HOUSE OF COMMONS

Business, Energy and Industrial Strategy Committee

Oral evidence: Post-pandemic economic growth: state aid and post-Brexit competition policy, HC 742

Tuesday 30 November 2021

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Watch the meeting

Members present: Darren Jones (Chair); Paul Howell; Mark Pawsey; Alexander Stafford.

Questions 48 to 107

Witnesses

I: Professor Sir John Vickers, Professor of Economics, University of Oxford, and Former Chair, Office of Fair Trading.

II: Nicole Robins, Partner, Oxera; Isabel Taylor, Partner, Slaughter and May; James Webber, Partner, Antitrust, Shearman & Sterling LLP.

Examination of witness

Witness: Professor Sir John Vickers.

Q48 **Chair:** Welcome to this morning's session of the Business, Energy and Industrial Strategy Select Committee for our latest hearing in our inquiry on post-Brexit competition and state aid policy. We are delighted, in our first panel this morning, to welcome Professor Sir John Vickers from the University of Oxford, and formerly the chair of the Office of Fair Trading, to give evidence. Good morning to you, Sir John.

We have been looking with some interest at the report that you have been involved in before Brexit, from the Brexit Competition Law Working Group, and that report concluded that there was not a huge amount of space for "radical reform" in this policy area as a consequence of Brexit. We have seen various functions come back from the European Commission into the UK. The UK Government have brought forward some legislation on subsidy. There is an indication that there will be further legislation after the next Queen's Speech. Do you think that things will change fundamentally in a way that will create opportunities for the UK, or do you think it will end up being largely the status quo?

Professor Sir John Vickers: Thank you, first of all, for having me this morning and giving me the opportunity to give evidence. The Brexit Competition Law Working Group was a self-appointed group. We thought it important, following the referendum result, that there be a vehicle for thinking about the implications for competition law. It was not one of the hottest political issues surrounding Brexit, but we felt it was extremely important, and it is one where the European Commission in Brussels has direct enforcement power.

Our main themes were that the competition law and institutional architecture that we have had in the UK for 20 years was broadly right, and that that should not be imperilled by Brexit, and, secondly, that there were a number of very important transitional issues to think about and address with great care. We were doing our work in 2016 and 2017, and a lot has happened since. We did not know what shape the nature of the withdrawal agreement and associated legislation would take. In terms of opportunities, may I ask whether your question is confined to competition law itself or more generally?

Q49 **Chair:** More generally insofar as it relates to the issues of competition, state aid incentives and the broader policy area.

Professor Sir John Vickers: State aid was one issue that we very explicitly did not include in our report. That is an area where withdrawal from the EU means that we are no longer subject to treaty provisions that we were subject to. I believe it is sensible to have safeguards against inefficient and distorting subsidies, and now there is legislation that seeks to do that within the UK, with a further role there for the CMA. My view is that the policy thrust there is sensible.

The constitutional issues are difficult and delicate, with one part of Government—perhaps not a democratically elected part—at least advising democratically elected parts, and we have the whole devolved structure as well to take care of. There are clearly difficult constitutional issues there, but it is not in the interests of the UK to allow unchecked and potentially distorting subsidies to proliferate. Safeguards there seem very important.

Q50 **Chair:** Let us look a little further at the role of the CMA that you alluded to in your answer there. The CMA has had to take on a lot of extra work quite quickly, preparing for the new subsidy regime and the Office for the Internal Market.

Quite a lot of work and effort is going into the Digital Markets Unit, which is more of innovation for the CMA, plus its traditional remit of competition and consumer policy, and then the larger cartel cases that the European Commission used to take, now coming back to the UK. Some of the evidence we have received previously was that there might be scope creep and about whether the CMA in and of itself is capable of managing all of that important work. What is your view on that issue?

Professor Sir John Vickers: That is a concern to guard against. I would think of it more as overreach rather than creep. The CMA, when founded, had very wide-ranging powers, because it was combining the powers of what had been two independent bodies. Unusually in the UK, we have the market investigation regime with remedy powers, which the other principal jurisdictions do not, or at least not in the same form. It was already an institution with very wide-ranging powers.

Brexit automatically increased the range of those powers very considerably, because a number of major matters that would have been dealt with in Brussels will be dealt with here, perhaps, and in Brussels. That also has big resource implications for the CMA, which our report sought to highlight. As you have mentioned, there is the whole digital markets area subsidy control issue, so it is growing and growing. The Government's proposals would add further to the powers of that body. That does not make me against the increases in responsibility that have occurred, but it does make me quite concerned to maintain adequate checks and balances on that array of powers.

I can contrast it with the situation I was in 20 years ago. When I went to the OFT, the twin pillars of competition legislation were brand new, or indeed in formulation. The Enterprise Act came into force halfway through my term. The responsibility and power of the OFT had increased enormously from just a few years before. I always thought that the counterpart for that was, and had to be, rigorous appeal routes above us in relation to the Competition Act. That is what the Competition Appeal Tribunal does. I would be very cautious about any dilution of that kind of scrutiny and check on what the CMA nowadays does.

Q51 **Chair:** Let me unpack that a little. There is some narrative that says that

the process of legal challenge and the role of the judiciary in the UK slows down or burdens the ability of the CMA to be able to bring forward enforcement cases in a way that allows it to challenge big, wealthy companies in the way that it may want to. There has been some narrative that we may need to streamline that approach.

For example, I understand that France has quite a quick process for judicial intervention around decisions of the relevant competition authority. Are you saying that what we have today in terms of the appeal tribunal is satisfactory? Would you be concerned about that streamlined approach, if that was to be brought forward?

Professor Sir John Vickers: Nothing is perfect, but then the best can be the enemy of the good. The length of appeal cases in the UK is in no sense exorbitant by international standards.

To your wider question, again, I would go back to my experience because that is all I really have as the basis for an answer. I can well remember how irritating it is to be appealed, and it is beyond irritating to be appealed successfully. Our overall record was reasonable; a lot of decisions were not appealed and we prevailed on many appeals. I feel it is just right that there be that check on these major decisions. Procedural fairness is important within the CMA, as it was within the OFT. It needs more than that when decisions of this magnitude are being made.

I am persuaded by those who say that there is considerable scope for more efficient case management. There may be further efficiencies at the CAT level but particularly within the CMA. I do not have a direct line of sight into that so I cannot speak with any authority on that point. It is true that we have an administrative layer with a judicial layer on top but it would be hazardous to dilute the level of judicial scrutiny. Even though it would speed up cases, the risk of error and unchecked power would be too great.

I understand the point that some people say the prospect of appeal leads to gold-plating of the first-stage decision. On balance, though, again speaking from my own experience, I would say that that prospect concentrates the mind wonderfully and leads to better first-phase decisions than if it were a weaker appeal review standard.

Q52 **Chair:** Are there any other checks and balances that need to be introduced or improved on, given the wide-ranging powers the CMA is going to have going forward?

Professor Sir John Vickers: In the competition area, I would say that the main point is the standard of review by the CAT, which, for the reasons I have given, I would not recommend diluting. A number of the Government proposals, for example in the market studies and market investigations area, would add to CMA powers there. There are questions over, if those extended powers were given, what the checks and balances would be in relation to them. I would see those two things going very much together.

In another but related area, there is the question of consumer law enforcement powers. There, I would favour stronger enforcement powers. For decades, we have had unduly weak deterrents to forms of trading malpractice. The idea of the CMA having direct enforcement powers there makes sense, but, again, there have to be the checks and balances in relation to those powers. If there is an expansion of powers, the other side of that coin would be judicial checks and balances.

Remember, too, that my own time was one of two separate bodies: the OFT and the Competition Commission. In the merger area, we really were independent from each other. In the merger area, there was almost a built-in mutual check and balance. You can try to replicate that when everybody is under one roof but it is surely harder to do so in that context.

Q53 **Chair:** That is interesting. The last question from me at this stage is about headcount. It is always difficult to give a number that you think you might need. The Government have been quite flexible with the CMA post Brexit, giving it enhanced budgets to recruit additional people. Do you feel like the CMA and the Government have broadly got that right in terms of its increased capacity, or are we still not able to deal with everything that we have to deal with?

Professor Sir John Vickers: I do not feel able to answer that very sensibly. However, as we have noted, the increase in responsibility and power of the CMA is very considerable, so there is bound to be a headcount and budgetary consequence for that. I believe that the value of what the CMA does and what competition law does in general is very high for the economy. I am all for a strong competition law framework, and it is cost that yields a return in that wider economic sense.

Q54 **Mark Pawsey:** Just to follow up the Chair's questions, you have just said that consumer law enforcement powers could be stronger and that you think there has been insufficient deterrent to trading malpractice. To bring this session to life, could you give us a "for instance"?

Professor Sir John Vickers: I can give you an anecdote that I heard from a local trading standards officer, which may or may not be true. There was an egregious rogue trader, I believe a locksmith, with a trail of ripped-off consumers. He was featured on one of those consumer programmes on television, exposing all of his malpractice, after which he advertised his services, truthfully, "as seen on TV". I do not know if that is true or not, but I know the record of the cases where a prosecution will be brought and an injunction might be granted, it might be flouted, and then back to court.

An example is laid out in the Government consultation paper. Only after repeat offending would someone be in such trouble that they would be in contempt of court, and then bad things could happen to them. It just seems to be very unsatisfactory that that should be the case, so I would favour stronger deterrents.

The other way that this law is often enforced is against not rogue traders but, in general, entirely reputable businesses and very well-known names who sail too close or beyond the wind. I remember cases involving, for example, the advertisement of credit card products. One was marketed as 0% forever—this was a balance transfer deal, if I remember correctly—but it simply was not. There was no construal of the facts that could make that so. There, if it is a well-known and reputable firm, publicly bringing action against them can cause an instant correction in the behaviour; you do not need to go to court.

This is an area that has been a bit Cinderella, so I would favour, with the fast evolution in online trading, tougher enforcement powers, again subject to the checks and balances.

Q55 **Mark Pawsey:** Thank you for that. Our constituents would expect, in the examples you have given, action of some form or other to be taken. I am very intrigued that you chose a locksmith example, because I held a debate in Westminster Hall earlier this year suggesting the regulation of locksmiths along the line of the Gas Safe Register, so that is very interesting. Thank you for that.

Could I turn to your Brexit Competition Law Working Group's 2017 report? In that, you said that primary legislation will require amendment, particular changes to the Competition Act. You have just given examples of where you would see additional regulation being brought forward.

Professor Sir John Vickers: The examples just given a moment ago were on the consumer law side, not the competition law side. When we were working on that 2017 report, we did not know—nobody knew—what form the exit agreement and legislation would take. Events have moved on and, while I would hold that the core principles in that report hold good, a number of things that we said about the legislative amendments required have been overtaken, I suspect, by events.

A particularly important one was section 60 of the Competition Act, which required that there be no inconsistency between the application of the Competition Act provisions against anti-competitive agreements and abuse of dominance in the UK and the equivalent provisions under the EU treaty. Now we have the amendment, section 60A, which maintains it to an extent but in other ways gives flexibility for UK law to depart from that. In addition, a lot of the competition and consumer law is retained EU law, so we have sucked into domestic law a very large quantum of EU law in these areas.

Q56 **Mark Pawsey:** You have had the opportunity to study the Subsidy Control Bill. How do you think the Subsidy Control Bill will deal with any gaps that are remaining in the Competition Act?

Professor Sir John Vickers: While I may have had the opportunity to study that Bill, I have not studied it in any depth. You should certainly take the opinion of someone such as George Peretz, who was before you a few weeks ago, much more seriously than mine on this.

The Competition Act did not attempt to deal with subsidy questions. It mirrored Articles 101 and 102, as they are now numbered, of the EU treaty, in a way that pretty much all competition jurisdictions in major countries around the world do. It gave us those two main pillars on anti-competitive agreements and abuse of dominance.

The subsidy control aspect—the state aid provisions of the EU treaty—were something altogether different. They related to the Commission enforcing anti-subsidy measures, subject to exceptions of course, across the EU. That never had a domestic counterpart. The Subsidy Control Bill is attempting to achieve something of that kind within the UK. Of course, it is within the context of the EU agreement. It makes internal UK sense on its own merits too.

Q57 **Mark Pawsey:** In terms of our future relationship with Europe and the relationship with the European Commission on competition policy, how should we develop our proposals in conjunction with them? Should we entirely mirror what they are doing or should there be an element of our own control there?

Professor Sir John Vickers: That is a question not only about the European Commission but also how the European competition jurisprudence evolves.

One factor that has weighed in some aspects of EU law, which is not relevant to us, is the EU single market imperative. The law on areas like distribution agreements in the EU has been extremely concerned that there not be discrimination on, as it were, nationality grounds or carving up territories in those terms. I am putting it in very broad overview terms, and I am sure lawyers will be able to give you a more accurate account. That factor does not weigh within the UK. On the law of that kind of agreement, I could imagine a UK law taking an incrementally different path from EU law. I would not expect that to be a radical difference, however.

Over time—and it might be quite a long time—you could imagine UK and EU interpretations of very similar looking statutory provisions moving in different directions. It might be that the UK would take a more economics-based approach—of course I am in favour of that in general—than EU law sometimes has in the area of abuse of dominance. Because so much of this law is retained by virtue of the way the withdrawal agreement works, and because it has authority not over the UK Supreme Court but over the lower courts, we are going to be, for some time, effectively with something very similar to EU law in these areas.

Q58 **Mark Pawsey:** Could you give us a practical example of how that might affect a UK company seeking to trade across the EU, for example?

Professor Sir John Vickers: A UK company seeking to trade across the EU will still be subject to EU law in respect of its business in EU member states. In that respect, there would be no difference. Within the UK,

however—and here I am speaking well beyond my personal knowledge, so think of it more as conjecture than authoritative remark—it could be that certain kinds of distribution agreements, vertical agreements for the distribution of goods and services, that had territorial restrictions might have fallen foul of EU law because of trespassing on the single market imperative whereas the internal UK equivalent might not.

Q59 **Mark Pawsey:** Could we turn it around the other way then, with an EU company seeking to trade in the UK?

Professor Sir John Vickers: An EU company seeking to trade in the UK is clearly subject to UK law, which, in large part, mirrors EU law because of its wording, because of the importing of the jurisprudence and because of section 60A as it now is. For all those purposes, it would be quite similar. Over an extended period of time, it could be that UK law became more restrictive or less restrictive relating to certain business practices. It is not glued together indefinitely.

Q60 **Mark Pawsey:** There would be burdens on businesses on either side in needing to understand the difference in the trading arrangements.

Professor Sir John Vickers: Yes, and that itself is a reason for maintaining a good degree of consistency. If we went off in very different directions, then the same business in relation to the same practice in different jurisdictions might have a very different law to deal with. That was the case before 2000, when the Competition Act 1998 came into force.

In your example of an EU business operating in the UK, there are the other elements of UK competition law—the market investigation regime and market studies—that do not have direct equivalence in the EU.

To complete the comment, another question in the Government's consultation is about the geographical scope of jurisdiction of the CMA. What about business practices or agreements that do not have a direct nexus to the UK but that may have indirect effects that come into the UK? Should those be within the scope of the UK jurisdiction or not? I am not a suitable person to comment on that. I leave that to the competition lawyers and the public international lawyers.

Mark Pawsey: We have that opportunity later on. Thank you.

Q61 **Paul Howell:** Can I move the discussion on to comparing and contrasting the impact of consumer policy and competition policy? In your April 2021 lecture on competition for imperfect consumers, you explained that consumer imperfection, such as limited consumer awareness, can give rise to companies with large market power, which raises questions for competition policy. What are the questions and how can those issues be remedied?

Professor Sir John Vickers: One of the main points I was keen to convey and illustrate is that, while there is competition law and consumer

law and they are different branches of law, they are very intimately related and must be seen together. When I went to the OFT, I was struck, and indeed quite surprised, at what felt to me rather like two cultures—the competition people and the consumer people—who might, in entirely good faith as conscientious civil servants, be looking at the same market through very different lenses. I was keen that we take an integrated market-based view, and seek to use the tools at our disposal where there were issues that we could seek to remedy and take action.

Q62 **Paul Howell:** At one point in your time at the OFT, you said that there was a big mismatch between the energy that was put in by economists into competition policy compared to consumer policy. I wonder if you could pick that up.

Professor Sir John Vickers: Yes, certainly. It is not always true, but generally true, that competition law and policy has a much higher profile than consumer law and policy. That is, in part, because of the scale of the issues concerned. It is partly because the powers that the authorities have, not only in the UK but in other jurisdictions, are often greater on the competition side than the consumer side. I am an economist. The engagement of economists in competition law and policy issues is very great, and long has been. Their engagement in consumer law questions, if I can make that distinction, and in contract law issues more generally—a lot of this is contract law and developments of it—is altogether different. That is worlds apart too. As you have highlighted, that difference of engagement by economists—we are only economists—is another radical difference between these two areas of law and policy.

It also appears to be the case that, in a number of retail markets, the competition problem, or at least part of the competition problem, has to do with consumer imperfection. That is in no sense a criticism of any consumer. It is just the way of the world and the capacity that any ordinary consumer—and I think of myself in this regard—has to compare different deals on offer, to be aware of the deals, and to be aware of our rights. It is inevitably limited. There were some very large questions before the CMA recently. Two examples would be retail banking and retail energy markets. They seem to fit this description very much.

That lecture, which was while I was president of the European Association for Research in Industrial Economics, was to highlight and encourage work on these consumer issues in a way that integrates them with competition law and policy.

Q63 **Paul Howell:** Do you think there has been any movement in that direction, or is that too open a question at the moment?

Professor Sir John Vickers: Let me try to respond in one way. In the last 10 to 15 years, there has been some extremely interesting and important work in economics that has taken much more seriously the limited capacity of consumers to be aware of market alternatives that they have. Sometimes this would be under the umbrella heading of

behavioural economics; on other occasions it would relate to search theory and all the rest. I fear that I will go off on a tangent here and that I will need a whiteboard, so I am going to stop at this point, but it is a very active area of economic research. The more it can be played into the policy debates, the better.

Q64 **Paul Howell:** Thank you for that. I am a fan of whiteboards but today is not the time or place. You said that economists are not involved in the consumer side compared to the competition side. I wonder if you can somehow, albeit from your very parochial perspective, say how worrying you think that is or how detrimental that is. Is it something we should be concerned about? You have argued that competition has more remedies available to people and therefore it becomes more interesting because there is a conclusion, whereas the consumer side does not feel the same way. Am I understanding that right?

Professor Sir John Vickers: In terms of what economists and others should be doing, I would hold this out as a really good opportunity, so I would emphasise the upside.

As far as law and policy is concerned, I would repeat my support for the Government proposal to have more effective enforcement powers. That could be done in different ways. The most natural would be the proposed way of giving the CMA—or perhaps other enforcers, but I think the CMA—direct enforcement powers subject to the checks and balances in the discussion that we began with. The alternative would be to retain the court-based system but to have tougher sanctions on those found to have transgressed the law. That is something to worry about.

A simple, practical point is that many consumers have more protections than they realise. An example is section 5 of the Consumer Credit Act, which gets a passing reference in the Government document. You will know the experience of your constituents much better than I would, but that does mean that, if I pay by credit card and something goes wrong, I have recourse to the card issuer. There are other payment schemes that offer that service. I believe quite a bit of good would be done if awareness of that provision were heightened. The card issuer is in a much better position than I am to get redress from the merchant. The card issuer can screen out, and should have incentives to screen out, bad merchants in the first place. The run-up to Christmas might be a good time to heighten awareness of that protection, which already exists.

Q65 **Paul Howell:** You mentioned George Peretz earlier. In our last evidence session, he discussed the suggestion to separate consumer and competition policy responsibilities within the CMA. At the same time, we have also heard John Penrose discuss the separation, saying that it needed a complete process redesign. What is your perspective on that?

Professor Sir John Vickers: I would retain competition and consumer law powers in the same body for the reason I mentioned earlier. They are two sets of tools that are related, and they often deal with very closely

related issues in one and the same market. If they were in separate bodies, one might institutionally crystalise the problem I mentioned earlier of these different mindsets.

What happened in my time at the OFT is that we had a competition division and a consumer division. We introduced a third one called markets and policy initiatives. My remark, not entirely in jest, was that three was one whereas two was two. I would not separate them that way.

On the Penrose suggestions more generally, for more efficient enforcement, those proposals could well have a great deal of merit. To repeat the earlier point, I would, however, be careful about checks and balances and not diluting those.

Q66 **Chair:** I just have a last question to check that I have understood properly. The jurisprudence that we have inherited from the EU in consumer law is extensive. What I think I am hearing is that the room for reform in the UK is not around consumer protections generally but about their enforcement, and probably a public education campaign so that consumers know what rights they already have. Have I understood that correctly?

Professor Sir John Vickers: That would be my tentative view to a first approximation. I am not claiming that the substantive law is perfect. There may well be areas, new trading practices and the whole online area where new provisions are necessary, but, in my remarks today, I have certainly concentrated on the point exactly as you have said it—that it is the enforcement powers that are the central issue.

You said that we have imported a lot of EU law. That is certainly true. It is important, though, to remember that that law is not alien to us. The UK had a very important role in shaping a lot of both competition law and consumer law. In competition law, whether it is from the judiciary, where I think of Francis Jacobs, for example, or the bar, where I think of Jeremy Lever, or academic commentators, where I think of Richard Whish, the UK influence has been very significant. We should, in part, take common ownership in that EU law and not think of it as alien to us; I am not suggesting you were.

In terms of consumer law, there are a number of UK judgments in the House of Lords and the Supreme Court subsequently, as well as UK judgments on the competition side in the CAT, which, in turn, have had some influence on the interpretation of EU provisions. Many of those, as you alluded to, date from the late 1990s. Each member state had to implement them in various ways and, at the OFT, we had to begin to start making those work. Again, we had some successes in court and we had some setbacks in court.

Q67 **Chair:** When you talk about enhanced enforcement, do you mean enhanced enforcement from the centre—that is, giving the CMA stronger

powers around enforcement—or are you supportive of some of the proposals from John Penrose who talks about disaggregating a bit the responsibilities for enforcement, so emboldening trading standards offices? John also talked about regional consumer enforcement courts or judicial processes that are local to people in their regions. Do you share that view that we need to increase the number of enforcement points across the country, or is it just something that we have to do at the headline authority level?

Professor Sir John Vickers: It is a very good and important question. I do not claim to know the answer. It might depend, in part, on whether it is the CMA that is given direct enforcement powers, subject to appeal, or whether it remains a prosecutorial system where the CMA, the local trading standards, as they do now, or others go to court to seek tougher sanctions than are currently available.

Another point not to forget is that we used to have a prosecutorial system on competition law in the days of the restrictive trade practices legislation. Of course, there are some who would argue that the way to cut through the system at the moment with an administrative layer and a judicial layer is to do what they do in the States, and go to a prosecutorial system on that side too, so that the CMA would bring cases to court, not take decisions subject to appeal in court. I respect greatly people who hold that view, though I am not there yet myself.

Chair: That is interesting. I am afraid that brings the time to the end for our first panel today. Professor Sir John Vickers, thank you for your contributions and your evidence. We are very grateful to you.

Examination of witnesses

Witnesses: Nicole Robins, Isabel Taylor and James Webber.

Q68 **Chair:** We now move on to our second panel, with some witnesses on the screen and some witnesses joining the top table. I am delighted to welcome Nicole Robins from Oxera, who is joining us on the screen. In the room today are Isabel Taylor, from Slaughter and May, the law firm, and James Webber, from the law firm Shearman & Sterling LLP. For the second half of the session today, we are focusing on state aid and the Subsidy Control Bill. I will kick off with some opening questions on the interim regime—not least because when the UK left the European Union, it did so without actually putting in interim legislation until the Subsidy Control Bill was brought to the House recently.

My first question to witnesses is about the self-assessment of subsidies by public authorities. We are taking a very different course compared to our time during the European Union around subsidy control.

My opening question for you is about what the opportunities and challenges are of taking this self-assessment approach from the public authorities themselves. I will let all of you open up and give me an answer to that, and then we will do more directed questions.

James Webber: Thank you very much, Chair, and for the invitation to the Committee more generally. What are the challenges and opportunities of the self-assessment regime? I am an ardent fan of the move away from the state aid rules that the EU had and that we were never going to inherit, unlike competition, as Sir John has said. State aid is an EU idiosyncrasy, internationally. Only the EU really has a system of state aid.

Also, unlike competition, there was no decentralised application of the law. The rules were entirely within the EU structure. If it was state aid, you were required to go to the European Commission. They had exclusive jurisdiction to approve the aid and so, obviously, at Brexit, all that has to go.

What are the challenges and opportunities of the alternatives? The first opportunity is to have an alternative. I agree with Sir John's comment, and it is a standard view that having a system of subsidy control is wise. It is worth saying why because, internationally, subsidy control is extremely unusual. As I say, only the EU really has an organised system of subsidy control.

Why is it a good idea to have subsidy control at all? The reason for it is that there is typically a mismatch between the political desire to give a subsidy in a particular instance and the wider productivity and economic interests of the economy, and ultimately of taxpayers. There is a role for a system of control to mediate and essentially protect interests that would not otherwise be simply protected by the political decision-making processes. That is the first opportunity, which is to have one at all.

It is appropriate that we have a system based on self-assessment. These are fundamentally fiscal decisions, spending decisions, which ought to be made by politicians and which ought to have political responsibility associated with them. Assessing, as a public authority giving public money, whether that subsidy is worthwhile, proportionate and necessary are all good public policy questions for a public authority to be asking itself before spending money in that way. Self-assessment tied to judicial review is the mechanism of enforcement across almost every element of public sector decision-making. Public authorities are accustomed to making decisions that may be vulnerable to judicial review, and so that struck me as normal within our system.

There is a lot of opportunity, and it is the correct decision to have a regime. Self-assessment is appropriate, democratically and politically, in a structure. Judicial review of those decisions is also consistent with our constitutional norms. I will talk about opportunities because I suspect Isabel and Nicole may have some other comments on challenges.

Q69 **Chair:** Isabel Taylor, do you agree?

Isabel Taylor: Yes, up to a point. In terms of self-assessment, I would say that the challenges and the opportunities are two sides of the same

coin, which is the decentralisation that James has been talking about. Decentralisation allows you to go faster. It allows you to make a case-specific assessment. It gives you more control of your timing and process.

The flipside of that is that you have to take responsibility for your decision-making. There is no external stamp of approval that you have it right. You have to make an assessment of legal risk and go forward, and that is sometimes harder. One is the flipside of the other.

In terms of thinking about the practical differences, I perhaps would not overstate that point in that—we may come back to this later—if you are looking at the EU regime, we should remember that, although it is a regime based on notification approval, the vast majority of state aid is not notified because it is covered by a block exemption, and so it is effectively a form of self-assessment in that you have to decide for yourself whether you are covered by the block exemption, and then you carry on.

Q70 **Chair:** Do you think that the public authorities that are going to be taking on this task have the capacity, willingness and skills to do that work?

Isabel Taylor: What I am trying to say is that I am not sure it is fundamentally different to the assessment that they have been doing already. The thing that is different in the UK regime at the moment, but may change under the Subsidy Control Bill going forward, is that we do not have a lot of subject-specific guidance and we do not have any block exemptions. The case-by-case assessment that you would have historically done in a minority of cases at the moment needs to be done at some level in a larger range of cases.

Q71 **Chair:** They will need people to do that work. Nicole Robins, do you have anything further on this question around self-assessment? Are you broadly in agreement with the evidence we have heard so far?

Nicole Robins: I agree with the points highlighted by James and Isabel. In terms of the opportunities of the current regime, it is really the opportunity to move quickly and flexibly to the current climate without having to wait for approval from what used to be the Commission, which could take quite some time.

In terms of the challenges, on the other hand, the flipside of this is that, currently, particularly for the largest funding measures, there could be inconsistency between public authorities in terms of how they determine whether a subsidy exists in the first place and then also applying the subsidy control principles. A number of those principles, particularly looking at whether the subsidy is limited to the minimum necessary, typically involves quite detailed analysis. There is a risk at the moment that there could be inconsistencies, which could lead to distortions to competition, particularly for the larger subsidy measures.

Q72 **Chair:** The Subsidy Control Bill, as I understand it, does not apply

retrospectively to the interim period between Brexit and the Bill becoming law. Given the point that you have just made, Nicole, do you think that that is a problem? Should the Bill apply retrospectively?

Nicole Robins: The main difference, in terms of the subsidy control principles, between the Bill and the TCA is the additional requirement in the Bill to look at the impacts on competition within the UK. There could be a risk that measures are currently going ahead under the interim regime that could distort competition within the UK but that would not otherwise be the case if it was assessed under the Subsidy Control Bill in light of that additional principle.

Q73 **Chair:** Do you have any other comments on retrospectivity? Do you think the Subsidy Control Bill should apply to cover subsidies granted in the interim period?

James Webber: I am not a big fan of retrospective application of legislation, so no.

Q74 **Chair:** I imagine it would be quite frustrating to your clients, but it is an interesting point in the interim period. You talked, Isabel Taylor, just now about the frameworks in the EU that we operate around the block exemptions and the clarity that that provides. The Government provided a five-step process to look at during the interim regime. Was that helpful?

Isabel Taylor: Yes, but the five-step process is guiding you through a slightly different stage of the thinking in that the five-step process says that you need to think about whether you are granting a subsidy, what legal regimes apply, and, if the TCA applies, you have to look at how the principles apply. It guides you through the things you need to think about. What it does not give you much guidance on is, if you are trying to apply the TCA principles, how you apply them. The TCA principles are not vastly dissimilar to the general treaty principles that would have been applied under the state aid regime.

The difference, when you are looking at the state aid regime, because it has been around for a long time, is that there is a vast amount of guidance out there on how you think about state aid in the context of energy and environmental measures, risk finance and regional development. You have the block exemptions. You have a lot more of a framework to guide you through the things you need to think about in making the assessment.

In terms of the UK regime as it is at the moment, you do not have any of that on a UK-specific basis. All you can do is say, "The TCA rules apply to the EU as well so we can look at the EU guidance by analogy, and that may or may not help us". That is the thing that is missing at the moment, for understandable reasons.

Chair: We will come back to that later.

Q75 **Mark Pawsey:** I am going to ask one or two questions about the role of the devolved Governments. Nicole, you spoke about the need for consistency between public authorities. Did you have in mind devolved Governments when you said that?

Nicole Robins: No, not specifically.

Q76 **Mark Pawsey:** Are there any tensions? What are the implications of different responsibilities within different Governments within the UK?

Nicole Robins: One of the main challenges is that, when a devolved Government is considering granting a subsidy, they will need to give consideration to the impact on competition within the UK as a whole. That may, in practice, be difficult to do.

Q77 **Mark Pawsey:** May I ask our other witnesses what the implications are for devolved Governments within the subsidy control regime?

James Webber: Both the interim regime and the Subsidy Control Bill regime are strongly deregulatory with respect to the devolved Administrations, by which I mean they will have much greater freedom to be able to make spending decisions and craft their economic interventions than they would have had had the UK remained part of the EU. That is the first point.

The second point, which is related to that, is that Westminster and the central Government of the United Kingdom have not claimed for themselves the same sort of institutional framework and procedural framework that the European Commission claimed under the state aid rules. Overall, the devolution impact is to increase the room for manoeuvre of the devolved authorities versus the UK being a member state of the European Union.

Q78 **Mark Pawsey:** Isabel, does the Bill enable different parts of the UK to determine their own priorities so that they may support disadvantaged areas? Does that extend to devolved Governments?

Isabel Taylor: The Bill itself does not say very much at all about who spends money on what. The decision on what money is available, how it gets divided up between different regions and different priorities and whether that money is then spent on a subsidised or non-subsidised basis—because money that is spent on a commercial basis does not fall within the scope of this regime at all—are all decisions that this Bill does not touch on.

It does not make a pre-judgment as to what your policy objective is; it just says that, once you have decided to do this, this is the way you need to do it. On a day-to-day spending basis, probably the more important thing is going to be where the money comes from and who has control of the money.

In terms of differences between the devolved Governments, in terms of the institutional structure that is described in this Bill, there are some

differences that arise with regard to who can refer things to the CMA to look at. The position of the devolved Governments is not quite the same as the Westminster Government, but that goes more to the operation of the institutional arrangements than it does to decisions on an individual project, if that makes sense.

Q79 **Mark Pawsey:** We could be in a situation where a devolved Administration provides support to a particular industry that is not available in other parts of the UK. How would that work out? What redress would there be to the administration that found its business sector at a disadvantage?

Isabel Taylor: There are two bits to that question. It has always been the case that different award-givers can make choices on what they spend their money on. That was the case under the state aid rules, and it is today. If one Government want to spend money on regional development and somebody else does not, the subsidy control has nothing to say about that.

In the example you give, you are saying, "Somebody has given a subsidy that is having a distortive impact on competition", and what are your rights of challenge and redress to say, "You have not given this subsidy properly". That is a slightly different aspect of the regime.

Q80 **Mark Pawsey:** Does redress exist in those circumstances?

Isabel Taylor: The rights of redress under this Bill are primarily through judicial review actions in the courts.

Q81 **Mark Pawsey:** James, how can we resolve this? How can we give flexibility to devolved Administrations without creating difficulties for the UK's internal market?

James Webber: That is the fundamental policy challenge that the Bill is trying to address.

Q82 **Mark Pawsey:** Does it do it adequately?

James Webber: It does, although there is always opportunity for improvement. How does it work? It works primarily through judicial review of public sector spending decisions, and that judicial review happening on the basis of whether the action was correctly identified as a subsidy and whether it complies with the principles. That means that, because the public authority must, under the Bill, consider the principles, it must have asked itself the questions like whether the subsidy is proportionate, whether there is an objective that is being met with the subsidy, whether the subsidy is the best way to meet the objective, and how it impacts competition within the UK.

If the authority granting the aid does not have answers to those questions, they will be falling afoul of that in judicial review. That is the first mechanism.

Q83 **Mark Pawsey:** Is judicial review the only mechanism that is available?

James Webber: No, that is the first mechanism. It is the guiding principles. You will also see, as the Bill develops through secondary legislation, the definition of a few gates before you get to judicial review. You have subsidies of particular interest, which are not defined in the Bill but which will be defined by regulation. Those will require a public authority granting a subsidy of particular interest to be defined to go to the CMA first.

The obvious thing for the Government to do in that regulation is to define a subsidy of particular interest such that it captures things that are likely to generate the effects you are talking about. Things that are likely to create tensions within the union, such as competition for an investment between Kilmarnock and Kidderminster, are the sorts of things that you would expect to be of particular interest to the United Kingdom as a whole. Then you have to go to the CMA, and the CMA has to give its opinion on the application of the principles, including the impact on competition and the integrity of the UK.

If the CMA decides that the measure, as designed, is adverse, it is quite difficult for the public authority to then ignore that. They can ignore that but it would be quite difficult for them to do so. That is the second big check. There is a third if there is time for me to explain that, but we can come to that later in terms of schemes.

Q84 **Chair:** Can somebody explain to me how the regime works in Northern Ireland? You will not be able to answer the question about the negotiations on the changes to the Northern Ireland protocol. As it stands today, how does it differ for relevant entities in Northern Ireland?

James Webber: Northern Ireland is subject to the EU state aid rules by virtue of Article 10 of the Northern Ireland protocol. If you were granting aid in Northern Ireland, that would require full compliance with the EU state aid rules and the EU institutional architecture, so notification to the European Commission and review by the European courts. That is the current position if you were granting aid in Northern Ireland.

I should say that there is a slight gap because the protocol applies to trade in goods and electricity, and so it is plausible that you could grant aid in Northern Ireland to someone who is a service provider of some sort and argue that that is not caught by Article 10. In general, aid in Northern Ireland to Northern Irish recipients would be subject to the EU state aid rules.

Q85 **Chair:** How would that then be resolved? The aerospace industry is important in Northern Ireland. It produces goods and provides a lot of services. The aerospace industry tends to get a lot of subsidies, especially around research and development. If there were a project for the aerospace industry on R&D around jet zero that was supporting jobs in Northern Ireland and there were a disagreement about that, how would

that be resolved?

James Webber: If the UK wished to grant that aid, it would have to apply to the European Commission for permission to do so, unless it was under the GBER, the General Block Exemption Regulation, which applies under EU law.

Q86 **Paul Howell:** I would just like to discuss the role of the CMA in subsidy control. There are a number of questions. Maybe I will start with you on this one, Nicole, and then we can move around. It is proposed to be a very light-touch subsidy control system, with the CMA in a non-binding advisory role. Is this sufficient to tackle the challenges of this new regime?

Nicole Robins: It will be sufficient in the majority of instances. For the subsidies that James mentioned earlier, it will be of particular interest. For the most distortive subsidies, such as restructuring aid, for example, there could be an argument that the CMA's role could be binding in those cases. As James highlighted, it is unlikely that a public authority would go against the decision of the CMA, but for those subsidies that have the greatest potential to distort competition, there could perhaps be an argument for having the CMA's role made binding.

Q87 **Paul Howell:** Thinking about the definitions of "binding" and "enforcement", should they have any enforcement powers at the same time?

Nicole Robins: In line with my comment just now, for subsidies of particular interest, the most distortive subsidies, they potentially should have an enforcement role.

Q88 **Paul Howell:** I have one final question for you, and then I am going to come to the other witnesses and ask them exactly the same questions, so they should be ready to follow through. Is the CMA the right body to oversee the subsidy control regime? If not, who should be? Does a new body need to be created specifically for this?

Nicole Robins: The CMA is very well placed for this role. They have experience of, for example, merger control. Speaking as an economist, the analysis there is very similar to the analysis in the subsidy control context. They definitely would be best placed in terms of the skills and their past experience for this role.

Isabel Taylor: In terms of whether the CMA has a binding or non-binding role, that is fundamentally a political decision about how this regime should work. If the role is going to be advisory, the provisions in the Bill about transparency and publication of the decisions are really important. That is what drives the effect that Nicole and James have talked about, which I agree with. In practice, there would be a strong moral authority to the findings of the CMA. The publication of CMA decisions and reasoned decisions is also important in terms of giving

other award-givers access to information on what is and is not acceptable.

To be honest, it is quite unlikely that we would see a large number of adverse CMA reports. If the regime that is designed in the Bill works properly, what you should see is that the dialogue with the CMA is a tool that gets to an outcome that achieves what people want to do in a way that is subsidy-compliant.

When it worked well, that is also how the EU regime worked. The dialogue with the Commission is often about tweaking the proposals to get to where you want to get to in a way that everyone is comfortable with. With notified aid, it was not that common that you ended up with adverse decisions at the end of the day.

Q89 **Paul Howell:** The discussions beforehand should enable the right outcome.

Isabel Taylor: If it is working well, that is how it should work.

Q90 **Paul Howell:** Is there anything you would like to add, James, or have we covered it?

James Webber: No, I agree with that. I have to say—this chimes with some of the comments that Sir John made earlier—it was never practical to give the CMA binding decision-making authority over other elements of Government that are making public spending decisions. That was never realistic in our constitutional set-up. I am sure the CMA would not have wanted that, but it would have been very unwise to organise the Bill in that way. It is excellent that it is a non-binding role. For the reasons that Isabel and Nicole have said, that will work perfectly well.

There is a role for saying that the CMA should be a privileged applicant for judicial review. The CMA should be able to bring judicial reviews of its own motion, which is not something that is contemplated by the Bill at the moment. There may be a place to increase enforcement power in that way.

Q91 **Paul Howell:** That nicely links in to my next question, which is about the role of the CMA in complaints by other interested parties. You are saying that the CMA could bring the complaints themselves, but should the CMA have a role in handling complaints by other interested parties in relation to unlawful subsidies?

James Webber: It probably will. If you are an individual complainant, going to judicial review is quite a big step. I expect that the CMA will in practice end up in conversation with people about the effects of subsidies. If people have concerns, they can raise them with the CMA. At the moment under the Bill, only the Secretary of State is able to direct the CMA to make a report. You would have to petition the Secretary of State.

Nicole Robins: I fully agree with what James is saying on that point.

Isabel Taylor: From the perspective of individual businesses that might be aggrieved by subsidy control decisions, the enforcement regime in the Subsidy Control Bill is weaker compared to what we are used to. In that sense, I can see a case for having some additional mechanisms for handling complaints.

At the moment, the system basically says, "You have to be prepared to go to court over this and, by the way, you have to go very, very quickly". That is the logical consequence of wanting a lighter, brighter, easier and lower-risk regime. The structure is by design rather than by accident, but that is a consequence for individuals. It is harder to challenge.

In terms of giving the CMA a role, it is very hard to separate that from the question of remedies. If you give the CMA a formal role in relation to complaints, you would have to give them the power to do something about complaints. Otherwise that is just going to cause frustration.

Q92 **Paul Howell:** You touched on the idea that this is supposed to be a much speedier situation. We are talking about a reporting period of 30 days for the CMA to publish a report. There are questions linked to that in terms of the categories allowed for referral, et cetera. There could be a significant volume of referrals into the CMA. What would be the consequence of the referrals and the need to act speedily in terms of CMA resources? Do they have the resources? Will their resources need further enhancement?

Isabel Taylor: This is a whole new function for the CMA, so undoubtedly they will need some people to do that. They either need to recruit or train a slightly different skillset to the one that is currently core to the CMA.

In terms of whether 30 working days is a sufficient amount of time, my expectation is that in practice it would take significantly longer than 30 working days. Currently, the statutory timetable for mergers is 40 working days, but nobody would expect it to be 40 working days from the first time you knock on the CMA's door. Whether it is 30, 40 or 50 days specified is neither here nor there.

Q93 **Paul Howell:** I can see you nodding quite a lot, James.

James Webber: Yes, Isabel's comment about different skill sets is extremely important and well made. Again going to Sir John's evidence, if you look at the evolution of the UK competition authorities, the roles they have been asked to take on and the powers they have gained, there has been an extraordinary broadening and deepening of those. This is another area that is brand new.

It is very important that the CMA does not take its learning from other areas of competition policy, especially markets and mergers, and try to simply take those techniques and apply them to this area. Most obviously, in markets and mergers you are dealing with private companies that are economic actors in that way. In a subsidy control

regime, you are dealing with public authorities that are spending public money, presumably with a democratic licence and rationale to do so.

It is obvious that the way you approach the impact on competition cannot be the same as it is in markets and mergers. When you look at the European Commission, it is DG Competition that does state aid and mergers. As someone who practises across lots of those areas that touch the European Commission, the state aid part of the European Commission is much more sensitive to political and diplomatic considerations and issues of wider public policy than a pure consumer welfare standard.

It is going to be really important the CMA does not try to apply the economics they are accustomed to applying to these questions. It is quite a difficult and different skill set.

Q94 **Paul Howell:** I was quite intrigued when Isabel said that it is not just about quantity of people; it is actually the skill sets that are involved that need to be developed and selected accordingly. Nicole, is there anything further to add to that point?

Nicole Robins: To clarify, are you referring to the skill set of the CMA?

Q95 **Paul Howell:** Yes, the overall resource position of the CMA going into this and the ability for the process to work in the timeline. Whether that is 30, 40 or 50 days, it is still quite a short period.

Nicole Robins: Yes. The fact there is such a narrow time window defined in the Subsidy Control Bill is certainly very much an improvement compared to the EU regime, under which investigation can take a number of years. That is a positive development. I fully agree with Isabel that 30 working days is unlikely to be feasible. If you look at the subsidy control principles, they are very involved. For example, they look at proportionality and the impact on competition. It will be very challenging to do that in 30 days, particularly for the most complex measures.

Q96 **Paul Howell:** Certainly, it appears that all of you support the intent of trying to get down to a much shorter time period. The EU process could run for several years, as you have just said.

Moving on to a slightly different subject, the Government set out in their subsidy control impact assessment that the use of the Competition Appeal Tribunal could deliver cost savings, as it is expected to hear cases more quickly than the courts. However, they have also recognised that a quicker process might lead to more challenges. Will there be a cost saving, or will the process become longer because of more challenges?

Isabel Taylor: The specific context of that comment was that they were trying to quantify the cost impact of putting appeals through the CAT rather than the High Court. They were saying, "It is hard to tell and so we are not allowing", which in the context of an impact assessment seems reasonable to me.

By international comparisons and comparisons with some High Court proceedings, the CAT can be faster and more efficient. It has a specialist tribunal, who need less skilling up on the substantive issues. If I am honest, I am not sure I would expect somebody who is thinking about bringing the challenge to be saying, "If it is in the CAT, I will bring it; if it is in the High Court, I will not". They might be more or less pleased to discover which way it is going. I am not sure I would expect that to be a massive factor in people's decision-making on whether they are going to challenge something or not.

Q97 **Paul Howell:** That goes back a little bit to what you said earlier. If the process is working well, people are having the discussions before they get to either of those, regardless.

Isabel Taylor: Yes, if the process is working well, the subsidy control principles have been applied and a proportionate proposal has been brought out that most people are happy with, including the CMA. From the perspective of any individual case, things ideally do not get to court, but I do not know whether nothing going to court is necessarily a good aspiration for a regime as a whole. A degree of challenge is healthy and helps you learn where the boundaries are. Ideally, for any individual case you would prefer not to end up in court.

Nicole Robins: I do not have anything further to add to what Isabel mentioned, which I agree with.

Q98 **Paul Howell:** James, I saw you nodding again.

James Webber: I agree with that. The CAT was the right choice because of the pan-UK jurisdiction. It raises some questions about how the CAT would deal with blended claims, where you have a subsidy control claim sat within a wider set of complaints about the way a public authority has taken a decision. There are perhaps some tensions and difficulties with that.

I agree with Isabel: if you have a regime that is driven by judicial enforcement, having a body of case law and people using that regime of judicial enforcement is a sign of health. That is how the common law will work its magic, as it were. We should welcome the fact that people are prepared to bring cases before the CAT. That is a good thing. It is a healthy thing.

Q99 **Alexander Stafford:** I apologise for being late. It is good to be back on subsidy control. I sat on the Bill Committee for that, so it is a topic that is close to my interest, if I can put it that way.

Talking about cases and the legal side of things, the Institute for Government has talked about a chilling effect whereby granting authorities and public bodies would be deterred from offering subsidies to businesses to avoid the risk of a legal challenge. How realistic is this? Will this have a huge knock-on effect or long-term consequences? If so, what would they be? You have talked about the good side of legal challenges,

but they could put people off.

Isabel Taylor: The point that they were trying to make is something that goes back to what we were talking about at the start. At the moment, you have a regime where largely the only authoritative text is the principles set out in the TCA. The point they were making is that the principles are fine, but on their own they are quite open-ended and difficult to apply, and what you need is more guidance and structure around that.

If you look back, we have come from a regime where the vast majority of subsidies would have been covered by a block exemption. There is provision in the Bill for streamlined subsidy schemes, which look like they will perform a similar role. That is the context of their comment. They were trying to say, "We cannot stop here".

Q100 **Alexander Stafford:** You have to start somewhere. What are the effects now? Will authorities basically drag their feet and wait until other people get off the blocks first?

Isabel Taylor: At the moment, there is more responsibility being pushed on local authorities, because they do not have an authoritative legal exemption. As a local authority, your practical way through that in many cases is to look at the EU rules and say, "If it was covered by the EU block exemption and it was okay a couple of years ago, it is probably still okay now".

Nobody thinks that this regime was intended to make it more difficult to give subsidies. That is your practical way through, but it is maybe not exactly what the vision of a UK-based subsidy control regime was. It does not give quite the same level of legal certainty that we had before. The Subsidy Control Bill will fill a gap in that regard.

James Webber: It is true, because I hear people reporting that fear. It is a bit sad and frustrating, really. It is a big reflection of the size of the cultural shift that has happened since the end of the transition period. Public authorities have been used to living in a regime that was very prescriptive. Moving to a regime that is not at all is disorientating. We are feeling the effects of that disorientation.

The Bill, particularly the regulations that will follow the Bill, ought to remedy that almost completely. Once we have defined what subsidies of particular interest look like, once we have the CMA set up and able to provide voluntary advice for things of particular interest and, very importantly, once we have streamlined schemes where the Government have the opportunity to create safe routes through, lots and lots of those issues of insecurity that public authorities are reporting should all drop away.

Q101 **Alexander Stafford:** Just to pick up some of the language that you have used, James, "sad", "frustrating" and "disorientating" are quite emotive and strong words. We heard just now from Isabel evidence saying that

basically the authorities will fall back on the EU guidance. If the authorities are going to fall back on the EU guidance, it would not be sad or disorientating. It is just business as usual. Do you disagree slightly? Will they try to move away from the EU and embrace it themselves?

James Webber: I agree entirely: anything you do within the EU rules is almost certainly going to be fine for the reason Isabel says. The sad and frustrating bit is that it is an opportunity, a Brexit opportunity, to coin a phrase. This effect that the IfG have identified around a fear of judicial review is chilling people's ability to be able to grasp it, as it were. That was why I referred to it in that way. If you are within the centre or the umbra, as it were, of the EU rules, you can still have very high confidence that you can do what you were doing before.

Nicole Robins: At the moment the interim regime creates a lot of uncertainty for public authorities, which in the past used to rely, as James and Isabel were talking about earlier, on the General Block Exemption Regulation for relatively low amounts of subsidies. As James was highlighting, a large part of that uncertainty can be resolved once streamlined schemes are designed.

Q102 **Alexander Stafford:** In terms of timescales, we are all talking about moving forward and when we will have streamlined schemes. How long will that take? What are the potential financial costs of this delay?

James Webber: The absolute benchmark is that you can use the existing EU rules. Any public authority using the previous rules could have a very high degree of confidence that they are okay. At that level, the delay is to the incremental benefit. The incremental benefit of the regime is delayed by this feature. It is not more costly than that.

Q103 **Alexander Stafford:** I just want to unpick that. On one hand, we established that what is currently going on now will continue going on, but then James also mentioned a potential Brexit opportunity. If there are opportunities over and above what the current situation is, is there any way to quantify or qualify that missed opportunity while things get bedded in, whether that is in terms of time, money, resource or any way we can talk about?

James Webber: I would imagine that someone would be able to do a PhD in 10 years' time attempting to do that, but I would not try to do it now.

Q104 **Alexander Stafford:** Moving on somewhat, some state aid practitioners have asked for a streamlined subsidy scheme route for smaller subsidies where defined rules, if adhered to, will guarantee the subsidy as legal. Would a safe harbours approach be useful and effective?

James Webber: A safe harbours approach has been adopted by the Bill, and that has turned into what we were referring to a minute ago as streamlined schemes. These allow the Government to identify spending either in general or in respect of particular policy objectives that would

meet the principles. Essentially, it is an opportunity to exempt, for want of a better word, spending from individual treatment of the principles, if you meet the conditions of the streamlined scheme. Clearly, that has an awful lot of resonance for people with the GBER regime, the previous EU exemption regime.

Yes, they will be useful. They could be made more useful and effective than the GBER, because they do not have to carry the same burden that the GBER did. The GBER was essentially the Commission giving up its authority over state aid across the entirety of the European Union to 27 very different member states with very different levels of capacity in their public authorities and very different abilities to be able to grant aid. The European Commission only gave away that authority under this exemption under very prescriptive rules. The UK does not have to do that; it does not have to meet those same restrictions.

Our streamlined schemes can be much easier to comply with. That is very important, because there was a lot of wasted work with the GBER. If you wanted to do a disabled persons' training scheme, the definition of a disabled person ran to about 12 lines, each one of which had criteria. An educationally disadvantaged person, again, would have a load of criteria. That work is essentially a waste of effort. It is not a waste of effort, but it is a proxy for the real question, which is whether or not the aid is useful. Under our streamlined schemes, we can cut to the chase, as it were, much more quickly.

Q105 **Alexander Stafford:** This safe harbours approach works for the smaller subsidies as well; we are not just talking about the bigger ones.

James Webber: It most obviously works for small subsidies. You may decide that you want to set up a scheme of really quite big subsidies for the green economy transition that meet certain criteria. It does not just have to be used for small subsidies.

Isabel Taylor: It is more for straightforward subsidies, where there is a clear consensus that it is a good idea. Very small subsidies would be covered by the de minimis rules anyway. The GBER is typically the next layer up, but it does not have to be limited in monetary terms if you can define a very clear use case. The same applies for the streamlined subsidy schemes.

There are two areas where the streamlined subsidy schemes will be different to the GBER. First, they will be UK-specific in their drafting. One of the problems with trying to apply the GBER is that it is drafted in a language that is meant to make sense against the legal systems of every single member state. Sometimes it is not always that clear what they are trying to say.

The big thing with the GBER that you do not have under the current regime is the cliff edge. The process that James is describing is critically important if you are trying to rely on the GBER. If you are within the

GBER, you are fine; you can carry on. If you are outside the GBER and you do not notify, it is illegal aid. That effect does not arise under the Subsidiary Control Bill regime.

Nicole Robins: I would agree with the points made. There is an opportunity to tailor the GBER to the UK context and to simplify the GBER. From my experience, even with relatively small amounts of aid granted under the GBER, the assessment of whether the aid falls into the criteria of the GBER can be quite involved. It does not seem quite proportionate to the amount of aid that is being proposed. There is an opportunity to make the regime a lot easier for public authorities to apply.

Q106 **Chair:** The conversation we have had today is in the broader context of our inquiry on the competition, state aid and digital markets work more generally from Government. As you will know, the Bill is going through Parliament at the same time. Is there anything in terms of secondary legislation, guidance or operational implementation of the Bill that is important for us to consider that we have not discussed today?

James Webber: My own view is that there are tweaks that you can make to the Bill around the transparency rules and ensuring that the information that is made available under the transparency provisions is going to be useful for people bringing judicial review. If judicial review is going to be your enforcement mechanism, ensuring that database is timely and complete is a corollary of that. BEIS can do that without being required to do so by the Bill.

There is also some merit in lengthening and clarifying the time period for judicial review. A month is extremely tight. Three months would be a more typical public law-type timeframe. That would be a possible improvement to it.

The architecture of it is sound, in my view. I particularly do not agree with the suggestion that we should be using the Subsidy Control Bill to direct how the Government spend money through regional aid or trying to bake in to the Bill requirements that you have to spend money in certain areas or on certain policy objectives. That is not the role that the Bill should perform. That is a good choice.

Q107 **Chair:** Do you have any final comments?

Isabel Taylor: In terms of the practitioner perspective on the Bill—I am not sure whether this is quite what you were getting at—the thing that is missing, to my mind, in terms of understanding how this is going to work is what a subsidy of particular interest is and what a subsidy of interest is. Where you draw those lines makes a big difference to what you think the future role of the CMA is going to be. In terms of trying to explain how the regime works for people, it is quite odd. Even if it is a non-exhaustive list, not being able to give any idea of where these lines are drawn at this stage in the process is a little bit challenging.

Nicole Robins: I would agree with the points just highlighted by Isabel. There is one other point that I wanted to highlight. We have talked a lot about subsidy control principles as opposed to what constitutes a subsidy in the first place. Under the European Commission, there is often a lot of debate around one of the principles as to what constitutes aid, and that is whether an economic advantage is being conferred.

Similar to the subsidy control principle, at the moment we see public authorities adopting the same standard that the European Commission would adopt. That is probably one area where further guidance could be provided. That would certainly be helpful for public authorities not just in terms of the principles but also in terms of what constitutes a subsidy in the first place.

Chair: No doubt Ministers will get to that shortly, now the Bill has proceeded through the Bill Committee and is making its way to the House of Lords. That brings today's session to an end. Thank you to Nicole Robins of Oxera, Isabel Taylor of Slaughter and May and James Webber of Shearman and Sterling for your evidence today. We will now bring the session to an end.