

**South of Scotland Enterprise (SOSE)**  
**Response to request by Economy and Fair Work Committee for written**  
**views on the UK Government's Subsidy Control Bill**  
**15 December 2021**

**1. In practical terms, how do you see the subsidy control regime, established by this Bill, affecting the delivery of economic development and business investment in Scotland?**

*Clarity*

- We are of the view that a well-functioning subsidy control regime must be based on clear rules that provide legal certainty to businesses and granting authorities. The interim regime that has been in place since the UK's exit from the EU has not provided the level of clarity required. We therefore stress the importance of ensuring that this Bill and its accompanying guidance implements a regime that is clear, proportionate and gives businesses and public agencies (and their advisers), the tools to operate confidently within it.
- Particularly in the community sector, SOSE officers depend on having the ability to easily and practically identify and apply the subsidy rules, in order to design and progress projects and investments which best meets the needs of the South of Scotland within the subsidy framework. This is essential for the effective delivery of economic development and business investment in Scotland.
- The subsidy control regime, as it currently stands, makes it much more difficult to plan ahead. Many of our projects and programmes can have a significant period of lead in time, and it is therefore a necessity that the regime can be practically and efficiently applied by our teams without hindering the process. In doing so, the subsidy control regime should therefore seek to avoid adding any unnecessary uncertainty to determining what projects we may or not be able to support. Planning difficulties and uncertainty can have a material knock-on effect on creativity, innovation and the ability for organisations to source match funding.

*Timescales*

- Nearly a year has now elapsed since the TCA was introduced, and the new subsidy control regime has applied to the UK. It is welcomed that the UK is attempting to create a new streamlined and practical subsidy framework, that is more user friendly for businesses and public agencies, and less restrictive than the previous framework. However, our direct experience is that the guidance on the application of the new regime has been limited, and the Subsidy Bill does not provide the necessary details and assurances. We would very much welcome increased guidance and support as regards the subsidy regime in the near future, because continued uncertainty has a negative effect on the delivery of economic development and business investment in Scotland.

*Differences between regimes*

- We have experienced practical difficulties by way of reconciling the pre- and post-Brexit approaches to subsidy assessment, particularly due to the ongoing

lack of guidance and detail in the new subsidy control regime.

- A recurring example would be assessing investment in community projects, which typically have a high intervention from the public sector. Pre-Brexit, the applicable state aid framework was helpful to be able to comfortably assess and confirm certain awards as being non-aid. However, the current subsidy control regime has made such an assessment more complex given the inclusion of the UK market element, as confirmed in the Subsidy Bill with the addition of Principle 6 or F.

This in turn makes a non-subsidy conclusion less likely, unless the project is very clearly not commercial. Practically speaking, since we are looking to support enterprising communities, the vast majority of projects involve some sort of a commercial element within the beneficiary, and so therefore are more likely to be deemed to be a subsidy. This results in a risk it could have unintended consequences on the funding decisions ultimately made by public agencies. We would therefore welcome guidance on this point, to assist in being able to confidently conclude more non-subsidy based awards based on official guidance taking into account Principle 6 or F under the Bill.

- Practically speaking, we have also found that the subsidy control regime review has so far been more burdensome and required more staffing resource as a public agency for similar projects than was common under the state aid regime.
- We would also note that there is an increased burden in terms of the number of entries required in the transparency register in comparison to the state aid regime. For SOSE this information is already in the public domain as a matter of process on the SOSE website. However, at the same time, the entries on the transparency database themselves offer no confirmation nor explanation on compliance with the subsidy principles, which the public agency only have to prepare as an internal document in case of a future challenge. We would accordingly welcome further detail on the transparency register.
- We would also ask for further information on the mechanism or process by which authority decisions deeming grants to be non-subsidy can be reviewed and/or challenged. While the transparency register significantly increases transparency on all subsidy awards to be made by authorities in the UK, there are significant amounts of awards which continue to be made on a non-subsidy basis. There does not currently appear to be a clear route to trace and account for these non-subsidy decisions, or to ask for a review or challenge. We would welcome further clarification on this issue.
- While the state aid regime provided the ABER and FBER, there has been increased confusion in the application of the rules for the agriculture and aquaculture sectors post-Brexit – which represent very important sectors for the South of Scotland. While the TCA initially excluded these areas from the UK subsidy regime, BEIS offered some guidance on the otherwise applicable WTO rules, but these differ from the base rules our schemes were based on. It is therefore necessary for public agencies to reconcile these pre-existing

schemes with the WTO rules – however at the same time the Subsidy Bill clearly intends to include these sectors within the subsidy control regime directly. Some detailed guidance would therefore be welcomed as soon as possible on the future direction of travel to support public agencies with efficiency in planning their agri/fish schemes, and more clarity on the way forward as regards the rules for these sectors.

#### *Cost of doing business*

- Our cost of doing business has also increased since the introduction of the subsidy regime- on the basis of having to engage internal subsidy specialists, and request legal advice for certain cases over £100K. This is necessary to manage SOSE's risk but would not have been required to this extent pre-Brexit.

#### *Risk aversion*

- Tied into the above arguments, and particularly the increased uncertainty, the new regime has the effect of a more risk-averse approach by necessity when applying subsidy regime assessments. This is unfortunate as there is a clear policy need not to overlook projects which are potentially more innovative in nature, since these are still a priority for economic development and business investment in Scotland. There is accordingly an increased risk that such projects will be more likely to be non-prioritised in favour of more straightforward or risk-free ones.

#### *Recognition of different local, regional and national markets*

- We consider it important to recognise different local, regional and national markets within the UK and the impact on and interaction with the formal UK Internal Market structures. Public agencies should still have the flexibility to be able to address their own priorities, while respecting the relevant subsidy rules and principles.

## **2. Do you have suggestions for specific amendments to the UK Bill, including for example, where more detail on the face of the Bill would be preferable to being left to regulations?**

#### *Prohibition on relocation*

- Clause 18 of the Subsidy Bill includes an additional requirement on top of the prohibitions contained in the TCA to the effect that subsidies which have relocation within the UK as a condition are also prohibited. We are of the view that this provision as drafted could be side-stepped as it expressly states that the prohibition is only applicable where the relocation factor is a condition for the subsidy award. Its practical application would therefore be limited as granting authorities could choose not to make such a requirement as an express condition of the grant offer – but instead require the location of production to be in the local area. If it is thought that the potential for subsidy races within the UK could have a damaging effect on local economies, then consideration needs to be given to alternative wording. By comparison, the state aid rules focus on the effect of displacement on the market in practice as opposed to technical wording of the condition and therefore have wider application.
- The question as to whether relocation will take place is further complicated for areas such as the South of Scotland which is located within Scotland but at the

same time is geographically located just beside England and also Northern Ireland. This means that the ability and attractiveness of nearby areas for businesses may well take them into an adjoining geographical area while not specifically seeking to infringe the restriction on relocation within the UK. Further guidance on the limits of the relocation prohibition in the context of proximate geographical locations and subsidy awards would therefore be welcomed.

- Furthermore, there is no clear indication so far of the specific relevant mechanism to, or relevant persons who could, make a request to review and make a challenge against a relocation requirement outside the general mechanism for subsidy challenges.
- Further guidance on this would also be welcomed, to also ensure third party public agencies would be included as interested persons who would have the right to make such a request or challenge.

#### *Guidance and devolved administrations*

- We note that clause 79 of the Subsidy Bill grants the Secretary of State a discretionary power to issue guidance (although also confers an obligation to publish any guidance issued). Given the general acknowledgement of the reliance on guidance for the effective operation of the regime, we are of the view that there should be an obligation to issue guidance. We note the obligation in clause 79 on the Secretary of State 'to consult with such persons as the Secretary of State considers appropriate', which should explicitly include the devolved administrations.

### **3. Do you have any other comments?**

#### *Involvement of devolved administrations*

We agree with your comments on the increased involvement and powers of the Scottish Parliament and Scottish Ministers needed under the Subsidy Bill. We note generally speaking that SOSE is an economic development agency, and therefore representative of an entity which does not exist in England and which Westminster does not have the relevant experience or understanding of dealing with. We think that this also adds to the importance of the inclusion of the Scottish Parliament and Scottish Ministers in the various points you raise, in order that SOSE and other Scottish enterprises will be appropriately represented and protected as appropriate.

- Since the control of subsidies has now been returned to the UK and is a reserved matter, much of the autonomy that the Scottish government had when the UK was under the EU state aid regime has been transferred to the UK government. The UK Internal Market Act recognised the importance of consulting with the devolved administrations on its proposals for subsidy control. We hope that the spirit of section 53 of that Act will continue throughout the development of the regime, and that the UK government will take the opportunity to consult fully with the devolved legislatures and administrations and other interests based in each of the UK jurisdictions.
- It is noted that the Subsidy Bill does not provide for devolved governments to

have any influence or involvement in the appointment of CMA panel members. CMA panel members will be in charge of exercising the CMA's powers under the Bill (unlike the provisions applied to appointments for the Office of the Internal Market which require prior approval from the devolved governments). This should be extended to at least include Scottish Ministers.

*Continuation of 'Safe Harbour' approach*

- In discussion with the Scottish Government, it has been intimated that a continuation of adherence to pre-Brexit rules, referred to as the 'safe harbour' approach, may continue after the new regime has been fully enacted. Whilst SOSE appreciates this approach is sensible as an interim measure, the practical application of this as the new regime becomes clearer is increasingly challenging. This is outlined in our response above. Further, the potential for a 'stricter' regime to be in place in Scotland, but not England, provides a specific challenge for SOSE given our proximity to the border. A more favourable subsidy regime in England has the potential to unfairly disadvantage business investment and economic development in the South of Scotland.