



## REPORT TO INFRASTRUCTURE SERVICES COMMITTEE – 13 MAY 2021

### SUBSIDY CONTROL CONSULTATION

#### 1 Reason for Report

- 1.1 This Report sets out the Council response to a UK Government consultation on subsidy control, submitted under delegated powers to Officers.

#### 2 Recommendation

**The Committee is recommended to:**

- 2.1 Note the response submitted to the UK Government on proposals for a subsidy control regime.**

#### 3 Purpose & Decision-Making Route

- 3.1 EU State Aid rules were repealed by the UK Government as of 1 January 2021. State Aid rules establish principles for public sector intervention in markets, including the provision of subsidies. At present, public authorities must ensure that any support provided complies with the UK's international obligations to the World Trade Organisation and trade agreements.
- 3.2 The UK Government's Department for Business, Energy and Industrial Strategy (BEIS) launched a consultation on a [UK Subsidy Control regime](#) on 3 February 2021 with a deadline for responses of 31 March 2021.
- 3.3 The Council's European Member Officer Working Group (EMOWG) discussed the submission of a Council response at its meeting on 3 March 2021, agreeing that the Group would be consulted via email prior to formal submission under delegated Officer powers. The EMOWG was consulted on the draft response between 18 and 24 March 2021 and the Chair and Vice Chair from 25 March to 30 March 2021. The formal response was submitted on 31 March 2021 and is set out at **Appendix 1** to this Report.

#### 4 Discussion

- 4.1 The introduction of subsidy control legislation is designed to ensure a level playing field within the UK; compliance with international obligations; and to provide legal certainty to subsidy providers. The UK Government has proposed the following principles for subsidy control:
1. Subsidies are provided to meet a specific public policy objective to remedy an identified market failure or to address an equity concern.
  2. Subsidies are proportionate and should be the minimum size necessary to achieve the stated public policy objective.
  3. Subsidies are designed to bring about a change in the practices of the subsidy beneficiary that would not be achieved in the absence of a subsidy and that will assist with achieving the stated public policy objective.

4. Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.
5. Subsidies are an appropriate policy instrument to achieve the stated public policy objective and that objective cannot be achieved through other less distortive means.
6. Public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that might arise from a subsidy.
7. Subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on domestic competition and international trade or investment.

4.2 All bar one of the principles is presently included in the Trade and Co-operation Agreement between the UK and EU. The additional priority (no. 6) is intended to ensure that there is not distortion within the UK market. As there are unlikely to be instances where trade within the UK market would not also distort competition internationally, the Council response suggests that the addition of this further principle may not be necessary.

4.3 The Council response proposes limiting any UK subsidy control regime to the minimum required to comply with international obligations. This is in order to maximise flexibility to provide support locally where necessary; to ensure that UK companies remain competitive with international competitors; and to minimise administrative and reporting costs.

4.4 The response particularly highlights the need to ensure that rules for agriculture and rural development are aligned with the World Trade Organisation's Agreement on Agriculture and that the fisheries sector can access equivalent levels of support as other industry sectors.

## 5 Council Priorities, Implications and Risk

5.1 The following Council priorities are relevant to this Report:

<b><i>Pillar</i></b>	<b><i>Priority</i></b>
<i>Our Environment</i>	<i>Infrastructure</i> <i>Resilient Communities</i>
<i>Our Economy</i>	<i>Economy &amp; Enterprise</i>

5.2 The table below shows whether risks and implications apply if the recommendation is agreed.

<b>Subject</b>	<b>Yes</b>	<b>No</b>	<b>N/A</b>
Financial			X
Staffing			X
Equalities			X
Fairer Scotland Duty			X
Town Centre First			X
Sustainability			X

Children and Young People's Rights and Wellbeing			X
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5.3 An Equality Impact Assessment is not required because this is a Report for noting and does not have a differential impact on any of the protected characteristics.

5.4 The following Risk has been identified as relevant to this matter on a [Corporate Level](#):

- Changes in government policy, legislation and regulation

The following risks have been identified as relevant to this matter on a [Strategic Level](#):

- Support Inclusive, Vibrant and Healthy Communities
- Regeneration
- Economic Development

## 6 Scheme of Governance

6.1 The Head of Finance and Monitoring Officer within Business Services have been consulted in the preparation of this Report and their comments are included within the Report. They are satisfied that the Report complies with the Scheme of Governance and relevant legislation.

6.2 The Committee is able to consider this item in terms of Section A.22 of [Part 2B of the Scheme of Governance](#) (Officer Powers) as this relates to the submission of a Council response to an external consultation on any policy matter where the timescale for responding does not permit an opportunity for approval by the appropriate policy Committee. As the policy area is primarily Economic Development, the appropriate policy Committee would be Infrastructure Services Committee.

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**Director of Infrastructure Services**

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5 April 2021

**List of Appendices**

**Appendix 1 – Consultation Response**

## APPENDIX 1 – CONSULTATION RESPONSE

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

Subsidies which address market failure and/or deliver wider public benefits are potentially beneficial to the UK economy. Market failures may emerge within particular geographical areas/communities (e.g., rural areas due to low population density, distance from markets etc.) or temporarily within particular industry sectors undergoing periods of adjustment.

In addition to benefits to the economy, consideration should also be given to wider benefits to communities and the environment. Public benefits arising from subsidies may be social (e.g., job creation in disadvantaged communities); economic (e.g., development of new and innovative products and services) or environmental (e.g., lowering energy consumption or emissions). Some industries may also be of strategic importance to particular communities (e.g., fisheries/agriculture) or the UK as a whole (e.g., steel), hence the costs of not providing support should also be considered when calculating the overall costs and benefits of subsidies.

As a Local Authority, Aberdeenshire Council has identified wider added value in providing subsidies to support wider economic development projects (including grants to specific businesses) and to enhance the delivery of services provided by the voluntary or not-for profit sector (e.g., community transport; social housing; advice services; employability services etc.).

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

Many of the subsidies which could be potentially most harmful and distortive would appear to be prohibited under the UK's international commitments, such as unlimited guarantees for unviable enterprises. The most harmful and distortive subsidies are likely to be of high financial value, well in excess of the 325,000 Special Drawing Rights (SDR) permitted in the Trade and Co-operation Agreement. Smaller subsidies are generally significantly less distortive hence the proposed increase to the de minimis level to 325,000 SDR is welcomed.

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

The following objectives set out in the consultation document appear appropriate:

- Facilitating interventions to deliver on the UK's strategic interests
- Maintaining a competitive and dynamic market economy
- Acting as a responsible trade partner

It may be helpful to provide examples of what is meant by the UK's strategic interests and consider local strategic interests which may vary in different geographical areas. Sufficient flexibility within the subsidy control regime to allow for targeted local interventions whilst mitigating any distortive impacts would be welcomed. Furthermore, it is important to ensure that 'strategic interests' are considered in a broad sense and consider interests which are not purely economic

such as food security, the levelling up agenda and climate change. As such, the recognition of the importance of place-based initiatives such as regeneration, employment and skills programmes is welcomed.

The TCA will provide sufficient protection to the internal market in the same way that EU State Aid rules previously prevented devolved and regional administrations from using subsidies to distort trade. A measure which distorts trade between parts of the UK will almost certainly affect trade between the UK and the EU. As such, there is no need for any additional subsidy tests as such tests are only likely to create more uncertainty and opportunities for challenge around what is permitted and what is not permitted.

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

- **Additional datasets (other than the European Commission's Transparency Award Module) on local or regional subsidy awards (e.g., by value, sector or category)**
- **Research and evaluation projects that have been conducted on the impacts of different types of subsidy awards on domestic competition and trade (e.g., by value, sector or category)**

Whilst we are not aware of any additional datasets or research/evaluation projects specifically focused on the impact of subsidies on competition and trade, evaluations of the wider policy impact of subsidies through funding programmes are available. For example, evaluations have been carried out periodically over a number of years on the impact of Structural Funds programmes.

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

It seems unlikely that the regime would have any potential impact on people who share a protected characteristic, particularly if it is uniformly applied across all industry sectors.

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

The four proposed characteristics (public financial assistance; conferring a benefit to an enterprise; targeted at a specific enterprise, sector, industry or region; potential to distort competition) appear appropriate. However, only the effect on international trade should be taken into consideration for the reasons mentioned in the answer to question 3. Selective subsidies by their very nature are bound to have some impact on trade. The effect on international trade is already a low bar: introducing another test will only make it more difficult to for local and regional bodies to promote economic development in their areas.

**Question 7: Should there be a designated list of bodies that are subject to the new subsidy control regime? If so, how could that list be constructed to**

**ensure that it covers all financial assistance originating from public resources?**

Whilst in theory, a list of designated bodies could be produced, in practice it could be difficult to compile a definitive list. Particular areas of complexity could relate to the disbursement of public funds by or through private organisations (e.g., the National Lottery); through public-private structures (e.g., City Region Deals, with the Oil and Gas Technology Centre an example from Aberdeenshire); Further education institutes with both commercial and public functions; and through Arms-Length External Organisations (ALEOs). There would also be a risk that an organisation which should be governed by the subsidy regime control assumes that it is not as it is not on the published list. It may be more appropriate to provide examples and guidance on what constitutes public funding to ensure accuracy in the application of the 'public financial assistance' test rather than develop a definitive list.

The defining source of the funding is key (i.e., state resources) rather than trying to create a comprehensive list of designated bodies. Creating a list could be used as an avoidance measure.

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

If agricultural subsidies in scope of the WTO Agreement on Agriculture (AoA) were incorporated into the UK subsidy regime, there is a risk that the competitiveness of domestic agricultural producers could be undermined. This is because the inclusion of additional criteria contained in the UK subsidy regime, over and above those set out in the AoA, could limit the support which could be provided to the sector which would otherwise be provided to competitors (e.g., EU producers receiving support through the Common Agricultural Policy). The AoA should therefore remain as the legislative framework upon which to develop domestic agricultural support schemes.

However, with regards to fisheries and in the absence of any sector-specific WTO requirements, it may be appropriate to apply the same domestic subsidy regime as to other industries. It would be critical to ensure that the domestic regime would not prohibit the provision of support to the UK industry which would be available to EU producers to maintain the level playing field. However, the risk of the domestic subsidy scheme undermining the competitiveness of the sector is lower than for agriculture due to the absence of a direct payments system in the European Maritime and Fisheries Fund. If fisheries are included within domestic subsidy arrangements, the sector should be accorded the same exemptions and treatment as other sectors. For example, the de minimis level of support should be equal to that available for other sectors rather than the significantly lower level permitted by EU State Aid rules.

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

No, it would not appear necessary to include audio visual subsidies in a domestic regime if these are excluded from the UK's international obligations. The rationale is to ensure that the UK sector can remain as competitive as possible in a global market without additional domestic restrictions.

<p><b>Question 10: Do you agree with the inclusion of an additional principle focused on protecting the UK internal market by minimising the distortive effects on competition?</b></p>
<p>No. We do not think a new principle focusing on the UK internal market is necessary. There is a concern that this will cause interpretation issues and could cause inequities for locations close to home nation boundaries. Furthermore, the addition of further principles could increase the administrative burden on subsidy providers.</p>
<p><b>Question 11: Do you think there should be any additional principles?</b></p>
<p>No. The list of principles appears comprehensive and as per the response to question 10, keeping the assessment as concise as possible would help to minimise administration time and costs.</p>
<p><b>Question 12: What level of guidance or information would be helpful for public authorities to assist with their compliance with the principles?</b></p>
<p>In general, examples of particular questions or information to consider when undertaking risk assessments would be helpful. Furthermore, if any controversial or ambiguous cases emerge post-introduction of the new system, sharing this information with practitioners can help refine understanding of what is and is not permitted.</p> <p>More specifically, further elaboration on what constitutes a public policy objective would be welcomed. For example, would this need to refer to specific legislation or would organisational strategies and policies be sufficient? If the latter, would these need to be formally adopted by public bodies or would more general public interest principles (e.g., climate change mitigation) apply?</p> <p>Proportionality and determination of the minimum size of intervention to achieve the desired outcome may also be open to interpretation. Whilst it should be relatively simple to quantify or estimate costs of an intervention, judging an appropriate private match funding contribution towards these costs is more subjective. For example, in a research and development project there is the potential for the recipient to profit from the product, but this is by no means guaranteed at the time of subsidy award. The use of block exemption schemes for particular activities with agreed intervention rates (either by % of costs or a financial limit) would be helpful in removing some of this ambiguity, assisting public bodies to ensure relative uniform application of the principles throughout the UK at a level unlikely to trigger disputes with international trading partners.</p>
<p><b>Question 13: Should the threshold for the exemption for small amounts of financial assistance to a single recipient replicate the threshold in the UK-EU Trade and Cooperation Agreement at 325,000 Special Drawing Rights over a three-year period? If not, what lower threshold would you suggest and why?</b></p>
<p>Yes. The threshold should replicate the amount in the UK-EU Trade and Cooperation Agreement to ensure that UK businesses remain competitive vis-à-vis EU competitors. Whilst the EU de minimis threshold is presently lower than the level in the TCA, it may be increased in future. De minimis was increased temporarily by the EU from €200k to €500k a few years ago and this did not</p>

appear to result in any widespread distortion of competition with this increased level. However, given the fluctuating value of SDR it might be necessary to set the level in Sterling slightly lower than the current SDR threshold to make it simpler to administer if it is decided to fix support limits in GBP.

**Question 14: If you consider the small amounts of financial assistance threshold should replicate the UK-EU Trade and Cooperation Agreement, should it be fixed at an amount of pound sterling (GBP)?**

A GBP amount would be easier to understand and be easier for funders to manage administratively. However, as the exchange rate between GBP and Special Drawing Rights (SDR) will vary this would likely result in the need for the GBP amount to be lower than that permitted under the TCA to allow for fluctuations. For the reasons set out in Question 13, maximising flexibility in defining small amounts of financial assistance would be desirable. A practical alternative may be to publish an official exchange rate on a Government website where public bodies can convert GBP to SDR and vice-versa or to set a GBP rate and regularly review this against the SDR rate.

**Question 15: Do you agree that subsidies under the proposed small amounts of financial assistance threshold be exempt from all obligations under the domestic regime, except for the WTO prohibitions? If not, why?**

In principle, small amounts of financial assistance should be exempted as far as possible from any obligations. However, assuming that the limit for small amounts of financial assistance to a single recipient is cumulative across all public funding/bodies, a system of recording/reporting/accounting may need to be established to ensure that the overall limit is not inadvertently breached. This could involve formally notifying recipients that they are receiving support as a small amount of financial assistance (and requiring them to report this to any future public funders) or the establishment of a national database whereby public bodies can consult previous awards and must record their own awards. Regardless of which option is chosen, a degree of administration and co-ordination would be required; either requesting information on past awards from funding recipients and issuing them with a letter or consulting a central database prior to making award decisions and recording any further awards.

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

Yes - due to the need to be able to respond quickly to exceptional occurrences such as natural disasters and diseases. Defining what constitutes an 'exceptional occurrence' in broad and general terms within the subsidy control regime would be helpful in providing certainty and assurance to public bodies.

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

Yes - with a similar approach taken as proposed for exceptional occurrences would be desirable with the inclusion of a broad definition of what constitutes a national or global economic emergency in the regime.



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

Yes - in order to provide maximum flexibility for public organisations and maintain a level playing field with the EU, the limits should mirror the TCA.

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

A GBP rate would be simpler from an administrative perspective but could result in a reduction in the amount of aid which could be provided due to the need to build in a cushion to accommodate variations in exchange rates. In order to maintain competitiveness with international partners, it is important that the level of support which can be provided is equivalent for both trading partners. Further consideration would therefore need to be given as to whether or not variations in the exchange rate are likely to be significant and materially reduce the level of support which could be provided.

**Question 20: Do you agree with the Government's approach to prohibitions and conditions? Should any types of subsidy be added to either category? If so, why?**

Yes – the proposed approach to prohibitions and conditions appears appropriate and is important to ensure that subsidies comply with the UK's international obligations. The list of prohibitions and conditions seems fairly comprehensive, so no additional types of subsidy are proposed.

**Question 21: Would more detailed definitions of any of the terms set out in this section, including the definition of "ailing or insolvent enterprises" be useful to ensure a consistent and proportionate approach to compliance? If so, what should these be?**

Any definitions should strike a balance between being sufficiently informative to assist subsidy providers and sufficiently flexible to allow for support to be made available in line with policy objectives.

**Question 22: Should the Government consider any additional ways to protect the UK internal market, over and above the inclusion of a specific principle to minimise negative impacts? If so, what?**

The effective establishment of common frameworks provided for in the Internal Market Act should assist in mitigating any potential distortion of competition within the UK internal market. As such, it would not appear to be necessary to include a specific principle in the UK subsidy regime or any other additional requirements.

**Question 23: Would an additional process for subsidies considered at high-risk of causing harmful distortion to the UK internal market add value to the proposed principles? If so, how should it be designed and what criteria should be used to determine if the subsidy is at high-risk of causing distortion?**

It seems unlikely that subsidies operating within the UK's international obligations would have a high risk of causing harmful distortion to the UK internal market, hence an additional process would appear unnecessary. The initial assessment should be sufficient to identify whether or not a subsidy is at high-risk of causing distortion. It's unclear what the benefit would be of having the awarding authority carrying out a more detailed assessment in such cases. However, a need to seek guidance or consultation with the independent body for subsidies above a certain level or in a particularly sensitive sector could potentially reduce the risk of market distortion.

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

It may be appropriate for reviews to be made public, but consideration would need to be given to assessments potentially including commercially sensitive information related to individual companies; the administrative cost of managing this; and the fact that information on subsidies awarded would already be published on the transparency database (including the amount; date granted; granting authority and the purpose of the subsidy). Existing freedom of information legislation and the right for competitors to obtain information on specific subsidies should provide alternative options for stakeholders to seek further information on individual cases.

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

There should be sufficient flexibility within legislation to define an emergency and make provision for public authorities to respond to this within subsidy control rules. Provided this is achieved, there shouldn't be a requirement to override impact assessments.

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

There is no need for such additional measures. Any subsidy likely to cause significant migration or displacement is almost certainly likely to affect trade between the UK and EU and would therefore already be prohibited.

**Question 27: Could additional measures help ensure that lower risk subsidies are able to proceed with maximum legal certainty and minimum bureaucracy? What should be included within the definition of 'low-risk' subsidies?**

The measures proposed for the general assessment of subsidies appear proportionate for lower-risk subsidies and strike a balance between maximising legal certainty and minimising bureaucracy. Low-risk subsidies could be defined as any subsidy which does not meet the definition of a high-risk subsidy (question 23). A further option could be to establish a block exemption system whereby support schemes meeting set criteria could be registered with and/or approved by the independent authority.

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

Specific and concise information on the UK's international obligations and domestic subsidy control policy would be helpful as there is presently an administrative burden on public authorities to consult multiple trade agreements/documents. Real-world examples of subsidies which are viewed as permitted or prohibited would also be helpful in informing risk assessment processes.

**Question 29: Should the specific rules on energy and environment subsidies apply only in so far as they are necessary to comply with trade agreements? Or should they apply under the domestic regime more generally?**

In order to maintain the competitiveness of the UK energy sector and allow the public sector to respond to the climate emergency, restrictions on energy and environmental subsidies should be limited to those in the UK's international trade agreements.

**Question 30: Which sectors or particular categories of subsidy (such as for disadvantaged areas, R&D, transport, skills, etc.) would benefit from tailored provisions or specific guidance on subsidy control? If so, why, and what should the nature, extent and form of the provisions be?**

In order to maintain a level playing field with the EU, it is important that similar support can be provided in the UK as could be within the EU's General Block Exemption Regulation. In particular, tailored provisions for the following sectors/categories would be beneficial:

- 1) **Support for disadvantaged and rural areas**, as these often require a greater deal of public investment to address market failure
- 2) **Research and development**, to support innovation, economic growth and enhance international competitiveness
- 3) **Transport**, including both strategic commercial infrastructure such as port/airports and public transport services
- 4) **Skills and employability**, including wage subsidies for people facing barriers to employment
- 5) **Culture, heritage and leisure**, where public investment is required to maintain and enhance facilities or services
- 6) **Social housing**, where an element of subsidy is required to ensure access to affordable and decent housing.
- 7) **Regeneration**, such as property enhancement schemes/public realm works
- 8) **Small and medium-sized enterprises**, through business advice services and small grants
- 9) **Agriculture & fisheries**, due to their importance in providing food security and employment in particular communities
- 10) **Natural disasters**, to allow public bodies to respond quickly and proportionately

Guidance and the establishment of principles on the type of support which can be offered and the level of support (either as a % or maximum financial contribution) would be helpful for the purposes of providing legal certainty for public authorities.

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

The principle of a central transparency database is welcomed, particularly if this could be used to collate information required to meet international obligations and provide a reference point for public bodies to identify other public funding awarded.

Consideration should be given to cumulation of smaller awards (either from multiple public sources or for multiple activities) when considering financial thresholds for reporting. For example, a company could receive over 325,000 SDR or £175,000 over three years through several awards which are individually below the reporting threshold. Public bodies awarding subsidies will not necessarily be aware of the other subsidies when undertaking their own risk assessment. This information could also be useful for those awarding subsidies to ensure that there is no inadvertent double funding of the same activity.

The inclusion of information such as a reference rate for loans as proposed would be helpful for public authorities, as would an exchange rate calculator between SDR and GBP.

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

No, only reporting on larger subsidies risks the possibility of multiple smaller awards over a three-year period cumulatively breaching international obligations. As such, it may be necessary to record all awards – including smaller ones – on the database.

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

It would be appropriate to have a single database which can meet all international obligations and replace the need for public bodies to submit returns on an annual or biannual basis as at present. However, due to the potential risk of cumulation of support, it may be necessary to include all awards rather than individual awards above a certain amount.

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

No, due to the possible risk of cumulation of grants exceeding international obligations (please see responses to questions 15 and 32).

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

This would appear to align with obligations under the Trade and Co-operation Agreement and should allow sufficient time for awards to be uploaded. However, it would be best practice for public bodies to upload awards as soon as possible so that other public bodies can ensure that they are not inadvertently overcompensating a recipient or breaching a cumulative threshold.

**Question 36: What should the functions of the independent body be? Should it be responsible for any of the following:**

- information and enquiries;
- review and evaluations;
- subsidy development advice;
- post-award review; and/or,
- enforcement.

There is likely to be a need for all of the above functions to be carried out, with the independent body the logical place for review and evaluations; post-award review; and enforcement. The extent to which enforcement of the subsidy control regime takes place through the courts will depend on whether the new independent body is given enforcement responsibilities. If it is given enforcement responsibilities, this may reduce the number of cases being brought to courts. However, if the cost of making a complaint to the independent body is lower than bringing a legal challenge then there is likely to be a significant increase in the level of complaints reported. The capacity of the independent body to manage this should therefore be given careful consideration.

The independent body could also undertake the functions regarding information and enquiries and subsidy development advice, but this may duplicate with existing provision (e.g., through the Scottish Government's Subsidy Control Team). A further function of the independent body could be the maintenance of the central database and preparing reports for the WTO and trading partners.

**Question 37: Should any review of a subsidy by the independent body consider all the principles, and the interaction between them, or only some principles, and if so which ones?**

It would seem appropriate for all principles to be assessed in order to ensure consistency of reviews. When undertaking a review, the independent body should have access to sufficient information on any subsidy and the rationale behind it to take an informed and holistic view on its compliance with legislative requirements.

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

It would be helpful if the independent body or an existing Government agency were available to provide guidance to public authorities where required. Support and advice from the Scottish Government's Subsidy Control Team has been invaluable and appreciated by Aberdeenshire Council when navigating complex State Aid issues relating to City Region deal and agricultural awards. The majority of routine awards are unlikely to require support, hence it would be best if this were an optional service which public bodies could take up rather than a compulsory one for low-risk subsidies. However, there may be benefit in having a compulsory review element for high-risk subsidies prior to awards being made.

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

It is foreseeable that complaints could be made from the competitors of subsidy recipients who believe that they are being adversely affected and other public bodies if they believe that a subsidy is distorting competition within the internal market. It would appear legitimate for the independent body to consider both of

these types of complaint, provided that there is evidence of a material, negative and direct impact on the complainant. Some forms of complaint, such as from those who object to particular subsidies due to value-for-money concerns, should be outside of the remit of the complaints procedure.

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

The new independent body should have enforcement functions. This should include power to order recovery of overcompensation or illegal subsidies.

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

Some sort of quasi-judicial body appointed like a tribunal could be an appropriate structure.

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

Consideration should be given as to whether or not interest would be payable on recovered subsidies and whether or not the subsidy recipient would have other forms of redress to seek compensation from the awarding public authority (e.g., for breach of contract) if their subsidy is recovered. Recovery should be limited to those entities which have benefited from an illegal subsidy. Intermediary bodies responsible for distributing the funding should not be treated as guarantors.

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

It may be better if appeals are simply referred to the courts to streamline a process which could ultimately lead to court intervention anyhow.