



Department for
Business, Energy
& Industrial Strategy

Lord Callanan
Minister for Business, Energy and
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24 February 2022

Dear Lord Purvis,

I am writing in response to your questions during the final Committee session on 9 February of the Subsidy Control Bill. You asked whether a subsidy scheme would constitute a 'regulatory provision' within the terms of the United Kingdom Internal Market Act 2020 (UKIM) and whether a subsidy scheme could be prohibited under the non-discrimination principle for goods set out in Part 1 of that Act.

The UKIM Act was introduced to preserve the United Kingdom's internal market as powers previously exercised at EU level return to the UK, providing continued certainty for people and businesses that they can work and trade freely across the whole of the UK. The purpose of the Subsidy Control Bill, currently before Parliament, is to implement a domestic subsidy control regime in the United Kingdom that reflects the UK's strategic interests and particular national circumstances, providing a legal framework within which public authorities make subsidy decisions.

The definition in section 30(8) of UKIM, provides that a 'regulatory provision' is "a provision ... contained in legislation, or ... not of a legislative character but made under, and given effect by, legislation." Although a subsidy scheme may, in principle, be contained in legislation or made under it, section 30(8) does not bring all such provisions within the UKIM Act. Rather, this is one element of the broader test in section 30(1) of UKIM that determines which regulatory provisions fall within the scope of Part 4 of UKIM (which sets out the CMA's functions under that Act to provide independent advice on and monitoring of the internal market).

For this purpose, a regulatory provision must also meet the conditions set out in section 30(2)-(4) of UKIM. The first of these conditions in section 30(2) is that it must impose certain types of requirements or restrictions which themselves fall within the scope of the provisions on UK market access for goods, services, and professional qualifications and regulation set out in Parts 1-3 of UKIM. During Committee, you suggested that a subsidy scheme might meet these conditions because it could fall under the non-discrimination

principle for goods set out in Part 1 UKIM and therefore a subsidy scheme might be prohibited by UKIM, despite being permissible under the terms of the Subsidy Control Bill.

However, the non-discrimination principle operates to disapply 'relevant requirements' which apply in parts of the UK if, and to the extent that, they directly or indirectly discriminate against incoming goods with a relevant connection to another part of the UK. Section 6 of UKIM provides that a 'relevant requirement' is a statutory provision that applies in part of the UK "to, or in relation to, goods sold in that part" and is within the scope of the non-discrimination principle. A statutory provision is within the scope of the non-discrimination principle if it relates to any one or more of the matters defined in section 6(3). You referred in particular to the matters set out in section 6(3)(a), namely "the circumstances or manner in which goods are sold (such as where, when, by whom, to whom, or the price or other terms on which they may be sold)", and section 6(3)(b), namely "the transportation, storage, handling or display of goods" and suggested that, because a subsidy scheme might have an effect on the price of goods, or support the transportation, storage or handling of goods, it could be prohibited under these provisions.

Whilst a subsidy scheme may take the form of a statutory provision, it will not impose 'relevant requirements' of the kind defined in section 6 of UKIM. There is a fundamental distinction between the legal nature of a subsidy scheme and a 'relevant requirement' in this context. A subsidy scheme allows for the provision of subsidies by a public authority which enterprises are not obligated to accept, whilst 'relevant requirements' provide for binding rules which market participants would otherwise be obligated to comply with. Whilst subsidies available under a statutory subsidy scheme in a part of the UK could potentially have an effect on the price of goods, such a scheme would not have the effect of creating general binding requirements which apply to, or in relation to, goods sold in that part. In this context, the reference to "price" in section 6(1)(3)(a) of UKIM covers regulatory requirements which relate to the prices at which goods are sold. It does not capture legislative subsidy schemes operating in a part of the UK under which subsidies may be given that merely have an effect on the price of goods. Likewise, section 6(1)(3)(c) covers regulatory requirements which relate to how goods are transported, stored, handled, or displayed. It does not capture statutory subsidy schemes operating in a part of the UK under which subsidies may be given to enterprises who are only engaged in the transportation, storage, handling, or display of goods.

It is also clear from the way in which the non-discrimination provisions in Part 1 of UKIM operate together that they are not intended to capture statutory subsidy schemes. For example, in order for any legal consequences to flow under these provisions it is necessary to demonstrate that a 'relevant requirement' gives rise to direct or indirect discrimination as defined in section 7 and 8 of UKIM respectively. However, it is difficult to see how a statutory subsidy scheme which is only available in a part of the UK could "apply to, or in relation to" incoming goods with a relevant connection to another part of the UK for this purpose. Furthermore, the remedy provided under section 5(3) of UKIM is to render 'relevant requirements' of no legal effect to the extent that they directly or

indirectly discriminate against incoming goods in a part of the UK. This remedy could not sensibly operate in respect of a subsidy which has been given under a statutory subsidy scheme in a part of the UK which does not place any requirements on incoming goods.

You also referred in your speech to section 21(2)(b) of UKIM and suggested a subsidy scheme could be prohibited under that provision if it put some service providers at a relative disadvantage. However, much like the non-discrimination provisions for goods discussed above, the definition of indirect discrimination in section 21(2)(b) is relevant to determining whether certain regulatory requirements on service providers in the UK have legal effect and, therefore, it must be read together with the definition of 'regulatory requirements' which applies in this context. This definition is provided in section 17(4) which provides that a regulatory requirement is "a legislative requirement that would if not satisfied (whether at a particular point or on a continuing basis) prevent a service provider from carrying on a business of providing particular services.". A subsidy scheme which merely provided for the giving of subsidies to service providers would not meet this definition and, therefore, it is not necessary to include such schemes within the exclusions from the non-discrimination provisions for services set out in Part 4 of Schedule 2 to UKIM.

For the reasons set out above, the Government is of the view that subsidy schemes will not fall within the scope of UKIM, and it is not necessary to include further provision in the Bill to ensure this.

I hope this clarifies the position. I will be placing a copy of this letter in the Libraries of the House.

Yours sincerely,

Kind regards

A handwritten signature in blue ink that reads "Martin Callan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lord Callanan