you in the Chair, Ms Nokes.

Welcome to this Committee of the UK Government, Mr McKee. We are discussing a UK Government instrument and within that there are provisions made for the role of the devolved Administrations. Clause 10 gives the devolved Administrations scope to set their own scheme of subsidies. Is that your understanding? Do you feel that that provides the Scottish Government with the powers to do what they need to do?

Ivan McKee: No, because the Secretary of State has powers over devolved areas that Scottish Government Ministers do not have, and that impinges on the devolution settlement. That settlement is quite clear on areas that are reserved and devolved, and it is the Scottish Government and Scottish Ministers who have the power to act and operate in those devolved areas. The Bill gives those powers to the Secretary of State and the UK Government, but it does not give equivalent powers to Scottish Government Ministers to operate likewise in devolved areas.

Q108 Robin Millar: I will ask the question in a slightly different way, then: does the Bill give you powers to do things that you were not able to do when the UK was part of the EU?

Ivan McKee: As I have said before, we believe that we should be in the European Union. The scope that we had within the European Union to be able to give subsidy, within a controlled environment, was very clear. We were able to get clarity in advance of making any subsidies as to whether it complied or not. There was clarity about that process that does not exist under the current proposals.

Robin Millar: I think the point you are making—

Ivan McKee: To answer your question, we don't know. We do not know until we have made a subsidy and then someone decides that they want to challenge that at some point down line. Until then, we will not know whether we have the authority to do what we think we might like to do.

Q109 Robin Millar: If I understand you correctly, you are saying that when we were within the EU, there was certainty that came from being told what we could and could not do. May I suggest that clause 10 gives the devolved Administrations scope to set their own subsidies? That was not a freedom that you had when we were in the EU.

Ivan McKee: No, because that would be open to challenge potentially further down the line, and we would not have clarity in advance about whether it was open to challenge or not, and what the conclusion of any challenge may be.

Q110 Robin Millar: I am grateful that you used the word "potentially" because there is not a certainty around that; it is only potential. The fact is that clause 10 does set the freedoms for the devolved Administrations to set their own subsidy schemes, so I am grateful to you for confirming that.

We have just had very interesting evidence from Mr Greenberg, who is the Parliamentary Counsel for the House of Commons concerned with domestic legislation. He said that we should not be complaining about a skeleton Bill because we should not be focused on detail so much as on ensuring that it gives us the freedoms that we want to do the things we do. I just come back to clause 10 and I wonder again what your response is to that. Do you feel that the clause gives you freedoms?

Ivan McKee: Again, I don't think that that is the case, because there is no advance approval. At the moment, there are several proposals on my desk that we are considering, and have done in the past. The process is that you go through a consideration, and then assess and get clarification on whether it would be allowable, or would breach state aid rules. If we are in an environment where you go ahead and do things and then you may get called up later on it because there is no clarity in advance as to whether it complies, clearly you can say that we must do something, but if it is then ruled non-compliant at a later stage because you did not know that in advance, that is a freedom that is not worth much.

Q111 Robin Millar: A final question, because I am really trying to get to the bottom of this point: would you be happier if the UK Government told you what to do?

Ivan McKee: No, I would be happier if there were clear rules for everybody across the UK that had been agreed with all parts of the UK, so that everybody knew exactly what that level playing field was, everybody knew what the rules were in advance, and there was a process for clarification before you took very important decisions about subsidies and economic development for very good reasons: to support businesses, industries, communities and parts of Scotland. I would be happy if we knew in advance that those things were clear and allowable, and if the Bill respected the powers of the devolved Administrations with respect to the devolution settlement.

Q112 Stephen Flynn: Thank you, Ivan, for coming along this afternoon. There are a couple of points that I wish to make, if I may. First, we heard this morning from Dr Pazos-Vidal, who said that the Bill is not reflective of the territorial constitution of the UK as it stands. This afternoon, we heard some comments from George Peretz QC that alluded to the wider discussion about the fact that BEIS could ultimately seek to invest in projects, be they in Wales, England, or indeed Scotland, and that those projects could have a consequence upon the devolution settlement—they could be at odds with the intentions of the Scottish Government. Do you believe there is an issue there, given the fact that, ultimately, it will be only BEIS that has the ability to refer such matters to the CMA? Do you believe that the Scottish Government, along with the Welsh Government and the Northern Ireland Assembly, should have the ability to refer such matters, should they feel that those matters impinge upon devolution and they want to challenge the situation as it stands?

Secondly, I would be grateful if you could expand upon your concerns in relation to agriculture, because I know it has been spoken about at length.

Ivan McKee: With regard to your first point, yes, of course that is a concern. It is lopsided, it is asymmetrical and it gives BEIS powers in devolved areas that it does not give to the devolved Administrations. Those are, to say the least, problematic with regards to devolved Administrations operating in areas of devolved competency. That is clearly of significant concern. I did not hear all the earlier evidence—I dipped in and out of some parts—but I am aware that those comments you referred to were made, and that does support the view that we have. It is not just ourselves: the Welsh Government and, I believe, the Northern Ireland Executive also have concerns regarding the powers that the Bill gives to the Secretary of State in devolved areas that are not reflected with equivalent powers for Scottish Government Ministers.

With regards to agriculture, our concern is that income support mechanisms for agriculture that would have been outside the scope of an EU subsidy control regime are inside the scope of the Bill, which raises concerns about the extent to which we can apply such income support mechanisms within the agriculture sector in Scotland, and of course elsewhere. That is a concern for us: we believe that agriculture should be excluded from the Bill, and I understand that an amendment could be coming forward with that objective in mind.

Q113 Stephen Flynn: Thank you for that, Ivan. Another question, if I may, Chair. On that income support for the agricultural sector, in the discussions—as you understand them—between Scottish Government officials and, indeed, officials from other devolved nations and the UK Government, has there been any indication that there would be a situation that arises where the UK

[Stephen Flynn]

Government would be cognisant of the concerns that the devolved nations have, and would seek to acquiesce to your request that agriculture be not included within the scope of this regime?

Ivan McKee: The proof of the pudding will be if an amendment comes forward in that regard and is accepted. We have not had confirmation that such an amendment would be accepted, so we will see where that goes. In answer to your question, we have not had confirmation from the UK Government that they would accept the exclusion of agriculture from the Bill at this point in time.

Paul Scully: Hi, Ivan. Good to see you.

Ivan McKee: Hi, Paul.

Q114 Paul Scully: Very quickly on agriculture and fishing, you will be aware that 81%—I think—of respondents to the consultation said that either agriculture or fisheries should be included in the Bill in some way. Do you at least welcome the fact that existing arrangements for agriculture and fishing subsidies will remain, and that legacy schemes will not need an assessment of compliance with the principles, or to meet the relevant transparency requirements—although, of course, we will continue to talk about future schemes?

Ivan McKee: Clearly the Bill sets out where we go in the future. Agriculture is devolved, so we would be concerned if a scheme or support that we put in place was deemed to be within scope, and could not be put in place as a consequence of the Bill. That would be a concern, obviously.

Q115 Paul Scully: We will continue to work with you and the other devolved Administrations to make sure that the agriculture and fisheries sector policy works across the UK. On engagement, obviously we have been working closely with you, Wales and Northern Ireland in developing the policy; I think we have had something like 34 official-to-official meetings and 12 ministerial meetings across the devolved Administrations—the quad meetings and so on. We will continue engaging throughout the parliamentary process and in the lead-up to implementation. What other engagement would you find useful?

Ivan McKee: I am very happy to engage, Paul, as you know, and to have those conversations at ministerial and official level. The issue is not so much the engagement; it is where the engagement leads. Our concerns have been clearly articulated, and if we do not see movement on them, clearly the engagement and discussion has not led to a solution that we find satisfactory. The challenge on the devolution settlement and the scope of powers is extremely concerning. We are glad that we continue to talk on this, but the real nub is the outcome. If the Bill continues to ignore the devolution settlement, clearly that is of significant concern to us.

On specifics, one thing that could help as part of that engagement process would be early sight of draft guidance and draft regulations; a lot of that has still to be nailed down. As we go forward with these discussions at ministerial and official level, any early sight of those things would facilitate discussions.

Paul Scully: That is helpful to know. Thank you.

Q116 Simon Baynes: Thank you, Mr McKee, for your time this afternoon; it is much appreciated. Do you welcome the devolution of powers under the subsidy control regime to local authorities in Scotland?

Ivan McKee: As I say, our main concern is the assault on the devolution settlement; it takes control away from Scotland in devolved areas. That is a significant concern. It is not acceptable for the UK Government to behave like that. Powers in devolved areas should lie with Scotland, and that is our main concern.

Q117 Simon Baynes: Does that mean that you would rather local authorities did not have these powers under the Bill?

Ivan McKee: The main issue we have is around the devolution settlement. It is quite clear: UK Government Ministers can have authority over devolved issues, which should be decided on in Scotland as per the devolution settlement. That should not be trampled on. That is something we are very concerned about, and we are opposed to that.

Q118 Simon Baynes: But do you support devolving powers to local authorities in general as part of the devolution settlement?

Ivan McKee: Clearly, it depends on what it is. In the devolution settlement, local government is obviously a devolved area, and those areas are for Scotland to decide on.

Q119 Kevin Hollinrake: It seems to me, looking at schedule 1, that you are able to design a scheme that the devolved Administration in Scotland deems appropriate. I think you said that you were worried that, having done that, you might be challenged—by the Secretary of State, for example. However, under clause 70(7)(a), you could challenge another part of the UK on their scheme, too. Why does Scotland have any less discretion in challenging another part of the UK than another part of the UK has in challenging you? It seems to be exactly the same either way.

Ivan McKee: Not really. Look at the calling-in powers, for example, that the Secretary of State has that we do not. The streamlined subsidy schemes, which have not been clarified yet, can be made only by the Secretary of State, not by the devolved Administrations. The cooling-off period, again, has no equivalent powers for the devolved Administrations. Requesting a report from the CMA cannot be done by the devolved Administrations. Referring to the CMA's subsidy advice unit can be done only by the Secretary of State and not by the devolved Administrations, so the Secretary of State has a range of powers that can operate in areas where the devolved Administrations do not have the authority to do those things as well. That asymmetry in devolved areas is something that we are concerned about.

Q120 Kevin Hollinrake: I am sure that the Secretary of State would argue that that is because it is an umbrella scheme for the United Kingdom, but do you accept that under the Bill you have the powers to design your own scheme for your devolved Administration, and you have the same powers as the UK Government have to challenge a scheme in another part of the UK?

Ivan McKee: In terms of designing the scheme, clearly it is open to challenge within the scope of that. As I have outlined, the Secretary of State has a range of powers that the devolved Administrations do not.

Q121 Kevin Hollinrake: That was not the question that I was asking you. I was asking whether you agree that clause 70(7)(a) gives you the same powers as any other part of the United Kingdom to challenge a scheme?

Ivan McKee: It does not give us the same powers as the Secretary of State, which are much more wide-ranging than those that you mentioned.

Q122 Kevin Hollinrake: That is not the question I asked you. I asked whether under clause 70(7)(a) or (b) you have the same powers to challenge a scheme in any other part of the UK as any other part of the UK has to challenge you?

Ivan McKee: That is true as far as it goes, but that is not the point. The point is that we do not have the same powers that the Secretary of State has under section 55.

Kevin Hollinrake: It was my point, though. Thank you.

Q123 Seema Malhotra: We had some discussion about clause 70(7)(a), and there is some point of clarification about the definition of "interested party", which I do not think is fully clear in relation to the devolved Administrations, but either we agree on the need for the Bill to be taken forward, I hope with some significant improvements, or there is a view that that cannot be achieved. I want to come back on a couple of points that you made, Mr McKee, that I was not fully clear on. The first is on being prepared to be involved in discussions, the question being what outcomes would be achieved. Do you feel clear at the moment on what specific changes, whether in relation to call-in powers, an obligation to consult or consent, you would want to see inserted in the Bill to meet some of those concerns? It would be very helpful to understand specifically what they were. Perhaps that could be in writing afterwards.

Secondly, I was not fully clear on what your view was in relation to local authorities. It seemed that it was more for the Scottish Parliament to decide what local authorities in Scotland may or may not do, rather than local authorities across the UK being able to make subsidies if they felt that they were in line with the subsidy control principles, and beneficial for their area. I was slightly confused on what your view was about local authorities being able to make subsidy decisions in Scotland. Perhaps you could come back on both those points, and put in writing what specific changes you want to see.

Ivan McKee: On the specifics of what our asks would be, I am very happy to put that in writing. In broad terms, it centres around, as I said, the requirement to not have the Secretary of State able to operate in devolved areas, as per the devolved settlement, and for the Scottish Government and Scottish Ministers to be able to do that. For us to have equivalent powers as it refers to devolved areas would be the ask, in broad terms. I have outlined some of that verbally, but I am very happy to come back to the Committee in writing with the details on specifically what that means.

Local authorities have always been able to grant aid within the rules that exist, so effectively nothing changes there. What changes with regard to the Bill is the authority that it gives the Secretary of State that it does not give in devolved areas to Ministers in the devolved Administrations. That is our concern.

Q124 Kirsty Blackman: Nice to see you, Ivan. My question is about the priorities and the fact that we are being asked to take on trust an awful lot of the stuff that is coming forward in regulation and guidance. Given the current track record of the UK Government and their relationship with Scotland, trampling over the Scottish Parliament, do you think that it is likely that the regulations and guidance that come through will be in any way suitable or tailored to the needs of Scotland, or do you think that they are likely to be done for the benefit of the UK?

Ivan McKee: Experience has shown us over recent years that the commodity of trust is in short supply. We would be very concerned if the issues that we are talking about were not dealt with in the Bill. I think we would be in a very difficult place if we were relying on guidance that might come out later to give us the comfort that we require that this was not a challenge to the devolution settlement, and the powers of the Scottish Government and Scottish Ministers.

Q125 Kirsty Blackman: Just one more on that. Are you aware that about one 10th of the subsidies on the UK subsidies website are from Scotland? About 50 of the 500 are Scottish subsidies. Scotland, presumably, does not do 10% of the subsidies in the UK. Do you think that the UK probably needs to pull its socks up a bit there?

Ivan McKee: I would not like to comment. We do what we think is right for the people, communities, regions and businesses in Scotland. I am sure that the UK Government will do what they think is right for businesses in England.

The Chair: If there are no further questions, I thank you, Mr McKee, on behalf of the Committee for giving evidence to us today.

Ordered, That further consideration be now adjourned.—*(Michael Tomlinson.)*

4.58 pm

Adjourned till Thursday 28 October at half-past Eleven o'clock.