



Neutral citation [2026] CAT 30

Case No: 1740/12/13/25

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

7 April 2026

Before:

BEN TIDSWELL  
(Chair)  
JOHN ALTY  
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

**BRISTOL AIRPORT LIMITED**

Applicant

- v -

**WELSH MINISTERS**

Respondent

Heard at Cardiff Civil and Family Justice Centre on 9 and 10 February 2026

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**JUDGMENT**

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## APPEARANCES

Ewan West KC (instructed by Osborne Clarke LLP) appeared on behalf of the Applicant.

George Peretz KC, Harry Gillow and Will Perry (instructed by the Legal Services Department of the Welsh Government) appeared on behalf of the Respondent.

**Note:** Excisions in this Judgment (marked “[...][~~✕~~]”) relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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## **A. INTRODUCTION**

1. This is the Tribunal’s judgment on an **Application** by Bristol Airport Limited (**Bristol**) for review under section 70 of the Subsidy Control Act 2022 (the **Act**) of a **Decision** of the Respondent, by which the Respondent granted to Cardiff International Airport Limited (**CIAL**) a subsidy of £205 million (the **Subsidy**).
2. In broad terms, Bristol challenges the Decision in three ways. It says that:
  - (1) The Respondent has not properly addressed the financial position of CIAL in making the Decision, contrary to the provisions of the Act in relation to the grant of subsidies to ailing or insolvent enterprises.
  - (2) The Respondent has not properly addressed the subsidy control principles set out in the Act, which the Respondent was required to have regard to in making the Decision.
  - (3) The Respondent has failed to comply with or otherwise have regard to the provisions of the Act which deal specifically with subsidies to air carriers.
3. As the Application concerned a subsidy granted by the Welsh Ministers to an entity based in Wales, it was agreed that the hearing of the Application should take place in Cardiff on 9 and 10 February 2026. The Tribunal is grateful to the Civil and Family Justice Centre for facilitating that and to the court staff for making us welcome.
4. We summarise first the factual and procedural background before turning to the statutory framework and the issues the Tribunal must resolve.

## **B. BACKGROUND**

### **(1) The parties**

5. The Applicant, Bristol, describes itself as the primary gateway to the South-West of England and South Wales. In 2024, 10 million people used Bristol

airport. Bristol employs some 5,000 staff on the airport site and says that it supports 30,000 jobs in the wider region. Bristol is owned by a Canadian pension fund, the Ontario Teachers' Pension Plan.

6. The Welsh Ministers who took the Decision were Rebecca Evans MS, Cabinet Secretary for Economy, Energy & Planning and Rt Hon Mark Drakeford MS, Cabinet Secretary for Finance & Welsh Language. The Welsh Government is the owner of CIAL, which it acquired in March 2013.

**(2) The Decision**

7. The Decision was taken by the Respondent on 31 March 2025. The specific policy objective of the Subsidy was to address equity issues of social and economic disadvantage in South Wales by growing the economic activity associated with the airport and maximising the potential agglomeration benefits linked to the wider aviation and aerospace sectors in the region.

8. The Decision provided for the Subsidy to be granted to CIAL by way of two packages:

- (1) Package 1, for non-passenger business development and enhancement. This involves funding the development of maintenance, repair and overhaul facilities (**MRO**), construction of aircraft hangars, fixed base operator and cargo centre development and enhancement and various other infrastructure upgrades, along with funding various capital investment projects such as terminal building development and airfield lighting enhancement. The total amount available under this package is £105.2 million.

- (2) Package 2, for commercial passenger air route development. This involves funding incentive payments by CIAL to new and existing airlines in order to expand air routes flying in and out of Cardiff Airport. The total amount available under this package is £100 million.

9. The Decision was given effect to by a **Grant Agreement**, dated 1 April 2025. This document sets out conditions upon which the Subsidy will be made available to CIAL. Among other things, it provides that any arrangements with commercial airlines for which CIAL uses Package 2 funding must be entered into on “CMO” terms and must be compliant with the “CMO Principle”. This is a reference to the Commercial Market Operator Principle, which is a concept established by the Act, as described below. There are provisions in the Grant Agreement to ensure that CIAL complies with this condition.
  
10. The Respondent received a number of documents in the course of making the Decision, the most important of which for present purposes was the Welsh Government’s Assessment of Compliance with the Act, dated March 2025 (the **Assessment**). This document had been updated, from an earlier version produced in August 2024, to take account of the advice of the Subsidy Advice Unit (the **SAU**) of the Competition and Markets Authority. The SAU’s advice, which commented on the August 2024 Assessment of Compliance, was dated 2 October 2024 (the **SAU Report**).
  
11. Following receipt of the SAU Report, the Welsh Government commissioned work from several advisers to help address the points made in the SAU Report. This included advice from:
  - (1) Altair Advisory (**Altair**), an aviation advisory firm, who provided a report dated 28 February 2025 (the **Altair Report**); and
  
  - (2) Grant Thornton, who carried out an economic impact study and reported on that on 6 December 2024 (the **December 2024 Grant Thornton Report**). Grant Thornton also reviewed the assumptions in CIAL’s 10-year performance forecasts with and without the Subsidy and reported on that on 7 March 2025 (the **March 2025 Grant Thornton Report**).

These reports were annexed to the Assessment.

12. The Assessment stated that the objective of the Subsidy was one of equity: seeking to reduce the social and economic disadvantages in Wales, and in

particular the South Wales region, relative to the UK. The Assessment stated that the Welsh Government viewed Cardiff Airport as essential infrastructure which, following the pandemic, was not delivering its full economic potential. The Subsidy would help to address this equity rationale through the policy objective.

13. This would be achieved in respect of Package 1 by a capital expenditure programme that would create facilities to encourage non-passenger business opportunities at or near the airport, including attracting companies focused on new aviation related technologies.
14. By developing new routes, in respect of Package 2, the Subsidy would generate potentially high-spending, inbound tourism. Developing routes to key cities in the EU, North America and the Middle East would also, among other things, support the Welsh Government’s ambition of increasing exports. By securing airlines, including one or more Low Cost Carriers (**LCCs**), to operate new routes to and from Cardiff, the Subsidy would increase employment at the airport and help increase passenger traffic. The aim was that annual passenger volume would increase to 2.3 million passengers by the end of the ten-year period.
15. As to the overall economic benefits from the Subsidy, the Assessment stated:

“The analysis by Grant Thornton (embedded in Annex A) estimates that, with the investments outlined above, the incremental GVA [Gross Value Added] impact across the 10-year period is estimated to be approximately £1206.4 million, which is significantly larger than the proposed subsidy of £200 million. Incremental direct GVA impact is approximately £468.4 million, incremental indirect GVA impact is approximately £582.5 million and incremental induced GVA impact is approximately £155.5 million across the 10-year period.”
16. The Assessment also considered whether CIAL fell within the definition of “ailing or insolvent”. While noting that CIAL had operating losses resulting in the previous subsidy and investment packages, it concluded that CIAL remained a going concern.

17. In considering the scenario if the Subsidy was not granted, the Assessment stated that CIAL would be significantly constrained in its ability to grow the business. CIAL would need to utilise an Extended Standing Credit Facility (ESCF) which had been granted to provide assurance to CIAL's board about the airport's medium term viability. As to possible long term scenarios for CIAL without the Subsidy, in a worst case scenario there would be a significant chance of CIAL getting into financial difficulty.
18. The Assessment then summarised the Altair Report's and Grant Thornton's assessments of CIAL if it did not receive the Subsidy. The Assessment summarised the Altair Report, stating that without the Subsidy or further projects, per-passenger revenue would remain roughly constant with the prospects of profitability being highly uncertain. The December 2024 Grant Thornton Report considered this scenario based on CIAL's ten-year forecasts, concluding that, without the Subsidy, it was unlikely that passenger numbers would increase. The March 2025 Grant Thornton Report assessed the credibility of CIAL's forecasts, which envisaged a 3% annual passenger growth from 2025 if the Subsidy was not granted. Grant Thornton concluded that this forecast appeared reasonable, although they noted that sustaining those levels of activity might be challenging.
19. Regarding the negative effects on competition in the UK likely to be caused by the Subsidy, the Assessment noted that it would be impossible to mitigate fully the Subsidy's potential distortive effects in the aviation and aerospace markets. The market operator most likely to experience any distortive effects from the Subsidy would be Bristol. The Assessment noted Bristol's May 2018 Masterplan consultation document which planned to increase Bristol's capacity to 15 million annual passengers by the mid-2030s. This strategy was reaffirmed in Bristol's November 2024 Masterplan consultation. The Assessment stated it was reasonable to assume that Bristol's Masterplan factored in a similar level of passenger growth for CIAL as envisaged by the Subsidy. The Assessment therefore stated that it was reasonable to assume that the investment plans outlined in the Assessment, with the intent to grow the Airport to 2.3 million annual passengers by 2034, should have no material adverse impact on Bristol Airport's expansion plans compared to its Masterplan.

20. The Assessment further noted that the main thrust of Bristol's strategy related to high-volume tourism and LCC flights. While the development of LCC routes was a part of Package 2, this was not the focus of the Subsidy. Rather, the Subsidy would take a different approach, focusing on a small number of routes to important economic centres and global air hubs.
21. Likewise for Package 1, the Assessment stated that, because the demand for MRO and general aviation sectors was outstripping supply, this package would be unlikely to adversely distort competition in the UK.
22. The Assessment went on to set out the independent advice from the Altair Report which noted there was a particular concern that new routes from CIAL could adversely impact Bristol. The Assessment stated that it did not agree with every aspect of Altair's analysis; however the Assessment stated that it agreed with Altair's suggestions regarding greater ongoing monitoring of the effect of the Subsidy, including periodic analysis of Civil Aviation Authority data on Bristol's and CIAL's catchment areas.

**(3) Background facts**

23. The following background facts are taken from the statement of facts agreed by the parties for the purposes of the hearing.
24. CIAL was established in 1942 as RAF Rhoose. It was released for civil use in 1952 and later transferred to Glamorgan County Council. In 1995 the airport was acquired and privatised by TBI PLC (**TBI**), a Welsh property company. TBI was itself acquired in 2005 by Abertis Infraestructuras SA (**Abertis**).
25. During Abertis's ownership, the airport entered significant commercial decline. Passenger numbers fell from approximately two million in 2007 to one million in 2012, and annual sales dropped from £22.6 million to £14.9 million. Several LCCs, which had accounted for a substantial proportion of passenger traffic, ceased operations at the airport. In March 2013, the Welsh Government purchased CIAL for £52 million, supplemented by a £3.3 million working-capital injection.

26. The Welsh Government's policy objective in acquiring CIAL was to stabilise and grow the airport for the economic benefit of Wales, including reversing the decline in passenger numbers. Although publicly owned, CIAL has been operated at arm's length as a commercial entity within WGC Holdco Limited, itself owned by the Welsh Government, to ensure compliance with State aid and subsidy control requirements.
27. Between 2014 and 2020, the Welsh Government issued five commercial loans to CIAL, totalling £69.8 million. It maintains that each loan was made on then-applicable Market Economy Operator Principle<sup>1</sup> terms. The Welsh Government also awarded £692,000 in grants for safety, security, and e-Passport-gate upgrades.
28. By March 2020, annual passenger numbers had risen to approximately 1.65 million. Following the onset of the Covid-19 pandemic, the terminal closed and operating hours were reduced. Although the terminal reopened in July 2020, travel restrictions in Wales persisted until March 2022, and by August 2021 passenger volumes were 90.7% below pre-pandemic levels.
29. CIAL's pandemic-related losses between March and December 2020 were estimated at £6.5 million. The Welsh Government notified the European Commission seeking authorisation to compensate CIAL up to that amount. The Commission authorised £2.39 million, which was never paid, and the aid was later withdrawn.
30. In February 2021, the Welsh Government approved a £42.6 million debt write-off, accompanied by a matching grant of £42.6 million. The grant was provided as a rescue and restructuring subsidy. The Welsh Government maintains that the write-off itself was consistent with CMO terms. In 2023/24, the Welsh Government approved a further £6.6 million equity investment to fund the required installation of Next Generation Security scanners and signalled its intention to develop proposals for a long-term support package. CIAL ultimately submitted a ten-year business development plan in early 2024.

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<sup>1</sup> The equivalent of the CMO Principle under EU State aid rules.

31. In December 2023, the Welsh Government approved a £15 million Standby Credit Facility (SCF), later increased in July 2024 to £33 million as the ESCF, which the Welsh Government maintains was also granted on CMO terms.
32. On 9 August 2024, the Respondent received advice recommending submission of a long-term subsidy proposal to the SAU. After receiving the SAU Report on 2 October 2024 and undertaking further analysis, Ministers were asked on 28 March 2025 to approve a subsidy package of up to £205.2 million. Three options were presented: do nothing, divest without subsidy, or proceed with the subsidy. The third option was recommended and adopted.
33. Rebecca Evans MS and Mark Drakeford MS approved the Decision on 31 March 2025. The Grant Funding Agreement was executed on 3 April 2025, and the Subsidy Decision entered on the Act's section 32 transparency database on 4 April 2025.

## **C. LEGAL FRAMEWORK**

### **(1) The Act**

34. Section 2(1) of the Act defines a “subsidy” as financial assistance which: is given from public resources by a public authority; confers an economic advantage on an enterprise; is specific; and has, or is capable of having, an effect on (in this case) competition or investment within the UK. It is common ground that the Subsidy falls within this definition.
35. Section 3(2) of the Act introduces the CMO Principle in the context of determining whether financial assistance confers an economic advantage on the enterprise in question. Broadly speaking, the CMO Principle provides that financial assistance will not be treated as conferring a financial advantage (and so will not fall within the definition of a subsidy) if it is on terms that might reasonably have been expected to be available on the market to the enterprise. This generally involves an inquiry into whether any rational private participant in the market might have entered into the same arrangement on the same terms.

36. Section 10 of the Act deals with subsidy schemes. According to the Department for Business and Trade’s Statutory Guidance for the UK Subsidy Control Regime<sup>2</sup> (the **DBT Guidance**), the difference between a scheme and a subsidy is that a subsidy is a binding commitment with a specific beneficiary, whereas a subsidy scheme is usually not binding and may give the public authority a substantial degree of discretion. We note that in *The Durham Company Limited v Durham County Council* [2023] CAT 50, the Tribunal, having already decided the Act did not apply in that case, discussed the necessary features of a scheme, which it said<sup>3</sup> involved “an element of appropriate fettering”. The Respondent submitted during the hearing that these obiter observations were inconsistent with the DBT Guidance and were, in any event, wrong. It is not however necessary for us to resolve that question. The key point is that a subsidy is different from a scheme and, as will be seen below, each is subject to its own regime under the Act.

37. Section 12(1) of the Act provides that a public authority must consider the subsidy control principles (the **Principles**) before deciding to give a subsidy, and that it must not give the subsidy unless it is of the view that the subsidy is consistent with the Principles. The Principles themselves are set out in Schedule 1 to the Act, and are as follows:

***“Common interest***

- A Subsidies should pursue a specific policy objective in order to—
- (a) remedy an identified market failure, or
  - (b) address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns).

***Proportionate and necessary***

- B Subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.

***Design to change economic behaviour of beneficiary***

- C (1) Subsidies should be designed to bring about a change of economic behaviour of the beneficiary.

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<sup>2</sup> The relevant version for present purposes is the fifth edition, dated August 2025.  
<sup>3</sup> At [51].

(2) That change, in relation to a subsidy, should be—

- (a) conducive to achieving its specific policy objective, and
- (b) something that would not happen without the subsidy.

***Costs that would be funded anyway***

D Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.

***Least distortive means of achieving policy objective***

E Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive, means.

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

F Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.

***Beneficial effects to outweigh negative effects***

G Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on—

- (a) competition or investment within the United Kingdom;
- (b) international trade or investment.”

38. It is clear from section 12(2) and 12(3) of the Act that section 12(1) does not apply to subsidies given under a subsidy scheme. Instead, those subsections create parallel requirements: first to consider the Principles before making a subsidy scheme, and secondly, not to make the scheme unless it is consistent with those Principles.
39. Immediately following the requirement to consider the Principles, Chapter 2 of Part 2 of the Act contains prohibitions and other requirements.
40. The first group of prohibitions falls under the heading “General prohibitions”. They are:
- (1) Section 15, which prohibits “*subsidies in the form of a guarantee*” that have specified features.

- (2) Sections 16 and 17, which prohibit subsidies that are contingent on specified circumstances.
  - (3) Section 18, which prohibits subsidies that are subject to specified conditions relating to relocation of an enterprise.
41. The next group of prohibitions is headed “*Ailing or insolvent enterprises*” and includes sections 19 to 26.
42. Sections 19 and 20 of the Act are central to Bristol’s arguments about the financial position of CIAL. Section 19 provides, insofar as is material:

**“19 Rescuing**

(1) A subsidy for rescuing an ailing or insolvent enterprise is prohibited by this section unless the conditions in subsections (2) to (4) are met.

(2) The condition in this subsection is that the subsidy is given during the preparation by the enterprise of a restructuring plan for the purposes of section 20(2).

(3) The condition in this subsection is that the subsidy consists of temporary liquidity support in the form of a loan or loan guarantee.

(4) The condition in this subsection is that the public authority giving the subsidy is satisfied that—

(a) the subsidy contributes to an objective of public interest by avoiding social hardship or preventing a severe market failure, in particular with regard to job losses or disruption of an important service that is difficult to replicate, or

(b) there are exceptional circumstances that justify the subsidy being given despite its not contributing as mentioned in paragraph (a).

[...]”

43. Section 20 of the Act then deals with subsidies for restructuring ‘ailing or insolvent’ enterprises in similar terms:

**20 Restructuring**

(1) A subsidy for restructuring an ailing or insolvent enterprise is prohibited by this section unless the conditions in subsections (2) to (6) are met.

(2) The condition in this subsection is that the enterprise has prepared a restructuring plan.

(3) The condition in this subsection is that the public authority giving the subsidy is satisfied that the restructuring plan—

(a) is credible,

(b) is based on realistic assumptions, and

(c) is prepared with a view to ensuring the return to long-term viability of the enterprise within a reasonable time period.

(4) The condition in this subsection is that—

(a) the enterprise is a small or medium-sized enterprise, or

(b) the enterprise or its owners, creditors or new investors—

(i) have contributed significant funds or assets to the cost of the restructuring, or

(ii) have a contractual obligation to do so.

(5) The condition in this subsection is that the public authority giving the subsidy is satisfied that—

(a) the subsidy contributes to an objective of public interest by avoiding social hardship or preventing a severe market failure, in particular with regard to job losses or disruption of an important service that is difficult to replicate, or

(b) there are exceptional circumstances that justify the subsidy being given despite its not contributing as mentioned in paragraph (a).

(6) The condition in this subsection is that—

(a) a subsidy has not previously been given for restructuring the enterprise, or

(b) five years have passed since the last time a subsidy was given for restructuring the enterprise.

(7) But a subsidy is not prohibited by reason only of the condition in subsection (6) not being met if the public authority giving the subsidy is satisfied that the circumstances that have given rise to the need for the subsidy were—

(a) unforeseeable, and

(b) not caused by the beneficiary of the subsidy.

[...]

44. In respect of the other sections under the heading “ailing or insolvent enterprises”:

(1) Section 21 prohibits “*a subsidy for restructuring an ailing or insolvent deposit taker or insurance company*”, subject to certain conditions.

(2) Section 22 also deals with deposit takers or insurance companies, but only those which cannot credibly be demonstrated as capable of being returned to long term viability. In this section, the prohibition applies to “[*a*] *subsidy to an ailing or insolvent deposit taker or insurance company*” which meets that description, for which a subsidy is then only permitted if it is intended to ensure an orderly liquidation and exit from the market.

45. The definition of “ailing or insolvent” is given in section 24(1) of the Act:

**“24 Meaning of “ailing or insolvent”**

(1) For the purposes of sections 19 to 23, a deposit taker, insurance company or other enterprise is “ailing or insolvent” if—

(a) it would almost certainly go out of business in the short to medium term without subsidies,

(b) it is unable to pay its debts as they fall due, or

(c) the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

[...]

46. It was suggested by the Respondent that subsections 24(1)(b) and (c) are based on the “cashflow” and “balance sheet” tests in section 123(1)(e) and (2) of the Insolvency Act 1986. Bristol did not accept this proposition, but we think little, if anything, turns on it. It was common ground that the key provision for present purposes was section 24(1)(a), which has no parallel provision in the Insolvency Act 1986.

47. There was also a debate between the parties as to the meaning of “short to medium term” in section 24(1)(a). Bristol submitted that the medium term could extend to four, or even five, years. It also argued that it would be wrong to ignore

longer term considerations altogether when considering the likelihood of a company going out of business. We understood this to mean that a business which had very poor long-term prospects might be susceptible to going out of business even in the medium term.

48. The Respondent submitted that, because financial forecasts beyond eighteen months in the aviation sector were inherently uncertain, any assessment that an enterprise would “almost certainly” go out of business was unlikely to be satisfied over a longer period.

49. We will return to this question when we consider the arguments about whether CIAL was ailing or insolvent at the time of the Decision.

50. Sections 25 and 26 define “deposit taker” and insurance company”. They do not assist the analysis.

51. The final group of prohibitions is under the heading “*Other specific prohibitions and requirements*”. These concern:

(1) Section 27, where the prohibition is directed at “[a] subsidy to an insurer that provides export credit insurance”.

(2) Section 28 (which is also central to Bristol’s arguments), where the prohibition is directed at “[a] subsidy to an air carrier for the operation of a route”, unless certain conditions are met.

(3) Section 29 which deals with services of public economic interest.

52. Section 30 of the Act appears near the end of Chapter 2 of the Act. under the heading “Subsidy schemes”. It provides:

**“30 Effect of prohibitions etc in relation to subsidy schemes**

(1) The preceding provisions of this Chapter relating to subsidies do not apply to a subsidy given under a subsidy scheme.

(2) A subsidy scheme is prohibited by this section to the extent that it provides for the giving of a subsidy that would, but for subsection (1), be prohibited by,

or in contravention of, a requirement imposed by any preceding provision of this Chapter.”

53. Section 70 of the Act, so far as relevant, provides for the review of subsidy decisions by the Tribunal, specifying that the standard of review will be judicial review principles.
54. Section 72 sets out the Tribunal’s powers to grant relief on applications made under section 70, including the power to make a quashing order and a recovery order. Section 74 provides further detail regarding the making of recovery orders.

## (2) The TCA<sup>4</sup>

55. The Act came into being in order to fulfil the UK’s obligations under the TCA<sup>5</sup>.
56. Recital (9) of the TCA provides that the TCA is concerned with:

“9. Recognising the need for an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation,”.

57. The section of the TCA dealing with subsidies commences with general provisions in Article 355, in which the parties agree that trade and investment between the UK and the EU “*require conditions that ensure a level playing field for open and fair competition between the Parties*”. Article 355(4) then goes on to say:

“4. The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the

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<sup>4</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, dated 30 December 2020.

<sup>5</sup> See *The New Lottery Company and others v Gambling Commission* [2026] CAT 14 at [71] and *R (British Gas and others) v Secretary of State for Energy, Security and Net Zero* [2025] EWCA Civ 209 at [18].

commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title”.

58. The TCA deals in Article 366 with the principles to be applied in the design of systems of subsidy control (reflecting what has become the Principles in the Act). Article 366(3) provides:

“3. It is for each Party to determine how its obligations under paragraphs 1 and 2 are implemented in the design of its subsidy control system in its own domestic law, provided that each Party shall ensure that the obligations under paragraphs 1 and 2 are implemented in its law in such a manner that the legality of an individual subsidy will be determined by the principles.”

59. Article 367 deals with prohibited subsidies and subsidies subject to conditions, and provides (as far as is material) as follows:

“[...]

Rescue and restructuring

3. Subsidies for restructuring an ailing or insolvent economic actor without the economic actor having prepared a credible restructuring plan shall be prohibited. The restructuring plan shall be based on realistic assumptions with a view to ensuring the return to long-term viability of the ailing or insolvent economic actor within a reasonable time period. During the preparation of the restructuring plan, the economic actor may receive temporary liquidity support in the form of loans or loan guarantees. Except for small and medium-sized enterprises, an economic actor or its owners, creditors or new investors shall contribute significant funds or assets to the cost of restructuring. For the purposes of this paragraph, an ailing or insolvent economic actor is one that would almost certainly go out of business in the short to medium term without the subsidy.

4. Other than in exceptional circumstances, subsidies for the rescue and restructuring of insolvent or ailing economic actors should only be allowed if

they contribute to an objective of public interest by avoiding social hardship or preventing a severe market failure, in particular with regard to job losses or disruption of an important service that is difficult to replicate. Except in the case of unforeseeable circumstances not caused by the beneficiary, they should not be granted more than once in any five year period.

[...]"

### **(3) Judicial Review Principles**

60. The applicable principles of judicial review were largely uncontentious as between the parties. Both relied upon the useful summary of the appropriate standard and intensity of review set out in the Tribunal's decision in *Weis v Greater Manchester Combined Authority* [2025] CAT 41 at [120] to [125]. In summary:

- (1) The Tribunal will review a subsidy decision under the Act by the application of ordinary judicial review principles.
- (2) A decision-maker is obliged to take into consideration only relevant matters, and to exclude irrelevant matters.
- (3) The decision-maker must take reasonable steps to acquaint themselves with the relevant information to enable them to make the decision correctly.
- (4) The rationality of a decision may be challenged on the basis that the decision is outside the range of reasonable decisions open to the decision-maker.
- (5) The rationality of a decision may also be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it (for example, significant reliance has been placed on an irrelevant consideration, there was no evidence to support an important step in the reasoning, or the reasoning involved a serious logical or methodological error).

61. In relation to reasons for a decision, they must be intelligible and adequate. A reasons challenge will only succeed if the aggrieved party has been substantially prejudiced by the failure to provide adequate reasons. See *South Buckinghamshire District Council v Porter* (No. 2) [2004] 1 WLR 1953 at [36].
62. In the course of the hearing, Bristol referred to *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) (which, for reasons that are unclear, was not included in the authorities bundle at any stage), as authority for the proposition that the wider the discretion afforded to a public authority, the more important it was that the authority gathers all relevant material. We note that this is in fact the fifth of the general principles of the duty summarised by Haddon-Cave J in that *Secretary of State for Education and Science v Thameside Metropolitan Borough Council* [1977] AC 1014. That summary was endorsed by the Court of Appeal in *Balajigari v The Secretary of State for the Home Department* [2019] EWCA Civ 673.
63. One area of difference between the parties was the margin of appreciation to be afforded to the Respondent in circumstances where, the Respondent submitted, the subject matter of the Decision is essentially a political one, for which the Respondent is accountable to the Senedd and the electorate generally. The Respondent relied on authorities such as *Office of Fair Trading and others v IBA Health Limited* [2004] EWCA Civ 14 at [91] and [92] for the proposition that a low intensity of review will be applied to cases involving issues of political judgment, and that judges are not equipped “to decide issues depending on administrative or political judgment”.
64. As we understood Bristol’s position, it accepted that the law was as stated above but submitted that:
- (1) That part of the Decision which was under challenge did not involve any policy or political judgement. We will deal with this question in our analysis of the Application.
  - (2) It was not open to the Respondent to afford less weight to considerations affecting (for example) Bristol airport simply because it is

geographically situated outside Wales. In other words, it was not open to the Respondent to give greater weight to considerations which were of particular importance to the Welsh electorate, at the expense of those outside Wales. We understood the Respondent to accept this proposition, largely on the basis that it said it had not acted in that way.

**(4) Principles of statutory interpretation**

65. The parties did not initially provide us with any submissions about the principles we should apply in interpreting the Act, no doubt because they are for the most part well understood. For the avoidance of doubt, we have followed the approach set out in the Supreme Court’s judgment in *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3 between [28] and [31], to the following effect:

- (1) The primary indication of the meaning of the sections is the legislative text itself, which should be read in the context of the section as a whole and the statute as a whole. This is an objective assessment as to what the legislature can be taken to have meant by the words in question.
- (2) External aids must provide only a secondary role. They may be used to assist in a purposive interpretation of a statutory provision but should not displace meanings of words which are clear and unambiguous, in the context of the section and the statute, and which do not produce absurdity.

66. We have also approached this matter on the basis that:

- (1) Domestic legislation should in general be given a meaning that conforms with international agreements. See Bennion, Bailey and Norbury, *Statutory Interpretation*, 8<sup>th</sup> edition, section 24.16.

- (2) Guidance issued by a minister or by a public authority may be persuasive, depending on the quality of the reasoning in the guidance. See Bennion, Bailey and Norbury at section 24.12.

## **D. ISSUES AND EVIDENCE**

### **(1) The issues arising on the pleadings**

67. The Applicant's Amended Notice of Appeal (ANoA) contains four grounds of review.
68. Grounds 1 and 2 primarily address whether CIAL was ailing or insolvent at the time of the Decision, and the consequences of that. In essence, Bristol's argument under Ground 1 is that the Respondent was irrational in its consideration of whether CIAL was ailing or insolvent at the time of the Decision and that the only course open to the Respondent under the Act was to conclude that CIAL was ailing or insolvent, in which case sections 19 and 20 provide a complete code for the giving of any subsidy under the Act. The ANoA also pleaded a failure to give proper reasons for the conclusion that CIAL was not ailing or insolvent.
69. Ground 2 involves the proper construction of sections 19 and 20, which determine the significance of whether CIAL is ailing or insolvent. A peculiarity of the ANoA is that this question is treated as posterior to Ground 1, which addresses the sufficiency (or otherwise) of the Respondent's consideration of whether CIAL was ailing or insolvent.
70. Ground 3 relates to the consideration by the Respondent of Principles A, E, B, C, F and G<sup>6</sup>. Bristol says the Respondent: failed properly to take certain relevant considerations into account; took into account irrelevant considerations; and made material errors of fact.

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<sup>6</sup> These do not appear in strict alphabetical order as the DBT Guidance suggests that they should be grouped in four steps, which do not follow alphabetically.

71. We found the ANoA somewhat unclear in its articulation of which matters were said to give rise to what grounds on challenge in relation to each Principle. During the course of the hearing, we asked Mr West KC to produce a table clarifying this, and we are grateful for the document he provided. The basis of all the challenges to the Principles identified in the table is irrationality.
72. Ground 4 concerns the application of section 28. The short point is that Bristol submits that Package 2 involves subsidies to air carriers for the operation of routes and that the Respondent was therefore obliged to (but did not) comply with or otherwise have regard to the conditions in section 28, which otherwise prohibits subsidies to airlines.
73. The relief sought by Bristol, should it succeed on its grounds of review, was a declaration that the Decision was unlawful, an order quashing the Decision and, to the extent necessary, an order requiring the Respondent to reclaim any part of the Subsidy already paid to CIAL, by way of a recovery order.

**(2) The agreed List of Issues**

74. Against that background, the parties agreed the following list of issues for determination:
  - (1) Whether, prior to deciding to grant the Subsidy, the Respondent undertook sufficient inquiry to determine if CIAL was “ailing or insolvent” within the meaning of section 24 of the Act (Ground 1).
  - (2) Whether it was rational for the Respondent to conclude that CIAL was not “ailing or insolvent” at the time the Subsidy was granted (Ground 1).
  - (3) Whether the Subsidy was unlawful by virtue of section 19 and/or section 20 of the Act (Ground 2).
  - (4) Whether, in respect of sums allocated for route development, the Respondent lawfully applied section 28 of the Act (Ground 4).

- (5) Whether the Respondent rationally concluded that the Subsidy complied with Principles A, E, C, B, F and G in Schedule 1 of the Act and, if not, why not (Ground 3).
  - (6) Finally, in light of the Tribunal's conclusions on the issues above, whether the grant of the Subsidy was lawful.
75. It was agreed that issues 4 to 6 would not arise if the Tribunal were to determine that the decision to grant the Subsidy was unlawful by reason of its answers to issues 1 to 3.

**(3) Evidence filed by the parties**

76. Bristol filed witness evidence from:
- (1) Aqeel Kadri, a partner at Osborne Clarke LLP, Bristol's solicitors. Mr Kadri's witness statement supported the ANoA by providing background facts and exhibiting relevant documents.
  - (2) Jonathan Naylor, a consultant in the aviation industry. Bristol sought to introduce Mr Naylor's evidence as expert evidence, but the Tribunal refused permission for that application by a decision dated 11 November 2025 ([2025] CAT 73). Instead, Mr Naylor provided a witness statement explaining certain aspects of the aviation industry and providing data relevant to that.
77. The Respondent filed the following evidence:
- (1) Two witness statements from Andrew Slade, Director General, Economy, Energy and Transport within the Welsh Government. Mr Slade's first statement accompanied the Respondent's Defence and explained the context of the decision. Mr Slade's second statement responded to matters raised in the ANoA and Mr Naylor's statement.

(2) A witness statement from Patrick Edmond, the Managing Director of Altair, which advised the Respondent in relation to the Subsidy. Mr Edmond responded to various matters raised by Mr Naylor.

**(4) Subsidy or subsidy scheme?**

78. The Respondent served an Amended Defence dated 19 December 2025 in response to the ANoA. At [61] of the Amended Defence, the Respondent pleaded:

“Having considered the matter further since the taking of the Subsidy Decision, the Respondent now considers that the proper analysis is that the Subsidy is, so far as the funds allocated to route development are concerned, a Subsidy Scheme under section 10 [of the Act].”

79. The Amended Defence went on to explain that the structure of the Grant Agreement in respect of Package 2 was such that funds were not committed to CIAL, which was instead required to put forward a business case for any incentive proposal regarding an airline. This lack of binding commitment and retention of discretion by the Respondent was said to be more consistent with a subsidy scheme, and was also consistent with the description of the differences between subsidies and subsidy schemes in the DBT Guidance. In a footnote, the Respondent accepted that it had not registered the Subsidy as a subsidy scheme in respect of Package 2 on the Subsidy Database, but noted that it would rectify that were the Tribunal to agree with its interpretation.

80. This change of approach seemed to have been motivated in part by an intention to address Bristol’s arguments about the lack of transparency of any incentives agreed by CIAL in respect of Package 2. The Respondent accepted that, under a subsidy scheme, there would need to be transparency by way of entries in the Subsidy Database when awards under the subsidy scheme were actually made.

81. In advance of the hearing, the Tribunal wrote to the parties expressing concern about the status of the Decision in light of this change of position. The issue was canvassed at the hearing, with Bristol contending that the change of position amounted to a withdrawal of the Decision, with the consequence that the

Tribunal no longer had jurisdiction to decide the matters set out in the various challenges to the Decision.

82. The Respondent did not accept that position, but we were inclined to agree with Bristol that the change in position affected the status of the Decision and, at the very least, gave rise to difficult questions about whether some or all of the Decision had effectively been withdrawn.
83. Towards the end of the hearing, the Respondent indicated its intention to revert to its original position (that the Subsidy was a subsidy and not a subsidy scheme under section 10 of the Act). Mr Peretz KC confirmed that he had received no formal instructions from the Respondent to withdraw the Decision, or indeed any part of it. He applied on behalf of the Respondent to re-amend its Defence to restore the original pleading.
84. Mr West KC, while expressing considerable concern and disappointment about the course of events, took a pragmatic approach on behalf of Bristol and did not oppose the proposed amendment, subject to: seeing the precise wording; the question of costs; and the need to address the potential for other prejudice which Bristol might have suffered as a consequence of the Respondent's approach to this issue.
85. On the issue of prejudice, Mr West KC had sensibly argued Bristol's case on the alternative basis that the Tribunal did have jurisdiction to decide Bristol's grounds of challenge. He had therefore addressed all of those grounds during the hearing. However, he noted that the need to address the change in position and to deal with the substantive arguments relating to subsidy schemes had diverted effort from the preparation of his skeleton argument and his oral submissions, which might otherwise have been directed at other issues.
86. We therefore gave permission to Bristol to file short supplemental written submissions after the hearing. These were filed on 19 February 2026 and were substantially directed at Ground 4. The Respondent did not seek to respond to those submissions but did note, on the question of prejudice, that the hearing had concluded about an hour early on the final day.

87. The consequence of this chain of events is that we have treated the Subsidy as a subsidy, not a subsidy scheme, under the Act, which accords with the basis on which the Decision was made, advice was provided by the SAU and the Subsidy was registered on the Subsidy Database.

**(5) Further supplemental submissions**

88. Following the hearing, we identified three questions which we wished the parties to address in more detail. These were:

- (1) In interpreting the relevant parts of sections 19 and 20 of the Act, what assistance (if any) can properly be derived from the overall scheme of the Act, and in particular from the prohibitions contained in sections 15–18, 21–22 and 27–28?
- (2) The EU approach to State aid for an undertaking in difficulty is addressed in recital 14, Articles 1(4)(c) and 2(18) of Commission Regulation (EU) No 651/2014, (i.e. the General Block Exemption Regulation, or **GBER**), and in the Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (the **RRG**), in particular at paragraphs [18] and [23]. Other than the wording of Article 367(3) of the TCA, what assistance (if any) does EU practice and/or the approach reflected in the TCA provide for the interpretation of sections 19 and 20 of the Act?
- (3) During the Public Bill Committee debate on 28 October 2021, Paul Scully MP (Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy) made several comments relevant to sections 19, 20 and 24 (Hansard, cols. 136–139). What assistance (if any) do those observations provide in construing these provisions, bearing in mind the rules on the use of parliamentary material (see Bennion, Bailey and Norbury at section 24.12).

89. The parties filed their responses to these questions on 5 March 2026 and these are summarised below.

**E. THE ARGUMENTS OF THE PARTIES**

**(1) The Applicant's case**

90. Bristol's central argument under Grounds 1 and 2 was that, as at the date of the Decision, CIAL was ailing or insolvent, as defined in Section 24(1)(a) of the Act. The Respondent either failed to recognise this fact or did not give it proper consideration such that the Decision was irrational.

91. The factual basis for this assertion was constructed by reference to a series of events by which CIAL received funding support from the Respondent. In summary, the Applicant said that:

- (1) CIAL was clearly ailing or insolvent at the time of the rescue and restructuring package granted by the Respondent in February 2021.
- (2) The need for further support to fund the next generation security scanners in October 2023 was consistent with a continuing financial problem.
- (3) The provision of the SCF in December 2023 was required to address going concern considerations, which meant there was no doubt that CIAL was ailing or insolvent before the SCF was put in place.
- (4) The same position must apply at the time the ESCF was put in place in July 2024, when a similar going concern consideration required further financial support.

92. Bristol then argued that the ESCF should be removed from the counterfactual analysis for the purposes of considering whether CIAL was ailing or insolvent in March 2025, when the Subsidy was granted. We understood this to be because:

- (1) The ESCF could not sensibly be said to have been provided on CMO terms, which meant that it should be treated as an unlawful subsidy and therefore disregarded for the purposes of the counterfactual analysis. The same applied to the SCF.
  - (2) The SCF and the ESCF were inextricably linked to the Subsidy, being a “bridge” towards it, such that the facilities should not form part of any counterfactual constructed to analyse what the position would be, absent the Subsidy.
93. Bristol relied on a report dated 22 August 2023 from Oxera Consulting LLP (**Oxera**) (the **2023 Oxera Report**) to the Respondent, which addressed whether a proposed subsidy from the Respondent to CIAL under consideration at that time would comply with the Principles. This referred to CIAL facing “a challenging financial situation” and being expected to “be loss making on a cash flow basis until at least 2034”, at which stage Oxera predicted that CIAL would “exit the market”. The report also discussed the difficulties in finding alternative sources of funds to support CIAL and concluded that, in the absence of the subsidy then under discussion, CIAL “*would inevitably have to cease operating from as early as 2024 due to the lack of funds*”.
94. Bristol also referred to other documents commenting on CIAL’s financial stability, such as a report dated 17 December 2024 from EY to the Respondent commenting on financing and funding options. That report discussed the need to satisfy CIAL’s auditors as to the airport’s ability to continue as a going concern, which was said to require either further financial support or an improvement in operating results in order to remain a going concern at the end of the following twelve-to-eighteen-month period.
95. Against that background, Bristol submitted that the Respondent had failed to undertake sufficient inquiry into the question of whether CIAL was ailing or insolvent, and that it had reached an irrational conclusion in deciding that CIAL was not ailing or insolvent.

96. According to Bristol, these failures carried that legal consequence because the question of whether CIAL was ailing or insolvent was:
- (1) Central to the subsidy options open to the Respondent, given Bristol's Ground 2 argument that sections 19 and 20 provide the exclusive means by which the Act permits subsidies to be given to enterprises which are ailing or insolvent.
  - (2) An important context for the proper consideration of the Principles, and in particular the value for money of the Subsidy.
97. There was a passage in Bristol's skeleton argument which suggested something less than an exclusive regime under sections 19 and 20 for ailing or insolvent enterprises, by reference to an inquiry into the purpose of the subsidy. However, Mr West KC confirmed in oral argument that Bristol's position was that sections 19 and 20 were the only routes open to a public authority where the beneficiary of the subsidy was ailing or insolvent.
98. The rationale for this position was said to be that, construing the Act as a whole, Parliament's intention was to prevent public authorities propping up failing enterprises and distorting competition for other enterprises who might be harmed as a result. If subsidies to such enterprises were not restricted to rescue and restructuring, then public authorities could side-step the protection which sections 19 and 20 provide for other market participants. That would undermine the controls on grants of subsidies which the Act set out to provide.
99. Given this position, Bristol submitted that the assessment of CIAL's financial position should have been central to the Respondent's analysis of its proposed subsidy, and hence the failure to investigate the issue, and the incorrect conclusion reached amounted to reviewable errors by the Respondent.
100. In its supplemental submissions about the scheme of the Act, Bristol noted that the provisions in Chapter 1 of Part 2 of the Act are universally applicable to any subsidy given under the Act. Chapter 2 of Part 2 then contains specific rules which must be followed in special cases, which fall into three categories:

general prohibitions; ailing or insolvent enterprises; and other specific prohibitions. Bristol argued that all three categories dealt with subsidies which also had to comply with section 12 and conform with the Principles in order to be lawful under the Act.

101. As a consequence, Bristol submitted that sections 19 and 20 cannot be alternative routes to a subsidy permitted under the Act, but must be seen as imposing additional requirements to apply where a subsidy which complied with section 12 and the Principles was given to an ailing or insolvent enterprise. Bristol submitted that this confirmed that there is a bespoke regime for all ailing or insolvent enterprises.
102. Bristol also relied on the wording of sections 21 to 23, which contemplate restructuring (where an enterprise remains in the market) and liquidating (where an enterprise exits in an orderly manner). Bristol submitted that it could not sensibly be contended that enterprises in either case could receive a subsidy for any other purpose. These sections must be interpreted consistently with sections 19 and 20, which confirmed Bristol's argument that there was a bespoke and unique regime for subsidies to ailing or insolvent enterprises.
103. In relation to EU practice and the TCA, Bristol submitted that "undertakings in difficulty" may only receive EU State aid for rescuing and restructuring purposes. The TCA was designed to preserve an open and level playing field for subsidies and the obligations of the UK under the TCA and the Act should maintain that consistency. The inclusion of the concept of an enterprise going out of business in the short to medium term without the subsidy was part of the means by which that consistency was achieved.
104. In relation to the relevance of Hansard materials, Bristol submitted that the Tribunal was entitled to look at Parliamentary materials in order to supply context or identify the issue at which legislation is aimed. Bristol said that the Hansard material available illustrated the desire to address the mischief of propping up failing enterprises, which was consistent with Bristol's interpretation of the Act. Bristol also said that the Hansard extracts confirmed the intention that assessing the short to medium term prospects of an enterprise

was to widen the ambit of ailing or insolvent to something closer to EU practice, although it recognised the possibility that the EU and UK regimes might not be precisely aligned.

105. Turning to Ground 3, Bristol’s secondary case (if it were to fail on Grounds 1 and 2) was that the Respondent failed in a number of respects properly to apply many of the Principles.
106. In relation to Principle A, Bristol submitted that the Assessment wrongly identified the purpose of the Subsidy as addressing the identified equity issues by growing the regional activity associated with CIAL and maximising the potential agglomeration effects linked to wider aviation and aerospace sectors. Instead, Bristol said that the real purpose, as disclosed by contemporaneous documents, was to preserve the existence of an airport in Wales and (in significant part) to fund the development of LCCs. Bristol relied on the 2023 Oxera Report, which advised that it was unlikely that the subsidy under consideration at that time would comply with Principle A.
107. In relation to Principle E, Bristol submitted that the Respondent had not properly considered either the options of sale of CIAL or a subsidised loan, and had incorrectly analysed the option of rescue and restructuring under sections 19 and 20. Given that the Respondent identified the Subsidy as the only option, it could not have complied with the requirement in Principle E that the Subsidy be the most appropriate instrument to achieve the policy objective. Bristol submitted that there was no, or no adequate, consideration given to alternative mechanisms to achieve the “purported equity objective”. Bristol also argued that the financial position of CIAL was relevant to Principle E, as the Subsidy could be wasted if CIAL ceased to trade. The Respondent had not addressed that issue.
108. In relation to Principle C, Bristol submitted that:
  - (1) The increased activity by LCCs contemplated by Package 2 would largely serve outbound routes, which would not contribute to the achievement of the equity objective. While the Respondent recognised in the Assessment that outbound leisure tourism could represent a drain

rather than a benefit to the Welsh economy, it did not go on to consider the implications of that and treated this element of Package 2 as supporting the equity objective, which was irrational.

- (2) The Respondent failed to conduct any analysis of whether the proposed route development activities contemplated by Package 2 would comply with the CMO Principle. Bristol relied on calculations of net (negative) aeronautical revenue and projections of CIAL's overall financial position to submit that the investment would be sufficiently disadvantageous such that no rational private operator would undertake it. The Respondent therefore failed to take into account relevant considerations which informed the likelihood of CIAL being able to proceed with the route development incentives, which was irrational.
- (3) The Respondent's assessment of the purported ability of the Subsidy to precipitate a change of behaviour gave no consideration to CIAL's historic failure to sustain new routes and /or existing airline operations (Qatar Airways and Flybe in particular), evidence of the lack of longevity of routes created in Scotland and Northern Ireland under route development incentive schemes and structural changes in the market which adversely affect regional airports. Bristol relied on the witness statement of Jonathan Naylor who provided data and factual material on these subjects. The failure to take into account these relevant considerations was said to be irrational.
- (4) The Respondent accepted CIAL's forecasts in relation to passenger numbers and the level of financial assistance it needed despite deficiencies in that material. It was said to be so lacking in detail or explanation that reliance on it was irrational.

109. In relation to Principles B and F, Bristol submitted that:

- (1) The LCC element of Package 2 of the Subsidy was disproportionately large, given the lack of contribution to the equity objective, and would

create a significant distortive effect. This was said to be irrational on the part of the Respondent.

- (2) The funds allocated to route carrier development as a whole were disproportionate, given the evidence from other initiatives which show a limited return on investment. This was said to be irrational on the part of the Respondent.
- (3) The Assessment failed to take into account relevant matters and considered irrelevant matters by not finding a distortive effect on Bristol from Package 2. The Respondent was said to have misunderstood the capacity constraints at Bristol airport, to have ignored contrary information in Bristol's Masterplan consultation document published in November 2024 and to have disregarded the history of Qatar Airways ceasing to operate from Cardiff, while maintaining routes to other UK airports. These matters were said to have involved material errors of fact and were said to amount to irrationality on the part of the Respondent.
- (4) The Assessment relied on advice from Altair which contained obvious flaws and material errors of fact in relation to the assessment of the distortive impact arising from Package 2, including the assertion that CIAL was entitled to a "fair share" of passenger traffic originating in the South Wales geographic area. Requirements in the Grant Agreement for ongoing evaluation would be too late to prevent distortive impacts. The Respondent had therefore made material errors of fact and there was irrationality in the making of the Decision.
- (5) The reliance by the Respondent on the requirement in the Grant Agreement that air route incentives would only be granted on CMO terms was misconceived as there was no explanation of how it would be possible to derive a benchmark to make such a determination. In any event, the air route incentives would ultimately be funded by the Subsidy, so would be capable of leading to over-compensation, contrary to the Respondent's views. This amounted to a failure to take into account relevant considerations, or taking into account relevant

considerations but reaching a conclusion not rationally open to the Respondent.

110. In relation to Principle G, Bristol asserted that the Respondent had underestimated the harm the Subsidy would cause to Bristol, because the balancing exercise required under Principle G was skewed by reliance on unrealistic forecasts in the face of historical underperformance and an incorrect understanding of the distortive effects of the Subsidy. There was also an error in the assessment of the distortive effect of a new airline operating a particular route when other airlines already operated from the same destination to the UK. Once again, this was said to amount to a failure to take into account relevant considerations, or taking into account relevant considerations and reaching a conclusion not rationally open to the Respondent.

111. Turning to Ground 4, Bristol's argument was that section 28 of the Act provides a bespoke regime for any subsidy to be provided to airlines for the operation of air services. No consideration had been given by the Respondent to this fact and that has resulted in both a breach of the Respondent's duty to make proper inquiry (the Tameside duty) and a misdirection in law. On Bristol's case, it was not sufficient for the Respondent to meet this point by simply saying that the incentives to airlines would be on CMO terms, as that would not be possible to establish and, in any event, would permit form to triumph over substance. Section 28 should be read as precluding the approach taken by the Respondent as a matter of law, unless the conditions in that section were met (which was not considered by the Respondent, let alone advanced by way of defence).

**(2) The Respondent's case**

112. The Respondent suggested that it was logical to address Ground 2 as the first stage of its argument. It submitted that the Act permits the grant of subsidies to ailing or insolvent enterprises as long as the purpose of the subsidy is not rescue or restructuring, in which case sections 19 and 20 would not apply.

113. The Respondent submitted that this was different from the approach taken to State aid in the European Union, where, as a matter of European Commission

practice, State aid to enterprises in difficulty would not be cleared unless specific criteria were fulfilled. It was clear from the drafting of the Act, which followed the wording of Article 367 of the TCA, that the Act does not take the same approach (which it could and would have done expressly if that was the intention).

114. That position was said to be supported by the DBT Guidance, which states in terms that there is no general prohibition on giving subsidies to ailing or insolvent enterprises, save for the specific prohibition on granting rescue or restructuring subsidies to such enterprises.
115. The Respondent submits that there are good policy reasons why the Act has taken a different approach from the EU, as otherwise it would be difficult to provide subsidies at scale across a financially stressed market (as was required during the Covid pandemic). It was not correct to say that this interpretation would encourage avoidance, as any subsidy would have to satisfy the substantive and procedural requirements of the Act, and would therefore be subject to scrutiny and potential challenge.
116. In its supplemental submissions on this point, the Respondent noted that the approach under EU State aid law may provide assistance in interpreting the Act, but where there are differences between EU law and the Act then this can also be instructive. In this case, there were differences between the EU's "undertaking in difficulty" test and the test set out in the Act, including the ailing or insolvent element of that, with the latter taking a narrower approach of the enterprises it could apply to.
117. In relation to the scheme of the Act, the Respondent's supplemental submissions pointed to the difference in wording in sections 19 and 20, which prohibit subsidies for a particular purpose, and section 22, which prohibits subsidies to certain entities. This demonstrates a deliberate use of the word "for" in sections 19 and 20 to focus on the purpose of the subsidy.
118. The Respondent answered the third question by submitting that it was neither necessary nor appropriate to look at Hansard material recording Parliamentary

debates as the plain wording of sections 19 and 20 was clear and the other conditions for taking such material into account, as set out in *Pepper v Hart* [1993] AC 593 at p. 640, were not met.

119. Overall, the Respondent submitted that there was no need, in respect of Ground 1, for the Respondent to turn its mind to whether CIAL was ailing or insolvent, other than to consider a rescue and restructuring subsidy as a potential route for support (which it did, discarding it as a viable option). The concept of “ailing or insolvent” was simply not otherwise relevant to the assessment of the Subsidy and the compliance of that with the provisions of the Act (that is, the relevant provisions excluding sections 19 and 20).
120. If the Respondent was wrong in its argument about Ground 2, it submitted that the Assessment was correct in its consideration of whether CIAL was ailing or insolvent, and its conclusion that it was not. That is because CIAL’s financial position was secure after the provision of the ESCF, which was designed to ensure that CIAL could remain fully operational and compliant with regulatory obligations, irrespective of progress in arranging a subsidy, for a three year period from November 2024 (putting the question outside any reasonable interpretation of “short or medium term”).
121. There was also no basis, according to the Respondent, to assume that the ESCF was not granted in accordance with the CMO Principle. It was also not material that the ESCF was linked to the provision of the Subsidy. That was a natural linkage and, as a simple matter of fact, the ESCF had the effect of removing any question of CIAL being ailing or insolvent.
122. In relation to Ground 3, the Respondent submitted that:
  - (1) Principle A: given that Bristol accepts that the policy objective identified in the Assessment was capable of complying with Principle A, there is no basis for a challenge that it did not so comply.
  - (2) Principle E: it is not correct that the Respondent was required to exhaust all other avenues before adopting the approach of the Subsidy. The

Respondent was rationally able to form a view on whether other options were conducive to the policy objective without actually pursuing those options. Bristol was incorrect in its argument that a single option cannot be the “most appropriate instrument”. In relation to the question of financial stability of CIAL, there was no question that it was solvent once the Subsidy was granted, so this did not arise as an issue for further consideration.

- (3) Principle C: While it is correct that outbound tourism is likely to comprise the majority of passenger traffic for LCCs, the Assessment did properly consider the impact of that. The rationale for including incentives to LCCs was to increase passenger traffic, which improved the economics of the airport generally. Bristol’s use of aeronautical revenue gave only a partial view of the economics, as it was also necessary to consider non-aeronautical revenue, which was an important factor and which was the basis on which the Respondent considered the Subsidy.

The evidence concerning incentives in Scotland and Northern Ireland and the history of routes at Cardiff related to a different time period and was not a reliable guide. The Respondent gave careful consideration to the need for incentive payments, the current market practice for such payments and the potential for route failure. It had taken expert advice on these issues. Bristol’s arguments about the level of scrutiny given to passenger and financial forecasts illustrated a difference in view rather than establishing that no rational authority would have relied on them. It is obvious that the Subsidy will result in a change in economic behaviour by CIAL.

- (4) Principles B and F: Proportionality should be assessed by reference to the policy objective, and not the size of the Subsidy relative to the beneficiary. The Respondent rationally concluded that the Subsidy was the most proportionate means of achieving the policy objective and was designed to minimise negative effects. The criticisms of the assessment of Bristol’s strategy are misplaced, as the conclusions reached in the

Assessment do properly reflect the essence of the published material at the time.

(5) Principle G: It is clear from the Assessment that the Respondent did conduct a balancing exercise which took into account the potential for negative effects on Bristol. This is an inherently uncertain exercise where the Respondent benefits from a wide margin of appreciation. Bristol has failed to demonstrate that no rational public authority would have reached the same conclusion.

123. In relation to Ground 4, the Respondent's submission was simply that the Subsidy was not a direct payment to air carriers caught by section 28. It is correct that CIAL is expected to make direct payments to air carriers by way of Package 2, but those are required to be on CMO terms, so they could not be subsidies under the Act (because of the operation of section 3(2)). It is also possible that CIAL will not strike deals with airlines for the total value of Package 2.

## **F. ANALYSIS**

### **(1) Introductory observations**

124. There was some discussion at the hearing about whether it was preferable to consider Bristol's Ground 1 before its Ground 2, or the other way round. We think it is helpful to start by considering the proper interpretation of sections 19 and 20 (which is essentially a Ground 2 issue) before then analysing what the Respondent considered in making the Decision (which is a mixture of Ground 1 and Ground 2 issues).

### **(2) Interpretation of sections 19 and 20 of the Act**

125. We start with the wording of section 19<sup>7</sup>. The key part of the section is subsection (1), which applies the relevant prohibition, unless certain conditions

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<sup>7</sup> We will focus on section 19 for the purposes of this analysis, but it would apply equally to section 20.

are met. The prohibition is expressed as applying to “[a] *subsidy for rescuing an ailing or insolvent enterprise*”.

126. On the face of the subsection, therefore, the prohibition is limited to a particular type of subsidy (one for rescue). The prohibition is therefore determined by reference to the purpose of the subsidy (that is, what the subsidy is for). It does not purport to apply to a broader category of subsidy. That is essentially the Respondent’s case on this point and we agree that the natural and ordinary meaning of the words in section 19 supports that position.
127. Looking at the Act more broadly for the purpose of identifying context, it defines the concept and extent of a subsidy in Part 1 and then, in Part 2, sets out requirements for the purpose of controlling the grant of subsidies. This is achieved first by the application of Principles which must be complied with in making a subsidy (the Principles in section 12 and certain other principles in section 13), and then by a series of prohibitions of types of subsidy.
128. Each of the prohibitions falling under the heading “*General Prohibitions*”, i.e. sections 15 to 18 describe a feature which, if included in the design of any subsidy, means that the subsidy is prohibited, subject to certain conditions. For example, in section 15 the feature is guarantees which are unlimited. In sections 16 and 17, the feature is any contingency relating to export performance or the treatment of domestic goods and services compared with imported ones.
129. The next group of prohibitions is headed “*Ailing or insolvent enterprises*” and includes sections 19 and 20. There are also provisions in this group concerning subsidies to deposit takers or insurance companies:
  - (1) Section 21 uses the same language as sections 19 and 20, with the purpose of the subsidy apparently determining whether the prohibition applies.
  - (2) Section 22 takes a different approach. The prohibition applies to any subsidy to an enterprise with specific characteristics (deposit takers or

insurance companies which cannot return to long term viability) – in other words, by reference to their identity.

130. The final group of prohibitions is under the heading “Other specific prohibitions and requirements”. In two of these (sections 27 and 28) the prohibition is again applied by reference to the identity of the beneficiary. The final prohibition (in section 29) is drafted in quite a different way and provides no assistance in this exercise. The Act therefore uses different language in different sections to apply the prohibitions by reference to the features of a subsidy (the general prohibitions), the identity of the beneficiary of a subsidy (the other specific prohibitions) or, in the case of ailing or insolvent enterprises, the purpose of a subsidy, save for the case of deposit takers or insurance companies which are destined for an insolvency process, in which case the identity of the enterprise is identified as the basis for the prohibition.
131. It seems to us that this difference in approach is important. It demonstrates that the choice of language is deliberate. It also differentiates between circumstances where the purpose of the subsidy to an ailing or insolvent enterprise is sufficient to apply the prohibition (sections 19 to 21 inclusive) and where it is necessary to identify more specific characteristics, such as where the identity or type of enterprise (deposit taker or insurance company) is used to apply a further test (the extent to which it is ailing or insolvent) as a means of determining whether the prohibition applies (section 22).
132. Further, the obvious care with which the draftsman has approached the section on prohibitions overall suggests that, if the intention was to approach sections 19 and 20 by reference to the identity or other characteristics of the beneficiary, then that would have been made clear, as it has been in section 22. In other words, if the intent had been to include all subsidies to ailing or insolvent enterprises (as Bristol argues) then sections 19 and 20 could easily have done that, using the word “to” instead of the words “for rescuing” or “for restructuring”.
133. Bristol submits that the requirement that all subsidies comply with section 12 and sections 19 and 20 undermines the Respondent’s argument that it has a

choice of route to give a subsidy, which means that sections 19 and 20 must apply to all ailing or insolvent enterprises.

134. We agree that section 12, which requires a public authority to consider the Principles, applies to all subsidies given under the Act. The term “subsidy” is defined in section 2, and section 12 applies universally to subsidies, including those to which sections 19 and 20 also apply. That means that, for any subsidy to which sections 19 and 20 apply to be lawful, section 12 must also be complied with so that appropriate regard is given to the Principles.
135. However, we do not agree with Bristol that this necessarily means that sections 19 and 20 are the only routes for subsidies to ailing or insolvent enterprises. It seems open to a public authority to give a subsidy to an ailing or insolvent enterprise (1) under section 12 alone, where the purpose is not rescue or restructuring or (2) under section 12 and sections 19 and 20, where the purpose is rescuing or restructuring the enterprise.
136. That is because, on the plain words of sections 19 and 20 (and unlike other prohibitory sections such as section 22) it is necessary to consider the purpose of the subsidy as well as whether the beneficiary is ailing or insolvent.
137. Bristol’s argument does raise the question of what function the reference to ailing or insolvent enterprises adds to the analysis. It is obviously intended to be a factor of some significance, as reflected in the heading for this set of prohibitions, in the wording of each of the prohibitions themselves and by the provision of a separate definition in section 24.
138. We do not think it follows that this prominence given to “ailing or insolvent” overrides the plain meaning of the words in sections 19 and 20. The Act provides a regime in sections 19 to 23 for enterprises which meet the definition of “ailing or insolvent”, but that is not necessarily determinative of the application of a prohibition in any of these sections. In all of them, there are other conditions which, if met, permit a subsidy.

139. That applies even to sections 22 and 23, which (as we have already described) apply a prohibition by way of reference to the identity of the beneficiary (in combination with it being ailing or insolvent), rather than focusing on the purpose of the subsidy.
140. Instead, it seems that this set of prohibitions works on the basis that they are intended to apply just to ailing or insolvent enterprises (as distinct from all enterprises) and then only where certain other conditions are satisfied. We see nothing unusual or untoward about such an approach.
141. We also note that sections 21 to 23 apply to all ailing or insolvent deposit takers or insurance companies, which explains why (contrary to Bristol’s submission) these sections are not required to be approached in a consistent way with sections 19 and 20, which only apply where the purpose is rescue or restructuring of an ailing or insolvent enterprise.
142. We should also add that there is no definition of “rescue” or “restructuring” in the Act. They are familiar words with well-defined ordinary meanings, which may explain that position.
143. In summary on this question of interpretation, it is no doubt true that the Act seeks to regulate the use of subsidies for rescuing and restructuring ailing or insolvent enterprises. That much is obvious from the terms of sections 19 and 20 themselves. However, Bristol’s argument apparently seeks to give that consideration primacy over all other conditions which regulate when a subsidy might be granted or prohibited. We do not think that the overall scheme of the Act supports that position.
144. Instead, it seems to us that the overall scheme of the Act is to control subsidies by reference to compliance with the Principles, with some ancillary prohibitions (of which sections 19 and 20 are one example) which apply in carefully specified circumstances. There seems to be no reason to question the apparent position that Parliament intended to permit an ailing or insolvent enterprise to receive a subsidy that complies with the Principles, in circumstances where

sections 19 and 20 do not apply because the subsidy does not have the purpose specified in those sections .

145. We therefore consider that the scheme of the Act supports the conclusion that, as a matter of construction, the prohibition in sections 19 and 20 is limited to a category of subsidies with a particular purpose, namely those for rescue or restructuring. If that is not the purpose of the subsidy (for example, if it is for a policy objective regarding an identified equity rationale) then sections 19 and 20 do not apply.

146. Having conducted that analysis, we have considered what further aids to interpretation are available. There seems to be nothing further in the Act which assists (and the parties did not suggest otherwise). There are however three other sources of potential guidance available to us:

(1) The background to the Act, in the form of the TCA as compared with the approach historically taken in the European Union in relation to State aid to financially troubled enterprises. This is relevant both to the context of the Act and the question of conformity with international agreements.

(2) Reports of Parliamentary debates about the Act, as recorded in Hansard.

(3) The DBT Guidance.

**(a) *The TCA and the approach in the EU***

147. Bristol points to the expressed intent in recital 9 of the TCA to create a “level playing field” and submits that the TCA should be read consistently with that (which would not be the case if the UK was allowed to depart materially from the EU approach). That leads to an assumption that the TCA replicates the EU approach (which essentially treats all troubled companies as an exception to general State aid rules). The Act should be construed in a consistent way.

148. The Respondent submits that the TCA represents a deliberate decision to move away from the historic approach in the EU, where European Commission practice was consistently to decline to clear State aid to undertakings in financial difficulty, despite no specific reference to that in Articles 107 and 108 Treaty on the Functioning of the European Union, being the articles which provide for the prohibition, compatibility and notification of State aid in the EU.
149. The GBER, which exempts various forms of aid (including aid for regional airports) from the notification requirements under Article 108, expressly excludes from its scope aid granted to “undertakings in difficulty”. Such undertakings are defined by reference to a variety of circumstances, which overall seem materially broader in their scope than the definition of “ailing or insolvent” in the Act.
150. The GBER says, in Recital (14), that aid granted to undertakings in difficulty should be assessed under the RRG. This is reflected in article 1(4)(c) of the GBER which states the GBER shall not apply to aid to undertakings in difficulties, subject to an exception regarding natural disasters. Point 18 of the RRG explains that the Commission will apply the guidelines to aid for all undertakings in difficulty, subject to some specified exceptions. Point 23 of the RRG says:
- “Given that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. Consequently, the Commission considers that aid to undertakings in difficulty may contribute to the development of economic activities without adversely affecting trade to an extent contrary to the common interest only if the conditions set out in these guidelines are met, even if such aid is granted in accordance with a scheme that has already been authorised.”
151. It will be immediately clear that this approach is contrary to the approach which the Respondent says is adopted by the Act, and which we agree is apparent from the wording and scheme of the Act, as discussed above.
152. The Respondent deals with this point by referring to Article 367(3) of the TCA. This specifies the prohibitions which the UK has agreed to put into effect under the TCA and provides that: “*Subsidies for restructuring an ailing or insolvent*

*economic actor without the economic actor having prepared a credible restructuring plan shall be prohibited*". Various conditions (which are reflected in the Act) follow.

153. The Respondent submits that this wording (which effectively replicates the key wording in the Act for present purposes) obviously represents a deliberate departure from the approach historically taken to State aid, as described above. Mr Peretz KC suggested a number of reasons why that might have been the case (some of which related to lessons learnt from Covid). In other words, Mr Peretz KC was inviting us to look at the context of the TCA as an aid to interpretation of Article 367(3), which is in the same terms as sections 19 and 20.
154. However, as sections 19 and 20 follow the wording of Article 367(3) in referring (in the natural and ordinary meaning of the relevant words) to the purpose of the subsidy, Article 367(3) itself sheds little extra light upon the construction of those sections, beyond the application of the same approach to determining the plain meaning of the words.
155. Looking at the approach which is apparent from this plain wording and at the EU approach set out in the GBER and RRG, there does seem to be a difference at least to this extent: the approach taken by the EU is to focus on the status of the beneficiary of aid, channelling such undertakings into a single, highly circumscribed route. In that sense, the financial condition of the beneficiary clearly determines the only possible route to State aid.
156. However, as already noted, Article 367(3) of the TCA (like sections 19 and 20 of the Act) seems to be structured differently, with the initial focus being on the aid category (rescue and restructuring subsidies) and then defining the class of beneficiaries (those who are ailing or insolvent).
157. The section of the TCA dealing with subsidies commences with general provisions in Article 355, in which the parties agree that trade and investment between the UK and the EU "*require conditions that ensure a level playing field for open and fair competition between the Parties*", thereby repeating the point from recital 9 relied on by Bristol. Article 355 then goes on to say:

“The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title”.

158. There is therefore no presumption that the approach of the EU to State aid will be exactly replicated in the Act. We also think it is a reasonable inference that, if the parties to the TCA wished to replicate the EU approach, as set out in the GBER and the RRG, they could easily have done so in terms that would have left no doubt about the matter.
159. It does therefore seem that there has been a deliberate decision in the TCA to allow for a different approach, which focuses on the purpose of the subsidy rather than identity of the beneficiary. That conclusion is however dependent on our construction of the plain words of sections 19 and 20 and Article 367(3), rather than anything more express in the TCA or in the context surrounding it. We therefore treat it as limited support for our interpretation of the plain words.

**(b) *Hansard***

160. We asked the parties, at the hearing, to confirm whether they had been able to locate any material in Hansard that might assist with interpretation. They confirmed that they had not been able to do so. We were therefore surprised to find that the record of the Public Bill Committee’s discussion of the Subsidy Control Bill on 28 October 2021 included the following observations from Paul Scully MP, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy:

“The purpose of clauses 19 and 20 is to prevent aimless bail-outs of failing enterprises, while allowing public authorities to provide temporary rescue support for enterprises that it is in the public interest to rescue and restructure. Those subsidies should not be undertaken lightly, in order to maintain a competitive free-market economy and facilitate compliance with our international obligations, including those in the TCA with the EU.[...]”<sup>8</sup>

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<sup>8</sup> Public Bill Committee, Subsidy Control Bill (Fourth sitting), 28 October 2021, col 136.

And

“The clause [referring to what is now section 24] defines “ailing or insolvent” in relation to the giving of rescue and recovery subsidies to deposit takers, insurance companies and enterprises. The definition of ailing or insolvent in this Bill incorporates both domestic and international terminology. It combines the existing concept of insolvency in UK law with the wider concept of ailing or insolvent agreed in the TCA. The definition is compliant with our international commitments and has a strong basis in British law. Subsections (1)(b) and (c) use the existing insolvency test in the Insolvency Act 1986. Subsection 1(a) uses the TCA definition of “ailing or insolvent”. An enterprise being unable to pay its debts or the value of its assets being less than its liabilities are British tests for declaring an enterprise “insolvent”. Subsection 1(a) builds on this by extending the tests to include enterprises that are “ailing or insolvent”—those which would go out of business in the short to medium term without subsidies<sup>9</sup>.”

And

“The Bill is clear that an ailing or insolvent enterprise is one that would almost [certainly] go out of business in the short to medium term without subsidies. Importantly, this definition applies only to the giving of rescue and recovery subsidies. I hope my opening remarks help the hon. Gentleman’s understanding of where we go in some of the definitions. Just to repeat: subsection (2) allows the Secretary of State to make regulations on what is meant by “would almost certainly go out of business in the short to medium term without subsidies”.

While the definition of insolvency reflects existing domestic law, “ailing” has no such domestic definition. Therefore, there is allowance for the Secretary of State to make further provision on the meaning of “ailing”, should that be necessary. We went down that route because the EU’s “undertaking in difficulty” test is disliked by stakeholders, is highly prescriptive and in some cases prevented the giving of subsidies to viable businesses with a longer route to market and profitability. These were businesses such as medical technology firms and start-ups. The definition that we are using has a much more restricted application, but where it does apply it provides greater flexibility while also preventing the use of subsidies to bail out unsustainable companies.<sup>10</sup>”

161. In its supplemental submissions, the Respondent has discouraged us from looking at this material, because it says it does not meet the conditions in *Pepper v Hart* which would allow us to do so. While we accept that analysis, we also agree with Bristol that, notwithstanding *Pepper v Hart*, we are permitted to look at Hansard to identify the mischief at which the relevant legislation is aimed. See *Presidential Insurance Co Ltd v Resha St Hill* [2012] UKPC 33.

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<sup>9</sup> Ibid, col 138.

<sup>10</sup> Ibid, col 139.

162. The observations quoted above provide two relevant indications of the context to the Act. First, there was a deliberate decision to move to a regime that differed in certain respects from EU State aid law (the use of “ailing or insolvent” being the most obvious), owing to perceived problems with the EU approach. That is consistent with our view that the TCA allows for a different approach from that taken historically under EU State aid law and is contrary to Bristol’s submission that the TCA must be taken to have replicated the EU approach. Secondly, the observation that the definition of ‘ailing or insolvent’ applies only to the giving of rescue and recovery subsidies seems to support our reading of the wording and overall scheme of the Act.
163. We advance the second point with some caution, as it may be said to go beyond providing an indication of the mischief intended to be addressed (as permitted by *Presidential Insurance v Resha St Hill*) and to stray into using the material as an aid to construction (which is not permitted unless the conditions in *Pepper v Hart* are met). That distinction between those two purposes is not an easy one to draw in practice, particularly where the material in question touches on both background and potential indications of legislative intent. For that reason, we attach only limited significance to the point. At most, it serves to reinforce a conclusion we have already reached from the wording and context of sections 19 and 20 themselves.
164. Bristol further submits that the extracts above demonstrate an intent to deal with the mischief of propping failing enterprises. That is plain from the beginning of the quote, but we do not think it adds materially to the analysis, as the relevant question is how the Act sets about doing that (in other words, what is the framework by which that intent is implemented).

**(c) *The DBT Guidance***

165. The DBT Guidance says at [5.38] that (emphasis added):

“5.38 The rules on rescue and restructuring subsidies are most likely to be directly relevant where an enterprise is at imminent risk of failure and approaches a public authority for financial assistance specifically to avert that failure. There is no wider prohibition against giving subsidies that are not rescue or restructuring subsidies to ailing or insolvent enterprises. For example,

an access to finance subsidy scheme open to small businesses generally does not constitute a rescue and restructuring subsidy scheme even if one or more recipients (among many) may be ailing or insolvent. However, public authorities may wish to consider whether ailing and insolvent enterprises should be excluded from eligibility for subsidies and subsidy schemes with regard to value for money (in the event that the enterprise were to face increasing financial difficulties or fail and the benefits of the subsidy were not fully realised).”

166. Unsurprisingly, the Respondent submitted that this passage (and especially the underlined words) was consistent with its position and therefore contradicted Bristol’s position.
167. Bristol submitted that the DBT Guidance had to yield to the specific words of the Act, which could not contemplate sections 19 and 20 being put to one side in this way. It also provided us, at the hearing, with a flow chart from page 88 of the DBT Guidance which was headed “Rescue and restructuring subsidies process diagram” and indicated the routes open to rescue and restructure subsidies once an enterprise was ailing or insolvent. This was said to support the argument that sections 19 and 20 were the bespoke and unique code for all subsidies to ailing or insolvent enterprises.
168. Mr West KC also advanced an argument at the hearing about section 30(1), which he said excluded subsidy schemes (and therefore the example in the middle of [5.38]) from the application of sections 19 and 20.
169. We agree with the Respondent that [5.38] is consistent with its position. However, the statement (underlined by us) about the scope of the prohibition is an assertion, rather than providing any reasoning which we might or might not find persuasive.
170. The example given of a subsidy scheme open to small businesses is of more use, as it provides a rationale for an interpretation that sections 19 and 20 do not prevent other subsidy awards to ailing or insolvent enterprises. The rationale is that a subsidy scheme to provide financial support to small businesses (such as the schemes launched during Covid) would be difficult to administer if it was necessary to identify which of the businesses was ailing or insolvent and should

therefore be excluded from the scheme. We do find this reasoning persuasive, and it supports our interpretation of the plain words of the sections.

171. We also note that Bristol's argument about section 30(1) is clearly wrong. Section 30(2) applies all the prohibitions to schemes, so there is no question that schemes are potentially subject to sections 19 and 20.
172. In relation to the process diagram, this tells us nothing about whether other subsidies might be permitted for ailing or insolvent enterprises as it simply shows the process to be followed when sections 19 and 20 do apply.
173. We therefore find the DBT Guidance to be of some limited persuasive influence in supporting our conclusions about the interpretation of sections 19 and 20. That influence reinforces and supports our view of the plain words of those sections and their context.

***(d) Conclusions on the interpretation of sections 19 and 20***

174. Our reading of the wording of sections 19 and 20 and the scheme of the Act as a whole is that sections 19 and 20 apply when the proposed purpose of a subsidy is (1) to rescue or restructure an enterprise and (2) where the enterprise is ailing or insolvent, as defined in the Act. These are cumulative conditions and both must be met in order for the sections to apply. As a consequence, a subsidy may lawfully be granted to an ailing or insolvent enterprise through other permitted routes in the Act where the purpose of the subsidy is not a rescue or restructuring. Against that background, we turn to the Respondent's assessment of CIAL's financial position.

**(3) Consideration of whether CIAL was ailing or insolvent**

175. We have found that it was open to the Respondent to make a subsidy to CIAL, in accordance with the Principles without following sections 19 and 20 if CIAL was not ailing or insolvent or the Subsidy was not for rescuing or restructuring. In this section we will examine the way in which the Respondent addressed the financial position of CIAL and the purpose of the Subsidy.

176. The Respondent did consider whether CIAL was ailing or insolvent for the purposes of deciding whether a rescue or restructuring under sections 19 and 20 was a potential option for granting a subsidy. This is plain from the top of page 73 of the Assessment, where it is said:

“As stated previously in Chapter 1, under the terms of the [Act], restructuring subsidy is a relevant term only in the case of businesses that are ‘ailing or insolvent’. As the Airport is a going concern that is actively looking to grow and invest, this description does not apply.”

177. It appears that the Respondent reached its conclusion that CIAL was not ailing or insolvent on the basis of the ESCF being in place and providing liquidity support to CIAL as at the date of the Decision. Bristol’s argument that we should somehow disregard the ESCF because it was not compliant with the CMO Principle or because it was inherently linked to the Subsidy lacks any proper basis. Our task is to consider the factual position absent the Subsidy, which was that CIAL had access to the ESCF. This is not a case where a counterfactual is being constructed with discretion about what should or should not be included. It is a simple assessment of the position without the Subsidy, which can most obviously be assessed in this case by looking at what the facts were the day before the Subsidy was granted.

178. We also see no basis on which we can sensibly assume that the ESCF was not compliant with the CMO Principle on the material before us. There has been no challenge under the Act to the provision of the ESCF. We do not have before us the full extent of material which would allow us to determine such a point. It would be unfair to the Respondent (who asserts that the ESCF was granted on a CMO Principle compliant basis) to make any finding about the legality of the ESCF under the Act.

179. Bristol also asserted that CIAL was ailing or insolvent despite the availability of the ESCF. It relied on extracts in a report by EY from December 2024, which discussed CIAL’s ‘going concern’ position after the following twelve to eighteen months and a material change in the short-term creditor position shown in CIAL’s accounts for the year ended 31 March 2025. In our view, these fall considerably short of showing that CIAL would, absent the Subsidy, almost certainly go out of business in the short or medium term.

180. The EY report gave no indication of the timeline in which they thought there might be going concern considerations, save to suggest that these would not arise in the next eighteen months. Even if medium term extends materially beyond eighteen months (which we express no view on), this material does not provide the level of certainty which section 24(1)(a) requires.
181. That applies even more so to the accounting treatment for short term creditors. The significance of this point was not fully explained by Bristol, but the suggestion was that it showed a need to manage liquidity and explained why the ESCF had not ever been drawn on. It seems to us there might be various reasons why this figure might change from year to year, without necessarily indicating a liquidity problem. One obvious reason is that drawings under the ESCF are subject to high interest charges, which CIAL may have wished to avoid in anticipation of the Subsidy. That is of course speculation on our part, and we advance it merely to illustrate that Bristol has not done enough to make the point relevant and credible.
182. In summary, the Respondent decided that CIAL was not ailing or insolvent. In those circumstances, that question was no longer material to the subsidy options which the Respondent was considering. Put simply, once sections 19 and 20 were no longer in consideration, ailing or insolvent ceased to be a useful reference point.
183. The financial position of the beneficiary can be a relevant factor for the purposes of assessing a proposed subsidy's compliance with the Principles. The extract from the DBT Guidance at [5.38], set out above, makes this point in the last sentence by noting that a failing entity might not be able to realise the benefits of the subsidy. The Respondent clearly constructed the subsidy to give CIAL the best possible chance of delivering the policy objective set out in the Assessment. One element of this is supporting CIAL to improve its financial performance (for example, by attracting new business). It is obvious from the Assessment that the Respondent considered the financial state of CIAL, including whether it was ailing or insolvent, as at the date of the Decision. We do not see any basis for a challenge to this approach on rationality grounds.

184. Finally, in relation to the purpose of the Subsidy, the Assessment described the specific policy objective of the Subsidy as addressing social and economic equity issues by growing economic activity associated with the airport. We have considered below, in relation to Bristol's Ground 3 challenge, the allegation that the purpose of the Subsidy was something other than was set out in the Assessment. We have concluded that is not the case.

**(a) *The Reasons Challenge***

185. Bristol advanced a separate argument under Ground 1 that the Respondent had failed to give any reasons for its determination that CIAL was not 'ailing or insolvent'. It submitted that, given the importance of the issue, the need to understand how that conclusion could be rationally justified, and the alleged impact of the Respondent's treatment of the matter on Bristol's interests, a duty to give reasons plainly arose. Reliance was placed on *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 WLR 1953 at [36], and it was submitted that the Decision was thereby vitiated by both procedural and substantive error.

186. This point was advanced only briefly, occupying a single sentence in the ANoA and a single sentence in Bristol's skeleton argument. We asked Mr West KC at the hearing whether he continued to pursue this alleged failure as a self-standing point of challenge; he confirmed that he did. However, he made no oral submissions on it at the hearing.

187. We do not consider the Respondent to be in breach of its duty to give reasons. That is because the Respondent's analysis, as set out at the top of page 73 of the Assessment (and quoted above) does explain why it thought CIAL was not ailing or insolvent – which was because it was thought to be a going concern.

188. The reasons obligation (as explained in *South Buckingham Council*) is a duty of adequacy, not elaboration: the question is whether the reasoning, read fairly and as a whole, enables the reader to understand why the decision maker reached its conclusion. The Decision makes clear the basis on which the Respondent proceeded. No further elaboration was required.

189. In any event, the alleged failure to give reasons does not come close to establishing procedural unfairness. Bristol has not identified any respect in which the absence of further reasoning impeded its ability to understand, address or challenge the Decision, nor has it shown how such an omission could have affected the outcome. Bristol has not suffered any substantial prejudice, which (as *South Buckingham Council* makes clear), is a prerequisite to relief under this head of challenge.

**(4) Application to Grounds 1 and 2**

190. It will be clear from our analysis above that the Respondent was not obliged to comply with sections 19 and 20 in relation to the Subsidy if it reasonably reached the conclusion that CIAL was not ailing or insolvent and/or the Subsidy was not for the purpose of rescuing or restructuring CIAL.

191. The Applicant's challenges hinge on the first of these conditions which is whether CIAL was ailing or insolvent, with this, (if answered in the affirmative), then determining (on the Applicant's construction of sections 19 and 20) that the subsidy was given for the purpose of a rescue or restructuring.

192. The Respondent did turn its mind to whether CIAL was ailing or insolvent and decided it was not, principally because of the liquidity support provided by the ESCF. It explained the reasons for that in satisfactory terms.

193. It cannot therefore be said that the Respondent has acted irrationally by concluding that CIAL was not ailing or insolvent, or that it failed to take adequate steps to satisfy itself about that issue.

194. Nor can it be said, in those circumstances, that the Respondent made an unlawful Subsidy by failing to comply with sections 19 and/or 20. It was in any event open to the Respondent to give the Subsidy without meeting the conditions in sections 19 and 20, if the Subsidy was given for a purpose other than a rescue or restructuring, which we have found was the position.

195. It follows that Bristol fails on both Grounds 1 and 2.

**(5) Ground 3 – compliance with the Principles**

196. By way of preliminary observation, there has been something of a “kitchen sink” approach by Bristol to this ground of challenge, with a wide range of points ranging from considerable detail to big picture. Many of the points are advanced in respect of more than one Principle, causing a degree of repetition and potential confusion. Even after the provision of the helpful table of challenges provided during the hearing, it has at times been difficult to identify precisely what the nature of the challenge is and on what basis.
197. We have however proceeded on the basis that the table is a complete summary of the challenges to compliance with the Principles, other than those relating to Principles A and E, which are dealt with separately.
198. For the most part, the challenges fail simply because they do not in substance illustrate any irrationality but rather illustrate a difference of opinion about the weight to be given to matters which were obviously the subject of consideration by the Respondent. That is not a proper basis on which to mount a challenge in judicial review proceedings. We will however deal with the detail of the challenges below, by reference again to the Principles to which they relate.

**(a) Principle A – policy objective**

199. Bristol’s argument that the policy objective was something other than is set out in the Assessment is in our view unsustainable. The policy objective is stated in the Assessment in clear terms, as follows:
- “The specific policy objective to address the equity issues evidenced and discussed below is to grow the regional economic activity associated with the Airport and maximising the potential agglomeration benefits linked with to [sic] the wider aviation and aerospace sectors in the region”.
200. This policy objective was considered by the SAU, which advised that: “...*the Assessment sets out in clear terms a policy objective that is narrowly focused on the development of the Airport and explains how this aligns with wider Welsh Government policies*”.

201. In its skeleton argument, Bristol expressed the view that the policy objective, as stated, was “*in principle capable of complying with Principle A*”. However, it maintained that an “*objective consideration*” of the contemporaneous documents indicated a different underlying policy objective, namely the preservation of the existence of Cardiff airport.
202. This seemed to suggest that the Respondent was either disingenuous or negligent in misdescribing the policy objective. It was not at all clear to us which of these was said to be the case. Whichever is the intended basis, it seems to us to be an unsustainable argument to make, on a judicial review basis, given the evidence of Mr Slade. He addressed the policy objective in both his first and second witness statements, making it plain that the policy objective was as stated in the Assessment, as described above. Bristol did not seek to cross examine Mr Slade and there is nothing arising from the documentation to justify rejecting his evidence on this point.
203. As far as contemporaneous documents are concerned, Bristol appeared to rely on extracts from these (including the 2023 Oxera report and the Assessment itself) to suggest that the real concern of the Respondent was to ensure the survival of Cardiff Airport, for reasons which were more related to external perceptions of Wales as a nation.
204. We agree with the Respondent that the Oxera Report is of little assistance in this regard, as it was considering a different subsidy proposal at an earlier stage of the process of evaluating subsidy options. There were significant differences between the policy rationale set out in the Assessment and that which was discussed by Oxera in its report.
205. As for the objective of preserving the airport, it seems to us that the airport’s existence is inextricably bound up with the achievement of the policy objective as stated in the Assessment and is entirely consistent with the fulfilment of the equity rationale. The airport was described in [2.1] of the Assessment as “*an essential element of Wales’s economic infrastructure*” which could be “*developed as a means to help remedy economic inequality*”.

206. While the Assessment did indeed talk about the importance of Wales having a strong “*presence on the world stage*”, that was in the context of the airport facilitating major cultural, entertainment and sporting events, which were linked (quantitatively and qualitatively) to economic benefits. It is also plain from the Assessment that these aspects were only part (and far from the central part) of the means by which the equity rationale was to be satisfied.
207. It therefore proves nothing to identify the preservation of the airport as an important consideration in relation to the policy objective, as it was clearly central to achieving that, but only in a way that was consistent with the policy objective as articulated in the Assessment.
208. It is perhaps the case that the development of the case for the Subsidy started with the recognition that CIAL needed more financial support to be stable on an ongoing basis. In that sense, it may be fair to say that the objective of the Respondent was shaped by a concern to preserve the airport. However, given that the Respondent has developed a legitimate policy objective which meets the requirements of Principle A, there would need to be compelling evidence that this was not the true objective to undermine that. We do not see that case is made. As for Bristol’s other argument that the policy objective was (at least in significant part) to fund LCCs, we can see no basis on which the intention to incentivise this form of air route could be said to be the main policy objective underlying the Subsidy. The incentives for LCCs identified in Package 2 form only a relatively small part of the overall Subsidy and served a particular, and expressly limited, purpose. Nothing in the evidence suggests that these measures displaced, or were intended to displace, the broader policy objectives identified by the Respondent. In our view, this argument is without merit, and particularly so in the context of judicial review proceedings.
209. Bristol’s challenge under Principle A therefore fails.

**(b) Principle E – appropriateness**

210. As we understand it, Bristol’s argument in relation to Principle E is that the Respondent considered various options for providing finance to CIAL, but

failed to do so properly, so that there cannot be said to have been adequate consideration of other options, as required by Principle E.

211. There was therefore a recognition that the Respondent had addressed the various options open to it (as is indeed plain from the Assessment, which sets them out in some detail). The complaint is that the Respondent has somehow conducted that analysis so badly that the overall assessment required by Principle E is so flawed as to be irrational.
212. However, there was a conspicuous absence of any evidence, or even any detailed analysis, to support this argument. Aside from bare assertions in the pleadings that the Respondent did not carry out sufficient investigations and incorrectly understood certain legal points (none of which are consequential), the only discernible criticisms of any substance were that:
- (1) The Respondent ignored a recommendation from EY in December 2024 that the option of sale to a private investor should be explored further.
  - (2) The Respondent placed too much weight on the views of CIAL as to the viability of certain options.
213. Section 1 of the Assessment explains that involving private investors at that time was thought to be premature. An advice to the Respondent of 28 March 2025 (accompanying the Assessment) set out the options available to Ministers, one of which was identified as divestment of the airport. The advice refers to the EY recommendation and sets out various reasons why divestment was not recommended at that stage. Mr Slade explains the position in detail in [96] of his first statement. It is therefore clear that the option of divestment was considered and rejected for apparently plausible reasons. Whatever Bristol may think of those reasons, it has come nowhere close to identifying why the advice, as accepted, was irrational.
214. As for the weight to be given to CIAL's views, it is clear from section 3 of the Assessment that the Respondent was simply recognising that some options (such as CIAL assuming further debt obligations) would be dependent on the

agreement of CIAL’s directors, which would be unlikely to be forthcoming. That seems to us to recognise the reality of the position and so can hardly be said to have been irrational.

215. Bristol’s challenge under Principle E therefore fails.

*(c) Principle C – change in economic behaviour*

216. Bristol’s challenge under Principle C concerns Package 2 and the likelihood that incentives to airlines will result in sustained passenger traffic and/or otherwise contribute to the achievement of the equity objective.

217. The first area of challenge concerns LCCs. Bristol asserts that the Respondent has failed properly to take into account the fact that LCCs primarily serve outbound passenger traffic, therefore failing to bring in tourist or foreign investment, which is what is required to create economic benefit.

218. Bristol pointed to various documents which, it was said, indicated the intention of the Respondent to focus incentives on airlines bringing in tourists and foreign investment. This was then contrasted with the relative size of the incentives earmarked in Package 2 for LCCs, which was said to be a significant amount, in real and relative terms, and to indicate a much greater focus on generating outbound passenger traffic.

219. We can deal with this point shortly, without extensive reference to the documents. The Assessment explains the strategy in relation to LCCs as follows:

“In addition to these strategic routes, the Airport will also aim to get one or more Low Cost Carrier (LCC) airlines to base aircraft on site. The aim to secure an LCC base presence is not focused on supporting WG economic growth efforts via international connectivity but instead is to increase employment directly linked to the airport and contribute further to the general growth of passenger traffic. Therefore, the specific routes served by the LCC are less important, but they will still increase overall connectivity to Wales.”

And (in a footnote to the above):

“Airlines basing aircraft at the Airport will also base permanent employees (to manage the base), thereby adding jobs to the local economy. Higher passenger

volumes generally linked to based aircraft will also increase employment linked to in-terminal catering and retail.”

220. This makes it clear that the role of LCC traffic is to provide a base level of passenger traffic and thereby allow the airport to operate at greater scale, providing employment and consequent economic benefit. Far from being excluded from consideration, this point was expressly considered. We can see no basis on which this approach can be said to be irrational.
221. The second area of challenge concerns the adequacy of the Respondent’s analysis of whether it would be possible for CIAL to agree incentive payments with airlines on a basis that complied with the CMO Principle (as required by the Grant Agreement). It is said it will not be possible for CIAL to disburse Package 2, meaning that there will be no change in its economic behaviour.
222. Bristol relied on three points to support this challenge:
- (1) The value of the proposed incentives payable under Package 2 significantly exceeds the route development funds established in Scotland in 2002 – 2007 and Northern Ireland in 2003. No commercial operator would invest such large amounts to achieve the projected benefits, which effectively amount to paying airlines to operate from the airport.
  - (2) Analysis by Mr Naylor which showed that there would be net negative aeronautical revenue for CIAL for several years.
  - (3) Analysis by Mr Naylor which showed that CIAL’s financial performance would not improve as a result of the route development programme.
223. In response, Mr Slade pointed out, In his second statement at [32] and at [50] and following , that Package 2 represents the maximum amount available to CIAL over the life of the Grant Agreement, and the amount actually made available by the Respondent and/or disbursed by CIAL may be less than the £100 million allocated. In relation to the economics of incentives, airport

revenues are made up of aeronautical revenues and non-aeronautical revenues. He said that Bristol's calculations failed to take the latter into account and that the Respondent's projections, based on advice from Altair and Grant Thornton, supported the projected passenger numbers and financial benefits flowing from that.

224. The argument made by Bristol essentially speculates about a future assessment by a private investor of undefined terms to be entered into with an unknown counterparty. Put another way, we cannot see how Bristol can say with any certainty (let alone the required certainty for showing irrationality) that CIAL is unable to demonstrate that no rational private investor would find the transaction acceptable. That is not a low bar in itself; but Bristol's argument is made all the more difficult by the need to speculate about many unknown future variables.
225. At times, Bristol's argument seemed to misstate the test under the CMO Principle. For example, [104] of the ANoA asserted: "*[t]here is no sensible way of deriving a benchmark to apply so as to determine whether the terms offered are the same as could be obtained on the market because that would involve an unknown factor, namely what scope CIAL would have had to negotiate absent the Subsidy*". That suggests that the proper comparator would be CIAL without the Subsidy.
226. Further, in [113] of the ANoA, Bristol alleged that incentives would only be offered to airlines who would otherwise find the routes uneconomic, suggesting that it would be impossible to rely on the CMO Principle in those circumstances. The focus was therefore said to be the economics for the airlines.
227. However, contrary to both these points, the CMO Principle requires consideration of whether a rational private investor would enter into the incentive arrangement in the place of CIAL, not whether CIAL would do so if there was no Subsidy, nor what the economics for the airline might be. The relevant question is whether the terms and the economic outcome of the transaction are such that no rational private investor would enter into it. There is clearly a market for incentive arrangements between airports and airlines (as

Altair has set out in their report) and any arrangement will have predicted economic consequences for CIAL (or the private investor) which can be considered. We see no reason why the relevant question would be difficult to analyse in respect of any incentive arrangement CIAL might agree with an airline.

228. There is therefore no basis for Bristol's assertion that it is not possible for CIAL to enter into arrangements which are CMO Principle compliant or that it will be impossible to demonstrate that compliance. Of course, whether any such transactions are in fact compliant will depend on their terms, but we see no reason why it is incumbent on the Respondent to anticipate the detail of that in its decision-making process, given that it has an effective veto over the use of incentives under Package 2 by reason of [7] and [8] of Schedule 1 to the Grant Agreement. In these circumstances, Bristol is not able to demonstrate that the Respondent has failed to take into account a relevant consideration in relation to the prospects of compliance of Package 2 incentive payments with the CMO Principle.
229. Bristol's third area of challenge under Principle C concerns the likelihood that incentives paid from Package 2 will result in material and sustained increases in passenger traffic. Bristol relies on analysis from Mr Naylor, based on historic lack of success at Cardiff, the experience of subsidy packages in Scotland and Northern Ireland and structural changes in the market and other airports.
230. We can again deal with this relatively shortly. The Respondent commissioned advice from Altair, which sets out its view on current market dynamics and the issues that need to be taken into account when considering incentive payments to airlines. This included the risk that airlines might withdraw services if incentives cease or market conditions change. The Respondent considered and relied on this in reaching the Decision. In those circumstances, it seems very difficult for Bristol to mount an argument that the Respondent has acted irrationally by failing to take into account relevant considerations.
231. The points advanced by Mr Naylor do not overcome this hurdle. The examples from Scotland and Northern Ireland are some 20 years old and are therefore of

questionable relevance, let alone being compelling information which the Respondent was required to consider.

232. The Respondent was aware of the history of CIAL (as Mr Slade confirms in [37] to [40] of his second statement). This had been considered by Grant Thornton, who Mr Slade described as providing a “*nuanced analysis of CIAL’s recovery trajectory*”. It seems impossible to say that the Respondent has not addressed its mind to the history and in particular the reasons why certain airlines have discontinued routes and why “*CIAL’s recovery has lagged behind other major UK airports*”.
233. [38]. The indicative allocation from Package 2 for this incentive is a significant amount of money, which Mr Slade explained would be payable over a number of years. Bristol might reasonably have a different view from the Respondent’s about the prospect of success of this initiative, but that does not make the Respondent’s approach irrational.
234. Overall on this point, the Respondent has had the benefit of advice from Altair and Grant Thornton. It has considered the question of whether incentives to airlines are likely to lead to established routes which would otherwise not exist. That includes considering the reason for CIAL’s historic underperformance as well as making assessments about the likelihood of future events. It has not considered the Scottish or Northern Ireland experiences as being relevant, and we do not consider that approach to be unreasonable given the historic nature of those examples and the advice the Respondent received about current market conditions. In those circumstances, Bristol falls well short of being able to demonstrate that the Respondent has failed to take into account any relevant consideration in relation to the potential success of Package 2 incentives.
235. Bristol’s fourth and final challenge under Principle C was that the Respondent accepted CIAL’s passenger forecasts without proper scrutiny, despite obvious deficiencies. This allegation seemed largely to be based on a complaint about the level of detail provided, as well as questions about the sustainability of routes and the passenger forecasts based on them.

236. Mr Slade points out (in [41] and [42] of his second statement) that the Respondent did consider the reliability of the forecasts, which were also considered by Grant Thornton. Bristol has not advanced any point which would justify any finding that this consideration was irrational.
237. Over and above the detailed points made above, we consider it to be obvious that the Subsidy, and Package 2 for the purposes of this issue, would result in a change in the economic behaviour by providing CIAL with the wherewithal to make incentive payments to airlines, which it would otherwise not do. Bristol's challenge under Principle C fails to meet the necessary test for a judicial review, namely irrationality. Bristol's challenge under Principle C therefore fails.

***(d) Principles B and F – proportionality and minimising negative effects***

238. Bristol advanced five points of challenge under these Principles.
239. The first is essentially a re-run of the argument about LCCs and outbound passengers, and therefore fails for the same reasons as addressed above.
240. The second is that the Subsidy is disproportionate by reference to the amount of funds allocated to route development. We understood this to mean that, relative to the size of the airport and the overall amount of the Subsidy, Package 2 was disproportionately large.
241. Bristol relied on the evidence from Mr Naylor about the Scottish and Northern Irish incentive experiences, but as already noted they both took place around 20 years ago and seem of limited relevance.
242. It seems to us that this is really a question about value for money and very much an issue on which the Respondent should have a wide margin of discretion, given the policy judgement inherent in it. In those circumstances, Bristol is not able to show that the Respondent has acted irrationally.
243. Bristol's third point concerns the distortive effect on Bristol airport. The main complaint is that the Respondent has not properly understood Bristol's strategy,

by failing to appreciate two factors: the potential interest in Middle Eastern routes and the ability of Bristol airport to service longer haul routes given runway expansion plans; and developments in aircraft capability. Bristol pointed in particular to its 2024 Vision for 2040 Masterplan consultation document, which identified both of these factors.

244. The Assessment contained, at section [6.1], a lengthy analysis of Bristol as a competitor of CIAL. This included an observation which the Respondent now submits was an entirely accurate representation of Bristol's strategy:

“Whilst the Airport is also looking to attract more LCC business and a 2-3 based aircraft, it is not focusing on massive growth of high-volume tourist and LCC flights, which is the main thrust of Bristol Airport's strategy.”

245. It seems to us that Bristol's argument falls considerably short of anything that could amount to an irrationality challenge. At its highest, Bristol is relying on a statement about future possibilities which are far from certain and not at all detailed. The Respondent has made it plain that it is dealing with the broad thrust of Bristol's strategy. Its conclusions are not undermined by possible variances in future outcomes which are not only uncertain but also perfectly consistent with the general understanding of Bristol's strategy that the Respondent has expressed. It is impossible to say that the Respondent has failed to address the negative impacts on Bristol in a sensible and rational way. It has done so in quite some detail.

246. Bristol advances various other arguments to the effect that there has been a misunderstanding by the Respondent of the overlap between Bristol and Cardiff airports in relation to airlines that currently operate from Bristol airport and would be the target for CIAL's incentives. Bristol also argued that the Respondent was not entitled to assume that Bristol's strategy would not change over time, especially in light of unforeseen circumstances such as the grant of the Subsidy.

247. None of these points could in our view amount to a failing by the Respondent which would approach irrationality. They are generalised and speculative complaints which seem of little consequence when put alongside the

Assessment, which expressly recognised that “[t]he market operator most likely to experience any distortive effects from investments at the Airport would be Bristol Airport, with any adverse effects most likely to be experienced in the passenger business”. There is therefore nothing in Bristol’s complaint which we think would justify a finding of irrationality.

248. Bristol also relies on the Respondent’s assessment of [36], which we have already addressed above and which fails as a point for the same reasons.

249. The fourth challenge by Bristol under this heading concerns some advice given by Altair to the Respondent about distortion and competitive impact. The only specific criticism advanced in Bristol’s table is that Altair gave some advice about potential future steps to evaluate the distortive effect of the Subsidy, once it had been given. This included a point which Bristol apparently takes exception to, being a suggestion that there might be an analysis of what the “fair share” each of Bristol and CIAL might be entitled to in respect of South Wales air passengers.

250. In the Assessment, the Respondent said that it did not necessarily agree with every aspect of Altair’s analysis. It is not clear whether or not this included the “fair share” point. In any event, the Grant Agreement does include some provisions about retrospective analysis but does not mention the “fair share” point. We see no basis on which this could be said to amount to irrationality on the part of the Respondent. It seems entirely unobjectionable to put in place a mechanism for assessing the effect of the Subsidy. Even if that did mention the “fair share” point (which it does not) it is hard to see how that could be said to be a reviewable error.

251. The fifth challenge by Bristol under Principles B and F concerns the lack of explanation of how the CMO Principle will be applied to incentive payments to airlines. We have already dealt with that point and have concluded that it has no merit.

252. Bristol’s challenge under Principles B and F therefore fails.

*(e) Principle G – beneficial effects to outweigh negative effects*

253. Bristol’s argument here is simply a repeat of its various arguments above about passenger forecasts, historic performance and distortive impacts. We have already found that there is no substance in those points and they are not therefore capable of giving rise to irrationality in relation to the balancing exercise which this Principle requires. That is an inherently judgemental exercise which involves a multifactorial assessment, including many uncertain elements. While Bristol criticises the Respondent’s approach as over-simplistic and incorrect, that demonstrates nothing more than disagreement with the conclusions and (in some cases) the identification of fairly trivial factual points which are even now open to dispute.
254. That all falls well short of showing any irrationality on the part of the Respondent and Bristol’s challenge under Principle G therefore fails.

*(f) Conclusion on Ground 3*

255. None of Bristol’s challenges have come anywhere close to establishing irrationality by the Respondent in applying the Principles. At best, its arguments illustrate that there is room for disagreement about some of the many issues that feed into the Decision. That is not sufficient however to show that no reasonable authority in the position of the Respondent would have acted in the same way. Accordingly, Bristol fails in all of its arguments under Ground 3.

**(6) Ground 4**

256. Bristol’s argument is that the specific rules set out in section 28 of the Act apply to any subsidies which flow down to an airline for the purpose of operating any service. That is said to be because section 28 embodies a bespoke regime for all subsidies to air carriers. As a consequence, the Respondent has misdirected itself in law by not seeking to comply with the requirements of sections 28, has improperly made section 28 redundant and has failed to consider the implications of section 28 in making the Decision.

257. As we have already discussed in our consideration of the interpretation of sections 19 and 20, section 28 is one of a set of prohibitions applied by reference to the identity of the beneficiary of the subsidy (in this case, air carriers). This is contrary to, for example, sections 19 and 20 where the prohibition is applied by reference to the purpose of the subsidy.
258. The difficulty with Bristol's argument is that section 28 does not, on its face, apply to anything other than subsidies given directly to air carriers. The Subsidy has been granted to CIAL, which is not an air carrier. CIAL is expected to make payments to air carriers, but on the Respondent's case (which is supported by the Assessment and the Grant Agreement), those payments are expected to comply with CMO Principle and will therefore not be subsidies. The Decision does not therefore contemplate the provision of subsidies to air carriers.
259. As a matter of plain wording, section 28 applies only where a subsidy (as that term is defined in the Act) is made to an air carrier. As we have already discussed, that seems consistent with the scheme of the Act and we are aware of nothing in the Act which would indicate that we should treat section 28 as meaning something different.
260. Bristol seems to rely on two points to argue that section 28 should be read more broadly, so as to apply to any subsidy which benefits an air carrier:
- (1) The reliance by the Respondent on the CMO Principle is misplaced as there is no detail given of how that would work and Bristol says that it will not be possible to apply.
  - (2) There will be no transparency about the incentives actually agreed as they will not have to be notified on the Subsidy Database.
261. As we understand it, Bristol submits that the Respondent's approach is therefore a misconceived attempt to permit form (or "labelling") to triumph over substance, and to ignore the correct classification of the Subsidy.

262. However, none of this can alter the plain words of the section. Nor has Bristol suggested that it is necessary (as a matter of proper interpretation) to read section 28 in a way that is different from the natural meaning. That would obviously be a difficult argument to make, requiring for example absurdity of outcome, and we see no basis for such an approach here.
263. Bristol has the additional difficulty that, as well as persuading us that section 28 permits a broader meaning, it also has to establish that the incentive payments made pursuant to Package 2 would not be CMO Principle compliant (as if they were compliant then they would not be subsidies and would not be subject to the Act). As already set out in this judgment, we do not accept the reasons advanced by Bristol as to why these payments cannot be CMO Principle compliant.
264. We do however see the practical problem Bristol has, in knowing whether any particular incentive payment agreed in the future by CIAL with an air carrier is or is not on CMO terms. We note that Bristol was offered a basis on which it could have had this potential opportunity for challenge, through the subsidy scheme approach adopted but then abandoned by the Respondent. However, we can understand why Bristol was reluctant to accept this offer, given the way it was presented.
265. Despite that, in the face of the terms of the Grant Agreement and the Respondent's stated intention to ensure that all incentive payments to air carriers are CMO Principle compliant, we do not consider that we could reasonably reach the conclusion that the arrangements are contrary to the spirit of section 28, even if that was open to us as a matter of interpretation.
266. The practical issues which may arise do not therefore alter our view on the correct interpretation of section 28, which only applies where a subsidy under the Act is made to the air carrier, which has not occurred on the facts of this case. Bristol therefore fails in its argument under Ground 4.

**G. DISPOSITION**

267. Bristol's Application for a declaration, a quashing order and a recovery order is dismissed.

268. This judgment is unanimous.

Ben Tidswell  
Chair

John Alty

Tim Frazer

Charles Dhanowa C.B.E., K.C. (*Hon*)  
Registrar

Date: 7 April 2026