



Department for
Business, Energy
& Industrial Strategy

Consultation on subsidies and schemes of interest and of particular interest

Subsidy Control Bill

Closing date: 6 May 2022



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Any enquiries regarding this publication should be sent to us at: subsidycontrolconsultation@beis.gov.uk

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General information

Consultation details

Issued: 25 March 2022

Respond by: 11:45pm on 6 May 2022

Enquiries to: subsidycontrolconsultation@beis.gov.uk

Consultation reference: consultation on subsidies and schemes of interest and of particular interest.

Audiences: The government seeks views from businesses and business representative organisations, subsidy granters, legal advisers and all other parties interested in subsidy control.

Territorial extent: United Kingdom.

How to respond

Respond online at: beisgovuk.citizenspace.com/ccp/subsidies-interest-particular-interest-regulation

or

Email to: subsidycontrolconsultation@beis.gov.uk

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

We will summarise all responses and publish this summary on [GOV.UK](#). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the government's [consultation principles](#).

If you have any complaints about the way this consultation has been conducted, please email: beis.bru@beis.gov.uk.

The proposals

Context

1. The Subsidy Control Bill will provide the framework for a new, United Kingdom-wide subsidy control regime.
2. This regime will enable public authorities, including devolved administrations and local authorities, to deliver subsidies that are tailored and bespoke for local needs to deliver government priorities such as levelling up and achieving net zero carbon, as well as supporting the economy's recovery from COVID-19.
3. It is crucial that the new subsidy control regime can identify subsidies and schemes that have the potential to cause negative effects on competition or investment within the United Kingdom or in relation to the United Kingdom's international trade, and subject these to additional scrutiny and review. To achieve this, the Subsidy Control Bill provides for two distinct categories of subsidy or subsidy scheme that could potentially have a distortive effect: Subsidies or Schemes of Interest (SSoI), and Subsidies or Schemes of Particular Interest (SSoPI).
4. The new Subsidy Advice Unit (SAU) – which the Subsidy Control Bill will establish within the Competition and Markets Authority – will have the function of reviewing public authorities' assessments of subsidies or schemes against the subsidy control principles and, where relevant, making non-binding recommendations on how to improve those assessments, or better design the subsidy or scheme. The SAU's review of SSoPI will be mandatory. The SAU's review of SSoI will be optional. Public authorities intending to grant a subsidy or make a subsidy scheme in either category will be encouraged (through guidance) to undertake a more extensive initial analysis of the subsidy or scheme's consistency with the subsidy control principles compared to the analysis undertaken for all subsidies¹.
5. This consultation covers the proposed categories of subsidies and schemes that will be defined in regulations and initial proposals for related guidance. The government intends to develop criteria that are clear and easy for public authorities to interpret and apply.
6. The draft regulations that are the subject of this consultation make provision as to the meaning of "subsidy, or subsidy scheme, of interest" and "subsidy, or subsidy scheme, of particular interest" for the purposes of clause 11 of the Subsidy Control Bill. Clause 52 of the Bill provides that a public authority must refer a subsidy, or subsidy scheme, of particular interest to the CMA before the subsidy is granted or the scheme is made. Clause 56 of the Bill

¹ Clause 12 of the Bill requires public authorities to consider the subsidy control principles set out in Schedule 1 to the Bill when deciding to give a subsidy or make a subsidy scheme and to ensure that subsidies and schemes are consistent with those principles. Clause 13 of the Bill requires public authorities to consider the energy and environment principles set out in Schedule 2 to the Bill when deciding to give a subsidy or make a subsidy scheme in relation to energy and environment and to ensure that subsidies and schemes are consistent with those principles.

provides that a public authority may voluntarily choose to refer a subsidy, or subsidy scheme, of interest to the CMA before the subsidy is granted or the scheme is made.

7. A draft set of regulations setting out the government's proposed definitions is included as part of this consultation. Clause 79 of the Subsidy Control Bill makes provision for statutory guidance about the practical application of the regime, including the criteria for determining whether a subsidy or scheme meets the definition of an SSol or SSoPI set out in regulations under clause 11. We are not including a draft of the proposed guidance at this stage as the precise content of that guidance will be subject to the outcome of this consultation on the draft regulations, and we intend to consult on the statutory guidance for the regime more widely at a later date. However, this consultation includes questions which seek to obtain initial views on the form and content of certain aspects of that guidance, which will be taken into account as the guidance is developed.

8. This consultation seeks the views of stakeholders on the government's intended approach, the terms of the draft regulations and initial proposals for related guidance. Subject to the Bill obtaining Royal Assent and the outcome of this consultation, the draft regulations will be laid before Parliament for approval under the affirmative procedure. These regulations will form an important part of the new subsidy control regime and the draft regulations will be available in good time ahead of the regime's implementation.

What are SSol and SSoPI?

9. Subsidies or Schemes of Interest (SSol) may potentially pose a substantial risk of negative effects on domestic competition or investment, or on international trade and investment. Public authorities intending to grant or make SSol will be encouraged, but not required, to refer their assessment of the subsidy or scheme to the SAU for review prior to the subsidy or scheme being granted or made, respectively. This will enable the public authority to make their own judgement, supported by relevant guidance, about the existence and extent of the potential risk posed by the subsidy or scheme. The SAU will have discretion on whether to carry out a review of a SSol that has been referred to them.

10. Public authorities intending to grant or make SSoPI will be required to engage in the mandatory SAU referral process. Subsidies or schemes of particular interest can be assumed to potentially lead to substantial negative effects on domestic competition or investment, or on international trade and investment. The SAU will be required to undertake a review of the public authority's assessment of the subsidy or scheme against the relevant subsidy control principles.

11. Regardless of whether a referral is mandatory or voluntary, after acceptance of the referral, the SAU will produce a non-binding report for public authorities within 30 working days (in normal circumstances). This report may, where relevant, identify and recommend ways in which the assessment of the subsidy or scheme against the relevant subsidy control principles may be improved. SAU recommendations are not binding on public authorities.

12. In the case of Schemes of Interest, or of Particular Interest, referral to the SAU will take place once, at scheme level, at the time the scheme is made. Subsidies granted under the

terms of a Scheme of Interest or of Particular Interest will therefore be able to be granted without further referral².

13. *Subsidies and Schemes not subject to optional or mandatory referral* - the government has developed appropriate exemptions to ensure that the provisions on mandatory and voluntary referral do not apply to subsidies or schemes where a review would not be appropriate. These are set out in the Bill and cover:³

- Streamlined Subsidy Schemes.
- Subsidies given as Minimal Financial Assistance.
- Subsidies given as Services of Public Economic Interest assistance.
- Subsidies in response to natural disasters and other exceptional circumstances.
- Subsidies in response to national or global economic emergencies.
- Subsidies for national security.
- Subsidies given by the Bank of England for the purposes of monetary policy.
- Legacy and withdrawal agreement subsidy schemes.
- Tax measures permissible under Article 413 of the EU/UK Trade and Cooperation Agreement.
- Subsidies for large cross-border or international cooperation projects.
- Subsidies given under a financial stability direction.
- Treasury or Bank of England subsidies used for prudential reasons.

14. *Streamlined Routes* – The government intends to establish Streamlined Routes (or “streamlined subsidy schemes” as they are referred to in the Subsidy Control Bill) for categories of subsidies linked to strategic government policies, which can be used by multiple public authorities, which are at low risk of causing negative effects on competition or investment within the United Kingdom, or on international trade, and which the government judges to be consistent with the subsidy control principles. As noted in the list above, Streamlined Routes will be exempt from the SAU referral process. In January 2022, the government published two illustrative Streamlined Routes, and an accompanying policy statement, to provide an early indication of how Streamlined Routes may look in practice.

15. *Legacy subsidy schemes* – consistent with the provisions of the Bill, subsidies will still be able to be granted under schemes that were established prior to the regime’s commencement.⁴ Neither the scheme nor individual grants under these schemes will be subject to the SAU referral process. Significant modifications of the scheme may require it to be assessed against the relevant subsidy control principles as if it was an entirely new scheme⁵.

² Subsidies given under schemes will be exempt from the referral process under clause 63 of the Subsidy Control Bill.

³ This list of exemptions is set out in clause 64(1) and (2).

⁴ See clause 48 of the Subsidy Control Bill.

⁵ See clause 81 of the Subsidy Control Bill.

16. *The Secretary of State's power to refer* - where subsidies or schemes may warrant a review, but are not captured by the mandatory referral criteria for SSoPI, the Bill sets out a process where the Secretary of State can call in subsidies or schemes for review.⁶ This process is intended to be a safeguard, and the Bill limits its use to SSol, or subsidies or schemes regarding which the Secretary of State considers there is a risk of failure to comply with the non-transparency related subsidy control requirements or of their having negative effects on competition or investment within the United Kingdom. In addition to this power, the Secretary of State can refer a subsidy or scheme to the SAU after is given or made in instances where he or she considers that there has been, or may be, failure to comply with the non-transparency related subsidy control requirements, or where there is a risk of their having negative effects on competition or investment within the United Kingdom.

Illustrative regulations

17. The illustrative regulations published in January 2022⁷ set out the government's proposed approach on definitions of SSol and SSoPI.

18. The illustrative regulations form the basis of the draft regulations that we are consulting on now. Since publication, we have shared them widely amongst stakeholders, the Competition and Markets Authority and devolved administrations, and invited feedback to inform further policy development. We are also developing guidance, to be published before the commencement of the regime, which will support public authorities in understanding and applying the regulations.

Objectives

19. The government has developed the approach and criteria proposed in this consultation and in the draft regulations on the basis of a clear set of objectives. Specifically:

- That the criteria capture only those subsidies or schemes which may potentially pose a substantial risk of negative effects on domestic competition or investment or international trade and investment and are therefore more likely to benefit from a review by the SAU.
- That the criteria are clear and easy for public authorities to interpret and apply.

20. These objectives may compete in practice. Simple criteria would not take into account the occasionally complex nature and features of subsidies that might increase their likelihood of distorting competition or investment within the UK, or international trade or investment; more complex criteria, however, that varied depending on the exact circumstances of each individual subsidy would be complicated for public authorities to navigate and may lead to uncertainty on their part over whether a subsidy or scheme is captured by the criteria.

⁶ See clauses 55 and 58 of the Subsidy Control Bill.

⁷ <https://www.gov.uk/government/publications/subsidy-control-bill-2021-illustrative-regulations-guidance-and-streamlined-routes>

21. The government recognises this trade-off and believes that the approach described in this consultation and set out in the regulations strikes the right balance between simplicity and ensuring that the thresholds and criteria capture the subsidies and schemes for which a review of the public authorities' assessment against the principles is most warranted.

Overall approach and thresholds

Overall approach

22. The proposed criteria for SSoI and SSoPI are designed such that public authorities intending to grant a subsidy or make a scheme that has the potential to be substantially distortive will have a clear framework and set of criteria to follow. This will be supplemented by government guidance, to ensure that the right subsidies and schemes are subject to additional in-depth assessment against the subsidy control principles where necessary, and which will make clear when SAU review is required. This will provide public authorities with a greater level of certainty that the potentially substantially distortive subsidies or schemes that they are granting or making are compliant with the requirements of the subsidy control regime.

23. The government has proposed an overall approach that takes into account that subsidies in different categories will differ in their potential to be substantially distortive, while establishing a clear set of rules for public authorities. This approach is comprised of three main parts that are designed to balance these objectives:

- General £ value thresholds for SoI and SoPI which apply in the majority of cases
- A specific lower SoPI £ threshold for subsidies which concern sensitive sectors
- 'Category' based criteria which define some types of subsidy as SoPI or SoI regardless of £ value

24. The decision to include a sectoral approach, rather than rely solely on one or several monetary thresholds, to identify subsidies that have the potential to be distortive has been informed by the available evidence, including historic WTO cases⁸, past theoretic⁹ and case study evidence¹⁰ on subsidies as well as current Green Book guidance¹¹. These provide clear evidence that subsidies awarded within certain sectors (such as aerospace and steel) and those with certain market and design characteristics – such as the size and level of concentration of the market relative to the size of the subsidy, and whether the subsidy is open to all competitors or just a single enterprise – have the potential to be substantially distortive, both to competition or investment within the UK and to international trade and investment. The use of monetary thresholds will ensure that the criteria for identifying SoPI's are clear and easy

⁸ https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

⁹ <https://www.oxera.com/insights/agenda/articles/state-aid-competition-economic-framework-european-commission/> and http://www.ofc.gov.uk/shared_ofc/reports/comp_policy/oft750.pdf

¹⁰ https://ec.europa.eu/competition/publications/ex_post_evaluations.html

¹¹ <https://www.gov.uk/government/publications/green-book-supplementary-guidance-competition>

for public authorities to interpret and apply. The regulations set out the monetary thresholds that will determine whether a subsidy is a Sol or a SoPI:

- Subsidies granted outside of sensitive sectors are SoPI if they are over £10 million.¹²
- All other subsidies of between £5 to £10 million which do not meet the SoPI criteria are Sol.¹³
- In addition, the government has proposed lower monetary thresholds for subsidies granted in sensitive sectors, which will be SoPI if they are over £5 million, as these subsidies can be assumed to be more likely to have a distortive effect than those of an equivalent value granted outside of sensitive sectors.¹⁴

25. Recognising their unique characteristics, the government has developed a bespoke approach for rescue and restructuring subsidies. Restructuring subsidies will be SoPI, given the higher risk of market distortions that may be consequent to government intervention in such cases.¹⁵

26. For the same reason - but bearing in mind that, because an enterprise may almost certainly go out of business without the expedited receipt of a rescue subsidy, mandatory referral may not be appropriate in all cases - all rescue subsidies will be Sol. The government will set out in guidance an expectation that rescue subsidies should be referred to the SAU wherever feasible.¹⁶

27. Regarding subsidy schemes, if the parameters of the scheme allow an in-scheme subsidy award that meets the definition of a SoPI then that scheme will be defined as a Scheme of Particular Interest. Similarly, a scheme which would allow an in-scheme subsidy award of a Sol is defined as a Scheme of Interest.¹⁷ For example, if a scheme allowed in-scheme subsidy awards of above £10m then that scheme would be a Scheme of Particular Interest.

28. In broad terms the alternatives to this overall approach would either base the criteria on a single factor – such as monetary value – that would likely not capture sectors that are more likely to be subject to international trade disputes; or a more complex approach that combined multiple criteria for different categories of subsidies. The government does not favour either of these approaches.

29. A simpler approach, while easier to navigate, would not be fully reflective of the differing likelihoods of substantial distortion stemming from different categories of subsidy or schemes or the sectors that they concern. Conversely, a more complex approach with many different thresholds for each category of subsidy may be better targeted at their different levels of potential for substantial distortion but would also be more complex for public authorities to

¹² See regulation 3(2) of the draft regulations.

¹³ See regulation 4(2) of the draft regulations.

¹⁴ See regulation 3(3) of the draft regulations.

¹⁵ See regulation 3(4) of the draft regulations.

¹⁶ See regulation 4(3) of the draft regulations.

¹⁷ See regulations 3(8) and 4(4) of the draft regulations.

comprehend. On balance, the government therefore believes the proposed approach strikes the right balance between these competing objectives, relative to the alternative options.

30. The government recognises that economic conditions change, and will accordingly keep these regulations under review, once in force, to ensure they are correctly targeted at subsidies that have the highest potential to be substantially distortive.

- 1. Do you agree with the first part of the overall approach, to base SoPI and Sol criteria solely on monetary thresholds in the majority of cases?**
- 2. Do you agree with the second part of the approach, of applying lower SoPI thresholds for sensitive sectors?**
- 3. Do you agree with the third part of the approach, of defining certain categories of subsidies such as rescue and restructure subsidies as SoPI or Sol regardless of value?**

Monetary Thresholds

31. This section covers the thresholds set out in regulations 3(2)(a), 3(3)(a) and 4(2)(a) of the draft regulations.

32. The government believes that the monetary criteria set out in the previous section will capture subsidies that have the potential to be more distortive while also taking a proportionate approach to prioritising SAU scrutiny, to ensure that subsidies or schemes where a review would be less appropriate would not be captured.

33. In its response to the Subsidy Control Bill consultation the government set out its expectation that SoPI criteria would likely capture a small number of subsidies per year. In the Bill Impact Assessment the government set out the economic assumptions which led to this expectation. These assumptions were based on an evidence base of past theoretic¹⁸ and case study evidence¹⁹ as well as current Green Book guidance²⁰.

34. These sources confirmed that all subsidies, regardless of value, could be distortive but that the likelihood of substantial distortions increases as the monetary value of the subsidy increases. Specifically, this risk of distortion will be relative: larger subsidies compared to the size of the enterprise or market that the enterprise operates in will have a greater potential of substantial negative impacts on domestic competition or investment and international trade.

35. Accordingly, the government has calibrated the Sol and SoPI thresholds with the intention of capturing only a small number of the largest subsidies or schemes, which therefore have a

¹⁸ <https://www.oxera.com/insights/agenda/articles/state-aid-competition-economic-framework-european-commission/> and http://www.of.gov.uk/shared_of/reports/comp_policy/oft750.pdf

¹⁹ https://ec.europa.eu/competition/publications/ex_post_evaluations.html

²⁰ <https://www.gov.uk/government/publications/green-book-supplementary-guidance-competition>

greater potential to be substantially distortive. Based on analysis of historical data²¹, the Impact Assessment estimated that between 5 and 15 subsidies or schemes would be referred to the SAU as SSoPI per year.

36. This evidence base was the most appropriate one to use at the time the Bill Impact Assessment was drafted. Historic data covering the period during which the United Kingdom was subject to the State aid regime, however, may not be informative of the size, scope and nature of subsidies granted under the interim regime²² in force since 1 January 2021, which differs in key respects from the previous EU State aid regime.

37. The government has accordingly expanded this analysis by including within it subsidies granted under the interim regime²³. This dataset is more informative of public authority behaviour under a principles-based system that more closely resembles the new regime that the Subsidy Control Bill will establish in legislation. Actual behaviour²⁴ by public authorities may differ once these regulations come into force and trends in the number, size and scope of subsidies granted may change over time.

38. Based on this analysis the government anticipates that a SoPI threshold of £10m for subsidies granted for activities outside of sensitive sectors, and £5m for subsidies for activities within sensitive sectors, would have captured 19 unique subsidies or schemes per year, before taking account of the exemptions to the referral process such as for those made as Streamlined Routes – see page 9 of this consultation document for a full list of these. By contrast, thresholds of £5m and £1m, respectively, would have captured 25 subsidies per year.

39. Consistent with the government's policy intention that SoPI thresholds should capture the subsidies most likely to potentially pose a substantial risk of negative effects on domestic competition or investment or on international trade and investment per year, these regulations feature monetary thresholds for SoPI of £10m for subsidies granted outside of sensitive sectors and £5m for subsidies granted in sensitive sectors. The lower £5m threshold is also used to define Sols not already captured by the SoPI criteria.

40. The government recognises that lower monetary value subsidies may still have potential for substantial distortion, especially when these are granted to recipients operating in smaller markets. While the government believes that thresholds that captured these subsidies would be too complex for public authorities to navigate, for these subsidies the principles assessments still apply – including Principle F that focusses on minimising the distortion to

²¹ The estimates in the Impact Assessment are based on a review of the European Commission Transparency Grant Module – available from July 2016 to 31 December 2020

<https://webgate.ec.europa.eu/competition/transparency/public?lang=en>

²² The interim regime is based on the United Kingdom's existing international commitments on subsidy control. The government has published further information and guidance on these commitments here:

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

²³ This analysis is based on the nine months of complete data from January 2021 to August 2021 on the UK's transparency database: <https://searchforuksubsidies.beis.gov.uk/>

²⁴ Across both datasets the government has removed subsidies or schemes that were explicitly in response to Covid-19 as this is a highly unusual circumstance which may not be representative of a typical period once the regime is in force. However, the indirect impact that it may have on the wider subsidy giving behaviour of public authorities is not possible to account for.

competition and investment – which mitigates the risk of substantial distortion for these subsidies not captured by the SoPI criteria.

41. The value of subsidies given in cash will be determined by reference to the Gross Cash Amount. For subsidies provided that are not in cash, the amount of the subsidy will be determined by reference to the Gross Cash Equivalent of the subsidy.²⁵ This will enable different types of subsidies, such as grants, loans and guarantees, to be compared in monetary terms to each other. Simple monetary thresholds, as set out in the regulations, can therefore be applied across all types of subsidies and schemes.

42. The Bill contains a separate power to make regulations to define the Gross Cash Amount and Gross Cash Equivalent²⁶. The government intends to use these regulations to set out a method that allows each subsidy to be expressed in an equivalent and easily comparable monetary figure. Using a consistent method throughout the regime will also mean that subsidies of different categories are treated according to their true value to the recipient, rather than an incomparable nominal sum.

43. This will therefore mean that the monetary thresholds used are more aligned with the potential for a subsidy to be distortive, and that they will be simpler and clearer for public authorities to apply.

4. Do you agree with the £5m threshold proposed for Sol and SoPI in sensitive sectors and the £10m threshold for SoPI not in sensitive sectors?

Cumulation Rules

44. This section covers the definitions set out in regulation 5(2) to 5(5) of the draft regulations, which apply for the purposes of the thresholds set out in regulations 3(2)(a), 3(3)(a) and 4(2)(a).

45. To ensure that the monetary thresholds set out in the draft regulations are effective in capturing all subsidies that should qualify as a Sol or SoPI, the government is proposing to include cumulation rules which mean that several smaller subsidies that are granted to the same recipient will count (or “cumulate”) together towards the monetary thresholds when the subsidies are genuinely related.

46. Cumulation rules are necessary for the monetary thresholds to function as intended. Two related subsidies to the same enterprise would greatly increase the second subsidy’s potential to cause substantial distortion. In the absence of appropriate cumulation rules public authorities may, in theory, split a larger subsidy that would ordinarily be deemed a SoPI into multiple smaller subsidies that would fit under the SoPI threshold and thereby avoid the additional SAU review process. The government anticipates that behaviour of this kind will be

²⁵ See regulation 5(6) and (7) of the draft regulations. Clauses 11 and 82 of the Subsidy Control Bill were amended after the publication of the illustrative regulations in January 2022 to provide that regulations may provide for the value of a subsidy to be determined by reference to its gross cash amount or the gross cash equivalent.

²⁶ See clause 82 of the Subsidy Control Bill.

very unlikely, but nevertheless believes that it is important to design a subsidy control regime that disincentivises such behaviour.

47. The government has included a definition of ‘related subsidies’ at regulation 5(2) of the draft regulations so that public authorities and subsidy recipients can determine when two or more subsidies should cumulate together, and when they should not²⁷. To ensure that the test is not prohibitively complex for public authorities to administer, the government is proposing a narrow test to determine where two or more subsidies are related. The overall effect of these provisions is that public authorities should cumulate previous subsidies for the purpose of determining whether the latest subsidy is a Sol or SoPI when they are:

- granted to the same enterprise²⁸ by any public authority;
- are for the same or substantially same project, costs or activities;
- are for the same or substantially the same specific policy objective under Principle A of Schedule 1 to the Subsidy Control Bill; and
- have been given within the last three financial years²⁹.

48. The first limb of this test is fundamental to the risk that the cumulation rules are intended to address; although a public authority could split a larger subsidy across multiple enterprises, this would not be a trivial change and would significantly reduce the likelihood of distortion associated with the subsidy. A test that extended the application of cumulation rules to subsidies granted to different enterprises would accordingly not be appropriate. Similarly, a test that only captured subsidies granted by the same public authority may be administratively simpler, but would not prevent subsidies being split across different public authorities without meaningfully changing the value or nature of the subsidy or the effect that it has on the enterprise.

49. The purpose of the second and third limbs of the test is to limit the subsidies that a public authority will have to consider to those that are truly related and for which there is a substantial likelihood of market distortion when cumulated together. Subsidies granted to the same recipient but for different policy objectives are less likely to be substantially distortive, given that the subsidies could be used for different purposes, whether to target entirely different market failures or address wholly separate equity rationales. Similarly, subsidies granted to the same recipient but for different projects, costs or activities are less likely to be potentially substantially distortive given that they could be used to fund entirely unrelated matters.

50. Compared to a broader test – for example one that cumulated subsidies based on their specific policy objective alone, but not the project, costs or activity that the subsidy was for or vice versa – this narrower test has the disadvantage that the public authority may have to consider multiple factors when considering whether two subsidies cumulate together. The

²⁷ This definition applies for the purposes of the monetary thresholds in regulations 3(2)(a), 3(3)(a) and 4(2)(a) of the draft regulations. These thresholds will apply based on total amount of the subsidy, taken together with any other related subsidy given to the same enterprise within the applicable period.

²⁸ The definition of enterprise is the same as the definition set out in clause 7 of the Bill which can be used to identify when a subsidy is given to the same enterprise rather than multiple enterprises.

²⁹ See the definition of applicable period at regulation 5(4).

government does not, however, favour a broader test, because it may be administratively burdensome for public authorities to consider multiple subsidies potentially given by different public authorities, and a broader test may capture too many subsidies that are not truly related, or which are less likely to lead to substantial distortion when combined.

51. The last limb limits the application of the cumulation rules to subsidies granted to the same recipient over the last three financial years. This is designed to reduce the administrative burden of applying the test, on the basis that the potentially distortive impacts of previous subsidies will reduce as time passes.

52. The government has reviewed existing evidence on competition impacts and has not found a strong rationale for any specific period over which cumulation rules should apply. In the absence of strong evidence in one direction, the government proposes to avoid creating a subsidy control regime that uses different financial year limits across different elements of the regime. Accordingly, the regulations include a three financial year period over which cumulation rules apply; this is consistent with the provisions on minimal or SPEI financial assistance in Chapter 2 of the Subsidy Control Bill³⁰ which also include monetary thresholds which apply over the same period of three financial years.

53. Subsidies that are exempted from the SSoPI referral process, such as those given under Streamlined Routes – see the full list set out in page 9 on this consultation document – will be exempt from the cumulation test. While these subsidies are exempt from the SSoPI referral process for a variety of reasons – those given under Streamlined Routes have been exempted as they will be explicitly designed to cover lower risk subsidies – exempting them in general from the cumulation test is also considered appropriate given that such subsidies cannot trigger the referral process in their own right.

54. The government will publish guidance on the application of the cumulation rules in due course, subject to the outcome of this consultation. In practice, however, the government anticipates that a public authority would be able to apply this test by first considering the policy objectives and project cost or activity that the subsidy they are granting is for, and then considering whether the intended recipient of the subsidy had received any subsidies for *any* of the same or substantially similar reasons in the applicable period. The public authority would only have to consider the other limbs of the test in instances where it had identified subsidies that were related based on the characteristics which are most simply compared – for all other subsidies the public authority could be satisfied that the subsidies were not related because all limbs of the test have to be met for subsidies to cumulate.

55. In most cases, it is likely that these related subsidies would be known to the public authority – for example if multiple subsidies are being used for a project with the same board or information management structure – or would have already been considered as part of the principles assessment. For example, public authorities will normally need to take into account any related subsidies when assessing whether the subsidy they are designing is proportionate to achieving their specific policy objective and whether that objective can be achieved through

³⁰ See clause 36(2) and 38(2) of the Subsidy Control Bill – the first and fourth limb of this test is based on these clauses, and the second and third are expansions on this

other less distortive means³¹. In instances where potentially related subsidies are not known, information provided by the recipient and the transparency database may be useful to identify these subsidies. This should form part of the public authority's own due diligence ahead of granting a subsidy and will reduce the risk of granting a subsidy that is subsequently declared unlawful³².

56. For example, if a public authority was considering two subsidies under the same project but it had accurately determined that they were for different policy objectives, such as a subsidy for training and a subsidy for research and development, these would not be related. Similarly, two subsidies that cover the same policy objective but are for different costs, activities or projects – such as two research and development subsidies for two separate and distinct areas of activity carried on by a large enterprise that are not contributing to the same project or covering similar costs would not be related. Whereas two subsidies that have the same policy objective and cover the same activity will be related and hence should be cumulated, as would two subsidies with the same policy objective that cover the same costs or contribute to the same project.

57. For subsidy schemes, where the assessment of the principles may be undertaken before the recipients of individual subsidies made under the scheme are known, scheme makers will need to take into account the effect of these cumulation rules when determining whether or not subsidies granted under that scheme may qualify as an Sol or SoPI as this will determine whether the scheme itself may or must be referred to the SAU³³. The government expects that the standard conditions of any scheme should avoid recipients receiving the same subsidy for the same purpose, whether by design or by accident, and that public authorities will, therefore, be able to design schemes in a way which provides certainty over whether subsidies granted under that scheme (taken together with any related subsidies) will exceed the Sol or SoPI thresholds. A scheme would not, for instance, be a Scheme of Particular Interest if that scheme capped the £ value from individual subsidies per recipient at the specified thresholds for SoPI and if this condition took account of the cumulation rules and adjusted the maximal grants per recipient accordingly to account for the value of any related subsidies previously received.

5. Do you agree with the proposed approach to cumulation rules?

6. Do you agree that the proposed approach to cumulation would be simple and easy to administer?

7. Do you agree with the way that 'related subsidy' has been defined?

8. If you disagree with the government's proposed overall approach, monetary thresholds or cumulation rules please explain why.

³¹ Principles B and E, respectively, of Schedule 1

³² Clause 31 of the Subsidy Control Bill provides that a subsidy or scheme which is subject to mandatory referral is prohibited if the mandatory referral process has not been complied with.

³³ Regulation 3(8) provides that a subsidy scheme of particular interest is a subsidy scheme under which a subsidy of particular interest could be given. Regulation 4(4) provides that a subsidy scheme of interest is a subsidy scheme under which a subsidy of interest could be given.

Sensitive Sectors

Defining Sensitive Sectors: Specified Economic Activities

58. This section covers the list of activities set out in Schedule 1 to the draft regulations and the associated definitions contained in regulation 2.

59. As set out above, the government is proposing that subsidies which concern sensitive sectors should be subject to a lower SoPI threshold. These sensitive sectors should include areas of economic activity in which there is: a record of international trade policy disputes; evidence of global overcapacity within the sector; or where there is evidence that the sector will be subject to one or both of these features in the future.

60. The government has considered evidence including historic WTO cases³⁴, past theoretic³⁵ and case study evidence³⁶ on subsidies as well as current Green Book guidance³⁷ and evidence of global overcapacity in order to both identify recurring patterns of international trade disputes or of global overcapacity within a sector, and also the likelihood of these occurring in the near future.

61. Subsidies in these sectors are considered to have a greater potential for substantial distortion at lower values and are at a higher-risk of being subject to challenge relative to subsidies in all other sectors. Ensuring that subsidies to sensitive sectors receive appropriate scrutiny by the SAU will give public authorities additional certainty that these subsidies are compliant with the subsidy control principles.

62. In order to identify these sensitive sectors for the purposes of the draft regulations, the government is proposing to include a list of 'specified economic activities' defined by reference to Standard Industrial Classification (SIC) codes contained in the United Kingdom Standard Industrial Classification of Economic Activities published by the Office for National Statistics³⁸. This is a standard and widely accepted way to categorise economic activities in the United Kingdom that is currently used in both business registration and tax policy, and is similar to international definitions of economic activities used for assessing trade distortions by academics, governments, and international organisations³⁹. This list of activities will form the basis for the broader definition, which appears in regulation 3(5) of the draft regulations, to

³⁴ https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm

³⁵ <https://www.oxera.com/insights/agenda/articles/state-aid-competition-economic-framework-european-commission/> and http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft750.pdf

³⁶ https://ec.europa.eu/competition/publications/ex_post_evaluations.html

³⁷ <https://www.gov.uk/government/publications/green-book-supplementary-guidance-competition>

³⁸ <https://www.ons.gov.uk/methodology/classificationsandstandards/ukstandardindustrialclassificationofeconomicactivities/uksic2007>. Full descriptions of what is included within and excluded from each SIC code is included in the explanatory notes in the main volume.

³⁹ <https://www.ons.gov.uk/file?uri=/methodology/classificationsandstandards/ukstandardindustrialclassificationofeconomicactivities/uksic2007/uksic2007web.pdf> pages 4 and 5 describe how SIC codes relate to other classifications and their standard uses.

identify those subsidies which 'concern a sensitive sector'. The other parts of this definition are discussed further below.

63. The government has included the following 'specified economic activities'⁴⁰ within the draft regulations⁴¹:

- Manufacture of basic iron and steel and of ferro-alloys (SIC code 24.10)
- Aluminium production (SIC code 24.42)
- Copper production (SIC code 24.44)
- Manufacture of motor vehicles (SIC code 29.10)
- Building of ships and floating structures (SIC code 30.11)
- Manufacture of motorcycles (SIC code 30.91)
- Manufacture of air and spacecraft and related machinery (SIC code 30.30)
- Production of electricity (SIC code 35.11)

64. The government recognises that it may be appropriate to expand this list of activities – including, for example, to cover activities such as the manufacture of man-made fibres⁴² or the manufacture of electronic components such as semi-conductors⁴³ where there has also been evidence of trade disputes or global overcapacity.

65. The government accepts that an approach that focusses on international trade disputes and evidence of global overcapacity is necessarily centred on negative impacts that a subsidy may have on international trade or investment rather than on its negative impacts on competition or investment within the United Kingdom. The government does, however, believe that negative effects on competition or investment outside of these activities would be captured by the thresholds that apply to all subsidies; for subsidies not captured by these higher thresholds Principle F of Schedule 1 of the Bill requires public authorities to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom. Additionally, the government does not believe it is feasible to accurately categorise sectors within which subsidies would pose a greater risk of negative effects on domestic competition or investment while at the same time retaining a simple test.

66. While the impact that subsidies have on domestic competition or investment compared to international trade can be similar, the knock-on negative impacts will differ. Subsidies that negatively impact domestic competition or investment will impact a specific market of enterprises that compete with the recipient of the subsidy. An understanding of the shape and nature of a market is usually arrived at on a case-by-case basis using economic analysis. While subsidies that impact international trade will also impact a specific market, the knock-on

⁴⁰ The exact definition of each of these specific economic activities is set out in the Office for National Statistics release:

<https://www.ons.gov.uk/methodology/classificationsandstandards/ukstandardindustrialclassificationofeconomicactivities/uksic2007>

⁴¹ See regulation 2 and the Schedule

⁴² SIC 20.60

⁴³ SIC 26.11

impact that this has on trade will depend on the trading conditions between the United Kingdom and its trading partners. These trading conditions are usually considered based on the activity that is being traded, which can be identified using standard classifications such as SIC codes, without requiring the use of additional bespoke economic analysis which the government believes is only proportional once the public authority has already identified the subsidy or scheme is a SSoPI.

67. It would accordingly not be practicable for the government to extend the list of sensitive sectors to also capture sectors that may have the potential for substantial domestic distortions. To do this, the government would have to define and maintain a list of markets with a particular sensitivity to the distortions caused by subsidies, and it would be administratively costly for every public authority who awarded subsidies above the relevant thresholds to undertake this analysis to determine whether the market the subsidy was being awarded in was a sensitive market at the point at which it was being assessed for compliance. The government does not believe that the benefits of defining the sensitive sectors categorisation on market definitions outweigh these administrative costs.

68. Due to the noted challenges in defining markets in a proportionate and accurate way, the government proposes to use SIC codes. This is a standard and widely accepted way to categorise sectors in the United Kingdom that is currently used in both business registration and tax policy and is also the basis for assessing trade distortions.

69. The government acknowledges that certain SIC codes may, depending on the circumstances, be either too broad or narrow to precisely and only capture the particular activity that is most likely to be at risk of causing substantial distortions within a sector. It is theoretically possible to create bespoke textual definitions for individual economic activities at a higher level of detail within the regulations, rather than to refer to existing SIC codes. However, this would be difficult and burdensome to produce and for public authorities to apply as it requires a more granular assessment of what exact activities lead to international trade distortions and would create a discrepancy between the way in which the regulations apply and the way that trade distortions are typically assessed, for example as part of WTO disputes⁴⁴.

70. Furthermore, the government considers that the risk that certain SIC codes may be too narrow to capture activities capable of causing substantial distortions within a sector can be mitigated by including within the definition in regulation 3(5) certain other 'input activities' where certain conditions are met (see the following section). The government therefore proposes to use SIC codes to identify the 'specified economic activities' which will form the basis for the broader test for subsidies which concern sensitive sectors.

71. The government recognises that economic conditions change and will accordingly keep the list of specified economic activities under review, once in force, to ensure they are correctly targeted at sectors where there may be greater potential of substantial distortion at lower values.

⁴⁴ See Footnote 39 on how UK SIC codes relate to measures of economic activity used for the purposes of assessing trade distortions.

9. Do you agree with the use of SIC codes to define ‘specified economic activities’ in general?

10. Do you agree with the list of ‘specified economic activities’ that has been set out? Are there any activities that you would add or omit?

Defining Sensitive Sectors: Input activities and the economic advantage test

72. This section covers the test set out in regulation 3(5) of the draft regulations and the associated definitions in regulation 2.

73. Due to the nature of contemporary business supply chains, economic activities may span several different sectors – some of these may be subject to frequent international trade disputes, while others may not. Similarly, modern enterprises – from large businesses with multifaceted operations in several countries to SMEs based exclusively in the United Kingdom – often operate across multiple sectors, while a subsidy may be targeted at only one of these sectors. Therefore, the sector that a business primarily operates in will not always neatly correspond to the activity that is being subsidised, and vice versa. The use of a simple test based only on the economic activities which the enterprise in receipt of a subsidy is engaged in (identified by reference to SIC codes) may produce suboptimal outcomes.

74. To reflect this complex reality, the government has developed a more sophisticated test that is designed to capture the potential that the subsidy has to create substantial distortions within a sensitive sector, even where it relates to an activity which does not sit within the scope of the specific SIC codes in question, whilst at the same time ensuring that subsidies which are unlikely to create such distortions are not captured merely because they are given to an enterprise which is engaged in a specific economic activity to some degree.

75. This test is set out in regulation 3(5) of the draft regulations, which determines when a subsidy ‘concerns a sensitive sector’. The first limb of the test requires that the subsidy is given to an enterprise which is engaged in a specified economic activity or an ‘input activity’. The draft regulations define ‘input activity’ to mean an economic activity that involves the provision of goods or services for the purpose of a specified economic activity⁴⁵. This definition is intended to capture wider supply chain activities which fall outside the specific SIC codes identified above but which are linked to those activities.

76. The second limb of the test is based on the concept of ‘economic advantage’⁴⁶. This requires that the subsidy confers, directly or indirectly, an economic advantage on an enterprise which is engaged in a specified economic activity in relation to that activity. It is not sufficient, therefore, that the recipient is merely engaged in an input activity or a specified economic activity. The effects of the subsidy must also be considered.

77. For example, the government would expect that the production of automotive batteries would constitute an input activity, regardless of the fact that this specific activity is not included

⁴⁵ See regulation 2

⁴⁶ Bill cl 2(1)(b) and cl 3

in the SIC code covering 'Manufacture of motor vehicles'⁴⁷. If subsidising this activity would in practice give an indirect economic advantage to an enterprise in the automotive sector, then the subsidy will 'concern a sensitive sector'. Conversely, this test would not capture a subsidy that merely results in increased production of batteries that can also be used for purposes that are not related to the automotive sector (or any other specified economic activity listed in the regulations) since no relevant economic advantage could arise.

78. Similarly, this test would not apply to subsidies given to an enterprise for activities other than specified economic activities or input activities, even where the same enterprise was also undertaking such activities, provided that the subsidy does not give rise to a direct or indirect advantage in relation to a specified economic activity i.e. provided that there was no cross-subsidisation in relation to this activity.

79. The inclusion of an economic advantage test should help public authorities identify those subsidies that are more likely to risk distorting international trade or investment.

11. Do you agree with the application of an additional economic advantage test for subsidies granted within sensitive sectors?

12. Do you agree with the inclusion of input activities within the approach to define sensitive sectors?

Carveout for General Schemes

80. This section covers the exemption set out in regulation 3(6) and 3(7) of the draft regulations.

81. The draft regulations provide that a subsidy scheme will be a Subsidy Scheme of Particular Interest if a SoPI could be given under it. This means that schemes which provide for subsidies which concern sensitive sectors will normally be subject to mandatory SAU referral where those subsidies may exceed the lower £5 million threshold. However, the government proposes that general schemes which are open to a broader range of enterprises, including those that would otherwise be caught by the sensitive sectors test, should not be subject to the lower thresholds for sensitive sectors. The government has, therefore, developed an exemption from these thresholds for subsidies given under schemes where the criteria or conditions that determine whether an enterprise is eligible to receive a subsidy under the scheme are based on objective factors – such as the size of enterprise, number of employees, or geographic location – that do not favour enterprises engaged in specified economic activities or input activities over others⁴⁸.

82. The rationale for this carveout is that schemes with broad eligibility requirements are accessible by enterprises in many sectors so the potential for substantial distortion in a sensitive sector is limited. The alternative to this approach – to not exempt these general schemes – would have the advantage that all subsidy schemes which allow for subsidies to

⁴⁷ SIC code 29.10 (Manufacture of motor vehicles) excludes 'manufacture of electrical parts for motor vehicles',

⁴⁸ See regulation 3(6) and (7) of the draft regulations.

sensitive sectors in excess of the £5m threshold would be captured, but as SAU reviews are only undertaken at scheme level in these cases, this would mean the whole scheme would be subject to review.

83. For these schemes, while it might be possible that individual recipients operate in sensitive sectors, the scheme as a whole is by definition unlikely to favour these recipients over any other sector. It would be disproportionate for the SAU to review these schemes on the basis of a potential substantial distortion to sensitive sectors, given that it may lead to an undue focus on the in-scheme subsidies that are granted to these enterprises over others. This could lead to unintended negative effects on scheme design and evaluation.

84. The government has chosen to base this exemption on the presence of objective eligibility requirements and has chosen the list of example objective factors based on precedent from WTO Agreement on Subsidies and Countervailing Measures (ASCM).⁴⁹ Building on this existing precedent is preferable to developing a wholly new approach.

13. Do you agree with the government's proposed approach to carveout general schemes from the sensitive sectors test?

14. If you disagree with the government's proposed approach to subsidies in sensitive sectors, please explain why.

Specific treatment of subsidies based on their category

Rescue and Restructure Subsidies

85. This section covers the criteria set out in regulation 3(4) and 4(3) of the draft regulations.

86. The Subsidy Control Bill provides for specific prohibitions and other requirements to apply to several categories of subsidies to ailing and insolvent enterprises⁵⁰:

- A rescue subsidy is prohibited unless specific conditions are met. These include the requirement that the subsidy is given temporarily to allow an ailing or insolvent enterprise to stay in business so that a restructuring plan can be prepared. Subsidies to liquidate or provide liquidity support to ailing or insolvent deposit takers or insurance companies are also prohibited unless certain conditions are met.⁵¹

⁴⁹ See the footnote to Article 2.1(b) of the WTO ASCM. Article 2.1(b) provides that a subsidy will not be 'specific' for under the ASCM where eligibility for, and the amount of, the subsidy, is governed by 'objective criteria or conditions'. The footnote to Article 2.1(b) provides that 'objective criteria or conditions' means criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise. In addition, Article 2.2 of the ASCM is relevant to determining when a subsidy which is available only to enterprises located within a designated geographical region is a 'specific' subsidy.

⁵⁰ Clause 24 of the Subsidy Control Bill provides that an enterprise (including a deposit taker or insurance company) is 'ailing and insolvent' if it would almost certainly go out of business in the short to medium term without subsidies, it is unable to pay its debts as they fall due, or the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

⁵¹ See clauses 19, 22 and 23 of the Subsidy Control Bill for all the relevant conditions that must be met.

- A restructuring subsidy is prohibited unless specific conditions are met. These include the requirement that there is a credible restructuring plan based on realistic assumptions to ensure a return to long-term viability within a reasonable period. Subsidies to restructure an ailing or insolvent bank, other deposit taker or insurance company are prohibited unless specific conditions or terms are met⁵².

87. Direct rescue or restructure of an ailing or insolvent enterprise by a public authority may pose particular risks of distorting United Kingdom competition or investment, or international trade and investment. The conditions in clauses 19 to 23 of the Subsidy Control Bill establish clear terms that public authorities must meet when designing these subsidies. Subsidies that meet these terms may serve a useful purpose by preventing social hardship or avoiding a severe market failure.

88. Defining rescue subsidies as Sol and restructuring subsidies as SoPI will enable the SAU to review and, where appropriate, make recommendations for public authorities to improve the way in which these subsidies are designed. Differences in the time-sensitivity of these subsidies has led the government to propose a differential approach for rescue and restructure subsidies.

89. Rescue subsidies under clause 19 of the Bill are, by definition, often time-critical; the ailing or insolvent enterprise may need the subsidy urgently or else go irrevocably out of business. Therefore, the government proposes that rescue subsidies are Sol – permitting public authorities to refer them to the SAU. If, however, after the referral is made, financial pressures on the intended recipient(s) are such that the rescue subsidy needs to be granted urgently, the subsidy can be immediately granted without waiting for the SAU to report.

90. This has the advantage that rescue subsidies can benefit from the SAU review, where possible. The government expects, and will recommend to this effect in guidance, that public authorities will ordinarily refer any rescue subsidies or schemes to the SAU wherever practicable. The government proposes that the same approach should also apply to subsidies for liquidating or providing liquidity support to ailing or insolvent deposit takers or insurance companies under clauses 22 and 23 of the Bill.

91. Restructuring subsidies, depending on their circumstances, also have the potential to lead to substantial distortions to competition or investment within the United Kingdom and international trade or investment. However, they are less likely to be subject to the same time pressures as rescue subsidies, given that they provide medium-term support for enterprises with restructuring plans. Therefore, the government proposes to define restructuring subsidies as SoPI.

15. Do you agree with rescue subsidies being categorised as a Sol and restructuring subsidies as SoPI?

⁵² See clauses 20 and 21 of the Subsidy Control Bill.

16. Do you agree with subsidies to insurance companies and deposit takers to support liquidity provision or for the purpose of liquidating being categorised as Sol?

17. Do you agree restructuring subsidies to deposit takers and insurance companies should be categorised as a SoPI?

18. If you disagree with the government's proposed treatment of rescue and restructure subsidies, please explain why

Subsidies conditional on relocation

92. The government considers that there may be instances in which a relocation subsidy is an appropriate way to tackle social or economic disadvantage in a particular locality or region. For example, a subsidy which aims to regenerate a disadvantaged rural community may require beneficiaries to relocate activity from wealthy areas to the rural area.

93. The government has accordingly amended clause 18 of the Subsidy Control Bill to qualify the general prohibition on subsidies that are conditional on the beneficiary relocating all or part of its existing economic activities.⁵³ This is so that public authorities have the broadest range of tools to tackle disadvantage and help level up the United Kingdom.

94. The exemption is available for subsidies that are explicitly conditional on relocation, providing they meet the following conditions:

- They must have the effect of reducing social or economic disadvantage in a particular locality or region.
- They must be designed to result in an overall reduction in social or economic disadvantages within the United Kingdom.
- They must be designed to bring about a change in the size, scope or nature of the relocated activity.⁵⁴

95. The subsidy must also comply with all the subsidy control principles (as well as all other subsidy control requirements set out in the Bill, as applicable). For a relocation subsidy, the proportionality test in Principle B and the overall requirement in Principle G to balance the positive impacts of the subsidy against its harms may be particularly relevant.

96. Despite these safeguards, the risks that might arise from relocation subsidies mean the government considers that an additional layer of scrutiny will likely be appropriate in some or all of these cases. The purpose of the SoPI referral process is to give an extra level of scrutiny for subsidies that present the greatest potential of substantial distortion of competition or investment, particularly if the subsidy control requirements are not properly applied. The nature of relocation subsidies is such that a failure to properly apply the subsidy control requirements

⁵³ Subsidies which increase the attractiveness to investment of a given area may lead to a relocation of a business – but if the subsidy was not given on that condition, it would not be considered a ‘relocation subsidy’ and the prohibition and exemptions in Clause 18 do not apply.

⁵⁴ See clause 18(4) to (7) of the Subsidy Control Bill.

also risks causing more direct harms, in the form of a disproportionate increase in social or economic disadvantage in the vacated area. This would defeat the purpose of permitting certain relocation subsidies, which is to reduce disadvantage in the United Kingdom as a whole.

97. It is likely that the size and nature of the potential negative impacts to both competition and investment, and to the vacated area, will differ based on the features of the relocation subsidy in question – for example its monetary value. Measures that may give a clearer indication of the risk of aggravating social and economic disadvantage in the vacated area, such as the number of jobs affected, could also be particularly relevant. Any of these features could therefore be used as criteria to determine the treatment of relocation subsidies as Sol or SoPI and to focus the SAU's attention on those relocation subsidies where there is a potential for substantial distortions of competition and investment, or negative impacts to vacated areas.

98. Furthermore, although some subsidies will not be subject to the prohibition (or the exemption), the government is conscious that the existence of the prohibition may deter public authorities from giving subsidies that simply make an area more attractive to investment and therefore have the effect of encouraging economic activity to move. These are legitimate subsidies, and the government does not want to deter public authorities from giving them. The exemption in clause 18 should help relieve that deterrent effect. However, requiring all permitted relocation subsidies to be Sol or SoPI could serve to build it up again. This, combined with the fact that relocation costs tend to be large and so a subsidy that meets those costs is unlikely to sit just above the minimal financial assistance threshold, may argue in favour of establishing some criteria that mean not all permitted relocation subsidies are Sol or SoPI.

99. The amendments to clause 18 of the Subsidy Control Bill were made after the government published illustrative regulations in January 2022. The draft regulations which are the subject of this consultation do not currently include any proposal for how permitted relocation subsidies should be treated. The government considers that there are several ways in which subsidies that utilise the relocation exemption could be subject to the additional scrutiny provided by SAU review of a public authority's assessment against the subsidy control principles. These would include, but not be limited to:

- Defining all permitted relocation subsidies as SoPI, regardless of monetary value;
- Defining permitted relocation subsidies of this kind as SoPI when their value falls within a monetary range that does not exceed £10m (since any subsidy in excess of £10m is a SoPI in any case);
- Defining permitted relocation subsidies as SoPI based on measures that may give a direct indication of the social or economic disadvantage in the vacated areas, such as the number of jobs relocated;
- Defining permitted relocation subsidies as a Sol that should be referred to the SAU when other design features of concern, such as those set out in the next section are also present

100. The Government welcomes views from stakeholders on the appropriate treatment for these subsidies.

19. What is your view on classifying some or all relocation subsidies as either Sol or SoPI?

20. Do you support one of the particular approaches set out above? If so, which one? If not, which other approach would be appropriate? Please provide examples.

Future guidance

Subsidies of Interest (Sol) design criteria

101. Section 56 of the Bill provides that a public authority may voluntarily choose to refer a subsidy, or subsidy scheme, of interest to the SAU before the subsidy is given or the scheme is made. The decision to refer to the SAU is, therefore, a matter of discretion for the public authority. However, the government intends to publish guidance on Sol that will set out a range of design criteria that, where established as a feature of an Sol, should help the public authority consider whether a subsidy or scheme should be referred to the SAU for review. Public authorities will be advised to make a referral to the SAU only in the event that they determine that one or more of the design features described in guidance are present.

102. There is clear evidence that specific design features, where present, are likely to increase the risk that a subsidy is potentially distortive to competition or investment. Public authorities are best placed to identify where these features are present as they work through their assessment of compliance against the principles. The government therefore proposes that the design features are set out in guidance rather than regulations.

103. The government will publish detailed guidance setting out the characteristics of design features prior to the commencement of the regime. These are likely to include, but are not limited to, cases in which:

- There is evidence of a subsidy race between public authorities;
- The same, or a substantially similar, subsidy has been repeatedly made to the same recipient;
- The subsidy is linked to the ongoing economic activity of an enterprise, rather than being a one-off activity;
- The subsidy is only open to one firm (i.e., there is no competition in the granting of the subsidy).

104. These examples have been chosen based on existing Green Book guidance, case study evidence on subsidies, and economic theory. These sources indicate that subsidy races may be more likely to lead to significant competition distortions, since by definition the amount of subsidy paid is not wholly proportional to the achievement of the policy objective. Repeated subsidies, or subsidies to ongoing activities, can lead to a recipient becoming reliant on

subsidies, which may in extreme cases prevent efficient exit from the market or hamper the ability for new entrants to join the market. Subsidies for ongoing activities are more likely to lead to price and output decisions compared to those for one-off activity. More selective subsidies, such as those only open to one firm, are more likely to favour recipients over rivals.

21. Do you agree with the approach to set out design features for Subsidies of Interest in guidance and to encourage public authorities to seek voluntary referral if they identify that these are present?

22. Do you agree with the suggested design features mentioned? If not, explain why not and whether there are any that you would add or omit?

Guidance on in-depth assessment

105. The government will publish, in good time ahead of commencement of the regime, general guidance on how to undertake the principles assessment which will apply to public authorities when granting or making the vast majority of subsidies or schemes – the government has already published illustrative guidance to this effect⁵⁵. Using related guidance, the government will encourage public authorities to undertake more detailed assessments against the subsidy control principles for subsidies or schemes that are categorised as SSol and SSoPI. This in-depth assessment will form the basis of the SAU's review.

106. The government intends that this guidance will:

- Explain how to carry out in-depth assessment under every subsidy control principle⁵⁶, but will in particular focus on detailed assessments under Principle B (proportionality), Principle F (distortions to the United Kingdom's competition or investment) and Principle G (the balancing test) of Schedule 1 since, of all the subsidy control principles, these are more heavily associated with negative impacts on the United Kingdom's domestic competition or investment or international trade; and
- Cover both quantitative and qualitative methods for assessing compliance against the principles.

23. Do you agree with the government's suggested form for guidance in relation to the in-depth assessment? Is there anything in particular that this should cover?

24. If you disagree with the government's proposed approach to future guidance, please explain why.

Public Sector Equality Duty

107. The government is considering the impacts that these proposals would have on persons who share a protected characteristic in accordance with the Public Sector Equality Duty. In

⁵⁵ <https://www.gov.uk/government/publications/subsidy-control-bill-2021-illustrative-regulations-guidance-and-streamlined-routes>

⁵⁶ I.e., both in Schedules 1 and 2

doing so the government has considered the evidence set out in the government's response to the previous subsidy control consultation⁵⁷.

108. Based on this evidence the government provisionally believes that these proposals do not create any foreseeable impacts of concern under the Public Sector Equality Duty. We will continue to analyse equalities impacts as the policy develops and we welcome any views and evidence that respondents may have to assist this analysis of policy impacts.

25. We invite respondents' views on whether the proposed regulations, including the way they will function, may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) or sexual orientation), in different ways from people who don't share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.

Consultation questions

- 1. Do you agree with the first part of the overall approach, to base SoPI and Sol criteria solely on monetary thresholds in the majority of cases?**
- 2. Do you agree with the second part of the approach, of applying lower SoPI thresholds for sensitive sectors?**
- 3. Do you agree with the third part of the approach, of defining certain categories of subsidies such as rescue and restructure subsidies as SoPI or Sol regardless of value?**
- 4. Do you agree with the £5m threshold proposed for Sol and SoPI in sensitive sectors and the £10m threshold for SoPI not in sensitive sectors?**
- 5. Do you agree with the proposed approach to cumulation rules?**
- 6. Do you agree that the proposed approach to cumulation would be simple and easy to administer?**
- 7. Do you agree with the way that 'related subsidy' has been defined?**
- 8. If you disagree with the government's proposed overall approach, monetary thresholds or cumulation rules please explain why.**

⁵⁷ <https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk> see page 20 for a summary of this evidence and the government's response.

- 9. Do you agree with the use of SIC codes to define ‘specified economic activities’ in general?**
- 10. Do you agree with the list of ‘specified economic activities’ that has been set out? Are there any activities that you would add or omit?**
- 11. Do you agree with the application of an additional economic advantage test for subsidies granted within sensitive sectors?**
- 12. Do you agree with the inclusion of input activities within the approach to define sensitive sectors?**
- 13. Do you agree with the government’s proposed approach to carveout general schemes from the sensitive sectors test?**
- 14. If you disagree with the government’s proposed approach to subsidies in sensitive sectors, please explain why.**
- 15. Do you agree with rescue subsidies being categorised as a Sol and restructuring subsidies as SoPI?**
- 16. Do you agree with subsidies to insurance companies and deposit takers to support liquidity provision or for the purpose of liquidating being categorised as Sol?**
- 17. Do you agree restructuring subsidies to deposit takers and insurance companies should be categorised as a SoPI?**
- 18. If you disagree with the government’s proposed treatment of rescue and restructure subsidies, please explain why**
- 19. What is your view on classifying some or all relocation subsidies as either Sol or SoPI?**
- 20. Do you support one of the particular approaches set out above? If so, which one? If not, which other approach would be appropriate? Please provide examples.**
- 21. Do you agree with the approach to set out design features for Subsidies of Interest in guidance and to encourage public authorities to seek voluntary referral if they identify that these are present?**
- 22. Do you agree with the suggested design features mentioned? If not, explain why not and whether there are any that you would add or omit?**
- 23. Do you agree with the government’s suggested form for guidance in relation to the in-depth assessment? Is there anything in particular that this should cover?**

24. If you disagree with the government's proposed approach to future guidance, please explain why.

25. We invite respondents' views on whether the proposed regulations, including the way they will function, may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (gender) or sexual orientation), in different ways from people who don't share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.

Next steps

The government will consider responses to this consultation and produce a response within 12 weeks of the close of the consultation.

This consultation is available from: www.gov.uk/government/consultations/subsidies-and-schemes-of-interest-and-of-particular-interest

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