

DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

SUBSIDY CONTROL BILL

**Memorandum by the Department for Business, Energy and Industrial
Strategy**

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A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Subsidy Control Bill (the Bill). This memorandum identifies the provisions of the Bill that confer delegated powers. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

2. Having left the European Union, the UK is no longer subject to EU State aid rules (the EU's particular approach to subsidy control).¹ The Subsidy Control Bill has been introduced by the Government to create a new domestic subsidy control regime that best suits the UK's needs, including providing value for money to the UK taxpayer and complying with international obligations.
3. The Government aims to deliver a regime that:
 - a. Empowers local authorities, public bodies, and central and devolved administrations to design subsidies that deliver strong benefits for the UK taxpayer.
 - b. Enables public authorities to deliver subsidies that are tailored and bespoke for local needs to support the UK's economic recovery and deliver UK Government priorities such as levelling up and achieving net zero.
 - c. Provides certainty and confidence to businesses investing in the UK, by protecting against subsidies that risk causing distortive or harmful economic impacts, including to the UK internal market.
 - d. Contributes to meeting the UK's international commitments on subsidy control, including its international commitments under the World Trade Organization Agreement on Subsidies and Countervailing Measures (ASCM), the Trade and Co-operation Agreement with the European Union (TCA) and in other free trade agreements.
4. The provisions in this Bill are therefore designed to implement a subsidy control regime that delivers on the policy objectives set out above. The key provisions of the Bill involve:
 - a. Setting out the subsidy control requirements public authorities are subject to when granting subsidies to an enterprise:
 - i. The Bill sets out seven principles that public authorities must assess their proposed subsidies against. The Bill defines these as the subsidy control principles.
 - ii. The Bill prohibits certain subsidies, and requires that certain subsidies can only be granted where specified conditions are met.

¹ Subject to the State aid provisions under the terms of Article 10 of the NI Protocol.

- iii. The Bill requires certain subsidies to be published on a database.
- b. Exempting certain subsidies from some or all of these requirements.
- c. The establishment of a new Subsidy Advice Unit in the Competition and Markets Authority (CMA) which will monitor and report on the regime and report on certain subsidies and schemes before and after they are given or made.
- d. Making provision for the Competition Appeal Tribunal (CAT) to hear applications to review subsidy decisions and to order recovery in certain cases, imposing a duty on public authorities to provide pre-action information at the request of an interested party, and conferring a right on public authorities to recover subsidies which are misused.

C. OVERVIEW OF THE BILL'S USE OF DELEGATED POWERS

- 5. The Subsidy Control Bill provides for a new domestic subsidy control regime for the UK that implements the TCA and other international commitments as well as providing for UK-specific measures that are intended to protect UK competition and investment.
- 6. The definitions, rules and processes that are core to the proposed new regime are set out on the face of the Bill. However, for certain concepts a further level of technical detail and specificity will needed to be provided for. The UK's regime also needs to be responsive to market and technological change over time. It is important to be able to respond to unforeseen events and developments from financial crises and Covid-19 to changes in world markets and global capacity for the production of particular materials.
- 7. Where it is considered necessary to reserve powers to implement a full and responsive subsidy control regime the Bill makes use of regulations, guidance and other measures, with an appropriate level of Parliamentary oversight.
- 8. The paragraphs below provide an overview of each Part of the Bill and the powers contained within them.

Part 1: Overview and Interpretation

- 9. Part 1 of the Bill sets out the key definitions that are used in the rest of the Bill. There are no powers to amend these core definitions. The Bill provides powers for the Secretary of State to give guidance to public authorities regarding the application of these definitions (in Part 6).
- 10. One of our policy objectives in developing the subsidy control regime has been to minimise burdens to public authorities and therefore there is no requirement for *ex ante* approval of subsidies by an independent body. However, the Bill provides for public authorities' assessment of compliance for the potentially most distortive subsidies

(Subsidies or Schemes of Particular Interest, and subsidies called in by the Secretary of State) to be scrutinised by the CMA before they can be granted. The CMA will exercise its functions through a new Subsidy Advice Unit.

11. The Secretary of State will have a power by draft affirmative procedure to make regulations to define Subsidies or Schemes of Interest and Subsidies or Schemes of Particular Interest that will need to be referred to the CMA (clause 11). Subsidy schemes made by the Secretary of State and notified to Parliament as a 'streamlined subsidy scheme' will not be included in these categories of Subsidies or Schemes of Interest and of Particular Interest. Part 1 also includes the power for the Secretary of State to make 'streamlined subsidy schemes'.

Part 2: Subsidy Control Requirements

12. Part 2 of the Bill sets out the principles that underpin the subsidy control regime. It also places a duty on a public authority to consider the principles, when taking a decision whether to give a subsidy, or make a subsidy scheme. The public authority must not give the subsidy, or make the subsidy scheme, unless the public authority considers that doing so is consistent with the principles.
13. Part 2 also sets out the prohibitions and requirements with which public authorities must also comply. Powers to apply or modify these elements are confined to technical definitions such as the definition of an 'ailing or insolvent enterprise' (clause 24), deposit takers (clause 25) and insurance companies (clauses 26 and 27) and to update the list of marketable risk countries for the purpose of export finance (clause 16)).
14. Finally, Part 2 sets out the transparency requirements for public authorities to upload their subsidies and schemes to the subsidy database. The Bill provides powers for the Secretary of State to transfer responsibility for the Subsidy Database to the CMA (clause 32), and to specify what information must be uploaded (clause 34). The Bill also contains powers for the Secretary for State to set the threshold at which certain subsidies given under schemes must be uploaded onto the database (clause 33).

Part 3: Exemptions

15. Part 3 of the Bill sets out certain types of subsidies that are exempt from the subsidy control requirements in Part 2. Chapter 2 of Part 3 sets out that subsidies given as Minimal Financial Assistance (subsidies of less than £315,000) or as services of public economic interest (SPEI) assistance (subsidies of less than £725,000) are exempt from the subsidy control requirements. The Secretary of State has a power to update these thresholds in line with exchange rate fluctuations and international commitments; and to set lower thresholds for individual sectors and sub-sectors (clause 42). This Part also contains procedural requirements related to the award of these subsidies.
16. Chapter 3 of Part 3 contains exemptions from the subsidy control requirements for subsidies given to address different emergencies. Subsidies given to compensate for

natural disasters or other exceptional occurrences are exempt from all the subsidy control requirements apart from the transparency obligations. Subsidies given in response to a national or global economic emergency are exempt from complying with prohibitions and requirements imposed by clauses 15 to 29 in Chapter 2 of Part 2. In both cases, the Bill provides for the Secretary of State to issue a notice stating that a particular emergency has occurred (clause 43 and clause 44).

17. Chapter 4 sets out further exemptions from the subsidy control requirements for subsidies given for the purpose of National Security, those given as part of the Bank of England's monetary policy activity, financial stability, large cross-border or international projects, legacy and EU-UK Withdrawal Agreement subsidies and certain tax measures. The Bill provides for a power for HM Treasury to give a financial stability direction to disapply specified subsidy control requirements, where subsidies or subsidy schemes are given for prudential reasons (clause 47).

Part 4: CMA: referrals and functions

18. Chapter 1 of Part 4 makes provision for subsidies and schemes to be referred to the CMA which will report on the public authority's assessment as to the compliance of the subsidy or scheme with the requirements of chapters 1 and 2 of Part 2. There are powers to amend the various statutory time periods which underpin these procedures, the circumstances in which certain of those periods may be extended, and the information which must be provided to the CMA and the content of its reports. These powers are intended to ensure that the new regime can be adapted based on operational experience and the findings of the CMA who will also be required to report on the operation of the Act, and its impact on competition and investment in the United Kingdom. These include powers that will sunset one year after the CMA publishes its first report on the operation of this legislation (clause 65).
19. Chapter 1 of Part 4 includes powers to make directions most of which are not addressed in this memorandum (see, for example, the power to extend the CMA reporting report for mandatory referrals in clause 53(6)). These powers are exercised in relation to particular cases rather than generally so are not considered to be legislative in character. However, the memorandum does include information about the power to make a direction under clause 64(2) which may be exercised to exempt subsidies or schemes from certain requirements of Part 4 in exceptional and urgent circumstances. The Government considers that it is appropriate to bring this power to the Committee's attention as while it is not considered to be legislative in characters it does have effect to disapply certain requirements of the Bill in individual cases.
20. Chapter 2 of Part 4 provides for the CMA's general functions in relation to subsidy control. The CMA's information gathering powers under section 41 to 43 of the United Kingdom Internal Market Act 2020 are applied for the purpose of assisting the CMA in carrying out its function of monitoring and reporting on subsidy control. There is a power to make regulations to modify section 41 to 43 of that Act for these purposes in clause 67 which is addressed in more detail below. The Committee may wish to note that

section 42(6) of that Act confers a power on the CMA to make a statement of policy in relation to the enforcement of notices under section 41, and section 43(4) and (5) contain powers for the Secretary of State to specify the maximum penalties that may be imposed under section 42(1) and (2). Those delegated powers were addressed in the delegated powers memorandum on the United Kingdom Internal Market Act 2020.

21. Chapter 3 provides for the establishment of the Subsidy Advice Unit by the CMA and does not contain any delegated powers.

Part 5: Enforcement

22. Part 5 sets out the enforcement provisions. No powers are provided for in this Part.

Part 6: Miscellaneous and general

23. Part 6 contains a number of general provisions. It provides for a power for the Secretary of State to make statutory guidance, which will be important for the operation of the regime as it will assist public authorities on how to apply the requirements of the regime to their subsidies (clause 79). The Bill also provides for a power to the Secretary of State to make regulations on how the gross cash equivalent for a non-cash subsidy should be calculated for the purposes of calculating minimal and SPEI financial assistance (clause 82).
24. This Part also provides for powers to make consequential or transitional amendments (clauses 86 and 87).

D. DELEGATED POWERS

PART 1

Clause 10(2): Subsidy schemes: Power for a Minister of the Crown to establish a Streamlined subsidy scheme

Power conferred on: Minister of the Crown

Power exercisable by: Statutory scheme

Parliamentary Procedure: Laid before Parliament after the fact

Context and purpose

25. This clause provides a power for a Minister of the Crown to make a streamlined subsidy scheme.
26. A scheme is a method of setting out categories of subsidies (to be granted under existing spending powers) which comply with the subsidy control principles and subsidy control requirements (this is assessed by the public authority making the scheme). By giving subsidies in accordance with the terms and conditions of the scheme a public authority demonstrates it has complied with those principles and requirements.
27. A streamlined subsidy scheme is a particular type of scheme which is made (or modified) by a Minister of the Crown, published, and laid before Parliament.
28. The intention is that these streamlined subsidy schemes (or 'streamlined routes') will be used will be used by the Government to facilitate the granting of low-risk subsidies by other public authorities in the furtherance of wider Government policy objectives. Streamlined schemes are likely to be made with horizontal application across the United Kingdom.
29. A streamlined subsidy scheme will therefore set out the parameters of the scheme, where the Minister of the Crown has assessed that all subsidies within those parameters comply with the principles and requirements. If a public authority complies with the parameters of the published streamlined subsidy schemes, they are no longer required to consider the subsidy control principles or the subsidy control requirements when giving an individual subsidy. Accordingly, as clause 70(2) sets out, it is the scheme that must be challenged as inconsistent with the subsidy control principles or requirements, not the subsidies made in accordance to it.
30. The making of a streamlined subsidy scheme is treated the same as any other subsidy scheme in terms of challenge: the publication of the streamlined subsidy scheme commences the limitation period for challenge before the Competition Appeal Tribunal, not the publication of subsidies given in accordance with it.

31. Streamlined subsidy schemes will not be subject to mandatory referral to the CMA (see clause 64(1)).
32. Public authorities granting subsidies are not required to use streamlined subsidy schemes and could decide to carry out its own assessment against the principles and requirements instead to inform its decision on whether to give the subsidy.

Justification for taking the power

33. Each streamlined subsidy scheme will contain technical parameters and requirements, which will need to be provided for in some detail in order to ensure that any subsidy granted within the parameters and requirements is compliant with the principles, prohibitions and conditions. The details that will need to be published will be specified in regulations under clause 34, however that clause sets out the level of detail the regulations may include. Given the level of technical detail, we do not consider it would be appropriate to provide for these schemes in primary legislation. It is also important to be able to publish new streamlined subsidy schemes quickly to address, for example, the UK's wider strategic needs to develop or facilitate subsidies for new or emerging technology and economic changes.
34. We also note the similarities between the streamlined subsidy scheme and any scheme created by a primary public authority for use by other public authorities (for example, a scheme that could be created by the Welsh Government for use by Welsh local authorities). These two types of scheme have very similar effect, including on the legal certainty provided to subsidies granted under the scheme after the end of the scheme's limitation period. Other types of scheme can be made by any public authority and do not necessarily entail any additional power or scrutiny.
35. These streamlined subsidy schemes will need to be evaluated and adjusted over time in light of wider Government objectives that affect the types of subsidies it is most desirable to facilitate; and in light of Secretary of State and CMA evaluations of the operation of the regime and the risk levels posed by different kinds of subsidies.

Justification for procedure selected

36. We consider the use of a statutory scheme that is published and laid before Parliament is the right level of scrutiny for such an assessment. We recognise that while Parliament will be rightly interested in the categories of subsidies that can be given in accordance streamlined subsidy scheme (which also set out the Government's strategic direction in terms of what subsidies should be facilitated in this way), the nature of the information contained in the scheme, which will be economic or analytical in nature, is consistent with the making of a technical scheme rather than regulations.
37. Although in a different context, we note that statutory schemes can be made by the Secretary of State under sections 261 and 263 of the National Health Service Act 2006 to establish either a voluntary or statutory pharmaceutical pricing scheme to regulate

NHS medicine pricing without a negative or affirmative resolution procedure. These pricing schemes might be considered to represent a similar economic assessment by the Secretary of State.

38. We also note that Chapter 1 of the Agriculture Act 2020 provides wide powers to create financial schemes to pay financial assistance for different agricultural purposes in England. Those provisions require the Secretary of State, from time to time, to prepare and lay in Parliament a document giving information about the expected use of the powers conferred on the Secretary of State by section 1 of the Agriculture Act 2020 during the period to which the plan relates. That document must specify the same type of information as a streamlined subsidy scheme, which is primarily an economic or policy assessment of the agricultural schemes in operation (or which are expected to come into operation), including the Government's strategic priorities for giving financial assistance.

Clause 11(1): Subsidies or Schemes of Interest or Particular Interest

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

39. Chapter 1 of Part 4 makes provision as to the referral of certain subsidies and schemes to the CMA before they are given or made. A public authority must request a report from the CMA if it is proposing to give a subsidy, or make a scheme, of particular interest. Having referred the subsidy or scheme to the CMA, the public authority must wait for the CMA to publish its report, and for a cooling-off period to elapse, before the subsidy or scheme may be given or made. Public authorities may also voluntarily request a report from the CMA before giving or making a subsidy, or scheme, of interest.
40. This power enables the Secretary of State to make regulations to define a subsidy, or scheme, of interest, or of particular interest. Regulations may make provision by reference to the value of the subsidy or the value of subsidies given under the subsidy scheme, or the sector in which the expected beneficiaries of the subsidy or subsidy scheme operate, and any characteristics of that sector.

Justification for taking the power

41. The Government considers that these definitions are better suited to regulations rather than being on the face of the Bill. The intention is to set criteria which capture a relatively small number of subsidies or schemes that are more likely to have a distortive effect on competition and investment within the United Kingdom. The criteria will need to be set at a sufficient level of detail so that it is clear to public authorities and others whether a subsidy or scheme must or may be referred to the CMA for a pre-award report.
42. As circumstances change, it is important that the criteria which is used to capture subsidies or schemes of interest, or of particular interest, can be adapted to ensure that they are continuing to capture subsidies and schemes which carry a higher risk of having a distortive effect on competition and investment within the United Kingdom. For example, if the criteria is set by reference to the value of a subsidy or scheme then any criteria based on the value of the subsidy may need to be adjusted in response to inflation and other changes in the economy. If the criteria is set by reference to the sectors in which the expected beneficiaries of the subsidy or scheme operate then this will need to be reviewed as the risks associated with particular sectors change over time (for example, as global overcapacity in a particular sector increases or decreases).
43. The definitions may also need to be modified in light of the findings of the CMA as to the operation of the regime and its impact on competition and investment in United Kingdom (see clause 65). The CMA may for example identify that the criteria is failing

to capture certain high risk subsidies or that it is not sufficiently clear to enable a simple assessment to be made as to whether a subsidy falls within the definitions.

Justification for procedure selected

44. The draft affirmative procedure is considered to be appropriate to ensure that Parliament debates and scrutinises the regulations given these definitions in part determine the scope of the subsidies or schemes which must or may be referred to the CMA under Chapter 1 of Part 4.

PART 2

Clause 16(4) and (6): Designation of marketable risk countries

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary Procedure: Laid before Parliament after the fact

Context and purpose

45. UK Export Finance (UKEF) is the UK's export credit agency, and a ministerial department. UKEF works with over 100 private credit insurers and lenders to help UK companies access export finance (the particular class of loans, insurance policies or bank guarantees that enable international trade to take place as easily and securely as possible); UKEF complements, and does not compete with, the private sector.
46. This power is connected to UKEF's function to support exports via short-term export credit insurance for UK businesses with customers that are not based in marketable risk countries. Marketable risk countries are defined in the Bill as countries that have sufficient private sector capacity, therefore making UKEF support for UK exporters with customers in these countries inappropriate in principle.
47. The list of marketable risk countries may need to change from time to time, based on fluctuations in private market capacity. The Bill provides the Secretary of State with a power to amend the list of marketable risk countries in the bill, if they judge that private sector insurance capacity, sovereign sector rating, or corporate sector performance has significantly deteriorated such that a particular country is no longer regarded as a marketable risk country, by removing that country from the list (or replacing them onto the list).

Justification for taking the power

48. We believe it is necessary to take this power as the market factors (private sector insurance capacity, sovereign sector rating, or corporate sector performance) may change over time, and at short notice, and it is important to be able to remove countries from the list of marketable risk countries in the Bill if necessary to reflect the latest situation. This will ensure that short-term export credit finance is provided where necessary, and only where necessary, in line with UKEF's objectives. Finally, this will preserve UKEF's current ability to make short notice removals from the list of marketable risk countries.

Justification for procedure selected

49. This power allows the Secretary of State to amend the list of marketable risk countries in the Bill by removing a country by Direction (should that be necessary). The Government considers that the giving of a direction, which is published and laid before

Parliament is the right level of scrutiny for the use of this power. We recognise that while Parliament will be rightly interested in the Secretary of State's decision in relation to a marketable risk country, the nature of the information contained in the statement and, potentially, the speed with which a statement may need to be made or amended and announced to the financial markets, means that making a direction rather than the making of a Statutory Instrument, is the correct procedure.

50. Market conditions may change quickly, necessitating a rapid response by the Secretary of State to build in certainty for exporting businesses. This change will be based on the criteria set out above and is a technical change that does not impact broader subsidy control policy.

Clause 24(2): Ailing and Insolvent enterprises

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

51. The Bill prohibits rescue and restructuring subsidies to ailing or insolvent enterprises unless certain conditions are met. In summary, rescue subsidies must only be given if it is in the public interest (or in exceptional circumstances); and while a restructuring plan is being prepared. Restructuring subsidies are subject to further conditions, including that the public authority must be satisfied that the restructuring plan is credible and realistic, and that the enterprise is contributing significant funds itself (unless it is a small or medium-sized enterprise). Further specific provisions apply similar conditions to subsidies to ailing or insolvent banks, other deposit takers and insurance companies.

52. The Bill defines 'ailing or insolvent' as follows:

- a. it would almost certainly go out of business in the short to medium term without subsidies,
- b. it is unable to pay its debts as they fall due, or
- c. the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

53. The first condition (a) is defined in the TCA and there is no existing concept of an ailing enterprise in domestic law; the second and third condition, (b) and (c), provide further detail on what would be considered 'insolvent' as a matter of UK policy and reflect existing well established domestic law concepts. The EU's equivalent test of an ailing enterprise is found in the 'Undertaking in Difficulty' test which uses forensic accounting characteristics that have been found to be ill-suited to providing support to enterprises in the start-up and scale up phases which take on debt, and would therefore fail the test, and yet are fundamentally viable and it is not considered that these are appropriate tests for the domestic subsidy control regime. However the general definition of ailing or insolvent company may require additional provision to provide legal certainty to public authorities as to whether an enterprise is ailing or insolvent .

Justification for taking the power

54. The power will allow the Secretary of State to provide further detail in regulations on the first part of the definition of 'ailing and insolvent' should that be considered desirable, for example to reflect any future changes in UK policy (e.g. insolvency policy). This would be a technical change and is constrained by what is necessary to comply with the TCA definition.

55. We are seeking to ensure that this definition strikes a balance between, on one hand, being clear to public authorities and subsidy recipients and providing for TCA

compliance and, on the other, avoiding a highly detailed and prescriptive test (similar to the EU's Undertakings in Difficulty test) that prohibits subsidies being given to companies that have a viable business plan but may nonetheless fail a forensic accounting test. Having a limited power to expand the level of technical detail in this definition will allow us to modify the test of 'ailing' enterprise based on the evidence provided by the practical operation of the regime.

Justification for procedure selected

56. The Government considers it appropriate that the Regulations are subject to the draft affirmative procedure.

Clause 25(4): Meaning of ‘deposit taker’

Powers conferred on: The Treasury

Powers exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

57. Article 367 of the TCA prohibits certain types of subsidies and provides that particular conditions must be satisfied in order to give specific types of subsidies. Article 367(6) and (7) of the TCA imposes conditions on the granting of subsidies to restructure and ensure the orderly liquidation of ‘banks’ and ‘credit institutions’. While the TCA does not define these terms, they must be interpreted in accordance with their ordinary meaning in light of the context and the TCA’s purpose (see art. 4 of the TCA). Taking these factors into account, ‘banks’ and ‘credit institutions’ refer to entities primarily engaged in deposit-taking: ‘banks’ captures the most distinctive type of deposit-taker while ‘credit institution’ refers to deposit-takers other than banks. The purpose of article 367(6) and (7) is to cover all entities taking deposits.

58. Clauses 21 and 22 of the Bill implement article 367(6) and (7) of the TCA. Clause 25 defines ‘deposit taker’ for the purposes of clauses 21, 22 and related clauses. In line with the meaning of the term in article 367(6) and (7), the definition covers all persons primarily engaged in deposit-taking, including what the TCA refers to as ‘banks’ and ‘credit institutions’.

59. Sub-section (4) gives the Treasury the power to amend the meaning of ‘deposit-taker’.

Justification for taking the power

60. The Government considers that the proposed power is appropriate as it may be necessary to update the definition of ‘deposit-taker’ following developments that cannot be anticipated at the time of the enactment of the Bill. The TCA is a treaty that has come into force only recently. Developments affecting the subsidy control regime may be occur over time. For example, terms used in the TCA might be interpreted differently over time.

61. Deposit takers carry on regulated activities under the Financial Services and Markets Act 2000 (FSMA) and relevant secondary legislation: e.g., the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. As a result, the definition in clause 25 is based on a multi-layered-legislative framework governing the authorisation and supervision of deposit takers. Changes to this framework are technical and not infrequent. To the extent that such changes indirectly affect the definition of ‘deposit taker’, the proposed power would enable the Treasury to make necessary changes in a timely manner.

62. The proposed power to amend a statutory definition in limited circumstances is supported by relevant precedents in financial services legislation. For example:
- a. Section 232(7) of the Banking Act 2009 gives the Treasury the power to amend the definition of 'investment activity' in that section.
 - b. Section 7 of the Banking Act 1987 (now repealed)² gave the Treasury a broad power to amend the definitions of 'deposit' and 'deposit-taking business' in that Act.
63. Non-financial services legislation also provides a few examples of a power to amend definitions: e.g., section 519A(5) of the Companies Act 2006; section 92(2) of the Climate Change Act 2008.
64. The power to amend the definition in clause 25 is subject to the following safeguards:
- a. The power is subject to a requirement to consult the Financial Conduct Authority and the Prudential Regulation Authority, see sub-section (5).
 - b. Regulations made in the exercise of this power are subject to the affirmative resolution procedure.

Justification for the procedure

65. This power enables the Treasury to amend primary legislation by secondary legislation. In line with the usual practice the regulations are subject to the draft affirmative procedure

² The power was repealed by the Financial Services and Markets Act 2000 (FSMA), which repealed the entirety of the Banking Act 1987. Section 22 of FSMA provides for the specification of regulated activities (including accepting deposits) by statutory instrument.

Clause 26(4): Meaning of ‘insurance company’

Powers conferred on: The Treasury

Powers exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

66. Article 367 of the TCA prohibits certain types of subsidies and provides that particular conditions must be satisfied in order to give specific types of subsidies. Article 367(6) and (7) of the TCA imposes conditions on the granting of subsidies to restructure and ensure the orderly liquidation of ‘insurance companies’. While the TCA does not define ‘insurance company’, the term must be interpreted in accordance with its ordinary meaning in light of its context and the TCA’s purpose (see art. 4 of the TCA). Taking into account these factors, the term is clearly restricted to companies and does not capture insurers that are not companies.
67. Clauses 21 and 22 of the Bill implement article 367(6) and (7) of the TCA. Clause 26 defines ‘insurance company’ for the purposes of clauses 21, 22 and related clauses. In line with the meaning of the term in article 367(6) and (7), the definition covers insurers that are (i) bodies corporate and (ii) companies. For this purpose, sub-section (2) of clause 26 excludes from the definition bodies corporate that are not companies. The definition of ‘insurance company’ is not restricted to companies incorporated in the UK.
68. Subsection (4) gives the Treasury the power to amend the meaning of ‘insurance company’.

Justification for taking the power

69. The Government considers that the proposed power is appropriate as it may be necessary to adapt the definition of ‘insurance company’ in light of changing circumstances which are not foreseeable at the time of the enactment of the Bill. The TCA is a treaty that has come into force only recently. Adjustments to the domestic regime may be needed over time in light of its actual operation. It is possible that, over time, the term might be interpreted differently. For example, should the UK and EU agree a new understanding of a term that departs from the existing one, the definition in clause 26 would need to be consistent with that understanding.
70. Insurance companies carry on regulated activities under the Financial Services and Markets Act 2000 (FSMA) and relevant secondary legislation: eg., the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. As a result, the definition in clause 26 relies on a multi-layered legislative framework governing the authorisation and supervision of insurance companies. Changes to this framework are technical and not infrequent. To the extent that such changes indirectly affect the definition of ‘insurance company’, the proposed power would enable the Treasury to make necessary changes in a timely manner.

71. As explained for clause 25, the proposed power to amend a statutory definition is supported by relevant precedents in financial services legislation. For example:

- a. Section 232(7) of the Banking Act 2009 gives the Treasury the power to amend the definition of 'investment activity' in that section.
- b. Section 7 of the Banking Act 1987 (now repealed)³ gave the Treasury a broad power to amend the definitions of 'deposit' and 'deposit-taking business' in that Act.

72. Non-financial services legislation also provides a few examples of a power to amend definitions: eg, section 519A(5) of the Companies Act 2006; section 92(2) of the Climate Change Act 2008.

73. The power to amend the definition in clause 26 is subject to the following safeguards:

- a. The power is subject to a requirement to consult the Financial Conduct Authority and the Prudential Regulation Authority, see subsection (5).
- b. Regulations made in the exercise of this power are subject to the affirmative resolution procedure.

Justification for the procedure

74. This power enables the Treasury to amend primary legislation by secondary legislation. In line with the usual practice the regulations are subject to the draft affirmative procedure

³ The power was repealed by the Financial Services and Markets Act 2000 (FSMA), which repealed the entirety of the Banking Act 1987. Section 22 of FSMA provides for the specification of regulated activities (including accepting deposits) by statutory instrument.

Clause 27(3): Meaning of ‘insurer’

Powers conferred on: The Treasury

Powers exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and Purpose

75. Article 367 of the TCA prohibits certain types of subsidies and provides that particular conditions must be satisfied in order to give specific types of subsidies. Article 367(11) of the TCA imposes conditions on the granting of subsidies to an ‘insurer’ that provides export credit insurance. While the TCA does not define ‘insurer’, the term must be interpreted in accordance with its ordinary meaning in light of its context and the TCA’s purpose (see article 4 of the TCA). Taking into account these factors, it is clear that ‘insurer’ in article 367(11) is broader than ‘insurance company’ in article 367(6) and (7).
76. Clause 27 of the Bill implements article 367(11) of the TCA. Clause 27 defines ‘insurer’ for the purposes of that clause. In line with the meaning of the term in article 367(11), the definition is broad and covers all types of insurers, whether they are bodies corporate or not.
77. Subsection (3) gives the Treasury the power to amend the meaning of ‘insurer’.

Justification for taking the power

78. The Government considers that the proposed power is appropriate as it may be necessary to adapt the definition of ‘insurer’ in light of developments which cannot be anticipated at the time of the enactment of the Bill. The TCA is a treaty that has come into force only recently. Modifications to the domestic regime may be necessary over time in light of its actual operation. It is possible that, over time, the term might be interpreted differently. For example, should the UK and EU develop a new understanding of the term ‘insurer’, the definition in clause 27 would have to be consistent with that development.
79. Insurers carry on regulated activities under the Financial Services and Markets Act 2000 (FSMA) and relevant secondary legislation: e.g., the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. As a result, the definition in clause 27 relies on a multi-layered-legislative framework governing the authorisation and supervision of insurers. Changes to this framework are technical and not infrequent. To the extent that such changes indirectly affect the definition of ‘insurer’, the proposed power would enable the Treasury to make necessary changes in a timely manner.
80. As explained for clauses 25 and 26, the proposed power to amend a statutory definition is supported by relevant precedents in financial services legislation. For example:
- a. Section 232(7) of the Banking Act 2009 gives the Treasury the power to amend the definition of ‘investment activity’ in that section.

- b. Section 7 of the Banking Act 1987 (now repealed)⁴ gave the Treasury a broad power to amend the definitions of 'deposit' and 'deposit-taking business' in that Act.

81. Non-financial services legislation also provides a few examples of a power to amend definitions: e.g., section 519A(5) of the Companies Act 2006; section 92(2) of the Climate Change Act 2008.

82. The power to amend the definition in clause 27 is subject to the following safeguards:
- a. The power is subject to a requirement to consult the Financial Conduct Authority and the Prudential Regulation Authority, see sub-section (4).
 - b. Regulations made in the exercise of this power are subject to the affirmative resolution procedure.

Justification for the procedure

83. This power enables the Treasury to amend primary legislation by secondary legislation. In line with the usual practice the regulations are subject to the draft affirmative procedure.

⁴ The power was repealed by the Financial Services and Markets Act 2000 (FSMA), which repealed the entirety of the Banking Act 1987. Section 22 of FSMA provides for the specification of regulated activities (including accepting deposits) by statutory instrument.

Clause 32(3): power to direct CMA to provide subsidy database

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary Procedure: None

Context and purpose

84. Clause 32 of the Bill places a duty on the Secretary of State to make arrangements to provide a subsidy database that is accessible to the public free of charge, and that can be edited by public authorities for the purposes of carrying out their duties to upload subsidies under clause 33.

85. Subsection (3) provides a power for the Secretary of State to direct the CMA to perform this duty on behalf of the Secretary of State.

Justification for taking the power

86. Part 4 of the Bill sets out the CMA's functions in relation to subsidy control. Currently the provision of the subsidy control database is the responsibility of the Secretary of State. In future, the Secretary of State may decide that the CMA is the most appropriate body to maintain the subsidy control database.

Justification for procedure selected

87. The Government considers that the power to direct is an appropriate mechanism to enable the CMA to maintain the subsidy database in addition to its other functions under the Bill. Any direction requiring the CMA to maintain the database will not affect the wider transparency requirements set out in the Bill. Namely, the requirement on public authorities to upload information to the database, the information that they are required to upload, the transparency thresholds, time periods, or any other transparency obligation on public authorities. The power to direct is sufficiently narrow that the Secretary of State has no discretion to make wider changes to the database or any other transparency requirements. The only discretion is whether, and if so when, to direct the CMA to maintain the database. It is therefore considered appropriate to make this change through a ministerial direction.

Clause 33(8): Power to set additional sector/subsector transparency thresholds for subsidies granted under schemes

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and purpose

88. Clause 33 subsection (2) provides that where a subsidy scheme has been uploaded to the subsidy database, subsidies given under that scheme which do not exceed £500,000 are not required to be uploaded. This power will allow the Secretary of State to make regulations to specify a different 'in scheme' transparency threshold for specific sectors. The threshold of £500,000 that is on the face of the bill will remain and be the default threshold for every other sector.

Justification for taking the power

89. The Government may wish to adopt different thresholds for certain sectors where the default threshold of £500,000 is not appropriate. This is particularly important for agriculture and fisheries sector subsidies where smaller subsidies may be considered to be distortive whereas industrial subsidies of a similar value would not. Changes to the 'in scheme' transparency threshold may be required to reflect changes to the exemption thresholds for Minimal Financial Assistance and SPEI assistance made under the powers in clause 42 subsection (1) (discussed below).

Justification for procedure selected

90. The Government considers that the negative resolution procedure is appropriate as amending the 'in scheme' transparency threshold to make it lower for separate sectors is a technical change. Unlike the power to amend the exemption thresholds in clause 42 subsection (1) (discussed below), this power would only be amending the point at which a subsidy granted under a scheme is uploaded (where the subsidy scheme under which it was granted, and which has been assessed against the principles, has already been published on the database). The general principles of the regime still apply to 'in scheme' subsidies through the subsidy scheme under which the subsidy is given.

Clause 34(1): Power to make regulations specifying information that must be included in entries in the subsidy database.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and purpose

91. Clause 33 places a duty on public authorities to make an entry in the subsidy database in respect of subsidies they have given, or subsidy schemes they have made. Clause 34 subsection (1) contains a power for the Secretary of State to make provision by regulations about the information that must be included in a public authority's entry in the database. Some information will be required for domestic subsidy policy reasons, while other information will be required by virtue of international subsidy reporting obligations such as those stemming from the World Trade Organisation or FTAs. Subsections (2) and (3) contain a non-exhaustive list of the types of information that the regulations may require public authorities to provide.

Justification for taking the power

92. Regulations are needed to provide further technical detail on the subsidy information that will be required to be uploaded onto the database. This could potentially change in future, either for reasons of domestic policy or because there are new international reporting obligations with which the UK is obliged to comply. Any further changes to the information specified would only be a change to the administrative reporting requirements placed on public authorities rather than a substantive change in the subsidy control requirements that affects which subsidies may or may not be given.

Justification for procedure selected

93. The Government considers that the negative resolution procedure is appropriate in relation to the exercise of this power as regulations will provide the further technical detail of what is required to be uploaded to the database, whereas the obligation to upload, and the circumstances in which it applies, is already clear on the face of the Bill. Any future changes to the information specified in regulations would only result in a change in the administrative reporting process for public authorities and does not fundamentally affect the operation of the subsidy control requirements or affect which subsidies may or may not be awarded.

PART 3

Clause 42(1)(a): Value thresholds for Minimal and SPEI Financial Assistance

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

94. Subsidies awarded through these exemptions are subject to a threshold ceiling where each enterprise cannot receive more than the threshold amount through these exemptions over a three year period.
95. The level at which the threshold is set is part of the implementation of the TCA. Within the subsidy chapter of the TCA it was agreed the threshold for the 'minimal financial assistance' exemption would be 325,000 Special Drawing Rights (SDR) and for SPEI assistance it is set at 750,000 SDR. The TCA also includes an exemption to the transparency requirements for SPEI subsidies below 15m SDR. These amounts can be amended through agreement of the TCA partnership council.
96. SDRs are supplementary international reserve assets defined and maintained by the International Monetary Fund (IMF). The consultation response outlines that the Bill will implement these thresholds as a fixed amount in pound sterling (GBP).

Justification for taking the power

97. It is necessary to give the Secretary of State the ability to change the GBP amounts set out in the Bill for three reasons.
98. Firstly, the TCA Partnership Council may amend the amounts by agreement and therefore it is necessary to be able to change the amount in the Bill to reflect an amendment to the TCA.
99. Secondly, the UK may agree to other international trade agreements that require a lower threshold related to these exemptions which would need to be reflected domestically.
100. Finally, as the GBP amounts in the Bill will be static and the conversion from SDR to GBP will fluctuate, it is necessary to have the ability to make changes to reflect such currency fluctuations and the five yearly review of SDR by the IMF.
101. The use of the power by the Secretary of State is qualified in that the value thresholds can only be raised due to changes in the exchange rate between SDR and GBP. This is without prejudice to Section 31 of the Future Relationship Act 2020 which allows the

Secretary of State to make regulations to amend legislation in response to changes in the TCA.

Justification for procedure selected

102. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 42(1)(b): Additional sector/subsector thresholds for Minimal and SPEI Financial Assistance and SPEI transparency

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

103. This power would allow for the creation of lower Minimal and SPEI Financial Assistance and SPEI transparency thresholds for particular descriptions of subsidy (e.g. for certain sectors or sub-sectors).

104. This means that lower-value subsidies of these descriptions would be subject to the subsidy control requirements, i.e. they would have a duty to consider the subsidy control principles and ensure their subsidy is consistent with them, to ensure compliance with the prohibitions and conditions, and to comply with the transparency requirements.

105. The TCA does not impose subsidy control requirements (including transparency requirements) on Minimal Financial Assistance below 325,000 SDR. However, the UK's other international obligations may be subject to lower thresholds. There is no minimum threshold to comply with World Trade Organisation requirements.

Justification for taking the power

106. This power will allow the Secretary of State to create lower thresholds in circumstances where lower-value subsidies are particularly likely to distort UK competition and investment, or particularly likely to affect our international commitments.

107. We consider it necessary to take a power because this may be adjusted in order to reflect future international commitments, or to reflect any evidence that arises on sectors that are particularly likely to lead to distortion or international concern even at subsidy levels below £315,000.

108. We envisage this power is most likely to be used to create lower thresholds for agriculture and fisheries subsidies. Small businesses comprise a large share of these sectors, making them more sensitive to lower value subsidies. There is also the possibility that other sectors or sub-sectors may require individual and different provision.

Justification for procedure selected

109. The Government considers it appropriate that the Regulations are subject to the draft affirmative procedure to ensure that Parliament has an opportunity to debate and scrutinise any proposal to lower the exemption thresholds for particular sectors which

could have effect to bring additional subsidies within the scope of the subsidy control requirements set out in the Bill.

Clause 43(3): Natural disasters and other exceptional circumstances

Power conferred on: Secretary of State

Power exercisable by: Notice

Parliamentary Procedure: Laid before Parliament after the fact

Context and purpose

110. In certain emergency situations subsidies can be awarded without needing to be in compliance with the subsidy control requirements in Part 2. Subsidies awarded to remedy a natural disaster or other exceptional occurrences do not have to comply with the subsidy control principles or prohibitions and conditions. The exemption is not subject to any value threshold.

111. The use of this exemption is restricted in that it can only be used when the Secretary of State has published a notice stating a particular emergency has occurred and therefore the 'natural disasters and other exceptional circumstances' exemption can be used to remedy that situation.

Justification for taking the power

112. The Government is taking this power to ensure that this exemption is used in a consistent manner and only in the exceptional circumstances in which it is envisaged it should apply.

113. One alternative approach would be to allow public authorities to judge for themselves where an emergency had occurred. However, this could lead to inconsistent use of the exemption, which see public authorities erroneously awarding large subsidies through the exemption that have not applied the principles as well as the prohibitions and conditions. Therefore, there is a particular risk that incorrect use of the exemption could create significant distortions that the subsidy control requirements are designed to prevent. This could cause subsequent issue for the UK and ensuring compliance with its international agreements, notably the TCA.

114. Another alternative might be to list all the possible circumstances in which this exemption could be used. However, we consider that carries a similar risk of TCA non-compliance and it would be impossible to create an exhaustive list of potential emergencies.

115. The issuing of a notice by the Secretary of State does not create any new obligations, it will relieve public authorities of certain subsidy control requirements where they are developing and delivering subsidies to remedy a particular emergency as stated in the notice by the Secretary of State. Individual subsidies and schemes will be subject to the usual levels of scrutiny that public authorities will face as part of authorising spending. For example, a scheme established in legislation will not have to apply

certain subsidy control obligations but will be subject to the normal levels of parliamentary scrutiny.

Justification for procedure selected

116. The Government considers that the publication and laying in Parliament of a notice is appropriate for the exercise of this power. This exemption would be used only in emergency situations where the subsidy in question is very likely to be urgent. As noted above, subsidies and schemes awarded to remedy an emergency will be subject to the general scrutiny public authorities face on authorising spending and passing legislation. Any notice must be laid in Parliament.

Clause 44(3): National or global economic emergencies

Power conferred on: Secretary of State

Power exercisable by: Notice

Parliamentary Procedure: Laid before Parliament after the fact

Context and purpose

117. In certain emergency situations subsidies can be awarded without needing to be in compliance with certain subsidy control requirements in Part 2. Subsidies awarded to respond to national or global economic emergencies are exempt from applying the prohibitions and requirements imposed by clause 15 to 29 of this Bill. This exemption is not subject to any value threshold.

118. The use of this exemption is restricted in that it can only be used when the Secretary of State has published a notice stating a particular emergency has occurred and therefore a subsidy using the 'national or global economic emergency' exemption can be used to remedy that situation.

Justification for taking the power

119. As above, the Government is taking this power to ensure that this exemption is used in a consistent manner and only in the exceptional circumstances in which it is envisioned to be applied in.

120. One alternative approach would be to allow public authorities to judge for themselves where an emergency had occurred. However, this could lead to inconsistent use of the exemption, with public authorities erroneously awarding large subsidies through the exemption that have not applied the principles as well as the prohibitions and conditions. Therefore, there is a particular risk that incorrect use of the exemption could create significant distortions that the subsidy control requirements are designed to prevent. This could cause subsequent issue for the UK and ensuring compliance with its international agreements, notably the TCA.

121. Another alternative might be to list all the possible circumstances in which this exemption could be used – however, we consider that carries a similar risk of TCA non-compliance and it would be impossible to create an exhaustive list of potential emergencies.

122. The issuing of a notice by the Secretary of State does not create any new obligations, it will relieve public authorities of certain subsidy control requirements where they are developing and delivering subsidies to remedy a particular emergency as stated in the notice by the Secretary of State. Individual subsidies and schemes will be subject to the usual levels of scrutiny that public authorities will face as part of authorising spending. For example, a scheme established in legislation will not have to apply certain subsidy control obligations but will be subject to the normal levels of parliamentary scrutiny.

Justification for procedure selected

123. The Government considers that the publication and laying in Parliament of a notice is appropriate for the exercise of this power. This exemption would be used only in emergency situations where the subsidy in question is very likely to be urgent. As noted above, subsidies and schemes awarded to remedy an emergency will be subject to the general scrutiny public authorities face on authorising spending and passing legislation. Because it is derived from the TCA, the Secretary of State will be bound both by this Bill and by international law when using the exemption. Any notice must be laid in Parliament.

Clause 47(1): Financial stability directions

Powers conferred on: The Treasury

Powers exercisable by: Direction

Parliamentary Procedure: None

Context and Purpose

124. Article 184 of the TCA contains a prudential carve-out (PCO)⁵ and provides that nothing in the TCA prevents the UK or EU from adopting or maintaining measures for prudential reasons, including measures for (see Article 184(2)):

- a. the protection of investors, depositors, policyholders or persons to whom a fiduciary duty is owed by a financial service supplier; or
- b. ensuring the integrity and stability of a Party's financial system.

125. Article 184(2) of the TCA provides that, where prudential measures are inconsistent with the TCA, they must not be used to avoid the obligations under the TCA.

126. Clause 47 implements article 184 of the TCA and allows the Treasury to give directions where appropriate for prudential reasons, including the purposes listed in paragraph (1) above. The Treasury may use such directions to disapply specified subsidy control requirements (as set out in clause 1) in relation to certain subsidies or subsidy schemes. More specifically, a financial stability direction could provide that one or more of the subsidy control requirements, specified in the direction, does not apply to (i) the giving of a subsidy, or making of a subsidy scheme, specified in the direction, or (ii) the giving of subsidies, or making of subsidy schemes, falling within a class specified in the direction.

127. Where a financial stability direction relates only to a subsidy given, or subsidy scheme made, by the Bank of England (the Bank), the Treasury may only make such a direction at the Bank's request. In all other cases where the Treasury intends to give a financial stability direction, the Treasury must consult the Bank before giving the direction.

Justification for taking the power

128. The Government considers the power in clause 47 to be necessary primarily because unless a power of this kind is taken, the provision of subsidies in relation to potential financial stability interventions may be hindered, delayed or rendered less effective or final where it is not possible (or in emergent circumstances, not possible in a timely or fully transparent way) to meet particular subsidy control requirements in the Bill. For example, the transparency provisions in the Bill require an entry in the subsidy database

⁵ Prudential carve-outs (or PCOs) are a standard feature of international financial services agreements and ensure that such agreements do not override the parties' ability to adopt and maintain measures for prudential reasons. This recognises that states need to preserve the freedom to operate quickly and with finality in ways that very often cannot be foreseen and which cannot be catered for in an international agreement without the use of a broad carve-out.

within 6 months of the decision to give that subsidy. As a result of experiences during the financial crisis (and as endorsed in the Plenderleith review in 2012)⁶, it is necessary to ensure there is flexibility to be able to keep emergency liquidity assistance ‘covert’ (i.e. not to disclose its existence publicly), to avoid negative effects of such disclosure on financial stability or the beneficiary (arising from a loss of confidence in that institution), which may require non-disclosure for a period longer than 6 months.

129. While the general nature of the concern in relation to transparency can be anticipated, it is not possible to anticipate all of the possible circumstances in which the Treasury, the Bank or other public authorities might have to provide financial assistance for prudential or financial stability reasons, including those set out above. As such, a power with a broad scope is needed to ensure that similar concerns which might hinder the ability to give subsidies for prudential reasons (or the effectiveness of those subsidies) can be handled. The flexibility of a direction-making power is necessary to allow swifter deployment of interventions in relation to those risks, which is often a key factor in the success of such measures.

130. The Government takes the view that the scope of the power is appropriate because it mirrors the PCO contained in article 184 of the TCA (the inclusion of which in the TCA acknowledges the necessity for the UK and the EU to be able to adopt and maintain measures to protect (amongst other things) the stability of their financial systems), ensuring that this policy safeguard in the TCA is preserved and applied in the domestic regime.

Justification for the procedure

131. The Government has identified several policy and operational imperatives which have been used to assess what procedure would be appropriate for the direction-making power described above are (i) speed of deployment (including to vary and amend exclusions), (ii) protecting information flows/secretcy, and (iii) finality and legal certainty.

132. *Speed of deployment:* A key lesson from the 2008-9 financial crisis is that the nature and scale of the interventions required to avoid financial collapse will not always be known or understood in advance, and the understanding of what is required may unfold over a substantial length of time, punctuated by very short periods of acute need for virtually immediate Government responses to fend off a general systemic breakdown of confidence. With that in mind, it is crucial that the power to create, and modify where appropriate, areas of flexibility around the subsidy control requirements should be able to be deployed at speed and in a manner capable of achieving legal certainty (including transactional finality) from the outset. As in 2008-9, for example, there may well be one or more acute crisis ‘weekends’ or other short intervals of time, after which confidence in the financial system is predicted to collapse or be seriously damaged if the

⁶ <https://www.bankofengland.co.uk/-/media/boe/files/news/2012/november/the-provision-of-emergency-liquidity-assistance-in-2008-9>

Government has failed to take action or if such action can only be taken contingent on other factors. In such circumstances, the Treasury and the Bank may have a matter of days or hours to decide to act and will be developing the shape of the measure and possibly negotiating with commercial parties until late in the process (such as over the weekend of 11th-12th October 2008). This is also relevant in relation to developing conditions, where a direction may need to be varied or amended to reflect those developments, potentially on the same day or several times over a series of days. A delegated power subject to procedural or other contingencies during or after the event would risk compromising the Government's room for manoeuvre in such a situation by restricting its capacity to craft bespoke solutions that have the characteristics of speed, certainty and finality needed to restore market confidence. The absence of such contingencies would not compromise the availability or integrity of other substantial forms of accountability to Parliament in respect of such interventions: such as oversight by the National Audit Office, the Public Accounts Committee and the Treasury Select Committee.

133. *Protecting information flows/secretcy:* As market confidence is a key component of the success of any financial stability intervention, the ability to control information flows is also a necessity. In particular, certain types of interventions may need to be made in a covert way, to insulate them from 'contagion' risks relating to wider market confidence. Examples include covert emergency liquidity assistance over a period of months to address liquidity shortages in an otherwise healthy firm, and the need to ensure that the fact of a particular intervention is not revealed until it has been negotiated, settled, and put in place. In both cases, secrecy would be needed to ensure that the position of a firm in difficulty is not further compromised because of a drop in confidence and an associated run which would make a situation worse, potentially rendering the intervention ineffective or lead to wider and unnecessary contagion. A delegated power subject to scrutiny or procedural or other contingencies during or after the relevant transaction 'window' would not be sufficiently flexible to provide for these varied circumstances, by guaranteeing confidence that information can be protected until the appropriate time (e.g., after contagion risk has dissipated). This flexibility would be secured by a power of the kind set out in the Bill, which is subject to a requirement to publish any direction issued in accordance with it, as long as publication doesn't undermine the purpose of the direction. While this necessary transparency may therefore be delayed for a period of time, it will in due course allow for scrutiny and accountability in relation to the use of the direction-making power. Other forms of Parliamentary oversight, as noted above, would also remain unaffected.

134. *Finality and legal certainty:* Alongside these elements it is worth referring separately to the need to ensure legal certainty and transactional finality – for the relevant institution, the market and for the customers of the institution affected (or that might be affected if confidence is disrupted). In the Government's view, this need provides further support for the view that a direction-making power as set out in the Bill is the appropriate form of delegated power in this case. Were there to be any degree of doubt in relation to the legal position or the sustainability of measures during the relevant transaction window (for example, due to the need to clear later scrutiny or approval processes), this could

lead to a reluctance or inability by counterparties to commit to transactions within the (potentially very short) time available to avoid a collapse in confidence. Similarly, the wider market confidence in the stability and effectiveness of an intervention would necessarily be leavened by the risk inherent in the necessity for further procedures to be negotiated and completed. In the Government's view, a direction-making power of the kind set out in the Bill, alongside other established forms of parliamentary accountability, is the only approach capable of providing the degree of certainty and finality needed to underpin emergency crisis interventions of the kind outlined above.

Other legislative options

135. The Government has considered other options to meet the policy drivers set out above. The use of secondary legislation in the form of regulations made by the Treasury (either before or after the relevant transaction window) was considered in various forms. None of the options would, in the Treasury's view, meet the requirement to control information flows and maintain secrecy as they are (rightly) transparent and accessible public procedures – and this would present an obvious challenge in the use of secondary legislation for this purpose.
136. The use of a made affirmative procedure could be relatively quickly deployed, but would raise concerns around maintaining secrecy and transactional finality. And while the relevant disapplication of subsidy control requirements would be legally effective at the time the instrument is made, where interventions are ongoing (the giving of liquidity support over many months, for example), the potential for non-approval by Parliament in due course would create uncertainty that the subsidy will continue to be available. In relation to this and other potential Parliamentary procedures, even if that risk is relatively remote (where the aims of the authorities can be communicated clearly to Parliament), the existence of that risk could potentially affect the viability or success of the intervention.
137. A draft affirmative procedure does not seem to clearly meet any of the objectives, being much slower to deploy than a made affirmative instrument, raising similar challenges in relation to covert subsidies, and with a similar uncertainty as to whether the instrument will be approved in due course.
138. While a negative procedure may have some advantages in relation to speed of deployment (assuming exceptions are made to allow for coming into force of the instrument before the conventional 21 days have passed), the common concern in relation to secrecy would apply, as would uncertainty as to whether the instrument might be prayed against and annulled.
139. The Government also considered whether a Parliamentary procedure including a retrospective element would be appropriate (to maintain secrecy in the short-term), but this would raise similar concerns to those above in relation to legal certainty and is unlikely to be suitable in relation to a relatively long-term covert provision of liquidity support.

140. The Government also considered the possibility of using an approach in this area that avoids delegated powers altogether: that is, a general exception on the face of the Bill, providing, broadly, that subsidy control requirements could be disapplied where a relevant subsidy is given for prudential reasons. This would provide for speed of deployment, control of information flows and similar legal certainty to a direction-making power. However, there would be limited control over the way that the exception could be used, and similarly limited accountability for that use. While such a general exception could be limited to the Bank and the Treasury, in relation to which there are Parliamentary and other controls (e.g. in the form of statutory objectives and accountability mechanisms as set out below), on balance, it was felt more appropriate to include a 'gateway' for the use of the exception, in the form of the Treasury's assessment of the appropriateness of issuing a direction, which allows for similar flexibility, but a further measure of control.
141. As noted above, article 184(2) of the TCA provides that, where prudential measures are inconsistent with the TCA, they must not be used as a means to avoid the commitments and obligations under that agreement. This creates a UK obligation in international law that the reason behind any use of the PCO should not be to avoid TCA commitments and obligations and that treaty mechanisms would potentially apply if the direction-making power were used in that way. Given that the general structure of the subsidy control regime in the Bill is predicated on obligations in the TCA, this obligation will need to be in consideration in relation to any use of the decision-making power in clause 47 and provides a further safeguard.
142. As noted above, the Treasury is subject to accountability and transparency mechanisms contained in the Bill, and is also required to consult the Bank prior to making any direction. The exercise of the power by the Treasury will also be subject to judicial review. In addition, while the direction-giving power is not subject to a specific Parliamentary procedure, the Treasury and the Bank are accountable to Parliament through a range of different mechanisms including the work of the Treasury Committee, the Public Accounts Committee and the National Audit Office.
143. The proposed delegated power is expected to be used in circumstances where there is a particular prudential risk, and where swift and potentially covert action may be needed to protect the UK financial system and economy. On balance, for the reasons set out above, the conclusion of the Treasury is that the proposed direction-making power is the appropriate form of delegation in this case – implementing a similarly broadly-drafted provision in the TCA in a proportionate way, and providing for a ministerial gateway to the disapplication of certain subsidy control requirements where this is considered to be appropriate. The transparency requirement via publication of the directions allows for accountability in relation to the direction-making decisions, and the power will also be limited by an international obligation to ensure that directions should not be used to avoid subsidy control requirements derived from the TCA.

PART 4

Clause 52(3): Mandatory referrals: content and form of request

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and purpose

144. A public authority must request a report from the CMA before giving a subsidy, or making a Subsidy, or Scheme, of Particular Interest, or where the public authority is directed to do so by the Secretary of State. The public authority must include certain information in that request as set out in subsection (2). The CMA must, once it notifies the public authority that it has received this information, prepare a report on the subsidy or scheme in respect of which the request has been made.

145. This power enables the Secretary of State to make regulations to make further provision as to the content of the information which must be included in the request, and also enables the Secretary of State to make provision as to the form of the request.

Justification for taking the power

146. Subsection (2) provides for the core information that public authorities must provide to the CMA so that is able to prepare a report on a subsidy or scheme following a mandatory referral. A power is needed to make further provision as to the information that must be included in the request so that the required information can be refined based on experience of how the new mandatory referral regime is working in practice. It may become clear through operational experience that the CMA requires additional information in order to prepare its reports within the time limits provided. There is a separate power to amend the content of the CMA's report following a mandatory referral and it will be important to ensure that the information which is included in a request can be supplemented to reflect any changes to the content of the CMA's report.

147. A power is also needed to prescribe the form in which a mandatory referral request must be given to the CMA by a public authority. A prescribed form will ensure that public authorities are clear as to how they are to provide the required information to the CMA and enable the CMA to more quickly assess whether the right information has been provided. The Government considers that these types of procedural matters are better suited to secondary legislation.

148. Merger notices under section 96 of the Enterprise Act 2002 perform a similar function under the merger control regime to mandatory referral requests. The Government notes that the required content and form of those notices are not set out in the Enterprise Act 2002. The CMA is authorised to prescribe the contents and form by notice published in the London, Edinburgh and Belfast Gazettes.

Justification for procedure selected

149. The Government considers that the negative resolution procedure is appropriate for this power. The core information which must be provided by public authorities is set out on the face of the Bill. It is considered that the negative resolution procedure provides sufficient parliamentary scrutiny in relation to any further provision as to the information which must be included in a request or the form in which the request must be given. The Government notes that the content and form of merger notices under section 96 of the Enterprise Act are not subject to any form of parliamentary procedure.

Clause 53(12): Mandatory referrals: verification and reporting periods

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

150. The CMA must, before the end of the five working days beginning with the day on which a mandatory referral request is received (the 'verification period'), given notice to the public authority that the request meets the relevant requirements, or provide reasons as to why it does not. Where the CMA gives notice that the request meets the requirements, the CMA must generally publish a report on the subsidy or scheme before the end of the period of 30 working days beginning with the day on which it notifies the public authority that the correct information has been provided (the 'reporting period'). This power enables the Secretary of State to amend the length of both periods.

Justification for taking the power

151. The Government considers that this power is needed to ensure that the Government has the means to adjust the length of these periods based on experience of how the new regime is working in practice. For example, if experience shows that the CMA are routinely having to agree extensions to the reporting period with public authorities or having to request extensions from the Secretary of State for that purpose, then that may indicate that the reporting period needs to be longer to give the CMA sufficient time to prepare its report. On the other hand, it may be that as the CMA becomes more experienced at preparing its reports it requires less time to prepare them, which may mean that the length of the reporting period can be shortened. This power will ensure that there is flexibility to adjust the length of both periods responding to the needs of public authorities and the CMA based on how the regime is working in practice.

152. The power will sunset after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act. This will provide an appropriate safeguard while ensuring that there is the necessary flexibility to adapt these periods based on early experience of how the regime is operating in practice taking into account the findings of the CMA's report.

Justification for procedure selected

153. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 54(7)(a): Mandatory referrals: cooling off period

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

154. A public authority may not give a subsidy or subsidy scheme, in relation to which the CMA has produced a mandatory referral report, until the cooling period has elapsed. The 'cooling-off period' is the period of five working days beginning with the day after the day on which the CMA publishes its report. This power enables the Secretary of State to amend the length of the cooling period.

Justification for taking the power

155. The Government considers that this power is needed to ensure that the Government has the means to adjust the length of the cooling off period based on experience of how the new regime is working in practice. For example, if operational experience shows that the CMA's reports are frequently identifying serious deficiencies in public authorities' assessments then it might be appropriate to increase the length of the cooling off period rather than doing so on a case-by-case basis. This power will ensure that there is the ability to adjust the length of cooling off period to respond to the needs of public authorities, subsidy beneficiaries and others based on how the regime is working in practice.

156. The power will sunset after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act. This will provide an appropriate safeguard whilst also ensuring that there is a mechanism to adapt the cooling off period based on operational experience and taking into account the findings of the CMA's report.

Justification for procedure selected

157. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 54(7)(b): Mandatory referrals: circumstances in which cooling off period may be extended

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

158. A public authority may not give a subsidy or subsidy scheme, in relation to which the CMA has produced a mandatory referral report, until the cooling period has elapsed. The 'cooling-off period' is the period of five working days beginning with the day after the day on which the CMA publishes its report.

159. The Secretary of State may direct that the cooling off period is to be extended on a case-by-case basis. A direction may only be made where the CMA's report has identified that there are serious deficiencies in the public authority's assessment as to whether the subsidy or scheme would comply with the requirements of Chapters 1 and 2 of the Part 2. This power would allow the Secretary of State to change the grounds on which the cooling-off period may be extended to reflect any changes to the content of the CMA's report made by regulations under clause 59(4).

Justification for taking the power

160. The circumstances set out on the face of the Bill in which the Secretary of State may make a direction to extend the cooling-off period are directly linked to the content of the CMA's report as provided for in clause 59. The cooling off period is intended to provide a short period during which the public authority must reflect on the CMA's findings as set out in their report. The power to extend that period is intended to be used where the content of the CMA's report gives rise to serious grounds for concern. There is a power to amend the required content of the CMA's report. If that power is exercised it may be necessary to make changes to the circumstances in which the cooling off period be extended to reflect any changes to the required content of the CMA's report.

161. The power will sunset after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act and its impact on competition and investment in the United Kingdom (see clause 65). This will provide an appropriate safeguard while ensuring that there is a mechanism to adapt the circumstances in which the cooling off period may be extended reflecting any changes of the required content of the CMA's report (with the power to make those changes sunsetting at the same time).

Justification for procedure selected

162. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 56(3): Voluntary referrals: content and form of request

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and purpose

163. A public authority may voluntarily request a report from the CMA before giving a Subsidy, or making a Subsidy scheme, of Interest. The public authority must include certain information in that request as set out in subsection (2). The CMA must, once it notifies the public authority that it has received this information, decide whether to prepare a report on the subsidy or scheme (or provide reasons as to why the CMA has decided not to prepare a report).

164. This power enables the Secretary of State to make regulations to make further provision as to the content of the information which must be included in the request, and also enables the Secretary of State to make provision as to the form of the request.

Justification for taking the power

165. Subsection (2) is aimed at ensuring that public authorities provide the key information which the CMA will need if decides to prepare a report on the subsidy or scheme following a voluntary referral. A power is needed to make further provision as to the information that must be included in the request so that the required information can be refined based on experience of how the new voluntary referral regime is working in practice. It may become clear through operational experience that the CMA requires additional information in order to prepare its reports within the time limits provided. There is a separate power to amend the content of the CMA's report following a voluntary referral and it will be important to ensure that the information which is included in a request can be adapted to reflect any changes to the content of the CMA's report.

166. A power is also needed to prescribe the form in which a voluntary referral request must be given to the CMA by a public authority. A prescribed form will ensure that public authorities are clear as to how they are to provide the required information to the CMA and enable the CMA to more quickly assess whether the right information has been provided. The Government considers that these types of procedural matters are better suited to secondary legislation.

167. Merger notices under section 96 of the Enterprise Act 2002 perform a similar function under the merger control regime to voluntary referral requests. The Government notes that the required content and form of those notices are not set out in the Enterprise Act 2002. The CMA is authorised to prescribe the contents and form by notice published in the London, Edinburgh and Belfast Gazettes.

Justification for procedure selected

168. The Government considers that the negative resolution procedure is appropriate for this power. The core information which must be provided by public authorities is set out on the face of the Bill and it is considered that the negative resolution procedure provides sufficient parliamentary scrutiny in relation to any further provision as to the information which must be included in a request or the form in which the request must be given. The Government notes that the content and form of merger notices under section 96 of the Enterprise Act are not subject to any form of parliamentary procedure.

Clause 57(8): Voluntary referrals: verification and reporting periods

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

169. The CMA must, before the end of the five working days beginning with the day on which a voluntary referral request is received, give notice to the public authority that a report will be prepared in response to the request, or provide reasons as to why the CMA has decided not to prepare a report (the 'verification period'). The CMA must generally produce a voluntary referral report on a subsidy or scheme before the end of the period of 30 working days beginning with the day on which the CMA notifies the public authority that a report will be prepared in response to the public authority's request (the 'reporting period'). The CMA and public authority may agree to a different reporting period or to extend the reporting period. This power enables the Secretary of State to amend the verification and reporting periods.

Justification for taking the power

170. The Government considers that this power is needed to ensure that the Government has the means to adjust the length of these periods based on experience of how the new regime is working in practice. For example, if experience shows that the CMA are routinely having to agree extensions with public authorities then that may indicate that the reporting period ought to be longer to give the CMA sufficient time to prepare its report. On the other hand, it may be that as the CMA becomes more experienced at preparing these reports it requires less time and the reporting period can be shortened. This power will ensure that there is flexibility to adjust the length of both periods responding to the needs of both public authorities and the CMA based on how the regime is working in practice.

171. The power will sunset after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act. This will provide the necessary flexibility to adapt these periods based on early experience of how the regime is operating in practice and taking into account the findings of the CMA's report.

Justification for procedure selected

172. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 59(4): Mandatory and voluntary referrals: content and form of CMA report

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative (provision about the content of the CMA's report); negative (provision as to the form of the report)

Context and purpose

173. The CMA must prepare a report on a subsidy or scheme following a mandatory or voluntary referral in accordance with clauses 52 and 56. The report must contain an evaluation of the assessment provided by the public authority. The report may also contain advice about how that assessment might be improved, and about how the proposed subsidy or scheme might be modified to ensure compliance with the subsidy control principles, prohibitions and conditions. This power enables the Secretary of State to make regulations to amend subsections (1) to (3) to make further provision as to the content of the report, and to make provision to prescribe the form in which the report must be provided.

Justification for taking the power

174. This power ensures that the content of the CMA's report may be adapted based on experience of how the regime is operating and its impact on competition and investment within the United Kingdom. This is a new regime and it is important that the content of the CMA's reports can be adapted to meet the needs of public authorities and subsidy beneficiaries, which may evolve over time.

175. It is also important that the content of those reports may also be adapted based on the findings of the CMA as to how the regime is operating and its impact on competition and investment within the United Kingdom (see clause 65). There are appropriate safeguards as to the exercise of the power. The power to amend subsections (1) to (3) to make provision as to the content of the report sunsets after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act, and its impact on competition and investment within the United Kingdom.

176. A power is also needed to make provision as to the form of the report to ensure that it is clear and accessible to public authorities and interested parties. The Government considers this to be a procedural matter which is better suited to being addressed through secondary legislation.

Justification for procedure selected

177. The Government considers that the draft affirmative procedure is appropriate where the power is used to make provision as to the content of the CMA's report as this will entail the amendment of primary legislation by secondary legislation. In line with the usual practice those regulations will be subject to the draft affirmative procedure.

178. The Government considers that negative resolution procedure is appropriate for regulations that make provision as to the form of the report which will not involve the amendment of primary legislation by secondary legislation. The Government considers that this provides sufficient Parliamentary oversight on the basis that these regulations will be dealing with the form rather than the substance of the report.

Clause 60(8)(a) and (b): Post-award referrals: content and form of information to be provided to CMA

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and purpose

179. The Secretary of State may refer a subsidy or scheme to the CMA after it has been given or made by a public authority. If the Secretary of State makes a referral then a direction must be given to the public authority requiring that certain information be provided to the CMA in relation to the subsidy or scheme (a 'post-award referral direction'). The public authority must provide that information to the CMA before the end of the referral period. The CMA must then, before the end of the reporting period, publish a report on the subsidy or scheme.

180. This power enables the Secretary of State to make further provision as to the information which must be provided by the public authority to the CMA following a post-award referral direction, and also enables the Secretary of State to make provision as to the form in which that information must be provided.

Justification for taking the power

181. Subsection (3) is aimed at ensuring that public authorities provide the information which the CMA needs to prepare a report on a subsidy or scheme which has been referred by the Secretary of State after being given or made (or that public authorities explain why that information is not being provided). A power is needed to make further provision as to the information that must be provided to the CMA so that the required information can be adapted based on experience of how the new post-award referral regime is working in practice. It may become clear through operational experience that the CMA requires additional information in order to prepare its reports within the time limits provided. There is a separate power to amend the content of the CMA's report following a post-award referral and it will be important to ensure that the information which must be provided to the CMA by the public authority following a post-award referral direction can be adapted to reflect any changes to the content of the CMA's report.

182. A power is also needed to prescribe the form in which information must be given to the CMA by a public authority following a post-award referral direction. A prescribed form will ensure that public authorities are clear as to how they are to provide the required information to the CMA and enable the CMA to more quickly assess whether the right information has been provided. The Government considers that these procedural are better suited to secondary legislation.

183. Merger notices under section 96 of the Enterprise Act 2002 perform a similar function under the merger control regime. The Government notes that the required content and form of those notices are not set out in the Enterprise Act 2002. The CMA is authorised to prescribe the contents and form by notice published in the London, Edinburgh and Belfast Gazettes.

Justification for procedure selected

184. The Government considers that the negative resolution procedure is appropriate for this power. The core information which must be provided by public authorities is set out on the face of the Bill. It is considered that the negative resolution procedure provides sufficient parliamentary scrutiny in relation to any further provision as to the information which must be provided by public authorities or as to the form in which that information must be given. The Government notes that the content and form of merger notices under section 96 of the Enterprise Act are not subject to any form of parliamentary procedure.

Clause 60(8)(c): Post-award referrals: Length of time periods

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

185. The Secretary of State may refer a subsidy or scheme to the CMA after it has been given or made by a public authority. If the Secretary of State makes a referral then a direction must be given to the public authority to provide certain information to the CMA in relation to the subsidy or scheme (a 'post-award referral direction'). The post-award referral direction needs to be given within 20 working days of the subsidy, or subsidy scheme, being published on the subsidy database (or, in the case of a subsidy or scheme which is exempt from the requirement to include information on the database, the day on which the subsidy is given or made). The public authority must then provide the CMA with the required information within 20 working days of the post-award referral direction being given. This power enables these time periods to be amended by regulations made by the Secretary of State.

Justification for taking the power

186. The Government considers that this power is needed to ensure that the Government has the means to adjust the length of the time within which a post-award direction must be made by the Secretary of State, as well as the time within which the public authority must provide information in response to such a direction. It is important that the Secretary of State is able to adjust these periods based on operational experience of how the new post-referral regime is working in practice.

187. For example, if experience shows that 20 working days leaves the Secretary of State with insufficient time to identify the subsidies or scheme that ought to be referred to the CMA then it may be appropriate to increase the length of the period within which a post-award direction may be made. Similarly, it may be necessary to extend the length of the referral period if experience shows that public authorities are being left with insufficient time to provide information to the CMA in response to a post-award referral direction.

188. The power will sunset after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act. This will provide the necessary flexibility to adapt these periods based on early experience of how the regime is operating in practice and taking into account the findings of the CMA's report.

Justification for procedure selected

189. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 61(11): Post-award referrals: Length of CMA reporting period

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative

Context and purpose

190. The CMA must produce a mandatory referral report on a subsidy or scheme before the end of the period of 30 working days beginning with the day on which the public authority has provided the correct information or the referral period ends. This power enables the Secretary of State to amend the length of the reporting period.

Justification for taking the power

191. The Government considers that this power is needed to ensure that the Government has the means to adjust the length of the CMA reporting period following a post-award referral based on experience of how the new regime is working in practice. For example, if experience shows that the CMA are routinely having to agree extensions to the reporting period with public authorities or having to request extensions from the Secretary of State for that purpose, then that may indicate that the reporting period needs to be longer to give the CMA sufficient time to prepare its report. On the other hand, it may be that as the CMA becomes more experienced at preparing its reports it requires less time to prepare them which may mean that the length of the reporting period can be shortened. This power will ensure that there is flexibility to adjust the length of both periods responding to the needs of both public authorities and the CMA based on how the regime is working in practice.

192. The power will sunset after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act. This will provide an appropriate safeguard whilst also ensuring there is the necessary flexibility to adapt these periods based on early experience of how the regime is operating in practice and taking into account the findings of the CMA's report.

Justification for procedure selected

193. This power enables the Secretary of State to amend primary legislation by secondary legislation. In line with the usual practice the Regulations are subject to the draft affirmative procedure.

Clause 62(5): Post-award referrals: content and form of CMA report

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Draft affirmative (if making provision as to the content of the report); negative (if making provision as to the form of the report)

Context and purpose

194. The CMA must prepare a report on a subsidy or scheme following a post-award referral direction. The report must contain an evaluation of any assessment that has been undertaken by the public authority, before the subsidy or scheme was given or made, as to why the subsidy or scheme complies with the subsidy control principles. If an assessment was not provided that that fact must be stated in the report together with any reasons provided by the public authority. If the subsidy or scheme is ongoing, the report may also contain advice about how the subsidy or scheme might be modified to ensure compliance with the subsidy control principles, prohibitions and conditions, or to mitigate any negative effects on competition and investment within the United Kingdom.

195. This power enables the Secretary of State to make regulations to modify the content of the report which must be prepared by the CMA and to prescribe the form in which it must be provided.

Justification for taking the power

196. This power ensures that the content of the CMA's report may be adapted based on experience of how the regime is operating and its impact on competition and investment within the United Kingdom. This is a new regime and it is important that the content of the CMA's reports can be adapted to meet the needs of public authorities and subsidy beneficiaries which may evolve over time.

197. It is also important that the content of those reports may also be adapted based on the findings of the CMA as to how the regime is operating and its impact on competition and investment within the United Kingdom (see clause 65). There are appropriate safeguards as to the exercise of the power. The power to amend clause 62 to make provision as to the content of the report sunsets after the period of one year beginning with when the CMA first publishes its report on the effectiveness of the operation of the Act, and its impact on competition and investment within the United Kingdom.

198. A power is also needed to make provision as to the form of the report to ensure that the report is clear and accessible to public authorities and interested parties. The Government considers this to be a procedural matter which is better suited to being addressed in secondary legislation.

Justification for procedure selected

199. The Government considers that the draft affirmative procedure is appropriate where the power is used to make provision as to the content of the CMA's report as this will entail the amendment of primary legislation by secondary legislation. In line with the usual practice those regulations will be subject to the draft affirmative procedure.

200. The Government considers that negative resolution procedure is appropriate for regulations that make provision as to the form of the report. The Government considers that this provides sufficient Parliamentary oversight on the basis that these regulations will be dealing with the form rather than the substance of the report.

Clause 64(3): Mandatory referrals: exemption direction

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary Procedure: Laid before Parliament after the fact

Context and purpose

201. Where the mandatory referral requirements apply, a public authority must request a report from the CMA and wait for a cooling period to elapse before giving the subsidy. A failure to comply with those requirements will mean that the public authority will have given a prohibited subsidy. This power allows the Secretary of State to direct that the mandatory referral requirements under Chapter 1 of Part 4 do not apply, or cease to apply, where the Secretary of State is satisfied that there are urgent and exceptional circumstances that justify the direction being given in the public interest.

202. The Government does not consider this power to be legislative in character as it can be exercised only in respect of individual cases. However, the Government considers it appropriate to bring it to the attention of the Committee given its effect is to disapply the requirements of the Act where it is exercised.

Justification for taking the power

203. This power is necessary to ensure that public authorities are not delayed in giving subsidies or making schemes where there are urgent and exceptional circumstances which mean that it is in the public interest that the mandatory referral requirements do not apply. The mandatory referral requirements would otherwise mean that the public authority had to obtain a report from the CMA and wait for a cooling off period to expire once the CMA has reported. This delay risks having significant adverse consequences if there are urgent and exceptional cases which mean that it is in the public interest that the subsidy be given sooner.

204. In the absence of this power, the public authority would either need to comply with the mandatory referral requirements which would mean a delay before the subsidy could be given, or the public authority would need to proceed to give the subsidy without referring to the CMA resulting in the subsidy being prohibited (and potentially subject to recovery on an application for review to the Competition Appeal Tribunal). It is not possible to anticipate in advance the precise circumstances in which this backstop power may be needed but it is important that there is a safety valve which ensures that in exceptional and urgent circumstances there is a mechanism for a subsidy to be given without delay. It is important that the Secretary of State has a power to direct where this subsidies are exempt from the mandatory referral requirements on the basis of there being urgent and exceptional circumstances so that public authorities are clear so that when they are able to give a subsidy without the need to comply with those requirements.

Justification for procedure selected

205. The exercise of this power will not be subject to any parliamentary procedure. It is critical that the Secretary of State is able to act swiftly to exempt these subsidies from the mandatory referral requirements as the circumstances will be urgent and exceptional. Any direction must be published by the Secretary of State and laid before both Houses of Parliament.

Clause 67(3): Monitoring and reporting on subsidy control: modifications to information-gathering powers

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative

Context and purpose

206. Section 41 to 43 of the United Kingdom Internal Market Act 2020 confer information-gathering powers on the CMA for the purposes mentioned in section 41(1) of that Act and deal with the enforcement of those powers. Clause 67 applies sections 41 to 43 of the United Kingdom Internal Market Act 2020 for the purpose of assisting the CMA in carrying out any of its functions under clause 65 (monitoring and reporting on subsidy control). Subsection (3) confers a power on the Secretary of State to make regulations to make such further modifications to section 41 to 43 as are considered necessary for these purposes.

Justification for taking the power

207. This power is needed to ensure that the information gathering powers in section 41 to 43 of the United Kingdom Internal Market Act 2020 work for the purposes of assisting the CMA to carry out its functions under clause 65. The application of those information gathering powers is effected on the face of the Bill by virtue of subsection (1). It is considered more proportionate to use regulations to deal with the more detailed modifications which are necessary to ensure the information gathering powers work rather than to deal with these modifications on the face of the Bill. Subsection (4) makes clear that regulations may not modify the amounts specified in section 43(6) which have effect to prescribe the maximum penalties that may be imposed under section 42(1) and (2) of the United Kingdom Internal Market Act 2020.

Justification for procedure selected

208. The Government considers that the negative resolution procedure provides the appropriate level of parliamentary scrutiny for this power. As set out above, the application of the CMA's information gathering powers is effected on the face of the Bill. These regulations will be confined to making any further modifications which are considered necessary in consequence of the application of those powers by subsection (1). As set out above, subsection (4) ensures that the power may not be used to increase the maximum penalties which apply under section 43(6).

PART 6

Clause 79(1): Power to publish guidance

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary Procedure: None

Context and purpose

209. This clause gives the Secretary of State the power to publish guidance on the practical application of the provisions in the Bill, most importantly for public authorities to consider as they develop subsidies and schemes that are consistent with the subsidy control requirements.

210. This gives the Secretary of State power to issue guidance on the practical application of the provisions in this Bill, particularly the principles. Guidance would provide greater detail on how the principles should be used to assess individual subsidies and schemes, including:

- a. Methodologies that could be used for assessing benefits and distortive effects;
- b. The level and type of analysis that would be considered proportionate depending on the type of subsidy (this would be linked to the Subsidies and Schemes of Interest and Particular Interest criteria);
- c. What kinds of features may be generally considered 'best practice' examples of subsidy design making a subsidy more likely to be consistent with the principles, such as fair and open competitions for subsidies; and
- d. What kinds of features might merit closer attention from a public authority to ensure that negative effects on other parties had been properly taken into account, such as subsidy races.

211. The guidance will also indicate how subsidies might be given to support disadvantaged areas in a way that is consistent with the principles, by indicating characteristics or criteria for an area to be considered disadvantaged and how that might be used to justify more ambitious or extensive subsidy interventions consistent with the principles. The guidance would also indicate that those kinds of interventions may not be consistent with the principles in more advantaged areas. This guidance will be nuanced and will reflect that different areas face different types and levels of disadvantage depending on their geographical, economic and social situation.

212. The Government would look to the *Green Book: Central Government Guidance on Appraisal and Evaluation* as an example of detailed guidance for authorities making spending decisions (albeit in the notably different context of spending control, rather than subsidy control) and would consider any relevant read-across as well as ensuring that the guidance was mutually compatible (to provide for situations where both *Green Book* and subsidy control guidance applied simultaneously, for central Government subsidies).

Justification for taking the power

213. This power is necessary for the regime to function. The regime is based on public authorities being required to comply with the underlying principles. In the absence of guidance setting out how this duty is exercised, there would be significant divergence which would severely impact the proper functioning of the regime. Moreover, issuing statutory guidance would increase public authorities' confidence in meeting the requirements.

214. Whilst the duty for how the public authorities relate to the principles are on the face of the Bill, the processes they must follow to meet this duty will be detailed, technical and advisory rather than prescriptive, making them more appropriate to sit in guidance than in legislation.

215. This process will also allow the guidance to be iterated and developed based on feedback from public authorities, subsidy recipients and the CMA.

Justification for procedure selected

216. As this is guidance and does not demarcate the boundaries of the legislation, we consider that Parliamentary oversight is not necessary.

Clause 82(1): Gross cash equivalent of financial assistance

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: Negative resolution

Context and purpose

217. The power allows the Secretary of State to make regulations setting out a methodology for public authorities to follow when calculating the 'gross cash equivalent' and 'gross cash amount' of subsidies to ensure there is a consistent way of calculating the value of the subsidies an enterprise has received through different routes

218. This is necessary for the operation of various parts of the Bill and the regime, including determining the applicability of the 'Minimal Financial Assistance' and 'SPEI assistance' exemptions thresholds. 'Gross cash equivalent' is also needed with respect to transparency so public authorities can determine whether the SPEI transparency exemption and 'within scheme' transparency exemption for individual subsidy awards of less than £500,000 given under a scheme apply.

Justification for taking the power

219. It is necessary to have a consistent methodology for public authorities to use so that the calculation of whether an enterprise can receive the subsidy through the exemption is the same across all public authorities, enterprises and subsidies. It will also ensure that transparency exemptions will be consistently applied where public authorities are awarding non-cash grant subsidies.

220. The methodology needs to be set out in regulations for three reasons. Firstly, it is not appropriate to include the level of detail we are envisioning with respect to the methodology on the face of the Bill. Relatedly, this is a technical issue that will need to be reviewed and updated over time to reflect changes to the interest rate, discount rate and other factors related to the awarding of loans, guarantees and other non-cash subsidies.

221. Finally, due to the importance of ensuring a consistent calculation of the the amount of subsidies an enterprise receives through these exemptions, it is necessary for the methodology to be in legislation rather than guidance.

Justification for procedure selected

222. The Government considers the negative procedure provides the appropriate level of parliamentary scrutiny for this power. The exercise of this power relates to how public authorities should calculate the cash equivalent value for particular subsidies, rather than relating to how or when public authorities can award subsidies.

Clause 86(1): Power to make consequential provision

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: Draft affirmative (where amending, repealing or revoking primary legislation or retained direct principal EU legislation); otherwise negative

Context and purpose

223. This provision allows the Secretary of State to make amendments to, or repeal of, existing legislation that are consequent on the functioning of this Bill. Paragraph 12 of Schedule 3 provides that it includes the power to make provision, in relation to subsidy proceedings before the appropriate court, corresponding or similar to provision made by clause 71 in relation to proceedings under Part 5 before the Competition Appeal Tribunal.

Justification for taking the power

224. This power is required for the implementation of amendments to, or repeal of, existing primary or secondary legislation, or retained European legislation, where the functioning of a statute or statutory instrument is affected by this Bill. While the Bill makes provision for changes to existing legislation where possible (i.e. to the Enterprise and Regulatory Reform Act 2013, on the duties of the CMA), it is highly likely that various technical changes to existing legislation may be required as the subsidy control regime is implemented and developed.

225. In addition, use of regulations will provide for the expedient correction of existing law in unforeseen circumstances, thereby preventing either this Bill, or existing law, from requiring new primary legislation purely to correct these deficiencies.

Justification for procedure selected

226. The Government considers that the affirmative procedure is appropriate in the event that repeal or amendment of primary legislation is necessary. The negative procedure is appropriate for changes to all other types of legislation.

Clause 91(2): Commencement

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: None

Context and purpose

227. Clause 91(2) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations. Subsection (1) lists the provisions that will come into force on the day on which the Bill is passed. Not all of the provisions in the Bill will need to be in force immediately on the Bill being passed. For this reason, a power is taken in subsection (2) to enable the Secretary of State to appoint, by regulations, a such day for the coming into force of the remainder of the provisions contained in the Bill.

Justification for taking the power

228. Some parts of the Bill will need to be commenced earlier than others. For that reason, where commencement is not already expressly provided for by subsection (2), this power will enable the Secretary of State to make regulations to commence particular provisions for when they are needed.

Justification for procedure selected

229. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions of the Bill to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Clause 91(4): Transitional or saving provision

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary Procedure: None

Context and purpose

230. Transitional provisions serve to act as a legal bridge between the expiry of the previous subsidy control regime and the entry into legal force of the new subsidy control regime. Transitional provisions will expire when the new regime comes into force.

231. Saving provisions preserve existing piece(s) of legislation, whether for transitional reasons or more permanently. Saving provisions may be transitional and therefore have an expiry date, or they may continue to function over the longer term.

Justification for taking the power

232. This power will ensure that there is no gap, in legal terms, between the current subsidy control regime and the regime created by this Bill. A legal gap of this kind would result in significant uncertainty for public authorities and subsidy recipients operating within it.

233. Transitional provisions may be necessary, for example, given that parts of the Bill come into force on the day it is given Royal Assent, and other parts of the Bill will take effect on a day appointed by the Secretary of State through regulations.

234. Saving provisions will prevent, in whole or in part, existing law that is necessary for the functioning of the Bill, or the future subsidy control regime, from expiring.

Justification for procedure selected

235. As is usual with powers to make transitional and saving provision, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions of the Bill to be commenced by enacting them. Regulations containing transitional and saving provisions will enable the provisions of the Bill to be brought into force with no gap, in legal terms, between the current subsidy control regime and the regime created by this Bill.

Department for Business, Energy and Industrial Strategy
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