

# **Submission from Highlands and Islands Enterprise Legislative Consent on the UK Subsidy Control Bill December 2021**

## **Introduction**

Highlands and Islands Enterprise (HIE) is the Scottish Government's economic and community development agency for the north and west of the country. HIE's role is to lead regional growth and development, improve competitiveness and build a fairer society across the Highlands and Islands.

The Highlands and Islands region comprises over half the Scottish land mass and has a complex geography, incorporating the UK's highest mountains, a fjord-like coastline, and around 100 inhabited islands. Of the population, around 60% live in remote areas and more than a fifth on an island. The region has the lowest population density in the UK, and one of the lowest in Europe. The Highlands and Islands has a number of distinct features of disadvantage, including sparsely populated areas associated with high and increasing dependency ratios, lower skilled employment and lower than average wages coupled with significant additional costs of living and doing business, relatively poor and worsening access to services and housing and digital connectivity challenges that are likely to constrain growth.

Research currently being undertaken by HIE highlights the correlation between peripherality, socio-economic experiences, economic growth and wellbeing and as such, the need for peripherality to be central to policy and funding to tackle disadvantage. In line with the Enterprise and Skills Strategic Board and the Scottish Government, HIE has set out a clear vision for sustainable and inclusive economic growth in every part of the Highlands and Islands. Our current priorities and planned activities can be found in our [Operating Plan](#).

HIE has been active in providing public subsidy for business and community development for a number of decades and had a detailed practical knowledge of the previous EU State aid regime. During the EU Transition period and subsequently with the publishing of the proposed Subsidy Control Bill we have been working to understand the impacts of these changes on the Highlands and Islands area and on the steps we need to take to comply with the new rules. Given the complexity of the environment this has required engagement of external legal input. To date we have participated fully in the Scottish Government Subsidy Control stakeholder group and monitored external expert comment by the UK State Aid Law Association. In the interim period from the end of EU State aid law applicability on 31 December 2020 until the Subsidy Bill is given legal effect we are operating subsidy control schemes in line with the BEIS guidance to public authorities and have opted to follow closely the EU Block Exemption Scheme which was our previous legal basis. Following the EU State aid rules was adopted on the basis that it provides a safe harbour which would protect against EU challenge under the UK-EU Trade and Co-operation Agreement, as a stepping-stone to implementing schemes adapted more closely to our policies once the UK Subsidy Control legislation is in place.

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

HIE Answer:

HIE will comment from the perspective of delivering our policies and the effects on the HIE area. Our overall view at this stage is that The Bill represents a major change to the way that subsidies will be authorised and controlled, by moving away from a system of detailed regulations with direct applicability in law to one of following principles and controlling effects on competition in order to avoid challenges under WTO based procedures, whilst also introducing internal market controls in addition.

**Potential for greater flexibility to justify priority interventions**

On the plus side we anticipate that in the medium term the HIE area could benefit from a greater flexibility for public funding of social and commercial fixed infrastructure which has very little impact on competing investments elsewhere. In relative terms the Highlands and Islands has a significantly greater need than most other areas due to the combined constraints on economy and society of the costs of sparsity of population and remoteness. The EU regime adopted rules to cover all member states and could have a lowest common denominator effect, and sometimes these constrained public funding when in practice the competition effects would be minimal.

**Lack of clarity to support interpretation and application may result in inconsistency, potential for challenge and significant resource burden**

Our main concern is that unless significant resources are put into creating clear and detailed guidance on satisfying the principles and developing Streamlined schemes HIE’s work will be held back by the administrative workload, including the huge demand on staff and legal resources that the route for potential challenge ie Judicial review entails (This will have a disproportionate impact on smaller public agencies). It is vital in our view that sufficient clarity on rules and guidance is created so that those concerned about subsidies to their competitors are not encouraged to pursue judicial review when it may not be appropriate or may be destined to failure.

**The regime should enable interventions targeted at where need is greatest with a similar approach adopted for levelling up funds**

The Bill seems to be weak on how to enable the increased levels of subsidy for areas that are lagging behind in terms of economic development. We fear that the lack of a definite commitment to an Assisted Areas Map would damage the Highlands and Islands. If levelling up is targeted by budget allocations to major programmes, the major conurbations may well absorb all available funds and we could be left with a double disadvantage in the HIE area, which is a remote and sparsely populated area. We could face a lack of levelling up funding and a lack of powers for bodies such as HIE to prioritise those areas with specific needs using local public sector budgets.

**Ensuring the schemes put in place to support interventions are fit for purpose**

Our concerns about Streamlined Schemes are that they need to be developed quickly and with sufficient breadth of scope. To illustrate HIE’s requirements, under the EU State aid regime HIE utilised all three block exemption schemes (General, Agriculture and Fisheries) despite our low budget, but they were all used because of the diverse nature of the region,

and consequently HIE's wide-ranging powers. The previous EU regime had fast-track procedures via the Block Exemption Regulations which covered around 90% of all State aid awarded. This illustrates how much work needs to be done to generate Streamlined Schemes which replicate this percentage if public authorities such as HIE are not to suffer an administrative over-load.

### **Ensure the arrangements are clear and fit for purpose across all sectors**

The Bill is silent on the treatment of sectors that have been carved out of the EU-UK Trade and Cooperation Agreement (TCA) and unless the Secondary legislation makes clear how the new rules apply across all sectors there could be inconsistency and lack of clarity. This is particularly relevant to sectors which are important to the HIE area e.g. agriculture, food and drink, aquaculture.

### **Competition and investment within the United Kingdom**

The seventh Principle requires that UK subsidies minimise any negative effects on competition or investment within the United Kingdom. Under the EU State aid regime we only considered the effect on international trade and competition meaning local services, small tourism attractions etc. did not involve State aid and were simply covered by Treasury Green Book rules. There is a need for clear guidance on how far and at what scale internal market displacement assessments should be carried out. This could be detrimental to community based and small-scale cultural attractions and organisations that rely on public subsidy to survive.

### **Increased support and guidance will be important to enable effective and efficient interpretation and compliance**

We are concerned that most public authorities have had less direct experience of State aid procedures than HIE and have less specialist resources to draw upon, and for these bodies it will be difficult to comply unless the Competition and Markets Authority is able to provide both training and excellent guidance in the short term. One particular problem for public authorities, including HIE, will be to have access to a list of subsidy obligations arising in WTO trade agreements, not just the TCA but all of the other agreements that could have subsidy rules. We understand that the UK intends to have of the order of 100 trade agreements as soon as is practical in order to facilitate free trade. As the current guidance from BEIS places the onus on public authorities to interpret these, this adds to the burden on subsidy givers.

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

HIE Answer:

Legal drafting of legislation is not our area of expertise, but we would like to see a stronger obligation to introduce secondary legislation on the following points:

1. To introduce an Assisted Area Map that reflects the different forms of disadvantage wherever they occur, within one year of the Bill coming into force.
2. To give high priority to introducing Streamlined schemes intended to cover 90% of subsidies in the UK.
3. To make it explicit how all sectors are affected by the Bill, including the sectors carved out of the EU-UK TCA (agriculture, food & drink, fishing, aquaculture and audio visual).

**Question 3: “Do you have any other comments?”**

HIE Answer:

The changing landscape will require increased resource to navigate, interpret and design compliant interventions, there is also a potential risk of an increased number of legal challenges which again will bring a resource requirement. Having access to central support and guidance will be increasingly important, particularly for smaller public sector organisations.

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