



Department for
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& Industrial Strategy

Lord Callanan
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Dear Michael,

SUBSIDY CONTROL BILL

Thank you for your letter of 21 January 2022 on the implications of the Northern Ireland Protocol for the above Bill. I apologise for missing your deadline of 31 January and trust that this has not prevented you or your Committee from making your views known in the Grand Committee debate on the Subsidy Control Bill.

The Department has been mindful of the need to make all Public Authorities aware of implications of Article 10 of the Protocol on Ireland and Northern Ireland (the Protocol). As you know, Article 10 deals with subsidies to goods and wholesale electricity that affect trade between the EU and Northern Ireland. Shortly after the publication of our NI Protocol guidance¹ – on 31st December 2020 we brought it to the attention of the Subsidy Control teams in Devolved Administrations as well as the network of Subsidy Control Champions representing the relevant range of government departments in Whitehall. We also made it clear in all our outreach meetings with Public Authorities that the guidance existed and that they needed to come to the Department for advice.

You ask whether there are differing views between the UK and EU on the interpretation of Article 10 with respect to GB. We consider that both the UK and the EU share a view that for a measure in GB to be within scope of Article 10 there must be a direct and genuine link back to in Northern Ireland. This could be, for example, when the aided company has a subsidiary in Northern Ireland. The Commission clearly set out this view in its Unilateral Declaration of 20 December 2020 and our statutory guidance echoed the terms of the Declaration. We are aware however, that the Commission's subsequent Notice to Stakeholders of 18 January 2021 appeared to complicate this position by focussing unduly on the effect on trade, in particular it appeared to suggest that merely putting goods on the Northern Irish market would bring a company within scope of Article 10.

¹ <https://www.gov.uk/government/publications/complying-with-the-uks-international-obligations-on-subsidy-control-guidance-for-public-authorities/technical-guidance-on-the-uks-international-subsidy-control-commitments>

A recent High Court Judgement (British Sugar Plc v the Secretary of State for International Trade) upheld the view that the Unilateral Declaration has purpose and effect when interpreting and applying Article 10(1) and that there must be a genuine and direct link to Northern Ireland. By contrast, the Commission Notice to Stakeholders does not have purposive effect.

You ask what the main differences are between the EU State aid regime and the domestic Subsidy Control regime in terms of procedural requirements and the amounts allowed. The main difference is that the EU regime is based on aid being prohibited unless it is expressly allowed and requires an ex-ante regulator, whereas the domestic regime (and indeed the Subsidy Control Chapter of the Trade and Co-operation Agreement (TCA)) is based on subsidies being permitted unless prohibited and is predominantly an ex-post system.

A detailed description of the EU state aid regime can be found in the House of Commons Library Research Paper “EU State Aid Rules and WTO Subsidies Agreement”.²

The domestic Subsidy control regime provides a bespoke and dynamic framework which allows Public Authorities to tailor subsidies to meet their needs whilst also respecting our international commitments. Reflect our international obligations and only requires that the subsidy meets the principles and any additional requirements for that type of subsidy – for example energy subsidies. There is no preapproval process although certain measures will be referred to the State Aid Advisory Unit for a non-binding view. The vast majority of subsidies will not be affected by this. We are also introducing Streamlined Routes which will offer a straightforward way for Public Authorities to give a subsidy confidently, knowing that they are within the terms of the principles.

There is also further detail on the proposed domestic regime in the House of Lords Library Research Briefing “Subsidy Control Bill”³

Turning now to your points about potential advantages and disadvantages arising from Northern Ireland having to take the EU State aid rules, the Government is firmly of the view that all parts of the UK should be able to benefit from the greater flexibilities in the future domestic regime (which build on the Subsidy Control chapter of TCA). The domestic regime allows the UK to tailor subsidies to meet our needs rather than having to fit within a prescriptive framework. We consider that the principles-based regime in the Subsidy Control Bill, which gives procedural and substantive flexibility, should apply throughout the UK. We are currently in negotiations with the EU to work towards a solution to the very real problems in the Protocol including addressing the problems with Article 10.

² <https://commonslibrary.parliament.uk/research-briefings/sn06775/>

³ <https://lordslibrary.parliament.uk/research-briefings/lln-2022-0001/>

This leads me to your questions about the negotiations. There are still significant gaps between our positions, but the Government will work tirelessly to get the best solution for the people of Northern Ireland. I trust you will understand that until the negotiations have concluded I will be unable to offer further details or give definitive answers to your questions. We consider that the Bill as drafted can accommodate any outcome from the negotiations.

I am copying this letter to Baroness Drake, Chair of the Constitution Committee, Sir William Cash MP, Chair of the Commons European Scrutiny Committee, George Wilson, Clerk of the Commons European Scrutiny Committee, Simon Hoare MP, Chair of the Commons Northern Ireland Affairs Committee, Les Saunders and Donald Harris, Cabinet Office, Graeme Winchester, Department for Business, Energy and Industrial Strategy; and Dr Caoimhe Archibald MLA, Chair of the Northern Ireland Assembly Committee for the Economy.

A handwritten signature in blue ink, appearing to read "Martin Callinan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lord Callanan