



Department for  
Business, Energy  
& Industrial Strategy

# Draft Statutory Guidance on the United Kingdom Subsidy Control Regime

Subsidy Control Act 2022

July 2022



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# Chapter 1: About this guidance

## How to use this guidance

1. This guidance is issued by the Secretary of State under section 79 of the Act. Under section 79(6) public authorities must have regard to this guidance (so far as applicable to the authority and the circumstances of the case) when giving a subsidy or making a subsidy scheme.
2. The guidance explains the legal obligations on public authorities under the domestic subsidy control regime. It provides a framework for designing and awarding subsidies in a way which is consistent with the Subsidy Control Act 2022 (the Act). The guidance is designed to help public authorities award subsidies in a way which minimises any negative impacts to competition and investment, as well as promoting the effective and efficient use of public money. Those responsible for giving subsidies in public authorities should read this guidance and assure themselves that they understand the requirements. However, this guidance is not intended to be exhaustive nor is it an authoritative statement of the law. Public authorities should therefore also seek their own legal advice if, and where, they are unsure of their legal obligations or the lawfulness of a proposed subsidy or scheme.
3. There is separate guidance [NB – link to be inserted] for public authorities to help them understand the limited circumstances where subsidies will fall within scope of the Withdrawal Agreement and the Northern Ireland Protocol.
4. [NB Placeholder – reference to CMA guidance and CAT website]<sup>1</sup>

## Overview of the subsidy control regime

5. A subsidy is where a public authority – for example central, devolved or local government – provides support to an enterprise that gives them an advantage over competitors. This can take the form of a grant, a tax break, a loan, guarantee or equity investment on favourable terms, or the use of facilities below market price, amongst other kinds of support.
6. Having left the European Union, the UK is no longer subject to EU State aid rules<sup>2</sup>. In September 2020, the Government announced its intent to design a new domestic subsidy control regime that best suited the needs of the UK, representing value for money to the UK taxpayer, and complying with international obligations. The Subsidy

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<sup>1</sup> Please note, corrections were made to pages 74 and 150 of this guidance on 6th July 2022 by amending and removing text that had been erroneously included in the draft.

<sup>2</sup> Some subsidies in Northern Ireland are still subject to State aid provisions under the terms of Article 10 of the Northern Ireland Protocol.

Control Act 2022 was introduced to Parliament in June 2021 and comes into force on [NB – insert date].

7. The new subsidy control regime:

- Empowers local authorities, public bodies, and central and devolved administrations to design subsidies that deliver strong benefits for the UK taxpayer.
- Enables public authorities to deliver strategic interventions to support the UK's economic recovery and deliver UK Government priorities such as levelling up and achieving net zero.
- Provides certainty and confidence to businesses investing in the UK, by protecting against subsidies that risk causing distortive or harmful economic impacts, including to the UK internal market.
- Contributes to meeting the UK's international commitments on subsidy control, including its international commitments under the World Trade Organisation's Agreement on Subsidies and Countervailing Measures (ASCM), the Trade and Co-operation Agreement with the EU (TCA) and in other free trade agreements.

8. The Act sets out the key provisions for the new subsidy control regime. These include:

- The four tests that financial assistance must meet to be considered a subsidy;
- The seven subsidy control principles that public authorities must assess their proposed subsidies against, and additional principles that apply to subsidies in relation to energy and environment;
- Prohibitions and specific requirements for certain subsidies;
- Transparency requirements, including the obligation that certain subsidies are to be published on the Subsidy Control Database;
- Exemptions for certain subsidies from some or all of these requirements – for example, where measures taken in response to natural disasters, natural or economic emergencies, or for reasons of national security and financial stability;
- Establishing a new Subsidy Advice Unit (SAU) in the Competition and Markets Authority (CMA), which will monitor and report on the regime and report on certain subsidies and schemes before and after they are given or made;
- Making provision for the Competition Appeal Tribunal (CAT) to hear applications to review subsidy decisions and to order recovery in certain cases;
- Imposing a duty on public authorities to provide pre-action information at the request of an interested party, and;
- Conferring a right on public authorities to recover subsidies which are misused.

## Executive summary

### Is it a subsidy?

9. As a first step, public authorities must establish if the support (known as financial assistance) they are proposing to provide is considered a subsidy under the regime. For financial assistance to be a subsidy it must meet four specific conditions. These are discussed in detail under Chapter 2 of the guidance.
10. The chapter also explains what financial assistance is, and what a scheme is.

### Assessment against the subsidy control principles

11. Chapter 3 of the guidance provides an explanation of the subsidy control principles, as well as providing a four-part framework to support public authorities to design their subsidies in a way that is consistent with the principles.
12. Public authorities will need to ensure that they consider the subsidy control principles when designing a subsidy, and they must not give a subsidy unless they are of the view that it is consistent with the subsidy control principles. The framework has been provided to aid public authorities in meeting this requirement.
13. Public authorities will need to make sure that the depth of their analysis on a subsidy is commensurate to the size and potential distortive impact of the subsidy.
14. Public authorities will need to assess a subsidy scheme to ensure that any subsidy given under it would necessarily be compliant with the full regime, enabling them to give subsidies under the scheme without delay in the future. As such, the steps required to assess a subsidy scheme are very similar to the steps required when assessing an individual subsidy.
15. Subsidies and schemes in certain sectors are also subject to the **energy and environment principles**. Advice for public authorities making assessments that are subject to these additional principles is set out in Chapter 9.

### Exemptions and permitted modifications to subsidies

16. The subsidy control regime allows for exemptions for subsidies and schemes in specific cases.
17. Chapter 4 sets out details of one such general exemption, for Minimal Financial Assistance (MFA), which allows public authorities to award low value subsidies without needing to comply with the majority of the subsidy control requirements. MFA is capped

at a financial threshold, meaning no recipient can receive more than £315,000 over a specified period<sup>3</sup>.

18. There are also a number of general exemptions to the subsidy control requirements, either wholly or in part, in relation to certain subsidies and subsidy schemes in exceptional circumstances. Examples of these exemptions include measures taken in response to natural disasters and natural or economic emergencies, and for reasons of national security and financial stability. Chapter 5 sets out further details regarding these kinds of subsidies.
19. Also exempt from the regime are subsidies and schemes related to the Withdrawal Agreement with the EU (including the Northern Ireland Protocol) and legacy subsidies and schemes which were given or made before [the Act comes into force]. These are explained in Chapter 6.
20. If a public authority makes a minor change to a subsidy or subsidy scheme, it will not necessarily need to carry out a full assessment of the altered subsidy or scheme against the subsidy control requirements. Chapter 6 of the guidance also discusses the permitted modifications that a public authority may make to a subsidy that has already been given or scheme that has already been made.

### **Services of Public Economic Interest (SPEI)**

21. Chapter 7 explains provisions for public authorities to provide subsidies for Services of Public Economic Interest (SPEI). These are subsidies for essential services provided to the public that would otherwise not be supplied in an appropriate way or may not be supplied at all by the market. Examples of SPEIs may include postal services, social housing and certain transport networks, particularly in rural or less populated areas of the country.

### **Prohibitions and other requirements**

22. The subsidy control regime prohibits some categories of subsidy outright. Other categories of subsidy may only be granted where they meet certain conditions. This is because these categories of subsidy pose a greater risk of significantly distorting domestic competition and investment, and/or international trade and investment.
23. Public authorities will find a description of the categories of subsidy that are prohibited outright under the regime in Chapter 10 of the guidance. They will also find an explanation of the conditions certain subsidies must comply with.

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<sup>3</sup> A minimum threshold also applies to subsidies and schemes that can be considered Services of public economic interest assistance or “SPEI Assistance” – where the total amount of “minimal or SPEI financial assistance” given to an enterprise does not exceed £725,000 over a specified period. See Chapter 7 for further details.

## Subsidies and Schemes of Interest and Particular Interest

24. The regime also requires certain sensitive categories of subsidy to receive closer independent scrutiny before a public authority has the power to grant them. These categories, as well as the procedure for their assessment and review are outlined in chapters 3 and 10 of the guidance.
25. Subsidies and Schemes of Interest (SSoIs) and Subsidies and Schemes of Particular Interest (SSoPIs) are subsidies which potentially pose a substantial risk of negative effects on domestic competition or investment, and/or on international trade or investment.
26. [Note: the government consulted on these definitions earlier this year, with the consultation closing on 6 May 2022. The government has not yet responded to the consultation.]
27. [NB – The final version of the guidance will explain in chapter 10 which subsidies and schemes meet these definitions. The guidance will also provide instructions for how to apply other exemptions from the SSol/SSoPI definitions, such as those for low value subsidies.]
28. Public authorities are required to ensure that any SSoIs or SSoPIs they give or make are compliant with the subsidy control rules. Because of the higher likelihood that these subsidies and schemes could be unduly distortive, public authorities should ensure their analysis is commensurate with that possibility. **Annex 2** describes additional in-depth assessments for SSol and SSoPI that public authorities should consider using to ensure that they are consistent with the principles.

## Referral to the Subsidy Advice Unit

29. A new Subsidy Advice Unit (SAU) has been set up in the CMA with the responsibility of monitoring and reviewing subsidies referred to them (SSoIs, SSoPIs and those called in by the Secretary of State) to evaluate the public authority's assessment of compliance with the regime. The SAU and the process public authorities are required to follow when requesting a report, is explained in chapter 10 of the guidance. It is mandatory for public authorities to request a report from the SAU where they are giving or making a SSoPI, and they may consider requesting a report where they are giving or making a SSol.
30. [NB: further guidance will be issued by the CMA to explain the referral process at the SAU in detail. Public authorities will need to ensure they refer to the CMA guidance when making an application to the SAU.]

## Transparency requirements and enforcement of the regime

31. The transparency of subsidy decisions across the regime is important to ensure accountability and to allow interested parties to challenge subsidy decisions. Chapters 11, 12 and 13 of the guidance detail the transparency requirements and enforcement mechanisms of the regime.
32. To ensure transparency of subsidy decisions, public authorities must upload details of the subsidies and subsidy schemes they have granted to a centralised open database.
33. Interested parties will be able to challenge a public authority's decision to give a subsidy or make a subsidy scheme through the Competition Appeal Tribunal (CAT). Details of making a challenge to a subsidy decision are discussed in chapter 12 of this guidance. The chapter explains who can request the CAT to review a subsidy decision, which decisions can be reviewed by the CAT, and the conditions in which an application for review may be made.
34. The CAT will have the power to grant relief to the interest party as they would when deciding a legal challenge under judicial review. In addition, the CAT will also have the power to make a recovery order, directing a public authority to reclaim a subsidy from its beneficiary.
35. Potential interested parties will wish to note the section on time limits in the chapter. There are time limits an interested party must abide by if they wish to apply to the CAT for review of a subsidy decision. These time limits are mandatory and set by the Act, so a clear understanding of them is necessary to ensure that interested parties raise a challenge at the CAT within these time limits.
36. It is also possible for potential interested parties to make pre-action information requests, in which they may ask a public authority for certain information to help them determine whether the subsidy was given, or scheme was made in accordance with the relevant requirements of the Act. The procedure and best practice for these is also set out in chapter 14.
37. Where a subsidy is being misused, public authorities will also have the statutory right to recover a subsidy without needing an order from the courts. Subsidies may be recovered to the extent that they have been used for a purpose other than the purpose for which it has been given. However, public authorities have discretion to decide when to exercise their right to recover a subsidy and it may not always be appropriate to do so.
38. Chapter 15 provides details of the considerations a public authority may want to take onboard if they are considering recovering a subsidy, or they believe a subsidy is being misused.

## Subsidies in primary legislation

39. Specific provisions in the Act apply to subsidies given and subsidy schemes made by primary legislation (that is, subsidies that are provided for directly by the UK Parliament, the Scottish Parliament, Senedd Cymru, or the Northern Ireland Assembly). The application of the subsidy control rules in the context of primary legislation is discussed under Chapter 16 of this guidance.

## Annexes

40. **Annex 1** sets out more in-depth information on how to determine whether a particular financial assistance measure is a subsidy, following on from Chapter 2.

41. **Annex 2** sets out further information for making an assessment against the subsidy control principles for Subsidies and Schemes of Interest (SSoI) and Subsidies and Schemes of Particular Interest (SSoPI), following on from Chapter 3.

## Further resources

42. This statutory guidance seeks to explain the subsidy control requirements and the processes provided for in the Subsidy Control Act. However, it is not an exhaustive explanation of every consideration a public authority will need to take into account when giving a subsidy and public authorities should also seek their own legal advice if, and where, they are unsure of their legal obligations or the lawfulness of a proposed subsidy or scheme.

43. [NB Placeholder – reference to CMA guidance]

## Additional considerations

44. Compliance with the subsidy control requirements does not replace the assessments and considerations required in the ordinary course of policy appraisal and value for money assessments, such as the techniques found in the Green and Magenta Books and in Managing Public Money. Similarly, the techniques described in Chapter 3 do not replace the assessments required to analyse the impact of a subsidy as part of the Public Sector Equalities Duty.

## Further Subsidy Control Act resources

45. [The Government will develop an outreach programme (with in-person and online events and supporting material) for public authorities so that they can understand their obligations under the new regime. These resources will supplement but will not replace this statutory guidance. Further links and explanation will be provided in the final published guidance.]



## **Streamlined Subsidy Schemes (known as Streamlined Routes)**

46. The government will also create a number of Streamlined Subsidy Schemes (known as Streamlined Routes in this guidance), which any public authority may use to give a subsidy without needing to carry out an assessment against the subsidy control requirements.
47. Streamlined Routes offer public authorities a way to award subsidies more quickly. They are intended to promote confidence and legal certainty among public authorities and businesses undertaking projects that are routine, low risk, and aligned to UK priorities.
48. It will not be possible for persons to challenge a subsidy granted correctly under a Streamlined Route in the CAT (although it will be possible to challenge a subsidy on the basis that it is not compliant with the Route).
49. Public authorities are advised to follow the specific eligibility rules and requirements of the relevant Streamlined Route.
50. [Links to information about specific Streamlined Routes will be included here in the published final version of the guidance. For further information about the policy objectives of Streamlined Routes, please see the government's policy statement published in January 2022.]

## **Northern Ireland Protocol and other international obligations**

51. The Subsidy Control Act was developed to support compliance with our international obligations, including those under the UK-EU Trade and Co-operation Agreement (TCA) and the World Trade Organisation Agreement on Subsidies and Countervailing Measures (ASCM). [Please note that the TCA and all our other international obligations will continue to apply once the regime has commenced and must be complied with].
52. Public authorities giving a subsidy that is likely to trigger a dispute or unilateral measures under WTO ASCM rules or under one of the UK's free trade agreements should consider the UK's separate guidance on international commitments, and contact the BEIS subsidy control team (see below). [Please note, this guidance can be found [here](#) but has not yet been amended to take into account the Subsidy Control Act coming into force.]
53. Subsidies in scope of the UK-EU Withdrawal Act, including the Northern Ireland Protocol, are not in scope of the Subsidy Control Act. Guidance on the application of the Northern Ireland Protocol can be found [here](#)].

## Advice on particular cases

54. Public authorities can request advice on specific cases or scenarios from the subsidy control teams at BEIS, DIT and Department for Environment, Food and Rural Affairs (Defra), and the Subsidy Control teams in the devolved administrations.

- UK Subsidy Control team [subsidycontrol@beis.gov.uk](mailto:subsidycontrol@beis.gov.uk)
- Defra Subsidy Control team: [nick.howard@environment-agency.gov.uk](mailto:nick.howard@environment-agency.gov.uk)
- DfE Subsidy Control Advice (Northern Ireland): [subsidycontrol@economy-ni.gov.uk](mailto:subsidycontrol@economy-ni.gov.uk)
- DAERA State Aid Unit (Northern Ireland – Agriculture) [stateaid@daera-ni.gov.uk](mailto:stateaid@daera-ni.gov.uk)
- Subsidy Control Division (Scotland): [subsidycontrol@gov.scot](mailto:subsidycontrol@gov.scot)
- Subsidy Control Team (Wales): [State.Aid@gov.wales](mailto:State.Aid@gov.wales)
- DIT WTO team: [wtocommitteeinbox@trade.gov.uk](mailto:wtocommitteeinbox@trade.gov.uk)
- Defra WTO team: [wto.team@defra.gov.uk](mailto:wto.team@defra.gov.uk)

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## Chapter 2: Is it a subsidy?

### Overview of the chapter

55. The subsidy control regime does not apply to all types of financial assistance given by public authorities. In the early stages of decision-making, it is therefore key that public authorities assess whether the financial assistance that is granted is in line with the definition of a subsidy that is set out in the Subsidy Control Act 2022.
56. Financial assistance – whether or not it constitutes a subsidy – can be given in a number of forms. That includes, for example, a grant, a tax break, a loan or guarantee, an equity investment, or the use of facilities. The first part of the chapter explains in more detail what financial assistance is, and the point at which it is considered to have been given.
57. The definition of a subsidy consists of a four-limbed test, of which each condition must be met. This test allows the UK to meet national policy objectives and international obligations. Where each limb is met, the financial assistance will be a subsidy and therefore must be granted in accordance with the legal obligations of the domestic subsidy control regime.
58. This part of the guidance sets out what public authorities should consider in determining whether the subsidy control regime is engaged.
59. Finally, the guidance explains what a ‘scheme’ is for the purpose of the Act.

### What is financial assistance?

60. Financial assistance is a wide concept including any kind of support or market transaction that is considered to have a financial value for the recipient. It can include:
- a direct transfer of funds (such as a grant, a loan or an equity investment);
  - a contingent transfer of funds (such as a loan or rent guarantee);
  - the forgoing of revenue that is otherwise due (such as a tax relief or exemption);
  - the provision of goods or services (as a benefit-in-kind or for payment is received);
  - the purchase of goods or services.
61. The examples set out above should not be considered exhaustive. Financial assistance captures any provision of funds, goods or services, regardless of whether anything is received in return. It also includes any commitment to provide those things in the future, or in certain scenarios.

62. For the purposes of the Act, the point that financial assistance is given is the point that there is a binding commitment from the giver to the recipient. This may not be the same date that funds (or goods or services) are transferred – and indeed, the subsidy may be given in multiple instalments over a longer period of time. It may also be much later than the original declaration of support or intention to provide the financial assistance.

63. This is relevant for considering the market value of the financial assistance.

64. If the financial assistance is indeed a subsidy, then the date that the financial assistance is given will usually be the same as the date of the subsidy decision (i.e. the confirmation of the decision to give a subsidy). This is important for determining the deadlines for the public authority's transparency obligations (if the financial assistance meets the definition of a subsidy, set out in the subsequent section of this chapter).

### **Example**

On 1 January, a local authority signs a contract with a business to provide support to enable them to develop an innovative green technology. The contract specifies that:

- On 1 January, a £1m grant will be paid;
- On 1 June, a £1m loan will be made at a 3% rate of interest if the business confirms it wants to take up the option; and
- At any point over the year, a further £1m grant will be paid if the technology meets the metrics for success specified in the contract.

All this financial assistance set out above should be considered to be given on 1 January, because that is the date the contract was signed, and this is also the date of the subsidy decision. This is the relevant date for:

- Determining whether or not the option of the loan was financial assistance provided at market rate
- Determining the value of the loan and the performance-related grant
- The beginning of the three month time period during which the subsidy must be uploaded onto the database (as it is a non-tax measure).

65. If the financial assistance is given in the form of a tax measure (that is, a relief or exemption from a specific tax), it is given at the point at which the tax payer becomes entitled to the subsidy. This will vary according to the nature of the tax. Where the amount of tax payable is tax is determined by reference to a tax declaration (e.g. corporation tax) the financial assistance will normally be given when that declaration is submitted.

66. The date on which a subsidy scheme is considered to be made is set out in the section relating to schemes, below.

## Is it a subsidy? The four-limbed test

67. Financial assistance will be considered a subsidy where it satisfies all four of the following 'limbs' of the test. For each limb, examples have been given of the types of financial assistance that may not meet the test, and therefore may not be considered a subsidy. **Annex 1** sets out further information for public authorities to consider if there is any question as to whether each test is met, including a full explanation of each of the examples.

68. **Limb A: The financial assistance is given, directly or indirectly, from public resources by a public authority.** Public authorities include any person who exercises functions of a public nature. Public resources include public funds that are administered by the UK government, the devolved administrations or local authorities, whether they are given directly, through other public bodies (e.g., agencies), or through private bodies.

Examples of financial assistance that may not meet this test include:

- Where regulation requires a transfer between two private bodies, without the resources coming under the control of a public authority
- Where a body with both public and private functions is giving the financial assistance in relation to its private functions, using private resources
- Where the financial assistance is given by a private body in which a public authority has a minority shareholding and exercises almost no influence over its decisions.

69. **Limb B: The financial assistance confers an economic advantage on one or more enterprises.** This limb has two components. Firstly, the recipient of the assistance must be an enterprise: any person, or groups of persons under common control that are engaged in an economic activity, which means offering goods and services on a market.

Examples of financial assistance that may not meet this test include:

- Financial assistance to a recipient that does not provide goods or services on the market (for example, NHS providers of health services)
- A ringfenced grant to a charity for its non-economic activities (even if the charity also provides some goods or services on the market)

- Support for an organisation that carries out non-economic activities with some ancillary economic activities (e.g., renting out equipment for less than 20% of the time, or providing a café or gift shop)

70. Secondly, it must confer economic advantage, meaning that the financial assistance is provided on favourable terms. Financial assistance will not confer an economic advantage if it could reasonably be considered to have been given on the same terms on the market: this is known as the CMO (Commercial Market Operator) principle.

Examples of financial assistance that may not meet this test include:

- Purchasing goods and services following appropriate public procurement processes at market rate.
- A loan, guarantee or equity investment provided on CMO principle terms (i.e. that could reasonably have been provided by a private investor on the market), for example by being given on the same terms at the same time as a significant private sector investment, or evidenced via benchmarking and/or profitability analysis.

71. **Limb C: The financial assistance is specific, such that it benefits one or more enterprises over one or more enterprises with respect to the production of goods or services.** This definition covers financial assistance that is provided to specific beneficiaries determined on a discretionary basis by the government, as well as assistance benefits (directly or indirectly) only enterprises in a particular sector, industry or region, or with certain characteristics.

Examples of financial assistance that may not meet this test include:

- Measures which treat equally all enterprises in the area for which the authority exercises its responsibilities (even if those enterprises are advantaged compared to those in the rest of the UK).

72. **Limb D: The financial assistance has, or is capable of having, an effect on competition or investment within the UK, or trade or investment between the UK and another country or territory.** Financial assistance envisaged by public authorities must be capable of producing a relevant effect, such that it is capable of having a genuine, adverse effect that is more than incidental or hypothetical on domestic competition or investment and/or international trade or investment in order to constitute a subsidy.

Examples of financial assistance that may do not meet this test include:

- Where the enterprise is operating in an inherently local market without competition and there is no evidence of any potential market entry (e.g. a hairdresser in a remote village).

- Where the enterprise is providing a wholly unique good or service with no relevant competitors domestically or globally, and no evidence of any potential market entry.

73. Further detail on each of the four limbs of the test is set out in **Annex 1**. This annex describes how public authorities should consider whether the test is met, where there is any doubt.

## What is a scheme?

74. The Act makes provision not only for the giving of standalone subsidies, but also for the making of subsidy schemes. Subsidy schemes are defined in the Act as a scheme made by a public authority providing for the giving of subsidies under the scheme.

75. Fundamentally, therefore, a scheme is a set of rules that describes the eligibility, terms and conditions for any number of possible subsidies to be given under the scheme, where the public authority has assessed compliance with the subsidy control requirements for all those possible subsidies in the round and concluded that all subsidies that are given compatibly with the scheme (and subject to the scheme conditions) would be consistent with the subsidy control principles. Further information on assessing a scheme against the subsidy control principles is found in Chapter 3.

76. The date that a scheme is made should be the date on which the scheme's rules were formally confirmed and put into operation. This might be, for example, the date the subsidy competition was launched, or the date the secondary legislation setting out the scheme's parameters came into force.

77. Not all policies, programmes or projects that distribute subsidies can be considered schemes under the Act. In some cases, the public authority may choose to assess compliance with the subsidy control principles for each individual subsidy given under the programme: since the subsidies are evaluated separately, the programme is not considered a subsidy scheme. In other cases, a funding project may form part of a wider scheme (for example, an innovation grant scheme may run from 2023 to 2028, with the public authority running yearly competitions).

## Subsidy or scheme?

78. It is also important to distinguish between a subsidy with multiple components, or that is given in multiple instalments, from a scheme.

79. A subsidy is a binding commitment with a specific beneficiary. In general, a subsidy will be given to a single beneficiary, although in some cases multiple enterprises could benefit from the same subsidy where they are collaborating on the activity for which the subsidy is given. A subsidy may include contingencies (e.g., a payment being made on

a certain date if a target is met) but these contingencies should leave no discretion to the public authority.

80. A scheme is usually not a binding commitment and may give a public authority a substantial degree of discretion in deciding exactly which possible subsidies under the scheme should be given. It can have any number of beneficiaries, who need have no connection to each other besides their receipt of subsidies under the scheme.
81. Certain schemes will create legal obligations on the public authority towards a general class of beneficiary, without any involvement of, or contracting with, specific beneficiaries. Examples could include a scheme in which consumers are given credits to purchase certain goods or services from local businesses which are then reimbursed by the government to the enterprise, or a tax scheme where the enterprise's tax liabilities are reduced by an amount calculated from their research and development spending that year.
82. As set out above, for tax measures, the subsidy is generally considered to be given on the date of the tax declaration. For non-tax measures of this kind, the date the subsidy is given under the scheme should be considered in a similar way, considering when it is appropriate to consider that a binding commitment has been made to a specific beneficiary – this may be the date on which a specific beneficiary submits a claim for reimbursement.

### Primary public authority and Streamlined Routes

83. In general, subsidy schemes will be set up by a public authority for its own use – that is, the authority making the scheme and giving the subsidy will be one and the same. However, there are exceptions. The Act sets out that a 'primary public authority' may make schemes for the use of other public authorities: for example, the UK Government or the Devolved Administrations may make a scheme for the use of local authorities in their jurisdiction.
84. Streamlined Routes (known as Streamlined Subsidy Schemes in the Act) are a type of scheme made by the UK Government for the use of any public authority in the UK. They will offer public authorities a way to award subsidies more quickly. They will promote confidence and legal certainty to public authorities and businesses undertaking projects that are routine, low risk and aligned to UK strategic priorities.
85. More information on the Streamlined Routes currently available can be found here [NB – link to gov.uk page when active], including guidance on using each Streamlined route.



# Chapter 3: Subsidy design and assessment

## Using this chapter

- If a financial assistance measure meets the definition of a subsidy outlined in Chapter 2, that subsidy will generally need to be assessed against the subsidy control principles. This chapter sets out the steps a public authority should take when making that assessment.
- Exemptions to this requirement are set out in Chapters 4-8. Subsidies given under schemes also do not need to be assessed separately; if the subsidy falls under an existing scheme, including a Streamlined Route, then there is no need to carry out an assessment.
- If a public authority is proposing a new subsidy scheme, the assessment should focus on the typical cases which are expected to be covered by the scheme as well as the subsidies that could be given under the terms of that new scheme that have the highest risk of not complying with the principles. At a minimum, one 'typical' and one 'worst-case' subsidy should be assessed against the principles in the same way as a standalone subsidy, using the same steps set out in this chapter.
- If a public authority is proposing a new subsidy or scheme that meets the criteria for a Subsidy or Scheme of Interest (SSoI) or Subsidy or Scheme of Particular Interest (SSoPI), they should also follow the steps set out in **Annex 2** when making their assessment against the subsidy control principles.
- There are also specific steps that public authorities should take if they are proposing a new subsidy or scheme that falls within certain categories, such as subsidies related to energy or the environment. These additional steps are set out in Chapter 10.
- The design of a subsidy or a subsidy scheme will also need to consider the prohibitions and requirements. These additional steps are set out in Chapter 9.

## Overview of the chapter

86. Subsidies can be important and useful tools to help deliver policy objectives, but they need to be designed carefully so that their benefits outweigh any negative effects.
87. Well-designed subsidies can bring about different benefits for society by correcting market failures or addressing social equity issues. They can, for instance, spur businesses to undertake activity which would not happen otherwise and would increase economic productivity and wider non-economic prosperity, such as research and development or increasing the uptake of low carbon technology. However, subsidies can also give rise to adverse effects on UK competition or investment or international trade or investment, which may prevent markets from delivering efficient outcomes that ultimately benefit society.

88. The Subsidy Control Act sets out seven principles that public authorities will need to consider when giving subsidies<sup>4</sup>. These principles are:

- **Principle A:** Subsidies should pursue a specific policy objective in order to remedy an identified market failure or address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns).
- **Principle B:** Subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.
- **Principle C:** Subsidies should be designed to bring about a change of economic behaviour of the beneficiary. That change, in relation to a subsidy, should be conducive to achieving its specific policy objective, and something that would not happen without the subsidy.
- **Principle D:** Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.
- **Principle 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.
- **Principle F:** Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.
- **Principle G:** Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on competition or and investment within the United Kingdom, and/or international trade or investment.

89. The subsidy control principles help to ensure that public authorities design subsidies in such a way that they deliver strong benefits and good value for money for taxpayers, minimise any negative effects on competition and investment in the UK, and help the UK meet its international obligations.

90. The subsidy control principles should be carefully considered as part of the subsidy design process. Given the interlinked nature of the principles, this chapter sets out a four-part framework to help public authorities ensure that a subsidy is consistent with these principles. These steps are:

- Identifying the policy objective, ensuring it addresses a market failure or equity concern, and determining whether a subsidy is the right tool to use

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<sup>4</sup> Subsidies and schemes in certain sectors are also subject to the energy and environment principles (see Chapter 9). Unless otherwise stated, references to “the principles” refer to the general principles set out in Schedule 1 of the Subsidy Control Act (2022).

- Ensuring that the subsidy is designed to create the right incentives for the beneficiary and bring about a change
- Considering the distortive impacts that the subsidy may have and keeping them as low as possible
- Carrying out the balancing exercise.

91. The depth of analysis conducted needs to be commensurate to the size and potential distortive impact of the subsidy or scheme in question. In most cases, assessing compliance with the subsidy control framework should be done alongside the business case for the subsidy, using similar evidence sources and analysis. The analysis can be less detailed where the subsidy is relatively lower in value, has very few potentially distortive design features (see section on the characteristics of the subsidy), and/or where there is established evidence that similar subsidies have resulted in few adverse impacts. Conversely, the analysis should be more extensive for novel and contentious subsidies and for those with more distortive design features. If the subsidy meets the criteria for a Subsidy or Scheme of Interest (SSoI) or Subsidy or Scheme of Particular Interest (SSoPI), the public authority should carry out more extensive analysis as set out **Annex 2**.

92. Public authorities should also consider what the minimum necessary depth and breadth of the assessment is given the availability of information or data need undertake each of the assessments set out in the guidance. Public authorities should consider cost of undertaking a more detailed assessment and gathering the required information compared to size, potential for distortion and novelty of the subsidy in question.

93. Public authorities are advised to document their evidence, analysis and conclusions of their principles assessment. This will be useful in the event of any pre-action information request or challenge (see chapter on enforcement).

## Identifying the policy objective and determining whether a subsidy is the right tool to use

94. To ensure there is a benefit to wider society, public authorities may only give subsidies to pursue a specific policy objective which:

- remedies a market failure; and/or
- addresses an equity concern i.e., redistributes resources between different groups or areas more fairly.

95. In doing so, the subsidy can improve overall societal welfare or distribute resources more fairly. The identified policy objectives may straddle both efficiency and equity issues, and address more than one market failure or social equity concern.

96. It is also possible that the subsidy (or a wider policy intervention of which it forms part) may have policy benefits which do not fall into either of these two categories. This is permissible, but these wider benefits should not be considered as part of this assessment against the subsidy control principles.

## Market failure

### Types of market failure and how to identify them

97. Market failure occurs where market forces alone do not produce an efficient outcome<sup>5</sup>. Where this arises, businesses may make investments that are individually rational, but not socially desirable, such as under- or over-supplying products or services relative to the levels desired by wider society. In these cases, subsidies may improve outcomes by adjusting businesses' incentives to supply more or less of these products or services. An undesirable outcome in a market does not necessarily constitute a market failure. Rather, the most common cases of market failure which are relevant for subsidy control occur when at least one of the following features are present:

- the existence of externalities,
- the involvement of public goods, or
- imperfect or asymmetric information.

98. Each of these features is discussed below. Public authorities must identify the existence of at least one market failures (or an equity concern) in order to be consistent with Principle A of the subsidy control principles.

### Externalities

99. Externalities are the side effects of a business's activities that none of the parties to the business transaction pay for. Externalities affect third parties that are not involved in the activities of the business and can be positive or negative.

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<sup>5</sup> An efficient outcome is defined as a situation where no one can be made better off without making someone else worse off. In effect the outcomes for a group or society at large are maximised.

100. An example of a negative externality is the discharge of untreated industrial effluent by a factory into a nearby river. This could impact river ecology and prevent people from swimming or fishing, thereby causing harm to people and society which have no involvement in the business's activities. When the full cost of the emissions are not directly factored into the costs of the business and therefore the decisions involved in producing them, the emissions will be higher than if the business had to compensate the affected third parties. The result of not bearing the cost of this negative externality is an inefficient outcome and by intervening with a well-designed subsidy, a public authority can improve overall welfare for society.
101. Public authorities can establish whether negative externalities may be present by considering the following questions:
- Are there negative effects (e.g. pollution, emissions) of an economic activity on a third party or wider society?
  - Are these third parties less than fully compensated by the business from which these negative effects originate?
  - In the absence of a subsidy, is there too much of the relevant economic activity, an oversupply of the products or services involved, or too little investment in preventing negative effects stemming from these?
102. Although negative externalities constitute a market failure for the purpose of Principle A, it is important that public authorities note the general principle, known as the "polluter pays principle" where those who produce pollution should bear the costs associated with it. Furthermore, public authorities looking to award subsidies in relation to energy and environment should also ensure that the subsidy is consistent with the principles in Schedule 2 of the Act.<sup>6</sup> Principle B of the energy and environment principles in Schedule 2 to the Subsidy Control Act requires that subsidies in relation to energy and environmental protection do not relieve the beneficiary from their liabilities as a polluter under the law.
103. An example of a positive externality from a business's activity is providing training to its employees. Training activities may have positive effects on the employees of the business because they can gain knowledge which may be useful in their current job, but also for other jobs they may take in other businesses or other organisations. Training can also increase the broader level of knowledge in society – giving the workforce, collectively, the capability to be more productive. Because a business does not privately reap all the benefits of providing this training, it will undertake less of this activity than is desired by wider society. Although the business behaves perfectly rationally, this is an inefficient outcome for society. A public authority can improve overall welfare by

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<sup>6</sup> See Chapter 10.

intervening in such cases, using a subsidy, to support the business to provide more training.

104. Another example of a positive externality is the stimulation of entrepreneurship through subsidised lending, even if this would not be profitable for a private lender. This is the case when greater levels of entrepreneurship increase innovation, competitive dynamics and business knowledge in society and thus overall welfare.

105. Public authorities can establish the existence of positive externalities by considering the following questions:

- Are there positive effects of an economic activity on a third party or wider society (e.g., training)? For instance, are the training outcomes useful outside of the recipient and can they benefit third parties or wider society?
- Do these third parties compensate insufficiently or not at all for the enjoyment of the positive effects?
- In the absence of a subsidy, is there not enough of the relevant economic activity or an undersupply of the products or services involved?

## Public goods

106. There are many products or services, such as cultural heritage, which can be shared by many people simultaneously and it is difficult to exclude people from consuming or enjoying. These are known as 'public goods' and they can have positive externalities, over and above the private benefit for those providing these goods, which mean they are undersupplied by the market. Many public goods are provided directly by public authorities (such as public parks, street lighting and defence), but in many other cases where they are supplied by private businesses, subsidies can be effective interventions to ensure they are supplied efficiently.

107. An example of a public good where subsidies can correct the market failure is certain research and development (R&D) activities. It may be difficult for an individual business, that privately funded the R&D activity, to exclude other businesses or wider society from capturing some of the benefits of this (e.g., through patent protection), and the business may therefore invest less in this type of R&D as a result. In addition, fundamental research (i.e., R&D of experimental or theoretical nature with no direct practical application or use in view), can increase the overall level of knowledge in society and may even spur innovation in other businesses and sectors, but may not provide sufficient commercial benefits to incentivise an individual business to undertake it. Therefore, intervention by public authorities through subsidies can incentivise businesses to provide more public goods and thus increase overall welfare.

108. Public authorities can establish whether a product or service has the characteristics of a public good, and therefore may benefit from intervention through a subsidy, by considering the following questions:

109. Can third parties only with great effort or not at all be prevented from accessing or benefitting from the product or service (e.g., through intellectual property rights)?
- Does the use of the product or service by one party still allow access of or benefit by other parties without reducing its availability?
  - Do these third parties pay no or insufficient compensation to be able to enjoy the benefits?
  - Is there undersupply of the public good in the absence of a subsidy?

### **Asymmetric or imperfect information**

110. When one party involved in a transaction has markedly better information or when all parties to a transaction do not have sufficient information, beneficial deals do not go ahead, or do so, but not on terms that would be optimal for wider society.
111. There can be information asymmetry involved in small business lending that can justify subsidies in the form of loans or loan guarantees. Banks may focus on the financial statements and collateral of a business to assess their credit worthiness, rather than carrying out a more thorough but costly assessment of the business's viability. This can present market failures where new, yet economically viable and potentially fast growing, businesses cannot obtain finance from traditional lenders to grow their business.
112. Public authorities can establish the presence of asymmetry or imperfect information by considering the following questions:
- Is there genuine information asymmetry between market participants rather than just different assessments of the available information (which may simply have resulted in different risk appetites, for instance) or is there a lack of information between all market participants that can reasonably be obtained and be made available?
  - Does the asymmetry or lack of information hinder market participants in making transactions that are beneficial for society?
  - Can the subsidy reduce the information asymmetry or make additional information available?<sup>7</sup>

### **Assessing market failure**

113. Public authorities should establish the existence of a market failure as outlined above, assess its significance, and demonstrate how the subsidy will address the issue so as to provide a more efficient outcome. Evidence that a project or activity would not go ahead in the absence of subsidies is not necessarily a sign of market failure – in fact,

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<sup>7</sup> Public authorities must take into account the restrictions of competition law on, for instance, the exchange of business information between competitors.

it may show that a market is working well as the activity would not be an efficient use of resources. Public authorities need to also identify why the subsidy leads to a more socially beneficial outcome. Furthermore, the identification of a market failure does not in itself justify using a subsidy. As discussed later in this step, there may be other, more suitable ways of addressing that market failure. Public authorities will also need to determine the desired outcomes of the intervention and whether a subsidy will bring about these outcomes (see below for how to assess whether a subsidy will address a market failure).

114. Depending on the nature of the market failure and data available, it may be possible to measure the efficient scale, nature, or quality of this activity. In other cases, it may only be possible or appropriate to describe the efficient outcome qualitatively. In these instances public authorities should attempt to identify and describe the efficient scale, nature of quality of specific activity as precisely as possible.

115. To do this, public authorities should use the business case to identify the societal benefits and societal costs to achieve a different scale, nature, or quality of the relevant activity. In practice, both these guidelines and the information in the business case require the same assessment to identify the relevant behaviour that delivers the socially beneficial outcome. Therefore, public authorities only need to undertake this assessment once and can use it for both the assessment of the subsidy control principles and their business case.

## Equity objectives

### What is an equity objective?

116. In the absence of market failure, market forces tend to bring about efficient outcomes, but they can also lead to unequal or unfair outcomes. Equity objectives seek to reduce these disparities between different groups in society or geographic areas. That is, equity objectives do not aim to achieve a more efficient outcome, but instead aim to redistribute the benefits of economic activity between different groups or areas. Examples include subsidies targeted at:

- Levelling up a disadvantaged area;
- Promoting employment of disadvantaged or disabled workers;
- Extending access to cultural or educational amenities; and
- Rescue and restructuring subsidies to prevent serious social difficulties arising from the closure of a large employer. Please note that rescue and restructuring subsidies are subject to more specific requirements in the Act.<sup>8</sup>

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<sup>8</sup> Please refer to Chapter 8 for further guidance on the requirements applicable to rescue and restructuring support.



## Assessing equity objectives

117. The first step to establishing a social equity objective is to identify inequality. Public authorities should use supporting evidence which demonstrates unequal opportunities or outcomes between different groups or areas. This should include measures or statistical indicators set against appropriate comparators (such as regional or national averages).
118. Then, the public authority should identify how a subsidy could act to remedy this inequality, and ensure that the policy objective will not be achieved in the absence of intervention.
119. Finally, the public authority should satisfy itself that it is socially desirable to address the inequality, because not all unequal situations are inequitable. (For example, a smaller proportion of 80 year olds are in work compared to 30 year olds: it does not follow that a public authority should subsidise employers to hire 80 year olds.)
120. Where possible, public authorities should also use the information used to underpin the 'case for intervention' which they would have set out in their business case for the subsidy or scheme to demonstrate, in their assessment, how the subsidy would contribute to the equity objective. The 'case for intervention' is a description of the steps by which the subsidy should in theory impact the behaviour of the recipient, and eventually the policy objective<sup>9</sup>.
121. To do this, public authorities should consider and breakdown the steps through which the subsidy will achieve the equity objective. Public authorities should consider whether the recipient or competitors would have undertaken any of these steps in the absence of the subsidies. Equally importantly, public authorities should consider the unintended effects of the subsidy, including whether the subsidy would discourage or 'displace' any behaviour from the recipient or others that would also contribute to the equity objective.

## Is the subsidy an appropriate tool?

122. Once the policy objective has been identified, public authorities must determine whether a subsidy is the best means for achieving the chosen policy objective.
123. As part of this, there should be consideration of other ways of addressing the issue. There may be more appropriate tools available to the public authority, such as regulation, direct provision of the good or service by the authority, and/or loans or equity investment on commercial terms. Use of alternative levers may have a lower cost

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<sup>9</sup> See Central Government Project Business Case guidance for a more in-depth explanation of a 'case for intervention':

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/749086/Project\\_Business\\_Case\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749086/Project_Business_Case_2018.pdf)

impact on the public authority, bring about less distortion, or more effectively achieve the specified policy objective.

124. In order to comply with Principle E, public authorities should address the following questions:

- Why is the subsidy route the most appropriate instrument for addressing the identified policy objective?
- What other means have been considered and why are they not appropriate for supporting the identified policy objective?

## Ensuring that the subsidy is designed to create the right incentives for the beneficiary and bring about a change

125. Subsidy Control Principle C states that subsidies should be designed in a way that leads to a change in the economic behaviour of the beneficiary and, when considered alongside Principle D, also requires that subsidies bring about a change over and above what would occur anyway.

126. Future developments can be difficult to assess not only by public authorities but also by recipients and other market participants. Nevertheless, the assessment should establish the most likely future scenario in the absence of the subsidy.

127. For their analysis, public authorities will often have to rely on information provided by the prospective recipients and third parties. Some recipients and third parties may have an incentive to provide information on the current state and future developments that would make a subsidy appear more or less favourable. In light of this, public authorities may want to consider gathering evidence from a range of different stakeholders, consider the information they have obtained in the round and decide the weight to place on that evidence in their assessment.

128. First, public authorities will have to undertake an assessment of what would happen in the absence of the subsidy, i.e., determine the baseline for assessing change. This section sets out how this baseline for comparison can be established. Second, public authorities will have to undertake an assessment of whether the subsidy creates the right incentives for the recipient and brings about the desired change to achieve the policy objective.

### The baseline for assessing change

129. Public authorities should consider what would happen in the absence of the subsidy, the 'do nothing' scenario. The baseline for this comparison would not necessarily be the current 'as is' situation, but what would likely happen in the future if

no subsidy were awarded now. In most cases, it is reasonable to assume that recipients and competitors will continue making investments in improvements, innovations or new products. In determining the 'do nothing' position, public authorities may find it helpful to refer to detailed guidance on the use of 'counterfactual' analysis.<sup>10</sup> There will be cases where, without intervention, negative impacts are likely to occur in the future and subsidies may be needed simply to maintain the status quo.

130. For instance, in order to establish what the appropriate baseline for assessing change is, public authorities expected to gather evidence on the most likely future development in markets where they observe or anticipate:

- positive or negative impacts on recipients or competitors in the absence of the subsidy;
- fast-moving technological or commercial developments;
- Changes in the set of competitors, for instance through exit, entry, or expansion. Public authorities assessing SSol or SSoPI should see **Annex 2** for a methodology to identify competitors;<sup>11</sup> or
- Growth or decline of a market,

131. The results of this assessment may be that the baseline for assessing change is different from the situation at the time of the assessment and, as a consequence, the subsidy may create stronger or weaker effects incentives to bring about a change. For example, in an industry that is undergoing a period of consolidation and increasing concentration, the competitive constraints that the beneficiary faces could be expected to change in the future and hence the subsidy may not create the right incentives to bring about the desired change.

132. Most subsidies will bring about a change in the decisions of the beneficiary to some extent. It is important for the public authority to establish that the intended change in behaviour supports the policy objective being pursued. To demonstrate how the subsidy will influence the economic behaviour of the beneficiary, public authorities should address the following questions:

- How will the subsidy influence the beneficiary to take one course of action over another?
- How will that change in behaviour contribute to the specific policy objective?

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<sup>10</sup> For further information, see <https://www.gov.uk/government/publications/rpc-case-histories-counterfactuals-september-2020--2>

<sup>11</sup> When different baseline scenarios appear appropriate, the public authority can use these to estimate different scenarios for the impact on domestic competition and investment of the subsidy. This will help public authorities to identify the most cautious approach for the assessments below. It will also make results more robust if it can be demonstrated that the subsidy yields benefits even when adopting the most cautious approach.

133. Subsidies must also bring about something that would not have occurred without the subsidy. In demonstrating this, public authorities should consider the likely change or additional net benefit stemming from the subsidy.

134. Examples of when changes or additional benefits might arise include:

- A project or activity being carried out, which would have otherwise not gone ahead (or at least not in a way that benefited a certain group of people or a specific geographical area);
- A measurable improvement in the quality of the output or outcomes;
- An increase in the scale or scope of a project or activity, for instance in order to extend the geographic area or number of groups benefiting from it; or
- A project or activity occurring at a significantly earlier point than it would have otherwise. A public authority must be satisfied that there are justifiable public policy benefits to using a subsidy to bring forward a project that would have happened without a subsidy.

135. As a result of this 'additionality' requirement, subsidies should not be used to finance a project or activity that the beneficiary would have undertaken in a similar form, manner, and timeframe without the subsidy.

136. Similarly, subsidies should not normally compensate for 'business as usual' costs – in other words, those costs that the beneficiary would have incurred and had to fund itself in the absence of any subsidy. In practice, this means that public authorities should generally avoid using subsidies to cover the ongoing costs related to the normal day-to-day of running of the business, facility or project. There may be circumstances where the funding of day-to-day expenditure can be justified where that expenditure is directly linked to the subsidy's policy objective. For instance, a subsidy used to increase the wages of disadvantaged workers.

137. Where data is available, and it is commensurate to do so, public authorities should consider using cost modelling to support their assessment of this 'additionality' requirement. Once public authorities have determined how the subsidy or scheme will address the given market failure or equity objective, and the change of behaviour that will be required of recipients to achieve this objective, public authorities should use cost modelling to determine the appropriate, proportional size of the subsidy. A subsidy is proportionate when it is just large enough to achieve the required change in behaviour. This change in behaviour will have a cost to the recipient, but there will often be a narrow benefit to the recipient in terms of decreased long-term costs, increased sales, or both. Public authorities should adjust the value of the subsidy to account for this. Public authorities should use the following formula to determine whether the subsidy is just large enough to achieve the required change in behaviour:

Size of subsidy = Cost of project – any benefits to the recipient such as expected increase in profits or decrease in costs after undertaking project.

138. To determine the cost of the activity and benefits to the recipient, public authorities should use information provided by the recipient, publicly available sources of data and any initial cost modelling undertaken in the business case.
139. Public authorities should undertake this assessment in conjunction with any 'additionality' assessment that they are required to undertake as part of the business case for the subsidy or scheme.

The following questions should be considered:

- What are the types of costs the subsidy is to be used to support?
- Why is the targeted project or activity and the associated costs not considered as 'business as usual'?
- Would the subsidy be needed by the beneficiary to maintain their market share or meet a legal or contractual obligation now or in the future? If the answer is 'yes', it is likely that the project or activity would be undertaken regardless of the subsidy.
- What would the likely outcomes be with and without the subsidy over the short- and long-term?

## Considering the distortive impacts that the subsidy may have and keeping them as low as possible

140. Subsidies have the potential to distort markets, and thus create negative impacts on UK competition or investment and/or international trade or investment. Efficient markets operate on the basis of rivalry between enterprises seeking to win business. This rivalry creates incentives for enterprises to cut prices, increase output, improve quality, enhance efficiency, or introduce new and better products or services. In turn, these market effects influence enterprises' investment decisions as they direct resources towards improving their offer of products and services to customers.
141. Subsidies are intended to change recipients' behaviour and operations; for instance, what to produce, the way in which to produce it, and at what price and level of output (see section above). Well-designed subsidies can help correct or ameliorate market failures as well as social equity issues. However, the effects on UK competition or investment, and/or international trade or investment, may be distortive to such a degree that the subsidy prevents markets from delivering efficient outcomes which ultimately benefit consumers.

142. Subsidies can distort markets by:

- Allowing less efficient recipients to remain in the market, when they would otherwise have gone out of business;
- Failing to reward competitors to the subsidy recipient that are more innovative or more efficient (and would have produced better or cheaper goods and services for their customers);
- Changing recipients and their competitors' incentives to innovate and to invest;
- Shifting the location of economic activity from one place to another, affecting the local economy and employment rates;
- For particularly large subsidies, creating or strengthening the market power of the recipient (which could in itself constitute market failure), or;
- Creating knock-on effects on the recipient's customers and suppliers in their own markets.

143. The subsidy control principles require consideration of the distortive and potentially harmful impacts of a subsidy. Principle B sets out that subsidies must be proportionate and limited to what is necessary. Principle F requires the public authority to minimise any negative effects on competition and investment within the UK domestic market. In other words, the public authority should be satisfied and show that any negative effects on competition or investment within the UK cannot be further reduced without harming the ability to meet the stated policy objective.

144. When considering impacts on UK competition or investment and/or international trade or investment, public authorities should examine:

- The characteristics of the subsidy and whether these can be redesigned to further reduce the impacts of the subsidy on the affected market(s), and;
- The geographical and distributional impacts of the subsidy. In other words, will there be any adverse effects for a particular group or geographical area?

145. The following subsections explore each of these in turn. Public authorities are advised to consider, in a way which is commensurate with the size and potential distortiveness of the subsidy, whether the subsidy could be designed in less distortive ways and still achieve the policy objective. There should be more thorough consideration of other options if the subsidy is more likely to lead to substantial distortion, such as those meeting the criteria for SSol or SSoPI. Annex 2 provides in depth assessment methods for public authorities awarding SSol or SSoPI to help them consider the distortive impacts that the subsidy may have and keeping them as low as possible. Public authorities awarding SSol or SSoPI should consider both the following sub-sections and this annex when considering this step in the framework.

## **The characteristics of the subsidy**

146. Certain features and characteristics can make a subsidy more likely to have distortive impacts on competition or investment within the UK, and/or on international trade or investment. It is important to identify where these features are present and consider whether it would be possible to alter or offset them to reduce the levels of distortion they might cause.
147. The public authority should systematically review each of the relevant characteristics of the proposed subsidy which could increase the probability of the subsidy being more distortive. In doing so, it is worth noting that all subsidies are distortive, by definition, and it may not be possible to design a subsidy without some of the characteristics listed. The features set out below should therefore be considered in the round. However, the public authority should consider the factors covered below (when relevant) and whether the subsidy could be redesigned to minimise the impact of distortive characteristics and thus the extent of distortion, whilst still meeting the policy objective.

## **The nature of the instrument**

148. As set out in Chapter 2, subsidies can be given in many different forms, including grants, loans, equity investment, loan guarantees, tax breaks. And the provision of products or services at below-market prices. Some forms are less likely to distort domestic competition or investment, and/or international trade or investment than others. For instance, a loan typically leads to less distortion than a grant as it will ultimately need to be paid back by the beneficiary. Furthermore, a loan provided at close to commercial interest rates is, all other things being equal, less distortive than a loan at a lower interest rate.
149. As a general rule, where a public authority is acting in a way more comparable to that of a rational private operator on the market (i.e. closer to the Commercial Market Operator principle), the beneficiary is likely to derive a smaller economic advantage, and the subsidy is likely to be less distortive.<sup>12</sup>
150. Public authorities should consider the following question: could a less distortive form of instrument be deployed whilst still meeting the identified policy objective?

## **The breadth of beneficiaries and the selection process**

151. Subsidies that are available to a broad set of recipients are less likely to distort than subsidies that are only made available to a single firm. Public authorities should consider whether a subsidy could be opened up to other market participants. For

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<sup>12</sup> Section 3(2) confirms that financial assistance, such as a state loan or investment, given on terms that might reasonably have been expected to have been available on the market to the enterprise does not meet the definition of a subsidy. Please see how will an economic advantage be assessed in Chapter 2 for further guidance on the circumstances in which a public authority will be considered to be acting in a way more comparable to a rational private operator.

example, a subsidy to promote entrepreneurship that is made available to all small businesses in a specific area is likely to be less distortive than a subsidy given to one or two small businesses.

152. There may also be instances where it is appropriate for the awarding process for a subsidy to involve an element of competition between potential recipients. For instance, the public authority could select recipients on the basis of which firm(s) can demonstrate that they would best meet the policy objective. The best placed firms may be identified by asking recipients to bid to win the subsidy and select the recipient(s) that require the smallest subsidy to achieve the policy objective. A competitive allocation process for a subsidy thereby may also help public authorities to meet Principle B.
153. When subsidies cannot be made available to a broad set of recipients or made available through a competitive process, public authorities should consider other mechanisms which introduce an element of competition.
154. Public authorities should consider the following questions: could the subsidy be made available to any competitors? Or could firms compete to win the award of the subsidy?

### **The size of the subsidy**

155. Smaller subsidies are less likely to distort competition or investment within the UK, and/or international trade or investment. Public authorities should consider the size of a subsidy in absolute terms as well as relative to the size of the recipient, the costs on the beneficiary, or the value of the market(s) of the affected products or services. For example, while a £1m grant may have a significant bearing on the decisions of a small or medium-sized enterprise, it is likely to have a smaller influence on the behaviour of a multinational enterprise.
156. In line with Principle B, public authorities should design subsidies to be proportionate to their specific policy objective and limited to what is necessary to achieve it. Further detailed guidance on identifying the size of the subsidy needed to bridge the 'funding gap' is provided in chapter 4.
157. Public authorities should consider the following question: could the value of the subsidy be lowered?

### **The timespan over which a subsidy is given**

158. Time-limited and one-off subsidies are likely to lead to less distortion. The timespan of the subsidy and investment can provide an indication of the longevity of any effect on the market. Where appropriate, public authorities should design subsidies that are time-limited, and payment schedules should be linked to performance criteria such as the achievement of specific milestones of a project (see the performance criteria subsection below). Public authorities should consider this feature in combination with the cost being covered by the subsidy (see the nature of the costs subsection below) as funding of different costs may have different effects on the timespan of funding.



159. Providing recurring subsidies over a period of time compared to a single, limited award is likely to have a greater distortive impact, including on firms' entry and exit decisions. First, recurring and open-ended subsidies increase the risk of projects or activities continuing even after they have become uneconomic or obsolete (see the nature of the costs subsection below) and incentivise recipients to request further funding to continue a project or desired activity. Second, potential entrants could be deterred from entering the market if they have to compete with incumbents that are expected to receive further subsidies. Recurring subsidies could also prevent efficient rationalisation - a firm may remain in a market when this is no longer the best option for it either because it is committed to as part of a subsidy programme or because it has reason to expect future subsidies.

160. Public authorities should consider the following question: could the subsidy be made a one-off or time-limited contribution?

### **The nature of the costs being covered**

161. Consideration should be given to how the subsidy will affect the beneficiary's costs. One-off subsidies which support the funding of an initial investment or the set-up costs of a project tend to be less distortive so long as they do not create barriers to entry or give a substantial advantage to the recipient. As discussed in step 2, ongoing subsidies which cover a beneficiary's 'day-to-day' costs, in particular those which vary with output, are more likely to impact domestic competition or investment, and/or international trade or investment. Funding only initial investments or set-up costs also reduces the risk that a project or activity continues to be funded even if it has become obsolete or ineffective during the project's lifetime. Further detailed guidance on identifying the cost impact of the subsidy (which will mostly be relevant for SSols and SSoPIs) is provided in chapter 4.

162. Public authorities should consider the following question: Could the subsidy offset the initial investment of a project or activity as opposed to supporting the ongoing costs?

### **Performance criteria**

163. The design of a subsidy may be improved by the inclusion of clear performance indicators in the agreement. These will help to ensure that the assistance is being best used to achieve the specified policy objective. Careful consideration will need to be given to the outcomes the beneficiary will be assessed against. Where appropriate and commensurate, it may be helpful for the subsidy agreement to set out:

- the performance criteria;
- how the necessary information will be obtained;
- who will conduct the performance evaluation and at which points;
- dispute mechanisms, including any appropriate clawback provisions<sup>13</sup>, and;

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<sup>13</sup> See also chapter 14 on Misuse of subsidies.

- the consequences for the beneficiary where it does not meet or falls short of the performance criteria. This could include conditions where later tranches of funding are only released if and when certain standards or outcomes have been exceeded, and/or recovery of tranches of funding where these have not been met.
164. Public authorities should consider the following question: could performance criteria and a payment schedule linked to achievement of specific milestones be incorporated into the subsidy agreement?

## Ringfencing

165. In their considerations on how to best target a subsidy (see paragraphs [x-y] above), public authorities should also consider whether conditions could be imposed on beneficiaries that limit which activities or projects the subsidy can be used for. Among other things, this can help prevent funds being used to cross-subsidise other areas of the beneficiary's business.
166. Public authorities should consider the following question: is it feasible for the subsidy to be ringfenced to ensure that funds are only spent on activities which contribute to the policy objective?

## Monitoring and evaluation

167. Public authorities should consider building in periodic reviews of any ongoing subsidies where it is proportionate and appropriate to do so, along with relevant conditions covering the use and recovery of the subsidy. This will assist with evaluating whether the subsidy is meeting the policy objective as well as identifying any distortions to competition, trade and investment. Depending on the nature of the subsidy, these reviews could include an evaluation of:
- progress against the stated policy objective and whether interim objectives have been met;
  - whether any new and overlapping subsidies have since been introduced which address the same policy objective;
  - whether the market failure or equity issue still exists (or is sufficiently significant) and planned future subsidies are still required;
  - any negative outcomes stemming from the subsidy, including on competition and investment; and
  - whether the subsidy should be altered going forward, phased out, or halted.

168. The UK Government provides detailed guidance on evaluation methods which may be of interest to other public authorities.<sup>14</sup>
169. Public authorities should consider the following question: could monitoring and evaluation be embedded into the subsidy?

## Geographical and distributional impacts

170. Subsidies often have geographical and distributional impacts. Distributional impacts can occur as a direct consequence of pursuing the policy objective, leading to one group being advantaged over another. For example, a scheme to subsidise youth employment could make it less likely that new jobs will be offered to older unemployed workers. Subsidies also often have geographical impacts. A subsidy designed to encourage growth or attract new investment into a disadvantaged area may impact the likelihood of investment in other disadvantaged areas. Public authorities should take these kinds of impacts into account before proceeding and consider whether there are ways to counteract the specific negative effect in the design of the subsidy.
171. Subsidies are commonly targeted at particular geographic areas, or sectors within particular areas, to improve regional economic development. Public authorities should consider the geographic spread or concentration of the industry within the UK even where this is outside their own geographic area of responsibility. Particular attention should be paid to subsidies directed at an industry made up of firms in different parts of the UK and directly competing for the same customers.
172. Public authorities should be aware that subsidies that require the beneficiary to relocate its activities are prohibited except where these subsidies aim to reduce social or economic disadvantage (see chapter on prohibitions). Subsidies which could have the impact of incentivising the recipient to relocate existing activities or divert the originally planned location of new investment (without requirement or conditionality) are not prohibited.
173. When considering the geographic and distributional impacts, public authorities should address the following questions:
- Is the subsidy likely to advantage or disadvantage a particular group?
  - Is the subsidy likely to lead to adverse effects on other geographical areas?
  - Can the subsidy be redesigned in such a way as to minimise these impacts while still meeting the stated policy objective?

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<sup>14</sup> [www.gov.uk/government/publications/the-magenta-book](http://www.gov.uk/government/publications/the-magenta-book)

## Subsidy races

174. In addition to the above, public authorities should have regard to the risk of ‘subsidy races’ or bidding wars where two or more public authorities are vying for new investments. Public authorities should be cautious about subsidy races occurring, as these may lead to a displacement of investment away from locations where the public benefits are the greatest, and may incentivise firms to use their leverage to secure larger subsidies than would have been possible had public authorities not been bidding against each other to secure the investment. This would also risk the subsidy not complying with Principle B, which states that a subsidy must be proportionate and limited to what is necessary.
175. Public authorities should assess whether another public authority offers a subsidy for the same or similar investment and whether these investments are mutually exclusive. When that is the case there is a greater risk of a subsidy race occurring. In such cases, public authorities should:
- Carry out more extensive analysis of both the positive and negative impacts of the subsidy (looking at the counterfactual of where the investment would be located in the absence of the subsidy);
  - Consider whether competing offers from different parts of the UK have increased the size of the subsidy on offer from what it originally would have been, and whether the subsidy can still be justified as being proportionate; and
  - Consider the relative levels of disadvantage of the areas in question. Subsidies which may result in a shift in economic activity from a less disadvantaged area to a more disadvantaged one, and which could lead to an increase in economic output for the UK as a whole, will be easier to justify against Principle G (the “balancing exercise”).

## Carrying out the balancing exercise

176. The final assessment follows from the steps set out above. It forms part of the overall assessment of a subsidy and is its final step. By following the framework, public authorities will have designed a subsidy that is consistent with Principles A, B, C, D, E and F, and will have established the likely benefits and negative impacts of the subsidy.
177. The final step of the framework consists, therefore, of a balancing exercise, where the public authority must establish that the benefits of the subsidy (as they relate to the specified public policy objective) outweigh the negative effects. They should then examine each of the first six principles to confirm that the subsidy is consistent with each.
178. It will not always be possible to quantify every element of the assessment, and therefore the balancing exercise may need to include both quantitative and qualitative

elements. Therefore, an element of judgement is necessary in deciding whether the benefits outweigh negative effects. In general, the more distortive a subsidy is likely to be (especially if it is an SSoI or an SSoPI) and the more finely balanced the decision (i.e. if the negative effects seem to be very close to the benefits), the more a public authority should endeavour to quantify as many costs and benefits as possible.

179. The benefits considered in the balancing exercise must be only those that relate to the specific public policy objectives identified in the first step of this framework, for the purpose of Principle A. As set out, there may be more than one specific policy objective, each relating to a market failure or equity rationale. Wider benefits that do not relate to a market failure or equity rationale must not be taken into account for the purpose of the balancing exercise.

180. The harms included in the balancing exercise should include all relevant negative effects. These include, in particular, those relating to competition or investment within the UK, and/or to international trade or investment. However, other relevant effects must also be taken into account, including negative impacts on climate change and carbon emissions if these are relevant.<sup>15</sup>

181. The balancing exercise consists of the public authority listing the subsidy's expected benefits (in relation to the specific policy objective) and negative effects, considering their expected size and their likelihood of occurring. The public authority must then come to a decision, based on the evidence available to it, of whether the benefits outweigh all of the negative effects and that it is still worth proceeding with the subsidy despite residual distortions and other negative effects.

## Subsidy Schemes

182. As set out in Chapter 2, subsidy schemes may be created by any public authority. The purpose of a subsidy scheme is to enable multiple grants of a subsidy to multiple different recipients for the same policy purpose. Streamlined Routes are a specific type of subsidy scheme, described in more detail in Chapter 1 and 2.

183. Before they are made, subsidy schemes (including Streamlined Routes) must be assessed against the relevant subsidy control principles and cannot be made unless the public authority decides the scheme is consistent with the principles – which means that all potential subsidies within the scheme must be assessed as compliant with the subsidy control principles.

184. The terms of a scheme must demonstrate how the scheme is consistent with the relevant subsidy control principles. A scheme's consistency with the subsidy control principles is in general assessed in the same manner as for individual subsidies – see earlier parts of this guidance chapter. If a public authority is proposing a new subsidy

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<sup>15</sup> The UK Government has produced guidance on valuing energy usage and greenhouse gas emissions. [www.gov.uk/government/publications/valuation-of-energy-use-and-greenhouse-gas-emissions-for-appraisal](http://www.gov.uk/government/publications/valuation-of-energy-use-and-greenhouse-gas-emissions-for-appraisal)

scheme, the assessment should focus on the ‘edge cases’: the subsidies that could be given under the terms of that new scheme that have the highest risk of not complying with the principles.

185. The rules and parameters of the scheme should be designed to ensure all potential subsidies within it meet the principles, as set out in the framework above. In some cases, this may require the recipient to confirm that it has a particular status before the subsidy is given, or to require the public authority to carry out a check that the recipient meets the criteria. For more potentially distortive or more complex schemes, it may be appropriate for the public authority to carry out analysis to confirm that the proposed subsidy/recipient meets the scheme rules (and therefore for the methodology of that analysis to be set out as part of the scheme).
186. Public authorities will need to consider other subsidies given to the same recipients for similar purposes as part of their principles assessment. This includes not only subsidies that have already been given at the point the scheme is made, but also those that could be given in the time period between the scheme being made and the subsidies under it being given. These subsidies could be given to the same recipients, for similar purposes, as other standalone subsidies or through other schemes (including Streamlined Routes). As such, it is likely to be appropriate to make provision in the scheme rules to manage this: for example, by asking recipients to confirm they have not already received a similar subsidy as the one given under the scheme, or by putting a cap on the total value of similar subsidies a recipient can receive over a certain time period in order to be eligible to receive subsidies under the scheme.
187. A subsidy that is not given in line with the terms of the subsidy scheme is a new subsidy that must be separately assessed against the relevant subsidy control principles.
188. In order to ensure that every subsidy within it is proportionate, a scheme’s terms should typically include a cap on the maximum amount awardable to a single recipient.
189. Schemes should be established to run over a clearly defined period of time. A scheme without an end date is not likely to be proportionate and limited to what is necessary to achieve its policy objective. However, the public authority may choose to relaunch the same or a similar scheme, having carried out a new assessment.

# Chapter 4: Minimal Financial Assistance (MFA)

## Overview of chapter

190. Minimal Financial Assistance (MFA)<sup>16</sup> allows public authorities to award low value subsidies without needing to comply with the majority of the subsidy control requirements. MFA has a financial threshold so no recipient<sup>17</sup> can receive more than £315,000 over the applicable period.

191. The applicable period is:

- The elapsed part of the current financial year (i.e. from 1 April)<sup>18</sup>, and
- the two financial years immediately preceding the current financial year.

192. Subsidies given under MFA provisions are very unlikely to have any appreciable distortive impacts on domestic competition or investment and/or international trade or investment or. Subsidies given under MFA are therefore exempt from the majority of the substantive requirements of the Act. This means that:

- no assessment against the Subsidy Control Principles or Energy & Environment Principles is required;
- Most of the prohibitions and other conditions need not be considered, with two exceptions (see Section X/para X);
- the transparency obligations do not apply if the subsidy is no more than £100,000 but they do apply if the subsidy exceeds this amount.

## When to use MFA

193. MFA can be used by a public authority when it is awarding a low value subsidy if the recipient has not reached the allowance threshold of £315,000 within the applicable period and will not breach this threshold on receipt of the subsidy. When providing a subsidy under MFA the public authority needs to follow certain procedural requirements

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<sup>16</sup> MFA encompasses all forms of subsidy, for example, grants, loans and loan guarantees at below market rates, tax measures, allowing a company to use publicly owned office space rent free.

<sup>17</sup> 'Enterprise' is defined in section 7 of the Act. An enterprise can be a group of persons under common ownership or common control engaged in an economic activity. The MFA financial threshold, therefore, applies at company group level, to a parent company and its subsidiaries operating within the UK.

<sup>18</sup> The financial year means a period of 12 months ending 31 March.

and these are set out below under 'How to give a subsidy under MFA'. There are also a number of factors to consider before providing a MFA subsidy.

194. Although subsidies given as MFA are exempt from the main substantive subsidy control requirements, there are two prohibitions that apply to all subsidies including MFA. These include the prohibition on giving subsidies relating to goods for export performance and the prohibition on domestic content [cross ref to relevant section in Guidance].

195. Cumulation rules apply to MFA. This is essential to ensure that the UK is complying with its international obligations. MFA subsidies cumulate with each other and with other subsidies that fall within the category of 'Minimal or (SPEI) financial assistance' [as defined under section 42(8) of the Act]. This captures all the different low value exemptions an enterprise<sup>19</sup> could receive support through. For example, the following should all be taken into account during the current and previous two financial years:

- MFA;
- SPEI assistance;
- aid given under the EU State aid de minimis regulations<sup>20</sup> either before the end of the implementation period of 31 December 2020 or after this date, if by virtue of the Northern Ireland Protocol;
- and subsidies given as small amounts of financial assistance (SAFA) under Articles 364(4) or 365(3) of the UK-EU Trade and Cooperation Agreement after the end of the implementation period but prior to this section of the Act coming into effect.

196. This prevents enterprises being able to receive many subsidies that are in isolation considered low value, but cumulatively could create distortions if their combined value exceeds the threshold.

197. MFA subsidies above £100,000 are subject to the transparency requirements. This means that for every subsidy provided of more than £100,000, the public authority needs to include details of the subsidy on the [domestic subsidy control database]. Further details are provided [in Chapter X on Transparency]. These subsidies, although appearing on the database, will not be subject to challenge on the basis of the subsidy control requirements as, with exception of the two prohibitions set out in [paragraph X/above], MFA subsidies are exempt from the substantive requirements of the Act.

198. The value of the subsidy should be calculated as the gross cash amount. If the subsidy is not provided as a cash grant, the value should be calculated on the basis of

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<sup>19</sup> An enterprise is defined under section 7 of the Act.

<sup>20</sup> This includes de minimis under Commission Regulation (EU) No 1407/2013, SGEI de minimis under Commission Regulation (EU) No 360/2012, Agriculture de minimis under Commission Regulation (EU) No 1408/2013, and Fishery and Aquaculture de minimis under Commission Regulation (EU) No 717/2014.



the gross cash equivalent. Further details on how to do this calculation can be found in [Chapter X.]

199. Where a public authority has a high number of small value payments and decides to make these payments under a scheme, thereby complying with the substantive requirements under Part 2 of the Act, these payments would not cumulate as MFA as they would fall outside of the exemption.

## How to give a subsidy under MFA

200. Public authorities awarding subsidies as Minimal Financial Assistance must comply with certain procedural requirements. The procedural requirements seek to ensure that enterprises only receive subsidies through the MFA exemption when they are entitled to do so.

201. Before awarding an MFA subsidy a public authority has to provide the intended recipient enterprise with an 'MFA notification'. A MFA notification means a written statement:

- explaining that the public authority is proposing to give to the enterprise a subsidy by way of minimal financial assistance,
- specifying the gross value amount of the assistance, and
- requesting written confirmation from the enterprise that the MFA threshold specified in section 36(1) will not be exceeded by the enterprise receiving the proposed assistance.

202. The public authority can only award the subsidy when it has received this confirmation. If the enterprise confirms that they will exceed the threshold on receipt of the subsidy, it can still elect to receive part of the subsidy up to the threshold as MFA but the remaining balance will be subject to the full subsidy control requirements associated with providing a subsidy that is not MFA.

203. When awarding an MFA subsidy, the public authority must give the intended beneficiary an 'MFA confirmation'. This is a written statement which confirms:

- that the subsidy is given as minimal financial assistance,
- the date on which it is given, and
- the gross value amount of the assistance.

204. The enterprise must keep a record of this information for at least three years beginning on the date on which the subsidy was given.

205. The procedures should represent a straightforward way for public authorities and enterprises to clarify whether the cumulative threshold has been reached. It is expected that public authorities will be able to undertake these procedures as part of the normal communications between a public authority and an enterprise before any subsidy is given. In seeking to keep the administrative burden to a minimum, public authorities are encouraged to use email and automated on-line processes wherever possible and by using forms including tick-boxes where appropriate.

206. Public authorities are encouraged to undertake their own due diligence. This should form part of the public authority's own procedures ahead of granting a subsidy and will reduce the risk of granting a subsidy that exceeds a recipient's MFA threshold.

An example of text that could be used as part of a notification letter under section 37(2) of the Act is included below.

“The [PA] offers [Enterprise] an Minimum Financial Assistance (MFA) subsidy under the Subsidy Control Act (2022), subject to your agreement to, and compliance with, the terms and conditions set out below [relating to MFA and any other terms of the subsidy specified by the PA].

The amount of MFA offered is [£x]. Before making the payment, we require written confirmation that receipt of the payment will not exceed [Enterprise's] MFA threshold of £315,000 cumulated over this and the previous two financial years, as specified in section 36(1) of the Subsidy Control Act (2022). This means you must confirm you have not received more than [£315,000 minus the value of the subsidy] in MFA subsidies or comparable types of subsidy (see section 42(8) of the Subsidy Control Act) between 1 April [year beginning the calculation period] and this date.

We take this opportunity to remind [Enterprise] that you are required to keep a written record of the amount of MFA you have received and the date/s when it was received. The written record must be kept for at least three years beginning with the date on which the MFA was given. This will enable you to respond to future requests from public authorities on how much MFA you have received and whether you have reached the cumulative threshold.

Confirmation must be sent by someone who is authorised to do so on behalf of your organisation.

I confirm, for and on behalf of, [Enterprise] that receipt of MFA of [£x] from [PA] will not exceed [Enterprise] MFA threshold specified in section 36(1) of the Subsidy Control Act (2022).”

207. When awarding the MFA subsidy, the public authority must then give the intended beneficiary an 'MFA confirmation'. [See paragraph X above]. As explained above enterprises in receipt of MFA from public authorities have certain obligations to fulfil including providing written confirmation that it will not exceed its MFA threshold on

receipt of the assistance. To provide this confirmation, the enterprise is required to keep a written record of the amount of MFA subsidy it has received and the date/s when it was received. The written record must be kept for at least three years beginning with the date on which the MFA subsidy was given. This will enable it to respond to future requests from public authorities on how much MFA it has received and whether it has reached the cumulative threshold. Although, public authorities are not required to remind beneficiaries of this as part of the process of giving an MFA subsidy, it would be good practice to do so to ensure a greater awareness of the requirements under the Act.

## Mergers and acquisitions

208. There are certain rules governing how a subsidy given as minimal or SPEI financial assistance is to be treated following a merger or acquisition. This is to ensure that subsidies awarded as minimal or SPEI financial assistance are properly attributed to successor enterprises for the purposes of determining how much support an enterprise has received through the exemptions and hence compliance with the relevant financial thresholds.
209. Where all or part of an enterprise that received minimal or SPEI financial assistance (as defined under section 42(8)) (enterprise A) is transferred to another existing enterprise (enterprise B), then any minimal or SPEI financial assistance given to enterprise A prior to the transfer is to be treated, on and after the transfer, as if given to enterprise B. As such, enterprise B is to be treated by public authorities as though it was the recipient when determining whether a relevant threshold, with regards to giving minimal financial assistance or SPEI assistance, has been exceeded.
210. If only part of enterprise A is to be transferred, then the proportionate part of the minimal or SPEI financial assistance is to be treated as given to enterprise B. This should also be applied when determining whether a relevant threshold, with regards to giving minimal financial assistance or SPEI assistance, has been exceeded in respect of the successor enterprise.
211. A 'proportionate part' refers to the part of the assistance that can be fairly attributed to the activities carried on by the part of the undertaking that is transferred. However, if this is not reasonably practicable to apply then it should be proportionate to the value of the part of the undertaking that is transferred.

### Example :

Scenario 1: In year 1 enterprise A receives £300,000 MFA

In year 2 enterprise B acquires 100% of enterprise A.

Post-acquisition, enterprise B is treated as if it had received £300,000 MFA and will need to keep a record for 3 years from the date the payment was made to enterprise A. In year 3 a public authority intends to make a payment of £50,000 to enterprise B, this will breach the MFA threshold and hence only £15,000 can be paid as MFA; the remaining £35,000 will fall outside the exemption and will be subject to the substantive requirements of the Act.

Scenario 2: In year 1 enterprise A receives £300,000 MFA.

In year 2 enterprise B acquires 25% of enterprise A.

An estimate of the proportionate value of MFA could be based on the total value of the transfer to enterprise B. This is equivalent to £75,000 MFA (25% of £300,000). In year 3, a public authority intends to make an MFA payment of £50,000 to Company B. This can be paid as MFA as the total MFA received by enterprise B in the three years will be £125,000 and is within the MFA threshold.

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# Chapter 5: Other Exemptions

## Overview of chapter

212. There are exemptions to the subsidy control requirements, either wholly or in part, in relation to certain subsidies and subsidy schemes in exceptional circumstances. These exemptions exist to allow public authorities to respond to natural disasters and natural or economic emergencies, and for reasons of national security and financial stability. This guidance sets out further details regarding these kinds of subsidies.

## Emergencies

### Natural disasters and other exceptional circumstances

213. A subsidy given to compensate for the damage caused by natural disasters, or other exceptional circumstances, is not subject to the subsidy control requirements. However, the transparency requirements apply as normal.
214. A natural disaster includes occurrences such as earthquakes, avalanches, landslides, floods, and wildfires of natural origin. They will have a significant economic impact or cost, and/or a serious or ongoing effect on local services and infrastructure.
215. Other exceptional circumstances may include rare and not straightforward to foresee events like a major pandemic. Exceptional circumstances cannot be purely economic in nature.
216. A public authority may fully compensate a recipient for the damage caused by natural disasters or other exceptional circumstances; it should not, as a rule, provide additional funding over and above the costs of repairing this damage.
217. An exemption under this section can only apply if a notice is published by the Secretary of State declaring that it applies in respect of a particular natural disaster or occurrence.

### National or global economic emergencies

218. The prohibitions and other requirements imposed by sections 15 to 29 of the Act (as set out in the guidance chapters on prohibitions and SPEI) do not apply to a subsidy given to respond to a national or global economic emergency. Such subsidies must be given on a temporary basis for these exemptions to apply.

219. Subsidies given in relation to national or global economic emergencies remain subject to subsidy control requirements more generally, including assessment against the subsidy control principles and the transparency requirements.

220. National or global economic emergencies are rare and not easily foreseeable sets of circumstances that are likely to entail sudden and severe disruption to global economic trading relationships, or systemic risks to critical national economic or financial infrastructure. An example of the latter is the 2007-08 global financial crisis. A further example of a national or global economic emergency are threats to essential supply chains of the kind posed by workforce absences during the Covid-19 pandemic in 2020. An economic recession, by itself, or a global economic downturn more generally, are not national or global economic emergencies.

221. A subsidy for the purpose of addressing a national or global economic emergency can only be granted by a public authority if a notice is published by the Secretary of State declaring that this exemption under the Act applies in respect of a particular emergency. Notices of this kind will be published on gov.uk.

## Other exemptions

### National security

222. Subsidies given to safeguard national security are not subject to the subsidy control requirements. This is without prejudice to UK's international commitments.

### Bank of England monetary policy

223. Subsidies given by or on behalf of the Bank of England in pursuit of monetary policy activities are not subject to the subsidy control requirements.

### Financial stability

224. The subsidy control requirements do not apply to the giving of a subsidy, or the making of a subsidy scheme, so far as a financial stability direction, as given by the Treasury, so provides.

225. A financial stability direction can provide that specified subsidy control requirements do not apply to:

- a) the giving of a specified subsidy or making of a specified subsidy scheme, or
- b) the giving of subsidies, or the making of subsidy schemes, of a specified description.

226. In both instances, the Treasury may give a financial stability direction only if it considers it appropriate for prudential reasons. This includes where it is necessary for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier or ensuring the integrity and stability of the financial system of the UK.
227. The Treasury must consult the Bank of England before giving a financial stability direction. The Treasury may only give a financial stability direction that relates only to a subsidy given, or subsidy scheme made, by the Bank of England only if the Bank of England has requested the Treasury to give the direction.
228. The Treasury must publish the financial stability direction in whatever manner it deems appropriate and lay this direction before Parliament.
229. However, if the Treasury considers that publication and laying before Parliament would have the effect of undermining the purpose for which the direction is given, the Treasury may delay the carrying out of those steps until it is satisfied that to do so would not have that effect.

## Tax measures

230. Subsidy control requirements do not apply to a tax measure which is otherwise permitted under Article 413 of the [TCA]. Article 413 of the [TCA] clarifies that the provisions of the [TCA] should not be construed as affecting the rights and obligations of the United Kingdom under any tax convention it has entered into. This exception covers conventions for the avoidance of double taxation or any other international agreement or arrangement relating wholly or mainly to taxation.
231. Therefore, to the extent that an enterprise may be considered to benefit from a subsidy (within the meaning of clause 2 of the Subsidy Control Act) as a consequence of an advantage accorded pursuant to a tax convention (as defined above), that subsidy will not be subject to provisions such as the requirement to comply with the subsidy control principles,<sup>21</sup> the duty to include information in the subsidy database,<sup>22</sup> or any other duties or requirements provided for under the Subsidy Control Act.
232. Article 413 of the [TCA] also specifies that the subsidy control requirements do not to prevent the adoption, maintenance or enforcement of any non-discriminatory measure that aims at ensuring the equitable or effective imposition or collection of direct taxes or any measure which distinguishes between taxpayers who are not in the same situation.

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<sup>21</sup> Subsidy Control Act, clause 12.

<sup>22</sup> Subsidy Control Act, clause 33.

## Large cross-border or international cooperation projects

233. A public authority does not need to consider the subsidy control principles when granting a subsidy if it is given in the context of a large cross-border or international cooperation project and the authority giving the subsidy is satisfied that the project's benefits are not limited to the enterprise, sector or States participating and that it will have wider benefits through spill over effects that do not exclusively accrue to the United Kingdom, the relevant sector, and the beneficiary of the subsidy. This is also true of authorities making a subsidy scheme that would grant such subsidies.
234. Large cross-border or international cooperation projects may include those for transport, energy, the environment or research and development and first development projects to incentivise the emergence and deployment of new technologies, excluding their manufacture.

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# Chapter 6: Legacy Subsidies, Withdrawal Agreement Subsidies, and Permitted Modifications

## Overview of the chapter

235. Legacy subsidies are exempt from the subsidy control requirements, with the exception of the transparency obligations.<sup>23</sup> Subsidies subject to Article 10 of the Northern Ireland Protocol, subject to Article 138 of the Withdrawal Agreement, or given in accordance with Regulation 1370/2007 are wholly exempt from the subsidy control requirements.
236. Modifications made to a subsidy which has already been given, or a subsidy scheme which has been made, are generally to be treated as the making of a new subsidy or subsidy scheme. Public authorities are therefore required to complete a new assessment against the subsidy control principles and to ensure that all the obligations of the regime are complied with, as they would when making a new subsidy or subsidy scheme.
237. There are, however, certain modifications defined in the Act<sup>24</sup> as ‘permitted modifications’, which may be made to a subsidy or scheme without the public authority being required to carry out a further assessment against the subsidy control principles. These will allow public authorities to make a limited range of changes to a subsidy without undue delay.
238. Any changes made to a subsidy or subsidy scheme after this section (section 81) of the Act comes into force must comply with the modification provisions in the Act. This includes those changes made to a subsidy or scheme after this section of the Act comes into force, where those subsidies or schemes were given before this section of the Act came into force.

## Legacy and Withdrawal Agreement Subsidies

239. Legacy schemes are schemes that were in existence prior to section 48 of the Act coming into force. Legacy schemes, and the award of subsidies under them, may continue indefinitely if provided for under the original terms of the scheme. The regime

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<sup>23</sup> Transparency obligations in the Act do not apply to legacy subsidies subject to the provisions of Part IV of Annex 2 of the WTO Agreement on Agriculture, or relating to trade in fish and fish products, or the audio-visual sector (see section 48(2)) or to subsidies given in accordance with Regulation 1370/2007 (see section 48(1)(b))

<sup>24</sup> See section 81 of the Subsidy Control Act 2022.

does not require these schemes be assessed against the subsidy control principles or comply with the other subsidy control requirements contained in the Act.

240. The rules on transparency contained in the Act, however, will still apply to subsidies given under legacy schemes where those subsidies are given once section 48 of the Act comes into force. An exception to this is for subsidies subject to the provisions of Part IV of Annex 2 of the WTO Agreement on Agriculture, or relating to trade in fish and fish products, or the audio-visual sector.

241. Subsidies given in accordance with Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road are also exempted from the subsidy control requirements, including transparency. This is retained EU law.

242. The subsidy control requirements do not apply to subsidies or subsidy schemes that are subject to Article 10 of the Northern Ireland Protocol. (Please see Chapter 1 for further details.)

243. Article 138 of the Withdrawal Agreement also applies EU State aid rules in certain circumstances. Where Article 138 of the Withdrawal Agreement applies the EU State aid rules, the UK's subsidy control requirements do not apply. Article 138 of the Withdrawal Agreement applies the EU State aid rules to subsidies given in the UK for programmes and activities committed under the Multiannual Financial Framework (MFF) 2014-2020, or any previous EU financial frameworks. Where a public authority which to take advantage of any remaining UK funds included in the 2014-2020 MFF, it must do so in conformity with the EU State aid rules, by using a Block Exemption Regulation for example. This will apply until all the funds the UK is entitled to under the 2014-2020 MFF have been exhausted.

## Permitted Modifications

244. There are seven permitted modifications. These are modifications which:

- provide for an increase in budget of a subsidy or subsidy scheme of up to 25%;
- provide for an extension of a subsidy scheme of up to six years;
- are administrative in nature;
- are made to a legacy subsidy or legacy scheme (see paragraph 4.2.9 below);
- are made to a withdrawal agreement subsidy or withdrawal agreement scheme (see paragraph 4.2.11 below);
- are made to allow a subsidy or subsidy scheme to operate effectively and/ or avoid deficiencies arising from the withdrawal of the UK from the European Union; or
- are made under Regulation (EC) No 1370/2007 (on public transport services by rail and road) which is retained EU law in the UK.

245. The following sections elaborate further on each of these categories of permitted modification in turn.

### Modifications for an increase of up to 25% of the original budget of a subsidy or subsidy scheme

246. An increase of up to 25% of the budget of a subsidy or scheme, when compared to the original budget, will be considered a permitted modification.

247. Public authorities should be aware that the 25% figure represents a cumulative total compared to the original budget of the subsidy or subsidy scheme. Once a subsidy or subsidy scheme has been modified to increase its budget by 25%, subsequent increases in budget will not benefit from the exemption from the regime afforded to permitted modifications. Instead, those further modifications will be subject to the full obligations of the subsidy control regime.

248. Where the budget for a subsidy or scheme is provided as a range of potential subsidy awards, the threshold is calculated from 25% of the maximum potential award.

249. In addition, the 25% increase is to be calculated by reference to the financial year in which the permitted modification of that subsidy or scheme was made. This means that where the subsidy or subsidy scheme already incorporates a ratchet mechanism that allows the budget to increase year on year, the baseline figure for calculating the 25% increase is the financial year in which the permitted modification is being made.

#### **Example**

A subsidy scheme has been made which provides grants of up to £80,000 per beneficiary. After the first year of the scheme's operation an increase of 20% is made to the maximum amount that can be awarded through the scheme to £96,000. After a further year, another increase in the budget provides for an increase of 5% to the maximum amount that can be awarded under the scheme, when compared to the original budget. The maximum amount that can be awarded under the scheme is now £100,000.

Both changes to the budget can be made as a permitted modification as the maximum amount that can be awarded under scheme has remained at, or below, the 25% threshold, when compared to the original budget of the scheme. Further changes which increase the maximum amount that can be awarded under the scheme will need to be made as the creation of a new subsidy scheme, with a full assessment against the subsidy control principles and following all the procedures required by the regime for that subsidy scheme.

## Modifications for an extension of subsidy schemes by up to six years

250. An extension to the life of a subsidy scheme by up to six years will be considered a permitted modification. Similar to the 25% increases in the budget of a subsidy or subsidy scheme discussed above, the six-year figure represents a cumulative total from the original end date of the subsidy scheme. Extensions that move the end date of the subsidy scheme beyond six years will not be classed as a permitted modification and will need to be considered as a new subsidy scheme.

## Administrative modifications

251. Administrative modifications to a subsidy or subsidy scheme are a permitted modification. Public authorities will need to determine whether a modification is administrative in nature, according to whether or not the modification introduces substantive changes to the subsidy or subsidy scheme.
252. A typical example of an administrative modification would include the situation in which a subsidy scheme is passed from one public authority to another without further substantive changes being made to the subsidy scheme itself. In that situation, the public authority would be required to make a modification in the subsidy database to alter the name of the public authority responsible for administration of the subsidy scheme. The public authority would be permitted to make such a modification without requiring the creation of an entirely new subsidy or subsidy scheme.
253. When assessing whether a modification would be considered an administrative modification for the purpose of this section, public authorities should remain alert to the fact that interested parties may challenge a modification made to a subsidy or subsidy scheme in the Competition Appeal Tribunal on the basis that it should not be classified as an administrative modification.
254. Where a public authority incorrectly decides that a modification to a subsidy or subsidy scheme is an administrative modification, and therefore did not ensure the modification complied with the subsidy control requirements, a legal challenge could be raised against the subsidy. If that challenge were successful, the Competition Appeal Tribunal could require recovery of all or part of the subsidy, or another available remedy.

## Modifications to a legacy subsidy/scheme or subsidy/scheme made in connection with the UK's withdrawal from the European Union

255. Modifications which are made to legacy subsidies or legacy subsidy schemes, or to withdrawal agreement subsidies or subsidy schemes may be a permitted modification, so long as those modifications are made in accordance with the terms of the subsidy or scheme in effect before this section (section 81) of the Act came into force.

256. A legacy subsidy or legacy scheme means the subsidies and schemes listed below:

- a subsidy given on or after the date on which section 48 of the Act came into force, under a subsidy scheme made before that date; or,
- a subsidy given in accordance with Regulation (EC) No 1370/ 2007 of the European Parliament and of the Council on public passenger transport services by rail and by road.

257. A withdrawal agreement subsidy or scheme means:

- a subsidy given or a subsidy scheme made in accordance with Article 10 of the Northern Ireland Protocol;
- a subsidy or subsidy scheme to which Article 138 of the EU withdrawal agreement applies.

258. Additionally, modifications that seek to deal with

- any failure of a subsidy or scheme to operate effectively; or
- any deficiencies related to a subsidy or scheme

259. which arise from the UK's withdrawal from the EU.

## Making a permitted modification

260. As stated above, public authorities do not need to conduct an assessment of the modified subsidy or scheme against the principles. Permitted modifications are also not subject to other obligations set out under the Act, including referring a subsidy or scheme to the Subsidy Advice Unit for further advice.

261. The types of permitted modification set out above are not mutually exclusive, and more than one type of modification may be made to the same subsidy or scheme. Notably, legacy schemes may be subject to administrative modifications, extensions, and increases in budget, as well as the specific category of legacy scheme modifications. However, if a modification is made that is not a permitted modification then, as set out in paragraph 2 above, the subsidy or scheme would need to be treated as the giving or making of a new subsidy or scheme for the purposes of applying the subsidy control requirements.

262. However, public authorities must comply with the transparency requirements, as they apply to modifications under section 33 of the Act. Public authorities must upload any relevant modifications made to a subsidy or subsidy scheme to the subsidy control database in accordance with the following timescales:

- for subsidy awards given in the form of a tax measure, within one year of the modification being made;
- for all other subsidies and subsidy schemes, including subsidy schemes that are made in the form of a tax measure, within three months of the modification being made.

263. There is an exception to these requirements for subsidy awards of no more than £100,000 that are given under a subsidy scheme that has been uploaded to the database already. A public authority would not be required to upload such a subsidy to the subsidy database. Additionally, any modifications to the subsidy would not need to be uploaded to the database provided the subsidy as modified remained below the £100,000 threshold.

264. Further, the permitted modifications in relation to subsidies or schemes given in accordance with Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, legacy subsidies relating to agriculture, fish and fish products, or the audio-visual sector, and withdrawal agreement subsidies or schemes given in accordance with Article 10 of the Northern Ireland Protocol or to which Article 138 of the EU Withdrawal agreement applies, do not need to be uploaded to the database as they are not subject to the transparency requirements.

265. Nothing set out in the above guidance on making a permitted modification to a subsidy or subsidy scheme is intended to override or replace the existing obligations public authorities have to manage spending responsibly and transparently, such as the Local Government Transparency Code or the HM Treasury Green Book. They should abide by the requirements set out above in conjunction with fulfilling the other statutory obligations they have in that regard.

266. Please refer to [\[link to the transparency section of the guidance\]](#) for more details on the transparency requirements of the Subsidy Control Act as they apply to unmodified subsidies and subsidy schemes.

# Chapter 7: Services of Public Economic Interest (SPEI)

## Overview of chapter

267. The Act contains provisions for public authorities to provide subsidies for Services of Public Economic Interest (SPEI). These are essential services provided to the public such as, postal services, social housing and certain transport networks, particularly in rural or less populated areas of the country. Without these subsidies, these services would not be supplied in an appropriate way or may not be supplied at all by the market.

268. The following sections provide guidance on:

- when a service is considered to be an SPEI;
- when public spending on an SPEI constitutes a subsidy;
- the requirements public authorities must adhere to when providing an SPEI subsidy, including those on transparency, and;
- exceptions to those requirements where the subsidy is given as SPEI Assistance.

269. The transparency obligations represent a significant change from those that have applied previously. Public authorities now need to record all SPEI subsidies above £100,000 on the transparency database.

## When is a service considered to be an SPEI?

270. To designate a service as an SPEI, the public authority must be satisfied that:

- the service is provided for the benefit of the public; and
- the service would not be provided, or would not be provided on the terms required, by an enterprise under normal market conditions.

271. It is for the public authority to decide whether a service can be classed as an SPEI, subject to the conditions set out under section 29 of the Act, as this will be dependent on the needs of the local community in question and the prevailing market conditions. For example, for a rail or bus service, market conditions may adequately provide one type of service for a community in one part of the country, but the same service would not be considered economically viable in another part of the country.

### Example

Certain households fall outside of the service area of the local bus company as it would be uneconomical for the bus company to provide a service on routes which would connect those households to the rest of the local community.

As the provision of public transport services would lead to a public benefit, insofar as it facilitates access to employment and healthcare for persons living in isolated households for instance, and would not be available under normal market conditions, the relevant public authority could designate the provision of public transport services to these households as an SPEI. As public transport services can be provided to the rest of the local community under normal market conditions, this service would not be considered to be an SPEI.

However, whilst it may be in the commercial interest of bus operators to provide public transport service to the local area on certain terms (e.g. using a conventional diesel-fuelled fleet), it might be uneconomical for any such operator to provide public transport services on the terms required by the public authority (e.g. using a fleet of electric buses).

In these circumstances, public authorities could designate the provision of public transport services in the local area using electric buses as an SPEI.

## When is public spending on an SPEI considered to be a subsidy?

272. Public authorities should consider whether public spending on an SPEI meets each of the four limbs of the test used to identify a subsidy (set out in Chapter 2).
273. In particular, the service provided in the public interest must entail an economic activity to be considered an SPEI. Public spending on non-economic services, that is, services which are not offered on a market would not be considered to involve a subsidy within the meaning of the Act.<sup>25</sup> For further information on when an activity will be considered to be economic in nature, please refer to section [X of this guidance].
274. Public authorities should also consider whether public spending on an SPEI confers an advantage on the SPEI enterprise. As set out Chapter 2, public authorities will generally be acting in accordance with the CMO principle when they engage in competitive public procurement for goods or services. Payment for the goods or services purchased through a competitive process will, therefore, not generally be

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<sup>25</sup> However, if public spending can be used to cross subsidise economic activities carried out by a provider of non-economic services, this spending may fall within the scope of the Subsidy Control Act if all other limbs of the test set out in Chapter 2 are met.



considered to confer an economic advantage, as the public authority will be purchasing such goods or services at a market rate.

## SPEI subsidy requirements

275. Should a public authority wish to provide a subsidy to an enterprise for the purpose of the provision of SPEI, the public authority must comply with certain substantive and procedural requirements in order to provide the SPEI subsidy. In particular, the public authority:

- must be satisfied that the subsidy is limited to what is necessary to deliver the service;
- must ensure that the SPEI subsidy is assessed against the subsidy control principles;
- must ensure that the subsidy is provided in a transparent manner;
- must ensure that the subsidy is regularly reviewed; and
- must comply with the duty to include information in the subsidy control database.

276. In the event that the public authority had failed to comply with its duty to apply the principles, prohibitions, and requirements, then the subsidy is at risk of challenge in the CAT from an interested party. If the challenge is successful, then the CAT will decide on a case-by-case basis what is the most appropriate remedy. Public authorities should also be mindful of the fact that the prohibition on export subsidies and local content apply to SPEI subsidies, as they do for all other subsidies (see chapter on Prohibitions)].

277. Each of the substantive and procedural requirements applicable to SPEI subsidies is discussed in greater detail below.

### Substantive

#### Compensation

278. A subsidy for the provision of SPEI services should be limited to, at most, the costs associated with its delivery and the making of reasonable profits whilst doing so. Public authorities have discretion to compensate only a portion of the costs associated with the provision of the SPEI services and to exclude profits entirely.

279. Public authorities are free to use whichever basis for calculating compensation they consider appropriate in view of the specific circumstances of the SPEI. For instance, a public authority may decide to calculate compensation based on the number of service users or the number of goods provided through the SPEI service, or may decide to calculate compensation on a daily, weekly, or monthly basis. Whatever basis is chosen, public authorities must ensure that it is possible to calculate the amount of compensation that will be provided to the enterprise as compensation for the SPEI in

advance (i.e., before the SPEI provision commences or any compensation is paid to the SPEI enterprise). Public authorities should also ensure that the compensation parameters used include incentives to encourage the efficient use of resources.

280. Public authorities should note that, for the purposes of the Act, compensation includes any advantages granted to the SPEI enterprise through public resources. This could include, for instance, rights to use certain assets owned by the public authority at sub-market prices.
281. If a subsidy for the provision of SPEI services is provided in cash, the gross cash amount is to be used in determining its value. If the subsidy is provided otherwise than in cash, its value is to be determined by reference to the gross cash equivalent of the subsidy. Further details on how to do this calculation can be found in [Chapter X.]
282. Compensation must only cover costs which are directly associated with the provision of the SPEI. In the event that a single service provided by an enterprise has both SPEI and non-SPEI components, public authorities must ensure that SPEI compensation only covers the additional costs incurred by providing the SPEI and in particular should not be used to cross-subsidise non-SPEI components. In the event that an enterprise carries out distinct SPEI and non-SPEI activities, the enterprise should maintain a clear separation of accounts and the public authority must be satisfied that the methodology used to calculate compensation will not cover costs which are not directly related to the provision of the SPEI.

### **Example**

A childcare provider has been tasked with an SPEI which entails the provision of childcare services to the local community at sub-market rates. The childcare service provider will be providing these services from a building owned by the public authority, which will be leased to the enterprise at sub-market rates.

In view of the type of service provided, the costs directly associated with the provision of the SPEI are the cost of providing childcare service at sub-market rates. It may, therefore, be appropriate for the public authority to calculate SPEI compensation on the basis of the cost per child. The public authority could do so by comparing the cost per child of providing childcare services at sub-market rates against the cost of providing those services under normal market conditions. The difference between the two would be considered to be the costs directly associated with the provision of the SPEI.

Public authorities should factor in the advantage provided by the lease of its building at sub-market rates to the childcare service provider when calculating the appropriate amount of SPEI compensation. The difference between the market price of a lease on identical terms and the price at which the building is due to be leased to the provider should be subtracted from the amount due to the provider in compensation.

283. Compensation for the SPEI may also include reasonable profits to the SPEI provider. Reasonable profits should be assessed through a benchmarking exercise, comparing the profits achieved under similar types of public service contracts awarded under competitive conditions. A public authority should consider which profit level indicator is most appropriate for the purposes of the benchmarking exercise in view of the specific circumstances of the SPEI. In general, the rate of return on capital investments required to provide the SPEI is likely to be the most appropriate basis for comparison.
284. Public authorities should also consider the degree of risk assumed by the enterprise in carrying out the SPEI when assessing the reasonableness of any profits generated. In particular, the degree of risk assumed by the SPEI enterprise can be influenced by the payment process used by the public authority. If the public authority decides to make compensation payments in arrears on the basis of the costs actually incurred by the SPEI enterprise, the enterprise will bear a lower level of risk. Conversely, lump sum payments in advance could expose the enterprise to greater risk in certain markets (especially those in which costs are prone to greater fluctuations).
285. In the event that compensation exceeds the costs directly associated with the provision of the SPEI and any reasonable profits, the compensation mechanism used in the contractual arrangements between the public authority and the enterprise must allow the public authority to recover any overpayment to the SPEI enterprise. Recovery mechanisms will be particularly important where it is difficult to forecast the costs and revenues generated by an SPEI in advance.

### **Compatibility with subsidy control principles**

286. An assessment against the principles needs to be undertaken by the public authority in relation to such SPEI subsidies, but the duty in section 12 not to give a subsidy or make a subsidy scheme unless doing so is consistent with the principles in schedule 1 applies only so far as the carrying out of that duty does not obstruct the delivery of the service in question. Further information on the subsidy control principles can be found at Chapter 3.

## **Procedural**

### **Transparency of the award**

287. The award of an SPEI subsidy must be done in a transparent manner which means that the subsidy is given through a written contract or other written legally enforceable arrangement. Public authorities will normally publish these contracts and it is good practice to do so.

288. The terms of the subsidy must be set out in the relevant contract or arrangement. This must include the following information:

- the services for which the subsidy is being given;
- the enterprise providing the service;
- the period over which the services are being given;
- the geographic area in which the services are being provided;
- how the amount of the subsidy has been calculated; and
- arrangements for review and steps for recovery if this becomes necessary.

289. Public authorities should note that they are not required to describe every task assigned to the SPEI enterprise in detail if this would be impractical. However, at a minimum, public authorities must ensure that the scope of the task assigned to the SPEI enterprise along with any key performance requirements and conditions (e.g., relating to service quality) can clearly be identified from the terms of the SPEI contract.

290. These measures will ensure that the delivery of SPEIs through the award of subsidies is transparent to competitors of the enterprise delivering the subsidy and the community benefiting from the service.

## **Regular review**

291. Throughout the period the service is being delivered, the public authority must keep the subsidy under regular review to make sure the subsidy remains limited to what is necessary to deliver the service. This will require the public authority to undertake a review of the SPEI subsidy at least once every three years, beginning with the day when the delivery period begins and at the end of the delivery period.

292. In particular, public authorities should assess whether the compensation paid to the SPEI enterprise is limited to what is necessary to deliver the SPEI services. If the public authority determines that the compensation provided to the SPEI enterprise is not limited to what is necessary to deliver the SPEI services (i.e., the compensation exceeds the level of costs directly related to the provision of the SPEI or allows for compensation exceeding reasonable levels), the public authority must take steps to recover the sums paid in excess.<sup>26</sup>

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<sup>26</sup> As noted above, public authorities should ensure that contractual arrangements with SPEI enterprises make sufficient provision for the recovery of these sums.

293. Public authorities can also use the provisions under ‘misuse of subsidies’ if they believe the enterprise delivering the service has used the subsidy to fund its operations not linked to the delivery of the SPEI.<sup>27</sup>

### **Duty to include information in the subsidy database**

294. SPEI subsidies of over £100,000 need to be recorded on the subsidy database. This needs to be undertaken by the public authority within 3 months of the decision to provide the subsidy.

295. The information that needs to be added to the database for SPEI subsidies is the same as that for all subsidies [as set out in Chapter 11 on Transparency].

## **SPEI Assistance**

296. Public spending on SPEI may be considered to constitute SPEI Assistance if the total amount of “minimal or SPEI financial assistance” given to an enterprise does not exceed £725,000 over the applicable period.

297. The applicable period is:

- The elapsed part of the current financial year<sup>28</sup>, and
- The two financial years immediately preceding the current financial year.

298. If SPEI assistance is provided in cash, the gross cash amount is to be used in determining its value. If the assistance is provided otherwise than in cash, its value is to be determined by reference to the gross cash equivalent of the assistance.

299. SPEI Assistance exemption allows subsidies to be provided by a public authority without having to comply with the subsidy control requirements set out in Part 2 of the Act. In particular, the public authority will not be required to ensure that the SPEI Assistance is compatible with the subsidy control principles.

300. However, public authorities will be required to comply with the transparency requirements on the SPEI Assistance unless the individual award provided as SPEI Assistance does not exceed £100,000, meaning an award of SPEI assistance exceeding this amount must be uploaded to the database. Public authorities should also

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<sup>27</sup> For further information on the provisions of the Act relating to the misuse of subsidies, please refer to [x-ref to misuse of subsidies section].

<sup>28</sup> The financial year means a period of 12 months ending 31 March.

note that the prohibitions relating to export performance and to the use of domestic goods or services apply to SPEI assistance where it is relating to goods.<sup>29</sup>

301. As for the Minimal Financial Assistance exemption, the public authority must follow certain procedural requirements in order to use this exemption. These procedural requirements will make sure that enterprises only receive subsidies through the SPEI Assistance exemption when they are genuinely entitled to do so.

302. Before awarding an SPEI Assistance subsidy, a public authority must provide the intended recipient with a 'SPEI Assistance notification'. An SPEI Assistance notification means a written statement:

- explaining that the public authority is proposing to give to the enterprise a subsidy by way of SPEI Assistance;
- specifying the gross value amount of the assistance, and
- requesting written confirmation from the enterprise that the SPEI assistance threshold specified in section 38(1) will not be exceeded by the enterprise receiving the proposed assistance.

303. The public authority can only award the subsidy when it has received this confirmation. If the enterprise confirms that they will exceed the threshold on receipt of the subsidy, it can still elect to receive part of the subsidy up to the threshold as SPEI Assistance, but the remaining balance will be subject to the full subsidy control requirements associated with providing an SPEI subsidy that is not given as SPEI Assistance.

304. When awarding an SPEI Assistance subsidy, the public authority must give the intended beneficiary a 'SPEI Assistance confirmation'. This is a written statement which confirms:

- that the subsidy is given as SPEI assistance,
- the date on which it is given, and
- the gross value amount of the assistance.

305. The beneficiary must keep a record of this information for at least three years beginning on the date on which the subsidy was given.

306. All subsidies contained within the definition of 'Minimal or SPEI financial assistance' must be taken into account when deciding whether the recipient can receive the proposed subsidy. 'Minimal or SPEI Financial Assistance' includes all the different low value exemptions an enterprise could receive support through. For example, the

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<sup>29</sup> See section 38(6) of the Subsidy Control Act 2022.

following should all be taken into account during the current and previous two financial years:

- MFA;
- SPEI assistance;
- Aid given under the EU State aid de minimis regulations either before the end of the implementation period [31 December 2020] or after if by virtue of the Northern Ireland Protocol, and;
- Subsidies given as small amounts of financial assistance (SAFA) under Articles 364(4) or 365(3) of the UK-EU Trade and Cooperation Agreement after the end of the implementation period but prior to this section of the Act coming into effect.

307. This prevents enterprises being able to receive many subsidies that are in isolation considered low value, but cumulatively could create distortions if their combined value exceeds the threshold. For details on how the SPEI assistance threshold is calculated in relation to mergers and acquisitions, please refer to [Chapter 4 on MFA paragraphs X].

308. The transparency requirements for SPEI Assistance are equivalent to those of MFA and require the following information to be included on the database:

- Name of the public authority granting the subsidy;
- Name of the recipient of the subsidy;
- Value of the subsidy;
- Date of confirmation of decision to give the subsidy, and;
- Upload date (automatically generated by the database).

309. Further information on the duty to include information relating to SPEI Assistance on the subsidy database can be found in Chapter 11.

# Chapter 8 Prohibitions and Other Requirements

## Overview of the chapter

310. The subsidy control regime prohibits specific kinds of subsidy and places conditions on the granting of others.
311. Before giving a subsidy, a public authority must ensure that it is not prohibited, and meets any specific requirements as set out below. Before making a scheme, a public authority must ensure that it is not possible to give a prohibited subsidy under the scheme. Schemes are prohibited to the extent that they provide for the giving of prohibited subsidies.

## General prohibitions and conditions

312. The Subsidy Control Act prohibits some categories of subsidy outright. This is because of the greater risk they pose of significantly distorting domestic competition or investment, and /or international trade or investment. The UK also has obligations under international agreements – including, for example, as a member of the World Trade Organisation – to prohibit many of these kinds of subsidies.
313. Some subsidies, on the other hand, may be granted provided that they are designed in such a way that they meet, and can demonstrate that they meet, certain conditions. Subsidies that meet these conditions can be granted – they may also be subsidies of interest (SSoI), or subsidies of particular interest (SSoPI), and the public authority should consider whether referral is appropriate or necessary in such cases<sup>30</sup>.

## Unlimited guarantees

314. Any subsidy that would guarantee an unlimited amount of liabilities or debts, or which would guarantee a finite amount of liabilities or debts but over an indefinite period, is prohibited. Whilst it is uncommon for public authorities in the UK to purposely grant unlimited guarantees, public authorities should nevertheless be mindful of the fact that subsidies in the form of a guarantee must apply to a finite amount of an enterprise's liabilities or debts and over a finite period of time.
315. This prohibition applies without regard the type of unlimited guarantee provided. It is not, therefore, material whether the guarantee is linked to a specific transaction or

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<sup>30</sup> See Chapter 10 for more information on the referral processes for SSoI and SSoPI



contractual obligation (e.g., a loan or a sale), or whether it is provided independently from any such transaction or obligation.

316. For the avoidance of doubt, public authorities should note that an insurance, reinsurance or compensation scheme operated by a public authority does not constitute an unlimited guarantee for the purposes of the Act.

### **Example**

A guarantee by a public authority in respect of all of a company's debts and liabilities, however and whenever incurred, is likely to constitute an unlimited guarantee to the company. This subsidy would also be prohibited under the Act if it were limited in time.

## **Export performance**

317. A subsidy that is contingent in law or in fact, whether solely or as one of several other conditions, upon export performance relating to goods or services is prohibited. This might include, for instance, subsidies to an exporter to cover the price difference between UK market prices and international market prices.
318. There is an exception to this prohibition for UK Export Finance short-term export credit support.
319. Notably, export performance subsidies are prohibited for Minimal Financial Assistance subsidies relating to goods (although Minimal Financial Assistance is exempt from most other subsidy control requirements).

## **Use of domestic goods or services.**

320. Subsidies that are contingent on the use of domestically produced goods or services, often known as 'local content' subsidies, are prohibited under the Subsidies Control Act.
321. A requirement to use domestic goods prohibited under the Act could take a variety of forms, including, for instance, a requirement to:
- use domestic goods which will be consumed in the process of manufacturing;
  - use domestic components which will be incorporated into a separate good; or
  - use domestic tools in the manufacturing process.

322. Goods should be considered to be domestic for the purposes of the Act if they originate in the United Kingdom. For further information on when goods are considered to originate in the United Kingdom, please consult [\[link to government guidance on origination\]](#).
323. Similarly, a requirement to use domestic services should be interpreted broadly to cover any requirement to use domestic services at any stage of the commercialisation process of any good or services supplied by the beneficiary of the subsidy.
324. The requirement to use domestic products or services can be an explicit requirement, flowing from the very terms of the subsidy or their necessary implications. A prohibited domestic use subsidy could also be an implicit requirement, flowing from the measure's design and structure, its practical implications, or any other relevant factual circumstances. Public authorities should therefore consider whether a condition to use domestic goods or services can be discerned from the terms of the measure providing the subsidy or can be inferred from the factual context surrounding it.
325. However, this prohibition does not apply where recipients use UK goods and services without being compelled to do so, as a commercial decision.

### Example

A subsidy conditional on the use of manufacturing equipment produced by manufacturers in the United Kingdom would be caught under the prohibition on the use of domestic goods.

A subsidy which is conditional on the enterprise using local customer service call centres would be caught under the prohibition on the use of domestic services.

326. This prohibition does not prevent public authorities from conditioning an incentive to an enterprise, which is not currently established or operating in the UK, to establish itself or operate in the UK on certain requirements such as to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in the UK.
327. Local content subsidies provided to the audiovisual sector are also not covered by this prohibition. This exception is linked to the important contribution the audiovisual sector can make to the objectives of promoting and protecting UK culture. Therefore, subsidies to the audiovisual sector will not be caught by this prohibition, but they must nonetheless comply with the subsidy control principles and other requirements set out in the Act.

328. Notably, local content subsidies are prohibited for Minimal Financial Assistance subsidies relating to goods (although Minimal Financial Assistance is exempt from most other subsidy control requirements).

## Relocation of activities

329. Relocation subsidies are generally prohibited where, first, the subsidy contains a condition requiring the relocation and second, the relocation would not occur without the subsidy. They may be permitted where the relocation subsidy is for the purposes of reducing economic or social disadvantage. Subsidies that require the enterprise to move within the same area are also not prohibited.

## What is relocation

330. Relocation for this purpose means that an enterprise that has been carrying on activities in one area of the UK ceases to carry on those activities after receiving a subsidy and moves to a new area.

331. This does not prevent subsidies that require the enterprise to move within a given area, provided the subsidy meets the other subsidy control requirements.

332. What constitutes an 'area' should be considered in light of the purpose of this provision: namely, to deter subsidy races between public authorities and prevent the poaching of economic activity to the detriment of the vacated area. As a result, the definition of 'area' is a question of both political and economic geography, as set out below.

- **Always an area:** Moving within a local authority area is within the same area for these purposes and is not prohibited.<sup>31</sup> Not only are local authority areas relatively small, but a movement within a local authority area cannot have any element of 'subsidy race' or poaching. Further, to the extent that a move over such a small distance does have any negative impact on the vacated area, the same public authority will be responsible for both the place where the benefits of the move are expected, and where any harms are felt.
- **Never an area:** Conversely, any relocation subsidy where a public authority is moving into its own area activity from the area in which another public authority exercises its responsibilities (for example, from the area in which one devolved administration

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<sup>31</sup> In this section, 'local authority area' refers to the area in which a unitary local authority exercises its responsibilities, or the area in which an upper-tier local authority, such as a county council or London borough, exercises its responsibilities. It is assumed that district councils will very rarely, if ever, give above threshold relocation subsidies.

exercises its responsibilities to another, or from one local authority area to another) will be between different 'areas' and therefore engage the prohibition and specific requirements in Section 18 (see below).

- **May be an area:** Where a public authority – such as a combined authority, a devolved administration or the UK Government – exercises its responsibilities over a larger area than that covered by a single local authority, then the public authority should establish that the move is sufficiently local that it will not have significant harmful effects on the vacated place. The loss of jobs and of multiplier effects in the vacated area would be the clearest direct and indirect potential harms of a relocation. As a result, the relevant area will often be the travel-to-work area. If the move is within the same travel-to-work area, this indicates that the same workforce is likely to continue working in the destination place after the move, and to continue spending in the local area in a similar way. As a result, the move should be considered to be within the same area and it would not be considered a prohibited relocation.
- However, the public authority should also consider employing a smaller area or different measure if the nature of the work, characteristics of the workforce and geography of the region mean that it will be impractical for staff to commute to the new location, even within the travel-to-work area. (Note that the subsidy's impact on competition and investment in the new location would be considered as part of the normal assessment against the principles.)

333. For clarity, an area does not extend to the entirety of the UK as regards subsidies given by the UK Government, or the entirety of the area in which a devolved administration exercises its responsibilities.

## What type of subsidies are prohibited?

334. The prohibition only applies to subsidies that are contingent on the beneficiary relocating. This does not, for instance, prohibit a subsidy where the public authority becomes aware that on receipt, the beneficiary intends to relocate and that it would not do so without the subsidy. Provided that the beneficiary would also be able to receive the subsidy if it did not proceed with the relocation.

335. Nor does it prohibit subsidies that simply make an area more attractive to investment, and to which a business might relocate to take advantage of subsidy schemes in place in that area.

336. Generally, no subsidy agreement should include any stipulation that the beneficiary must relocate. Even where there is not a clear-cut requirement that the beneficiary must relocate, a public authority should reflect on whether it is only giving a subsidy because of a common understanding that the beneficiary will relocate. This is likely to be prohibited.

## Relocation subsidies for the purposes of addressing social or economic disadvantage

337. The prohibition does not apply to subsidies that are given to reduce social or economic disadvantage. To make use of this exemption, the public authority giving the subsidy must be satisfied that it meets all of the following requirements.

- The first requirement is that the subsidy will reduce social or economic disadvantage in an area (the target area). This requires the public authority to establish first that there is a disadvantage by using measures or indicators such as household income or unemployment levels, set against appropriate national or regional comparators. However, depending on the nature of the disadvantage other measures may be suitable if they are also set against appropriate comparators.

The public authority should then establish the reduction in disadvantage that the subsidy is expected to create in the target area. This reduction is likely to have been the rationale for giving the subsidy in the first place, and therefore there will be significant overlap with the analysis required to assess the subsidy or scheme in line with the subsidy control principles. The same measures and indicators that would be needed to evidence that type of equity rationale and to limit the value of the subsidy to what is necessary to meet that objective would also be appropriate here to anticipate the subsidy's effect on social or economic disadvantage in the target area.

- The second requirement is that the subsidy will result in an overall reduction in the social or economic disadvantages within the United Kingdom generally. This requires the public authority giving a relocation subsidy to look carefully at the impact of the subsidy on the area from which the economic activity will move (the vacated area). As a starting point, a public authority should use the same measures and indicators needed to gauge the subsidy's likely positive impact on social or economic disadvantage in the target area, and use these to assess the subsidy's likely negative impact on disadvantage in the vacated area. If there are significant foreseeable harms that would not be captured by this initial exercise, the public authority should also consider additional ways of assessing the impact on social or economic disadvantage in the vacated area.

For the subsidy to result in an overall reduction of social or economic disadvantage in the UK, the positive and negative impacts should not simply cancel each other out. This means, for example, that where a relocation subsidy aims to create jobs in an area with high unemployment, the vacated area should be one that has lower unemployment levels than the destination area. The public authority giving the subsidy must be satisfied that the resulting increase in social or economic disadvantage in the vacated area will be less than the decrease in disadvantage in the target area.

- The final requirement is that the subsidy is designed to bring about a change in the size, scope or nature of the activities that are being relocated. Changes in nature may include an increase in workforce, the addition of new product lines or taking advantage of clustering effects to establish new collaborative projects.

338. In addition to these criteria, the subsidy must still satisfy the subsidy control principles. To avoid any possibility of subsidy races it will be particularly important to establish that the subsidy is proportionate to its policy objective and that it is an appropriate policy instrument for achieving the objective.

## Ailing or insolvent enterprises

339. The Act prohibits rescuing and restructuring subsidies to ailing or insolvent enterprises unless certain requirements are met.

340. There is a spectrum of enterprises in financial difficulties. This can range from expected temporary financial difficulties of a subdivision in the future to actual insolvency of the entire enterprise. Enterprises anywhere on this spectrum may be intentionally or inadvertently in receipt of a subsidy.

341. There is no wider prohibition against giving subsidies that are not rescue or restructuring subsidies to ailing or insolvency enterprises. For example, an access to finance subsidy scheme open to SMEs generally does not constitute rescue and restructuring aid even if one or more recipients (among many) may be ailing or insolvent. Rescue and restructuring aid is therefore 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.

342. Public authorities should, however, consider carefully whether ailing and insolvent enterprises, or any other category of enterprises in financial difficulties, should be excluded from eligibility for subsidies both with regard to value for money (in the event that the enterprise were to face increasing financial difficulties or fail) and compliance with the subsidy control principles. The latter could include in particular, how financial difficulties or failure would affect Principles B and C and to what extent the subsidy would increase distortions, of domestic competition or investment and/or international trade and investment (see Chapter 4).

343. This section is concerned with rescue and restructuring support. Each is discussed in turn below.

## Rescue support

344. Subsidies for rescuing ailing or insolvent enterprises, that are not deposit takers or insurance companies, are prohibited unless certain conditions are met. The Public Authority must be satisfied that:

- the subsidy is granted during the preparation of a restructuring plan;
- the subsidy contributes to an objective of public interest, by avoiding social hardship or preventing serious market failure; and

- the subsidy consists of temporary liquidity support in the form of a loan or loan guarantee
345. Further guidance on the contents of the restructuring plan required pursuant to condition (a) and the considerations relevant to establishing that a subsidy contributes to an objective of public interest under condition (b) are discussed in greater detail in the following section on restructuring support.
346. Guidance on condition (c), requiring that the subsidy consists of temporary liquidity support in the form of a loan or loan guarantee, has been provided below.
347. Rescue subsidies are subsidies of interest and accordingly may be, but are not required to be, referred to the SAU. Public authorities are encouraged to refer rescue subsidies to the SAU where possible, given their higher likelihood of posing a risk of distorting the market. If, following a referral, a recipient's financial circumstances decline to the extent that it would collapse if the subsidy were not granted immediately, a referral to the SAU may be withdrawn and the rescue subsidy granted forthwith.

### Temporary liquidity support in the form of a loan or loan guarantee

348. As a general rule, liquidity support is considered to be temporary if it provides the necessary support over a period which does not exceed six months.
349. However, public authorities may grant liquidity support for a period exceeding six months where they are satisfied that extended access to liquidity support will enable an enterprise to complete its restructuring without the need for restructuring support.

### Amount and duration of support

350. In general, the support provided to the enterprise must not exceed the amount required to keep the enterprise operating as a business for six months.
351. Where additional liquidity support is provided with a view to avoiding the need for restructuring support, the amount of liquidity support provided under the initial and subsequent measure, taken together, should not exceed the amount required to keep the enterprise operating as a business for 18 months.
352. Public authorities can assess the amount required to cover an enterprise's liquidity support needs by basing themselves on the enterprise's operating cash flow in the financial year immediately preceding the date on which the rescue support is due to be provided.

## Appropriate reimbursement

353. Public authorities should ensure that they are appropriately reimbursed for the loan or loan guarantee provided to the enterprise. In particular, the financial cost of the loan and the total cost of the guaranteed loan must reflect the creditworthiness of the enterprise and provide incentives for the enterprise to reimburse the public authority as soon as possible.
354. When assessing the creditworthiness of the enterprise, the public authority should discount the temporary effects of the liquidity difficulties the enterprise has encountered as well as the temporary effects of the subsidy received from the public authority.

## Use of the subsidy

355. The public authority must be satisfied that the loan will be used to support the enterprise's liquidity needs. This will generally not include the financing of structural measures, such as the acquisition of significant businesses or assets, unless measures such as these are strictly necessary for the continued survival of the enterprise during the period in which rescue support is provided.

## Restructuring support

356. Subsidies for restructuring ailing or insolvent enterprises, that are not deposit takers or insurance companies, are prohibited unless certain conditions are met. The public authority must be satisfied that:
- the enterprise has prepared a restructuring plan;
  - the enterprise's owners, creditors or new investors have contributed to the cost of the restructuring;
  - the subsidy contributes to an objective of public interest by avoiding social hardship or preventing severe market failure; and
  - at least five years have passed since the last time a subsidy was given for rescuing or restructuring the enterprise.
357. Each of these conditions are considered below. Provided these conditions are met, the public authority is free to determine the form the restructuring support should take, so long as the instrument chosen is consistent with the subsidy control principles.



358. Specific guidance on the measures public authorities should adopt to limit distortions of domestic competition or investment, and/or international trade or investment as a result of restructuring support have also been considered below.
359. Subsidies for restructuring ailing or insolvent enterprises are subsidies of particular interest and must be referred to the SAU before they are granted. The SAU will assess the public authority's assessment of how the subsidy meets the subsidy control requirements and provide a report to this effect, typically within approximately 30 days of receipt of the referral.

## **Restructuring plan**

360. The public authority must be satisfied that the enterprise's restructuring plan is credible and based on realistic assumptions.
361. Public authorities must be satisfied that the restructuring plan describes a credible means of returning the enterprise to long-term viability. At a minimum, the restructuring plan must describe the reasons explaining why the enterprise will exit the market in the absence of the support and how the restructuring measures the enterprise proposes to undertake will address those underlying reasons.
362. The plan should also aim to return the enterprise to long term-term viability within a reasonable time period without needing further subsidy support. As part of the balancing exercise required by Principle G, public authorities should also consider whether restructuring support should be subject to any conditions (such as behavioural or structural conditions) to mitigate the negative effects of any restructuring subsidy on domestic competition or investment and/or international trade or investment.

## **Contribution toward costs**

363. The amount of support provided by the public authority should be limited to the smallest amount necessary to make the restructuring possible.
364. Unless the recipient of restructuring support is a small or medium-sized enterprise, public authorities should ensure that the enterprise or its owners, creditors or investors have contributed significantly to the cost of restructuring or have a contractual obligation to do so.
365. In considering whether a recipient is a small or medium-sized enterprise, public authorities should first identify the enterprise as defined in this Act: a person, or group of persons under common ownership or common control, which is engaged in economic activity (see Chapter 2 of this guidance). They should then consider whether it should be considered small or medium-sized by reference to the Companies Act (Section 382 and Section 465, respectively).

366. The contribution by the enterprise or its owners, creditors, or investors should be as high as possible and be similar to the support provided by the public authority in terms of the type of effect it can produce on the enterprise's solvency or liquidity position.
367. As general rule, the contribution by the enterprise or its owners, creditors, or investors should amount to at a minimum 50% of the total cost of the restructuring for large enterprises, at a minimum 40% for medium enterprises, and 25% for small enterprises. Lesser contributions may be considered for large enterprises where the public authority is satisfied that the contribution remains substantial and the lesser contribution is justified on account of exceptional circumstances or by particular hardship.
368. The public authority must also be satisfied that the restructuring support provided will not serve to cover the losses of shareholders or subordinated debt holders. Support should only be provided once these losses have been fully accounted for and attributed to the relevant debt holders.

## Public interest

369. The public authority should be satisfied that the subsidy contributes to an objective of public interest by avoiding social hardship or preventing severe market failure.
370. A number of considerations can be relevant to assessing whether an enterprise's exit from the market would produce social hardship or lead to severe market failure. Relevant considerations can include, but are not limited to circumstances such as:
- where the rate of unemployment in the area potentially affected by the enterprise's exit has been persistently higher than the nation average and where it is difficult to create new jobs in that area;
  - where the enterprise provides an important service which cannot easily be provided by another enterprise, making the enterprise difficult to replace;
  - where the enterprise's exit would have a considerable disruptive impact on a regional market or in a particular sector;
  - where there is a risk of interruption of a SPEI;
  - where the market exit of the enterprise is an otherwise avoidable consequence of a failure or adverse incentives of credit markets; or
  - where the enterprise's exit from the market would lead to the loss of important technical knowledge or expertise.

371. Where the public authority is considering restructuring support for a small or medium-sized enterprise it should also consider whether the small or medium-sized enterprise's exit from the market could lead to potential negative consequences due, for instance, to:

- the fact that the small or medium-sized enterprise is highly innovative or has serious growth potential, or
- the fact that the small or medium-sized enterprise has extensive links to other local or regional enterprises and in particular other small or medium-sized enterprises.

372. Where the subsidy does not contribute to an objective of public interest by avoiding social hardship or preventing severe market failure, the authority must be satisfied that there are exceptional circumstances that justify it being granted.

### Where rescue and restructuring support has been granted in the last five years

373. As a general rule, restructuring support should not be granted to an enterprise if it has previously received rescue or restructuring support.

374. However, this does not necessarily prohibit a public authority from granting the enterprise a restructuring subsidy. Restructuring support may be granted if the enterprise has not received rescue or restructuring support in the previous 5 years or if the public authority is satisfied that the circumstances that have led to the need for the subsidy were unforeseeable and not caused by the beneficiary of the subsidy.

375. In addition, there may be circumstances where support would be a variation of existing structuring support rather than new restructuring support for this purposes, for example where contingent liabilities relating to the original restructuring event were subsequently found to be more extensive and require supplementary finance.

### Calculating the five-year period

376. The five-year period commences from either the date on which support was granted, the date on which the period covered in the previous restructuring ended or was suspended. The public authority should use the most recent of these three dates as the commencement of the five-year period within which rescue support should not be granted in all but exceptional circumstances.

377. Where rescue or restructuring support was previously granted to a corporate group, the five-year prohibition applies to all bodies corporate within that group. Conversely, where rescue or restructuring support was granted to a single body corporate within a corporate group, the 5-year prohibition does not apply to the bodies

corporate within the corporate group which did not receive support. However, the public authority must be satisfied that any support provided will not be passed on to the body corporate which has received support in the previous five years.

378. The five-year prohibition will continue to apply to an enterprise despite the fact that it has changed ownership after receiving rescue or restructuring support. However, an enterprise will not be covered by the five-year prohibition merely on account of having purchased the assets of an enterprise which received rescue or restructuring support in the previous five years.

### Exceptions to the 5-year prohibition

379. Where an enterprise has received rescue support and is due to receive restructuring support in the context of a single restructuring process, the rescue support received in the context of that process will not prevent the enterprise from receiving restructuring support.
380. Outside of support granted as part of a single restructuring process, an enterprise should only be exempt from the 5-year prohibition in the event of exceptional circumstances which were not caused by the enterprise. This exception will only apply where the enterprise's need for restructuring support is due to circumstances which could not possibly have been foreseen by the enterprise's management at the time the previous rescue or restructuring support was granted and which is not a consequence of negligence or errors on the part of the enterprise's management or decisions of the corporate group to which it belongs.

#### **Example**

An enterprise which required rescue support in 2018 may nevertheless be eligible for restructuring support in 2022 if the enterprise's need for restructuring support is due to the economic consequences of the Covid-19 health crisis.

### Limiting distortions of domestic competition or investment, and/ /or international trade or investment

381. Public authorities should ensure that the beneficial effects of restructuring support to an enterprise should outweigh any negative effects, including, in particular, negative effects on domestic competition or and investment, on international trade or investment.
382. Using the assessment of the likely effects of financial assistance as a baseline, the public authority should consider whether any distortionary effects of the subsidy on domestic competition or and investment, and/or international trade or investment could

be reduced by actions undertaken by the enterprise. These actions can relate to the enterprise's conduct on the market as well as the enterprise's own business.

## Conduct on the market

383. In all cases, public authorities should require the enterprise to agree to certain undertakings regarding its conduct on the market for the duration of the restructuring plan. These undertakings aim to ensure that restructuring support is used for its intended purpose and is not used to distort competition. Specifically, the enterprise should undertake to:

- refrain from using restructuring support to expand its market position through the acquisition of shares or assets, unless these acquisitions are strictly necessary to ensure its long-term viability; and
- refrain from using the fact that it is receiving restructuring support in its marketing activities.

384. Public authorities should consider whether any other undertakings regarding the enterprise's conduct on the market are necessary to reduce any distortionary effects of the subsidy on domestic competition or investment, and/or international trade or investment.

## Actions affecting the enterprise's business structure

385. The public authority should also consider whether any actions relating to the structure of the enterprise, such as asset divestments, may be required to avert or reduce the potentially distortive effects of the subsidy.

386. Any actions relating to the structure of the enterprise should pertain to the market(s) on which the subsidy is likely to produce a distortive effect, should be designed to favour market entry or the expansion of smaller competitors on this market(s), and should not lead to a degradation in the structure of that market(s). These actions should also be implemented within the period covered by the restructuring plan.

## Restructuring deposit takers or insurance companies

387. A subsidy for restructuring an ailing or insolvent deposit taker or insurance company is prohibited unless the subsidy is granted by an authority based on a restructuring plan that is credible and likely to restore long-term viability. The public authority should also expect to be properly remunerated for the subsidy.

388. Similarly, to restructuring subsidies for other enterprises, the beneficiary of the subsidy, its shareholders, or the business group to which it belongs should have contributed significantly to restructuring costs from their own resources or have a contractual obligation to do so.

### Liquidating deposit takers or insurance companies

389. Subsidies to ailing or insolvent deposit takers or insurance companies that cannot credibly demonstrate that they are capable of being returned to long-term viability are prohibited. However, public authorities can grant such subsidies to a deposit taker or insurance company if it is for the purpose of ensuring their orderly liquidation and exit from the market. The subsidy should be limited to this purpose to minimise its negative effects on domestic competition or investment, and/or international trade or investment. Finally, the beneficiary of the subsidy, its shareholders, or the business group to which it belongs should have contributed significantly to the liquidation costs or have a contractual obligation to do so.

### Liquidity provision for deposit takers or insurance companies

390. A subsidy to support liquidity provision for an ailing or insolvent deposit taker or insurance company is prohibited unless the subsidy is temporary and the public authority granting the subsidy reasonably expects to be paid back. Such a subsidy should not be used to absorb losses or become capital support.
391. For the avoidance of doubt, a subsidy which is temporary liquidity support provided to a beneficiary in the process of preparing a restructuring plan shall be considered as liquidity provision rather than a restructuring subsidy.

### Defining 'ailing or insolvent', 'deposit taker' and 'insurance company'

392. 'Ailing or insolvent' is used to define a deposit taker, insurance company or other enterprise that is unable to pay its debts as they fall due and would almost certainly go out of business in the short to medium term without subsidies.
393. 'Deposit taker' refers to an organisation whose main function is to carry on the regulated activity of accepting deposits.
394. 'Insurance company' refers to a corporate body that has permission to carry on the regulated activity of effecting or carrying out contracts of insurance.

## Other specific prohibitions and requirements

### **Subsidies for insurers that provide export credit insurance**

395. Such a subsidy is prohibited unless it is subject to the conditions that any export credit insurance provided by the insurer against marketable risks is done so on a commercial basis and it is not used to benefit so much of the insurer's business as consists of providing export credit insurance against marketable risks.

### **Subsidies for air carriers for the operation of routes**

396. This type of subsidy is prohibited unless one of the following three conditions is met:

- the operation of the route is a public service obligation imposed upon the air carrier<sup>32</sup>;
- the public authority is satisfied that the subsidy provides benefits for society at large; or
- the subsidy is a start-up subsidy for opening a new route to a regional airport, and the public authority is satisfied that it will increase the mobility of citizens and stimulate regional development.

### **Subsidies or schemes subject to mandatory referral**

397. Subsidies or schemes of particular interest must be referred to the Subsidy Advice Unit before they are granted or made, respectively, and the cooling off period following the publication of the SAU's report has expired. If they have not been referred, they are prohibited subsidies and schemes. Further information on SAU referrals is set out in Chapter 10.

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<sup>32</sup> The public service obligation must be imposed under either Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the United Kingdom (which is retained EU law), or Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (as it has effect in EU law).

# Chapter 9: Energy and Environment Principles

## Overview of chapter

398. Subsidies and schemes in relation to energy and/or the environment must be assessed against the relevant further energy and environment (E&E) principles of Schedule 2 of the Act, as well as being assessed against all of the subsidy control principles of Schedule 1. Principles A and B of Schedule 2 are applicable to all energy and environment subsidies; all other principles in Schedule 2 apply only to specific kinds of subsidies, or subsidy schemes.
399. These limited additional principles are an important means of complying with the UK's international obligations in this area, specifically under the Trade and Cooperation Agreement with the European Union, and support the UK's commitment to achieve net zero by 2050 ("the UK's net zero commitment") for subsidies in relation to energy and environment.

## Scope

400. Not all subsidies given to beneficiaries operating in the energy or environment sectors will need to take these principles into account.
401. General schemes that are not specifically targeted at recipients operating in the energy or environment sectors, or schemes that have objective criteria, that do not favour one sector over another, to determine whether a recipient is eligible to receive a subsidy under it, are not energy and environment subsidies. For example, if a public authority set up a scheme to support disadvantaged workers that was open to all sectors, including energy producers, waste management firms and farmers, that would not fall within scope of Schedule 2.
402. The E&E principles apply only to those granted in relation to energy and the environment – that is, where the subsidy's specific policy objective (or one of its objectives) is in relation to energy and/or the environment.
403. The scope of the E&E principles is not determined by the sector that the beneficiary is primarily based in.
404. Examples of subsidies that must be considered in line with the E&E principles include:
- A subsidy to encourage innovation in renewable energy production
  - A subsidy to improve energy efficiency of an energy-intensive industry



- A subsidy to increase plant diversity on agricultural land
- A subsidy to improve recycling among small businesses

405. Subsidies may have more than one specific policy objective, and they should be considered to be in scope of the E&E principles if one or more of the objectives of the subsidy is in relation to energy and environment. For example, a scheme may have two policy objectives; to encourage the regeneration of high street shops and cafés and, secondly, to incentivise increased energy efficiency of the refurbished shops and cafes. This scheme would be in scope of Schedule 2 because at least one of the policy objectives is in relation to energy.

406. However, public authorities giving subsidies that have incidental benefits in relation to energy or the environment, that are not related to the policy objective of the subsidy, need not consider the principles in Schedule 2. Principle G of Schedule 1 requires public authorities to assess the beneficial effects of the subsidy (in relation to the specified policy objective) and ensure they outweigh any negative effects..

407. The E&E principles do not apply to nuclear energy subsidy awards or subsidy schemes. Public authorities granting nuclear energy subsidies must consider them against the main subsidy control principles.

408. Only the first two E&E principles apply to all subsidies in relation to energy and environment. The subsequent principles apply to specific types of subsidy, as set out in the principles themselves. A summary of the scope of the different principles is as follows:

Principle	Scope
A	All subsidies in relation to energy & environment
B	All subsidies in relation to energy & environment
C	Subsidies for electricity generation adequacy, renewable energy or cogeneration
D	Subsidies for electricity generation adequacy
E	Subsidies for renewable energy or cogeneration
F	Subsidies in the form of partial exemptions from energy-related taxes and levies
G	Subsidies that compensate electricity-intensive users for increases in electricity costs

H	Subsidies for decarbonisation of industrial emissions
I	Subsidies for improving energy efficiency of industrial activities

## Application of the main subsidy control principles in Schedule 1

409. The main subsidy control principles continue to apply to subsidies in relation to energy and environment. A subsidy that is not consistent with those principles must not be given, regardless of whether it is consistent with the E&E principles.
410. The main subsidy control principles also require energy and environment impacts – including potential impacts on the UK’s net zero commitment and other UK climate commitments as relevant – to be taken into account for all subsidies. Principle G in Schedule 1, the ‘balancing test’, requires all relevant costs to be weighed up against the benefits of the subsidy (in relation to the specified policy objective). The existence of relevant energy or environment costs does not necessarily mean that the E&E principles apply.
411. However, if energy or environment benefits are relevant for the assessment of both Principles A and G of the main subsidy control principles in Schedule 1, then the E&E principles will apply. Subsidies may have more than one specific policy objective, and therefore all objectives should be considered for the purpose of the main subsidy control principles (including the benefits to be considered for the balancing test).
412. For example, a subsidy to increase employment of disadvantaged workers in gardening and waste management may be explicitly targeted at both an environmental and a non-environmental objective. Environmental improvement would be an objective under Principle A of the main subsidy control principles in Schedule 1 and the anticipated benefits would be taken into account under Principle G of the main subsidy control principles. The E&E principles would apply.

## Carrying out an assessment

413. The Act requires public authorities to consider whether a subsidy or scheme in relation to the environment is consistent with these Schedule 2 principles. As with the main subsidy control principles in Schedule 1, this requires the public authority to carry out an assessment using an appropriate level of analysis before giving the subsidy or making the scheme. This assessment should look at the specified requirements and objectives set out in the relevant E&E principles and ensure that the subsidy is designed in such a way as to meet them.
414. As with the main subsidy control principles, public authorities should carry out an assessment that is proportionate to the potential harm of the subsidy or scheme in question. In determining how extensive the assessment should be, a public authority

should consider the risk of harm to energy and/or to environmental objectives, whichever are relevant, such as energy security, energy affordability, environmental protection and the UK's net zero commitment and other climate commitments.

415. The appropriate level of analysis will usually be similar to that carried out for any business case and/or impact assessment for the subsidy or scheme. The E&E principles do not require a public authority to consider any unusual analytical techniques. Existing relevant assessment tools can be used (for example, environmental impact assessment, natural capital assessment, and strategic environmental assessment).

416. The assessment required by the Act is solely forward looking. Where the principles require a specific outcome to be achieved, the assessment should consider whether the subsidy is designed to achieve the outcome and whether that outcome is likely to take place (as with any kind of prospective business case or impact assessment). Nonetheless, in some cases, it may be appropriate to use checkpoints/contingencies for future payments in the subsidy design, to ensure the subsidy is consistent with the E&E principles. It is also best practice to evaluate whether the intended outcomes have, in fact, been achieved and to use that to inform future subsidies.

## Principle A – Aim of subsidies in relation to energy and environment

417. All subsidies in relation to energy and environment shall be aimed at and incentivise the beneficiary in:

- delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market, or
- increasing the level of environmental protection compared to the level that would be achieved in the absence of the subsidy

418. In addition to the main subsidy control principles in Schedule 1, all subsidies in relation to energy and environment must be assessed against this principle, and a public authority must be of the view that the subsidy is consistent with one of the two limbs, depending on whether it is in relation to energy or environment. If a subsidy is in relation to both energy and environment, it should meet both of these limbs.

419. On delivering a secure, affordable and sustainable energy system and a well-functioning and competitive energy market: if a subsidy is in relation to energy, public authorities will need to ensure that their objective is consistent with this. Public authorities should take a balanced approach to the different aims set out in this principle: a subsidy may, for example, increase the price of energy by a small amount (i.e. reducing affordability) while leading to a large increase in sustainability.

420. On increasing the level of environmental protection: if a subsidy is in relation to the environment, public authorities should be clear that it increases the level of environmental protection compared to what would have happened otherwise. (It is not relevant whether the level of protection increases or decreases over time.)

421. The environment means the natural environment as defined in section 44 of the Environment Act 2021:

- plants, wild animals and other living organisms;
- their habitats;
- land (except building or other structures), air and water, or;
- the natural systems, cycles and processes through which they interact.

422. The Act does not define ‘environmental protection’ and public authorities may take any reasonable approach. It is useful to consider the definition of environmental protection set out in section 45 of the Environment Act 2021, which defines it as:

- protection of the natural environment from the effects of human activity;
- protection of people from the effects of human activity on the natural environment;
- maintenance, restoration or enhancement of the natural environment, or;
- monitoring, assessing, considering or reporting on anything in the previous paragraphs.

423. Subsidies and schemes must be assessed against all of the Schedule 1 principles which includes making an assessment that the subsidy’s beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects. As part of this weighing up of beneficial versus negative effects, public authorities that are designing subsidies and schemes in relation to the environment (defined in 10.4.8) must evidence, as part of their assessments, that those subsidies and schemes will have a beneficial effect of increasing environmental protection as opposed to a neutral or negative effect. Existing relevant assessment tools can be used (for example, environmental impact assessment or natural capital assessment or strategic environmental assessment).

424. Public authorities may find it useful to consult the UK Government’s environmental principles policy statement that outlines how to interpret and proportionally apply five internationally recognised environmental principles.

425. The principles in Schedule 2 are in line with the UK’s net zero commitment, and subsidies with a specific policy objective of promoting net zero will tend to be consistent with Principle A.

## Principle B – Subsidies not to relieve beneficiaries from liabilities as a polluter

426. Subsidies in relation to energy and environment shall not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of England and Wales, Scotland or Northern Ireland. All subsidies in relation to energy and environment must be assessed against this principle.
427. This principle is known more generally as the “polluter pays” principle. The polluter pays principle means that the costs of pollution should be borne by those causing it, rather than the person who suffers the effects of the resulting environmental damage, or the wider community.
428. The polluter pays principle serves several functions and may be used through different phases of policy-making. It can be used in the design of a policy (before the damage has occurred) to prevent or deter environmental damage. In cases where pollution cannot be avoided or is caused due to an accident, the polluter pays principle can be used to restore or redistribute the costs of environmental damage. Applying this principle helps to incentivise individuals or groups to avoid causing environmental damage and encourage sustainable practices.
429. Generally speaking, a subsidy or a subsidy scheme must avoid relieving the beneficiary from the polluter pays principle either directly or indirectly; in the latter case by including, for example, an expectation that the granting public authority will pay for the costs of environmental damage caused by the recipient.
430. Public authorities granting subsidies in relation to energy and environment are advised to include a clear statement in the terms of the subsidy or scheme to the effect that receipt of the subsidy does not relieve the recipient from any liabilities arising from its responsibilities as a polluter under the relevant law of England and Wales, Scotland, and Northern Ireland.
431. Public Authorities may find it useful to consult the UK Government’s environmental principles policy statement<sup>33</sup>, which includes guidance on the application of the polluter pays principle.

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<sup>33</sup> <https://www.gov.uk/government/publications/environmental-principles-policy-statement>

## Principle C, D, E – Subsidies for electricity generation adequacy, renewable energy or cogeneration

### **Principle C – Subsidies for electricity generation adequacy, renewable energy or cogeneration**

432. Only energy and environment subsidies that are specifically designed to be granted for the purpose of electricity generation adequacy, renewable energy or cogeneration need to be assessed against principles C, D and E.
433. Subsidies or subsidy schemes must not undermine the government's ability to meet its obligations under Article 304 of the TCA. This Article requires the UK to ensure that wholesale electricity and natural gas prices reflect actual supply and demand, and that, to this end the government shall ensure that the wholesale electricity and natural gas market rules will, in general terms, be transparent, encourage free price formation, and operate in an efficient and secure manner.
434. Subsidies must not, therefore, have the effect of introducing significant distortions, price controls, or significantly impede the transparent operation of the wholesale electricity and natural gas market.
435. Subsidies shall not unnecessarily affect the efficient use of electricity interconnectors provided for under Article 311 of the TCA. This Article provides for the efficient and non-discriminatory use of electricity interconnectors between the UK and the European Union, by requiring (in general terms) both parties to manage electricity interconnectors in efficient, market-based, and transparent terms. It also provides for mechanisms to manage congestion and allocate capacity in such a way as to deliver robust and efficient outcomes.
436. Public authorities should consider carefully any impacts a subsidy for electricity generation adequacy, renewable energy and cogeneration may have on the UK's electricity interconnectors, and in particular on TCA Article 311 obligations.
437. There are limited circumstances in which it is acceptable for an energy and environment subsidy to affect the efficient use of electricity interconnectors, including by (for example) ensuring continuity of electricity supply.
438. Subsidies for electricity generation adequacy, renewable energy or cogeneration shall be determined in a non-discriminatory, transparent and open manner, without unnecessarily excluding companies that may compete with projects to address the same environmental or energy objective. The selection process should lead to the selection of beneficiaries that can address the environmental or energy objectives using the least amount of subsidy or in the most cost-effective way.
439. These transparency requirements do not affect the provisions of Article 304(3) of the TCA. This article requires that any capacity mechanism in electricity markets is clearly defined, transparent, proportionate and non-discriminatory.

440. A non-competitive process may be used to determine a subsidy for renewable energy or cogeneration if appropriate measures are put in place to prevent overcompensation and:

- the potential market supply is insufficient to ensure a competitive process,
- the eligible capacity is unlikely to have a material effect on any of the following:
- competition or investment within the United Kingdom,
- trade between the United Kingdom and any country or territory outside the United Kingdom, and
- investment as between the United Kingdom and any country or territory outside the United Kingdom, or
- the subsidy is given for a demonstration project.

441. In this paragraph and paragraph D, “subsidy for electricity generation adequacy” means a subsidy that provides an incentive for a capacity provider to be available in times of expected system stress.

#### Principle D – Subsidies for electricity generation adequacy may be limited to installations not exceeding specified CO2 emission limits

442. Subsidies for electricity generation adequacy may include, under their terms, a requirement on the recipient that the subsidy not be used to directly benefit installations exceeding specified CO2 emissions limits.

443. Public authorities should ensure that CO2 emissions limitations of this kind are clearly laid out, either in the terms of the subsidy or scheme, or else clearly signposted to within those terms (if published elsewhere).

444. Public authorities are not obligated to include a limitation of this sort in the design of an electricity generation adequacy subsidy or the terms of a scheme with this purpose. A statement to the effect that no facility exceeding specified CO2 emission limits has been included in the terms of the scheme or subsidy is sufficient to demonstrate that this Principle has been complied with.

#### Principle E – Subsidies for renewable energy or cogeneration shall not affect beneficiaries’ obligations or opportunities to participate in electricity markets

445. Only subsidies with a purpose in relation to renewable energy or cogeneration must be assessed against this principle.

446. Cogeneration, or combined heat and power (CHP), is defined as the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy.
447. Public authorities designing subsidies to be assessed under this principle should avoid placing limitations on the recipient's ability to participate in electricity markets, either directly or indirectly. They should also not relieve a recipient of any obligations they may have to participate in electricity markets. Public authorities should in general be aware of existing law and practice on electricity market participation when designing their subsidy or scheme.
448. A statement in the terms of a renewable energy or cogeneration subsidy or scheme to the effect that nothing in the terms of the subsidy relieves a recipient of the obligation or ability to participate in electrical markets is sufficient to ensure compliance with this principle.

#### Principle F – Subsidies in the form of partial exemptions from energy-related taxes and levies

449. Only subsidies that take the form of partial exemptions from energy-related taxes and levies need to be assessed against Principle F.
450. Subsidies in the form of partial exemptions from energy-related taxes and levies in favour of energy-intensive users shall not exceed the total amount of the tax or levy concerned.
451. Accordingly, a public authority may exempt an energy-intensive recipient liable for the payment of (for example) £10m in relation to an energy levy from paying anything up to the full amount, or £10m of the liability. The public authority may not provide funding in excess of the full amount of the total amount of the levy without undertaking a further assessment against the subsidy control principles.
452. An example of an energy-related tax or levy that would fall under the terms of this principle is the Climate Change Levy (CCL). More information on the CCL is here – <https://www.gov.uk/green-taxes-and-reliefs/climate-change-levy>

#### Principle G - Subsidies in the form of compensation for increases in electricity costs

453. Only subsidies in the form of compensation for increases in electricity costs for electricity-intensive users need to be assessed against principle G.



454. Subsidies in the form of compensation for electricity-intensive users given in the event of an increase in electricity costs resulting from climate policy instruments shall be restricted to sectors at significant risk of carbon leakage due to the cost increase.
455. Carbon leakage is the displacement of production, and associated greenhouse gas emissions, in ways that would not have happened if climate rules and policies across jurisdictions were implemented in an equivalent way.
456. Energy intensive industries typically refer to industrial sectors – usually manufacturing industries – that are high, or very high, users of energy. Energy costs are often an unavoidably high proportion of production costs in these industries. Energy intensive industries may include the cement or steel industries.

## Principle H – Subsidies for the decarbonisation of emissions linked to industrial activities

457. Subsidies for the decarbonisation of emissions linked to industrial activities in the United Kingdom shall:
- achieve an overall reduction in greenhouse gas emissions, and
  - reduce the emissions directly resulting from the industrial activities.
458. Greenhouse gas (GHG) emissions include six GHGs that contribute to global warming, of which carbon dioxide (CO<sub>2</sub>) is the most widely known. The other gases included are methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulphur hexafluoride (SF<sub>6</sub>). These last three gases are collectively referred to as Fluorinated-gases (or F-gases). The Secretary of State may also designate other greenhouse gases as targeted greenhouse gases under the Climate Change Act 2008.
459. Industrial activities generally include, but are not limited to, industrial processes that use inputs to produce outputs. Activities in the Standard Industrial Classification (SIC) code of [XYZ] are likely to fall within the definition of industrial activities for the purpose of eligibility for assessment against this principle.
460. Only subsidies for the decarbonisation of emissions linked to industrial activities in the UK need to be assessed against Principle H.
461. Examples of emissions linked to industrial activities include:
- Emissions related to the burning of fossil fuels or biomass;
  - Emissions related to industrial production processes, such as steel;

- Emissions that are not related to industrial activities are not within scope of this principle, including emissions from agriculture and agricultural land management.
462. Public authorities granting subsidies for the decarbonisation of emissions linked to industrial activities in the UK should therefore, when assessing the subsidy or scheme for the purpose of this principle, ensure that:
- Overall reductions in greenhouse gas emissions are achieved relative to likely greenhouse gas emissions in the absence of the subsidy; and,
  - The subsidy has the effect of reducing the emissions directly resulting from the industrial activities in question.
463. When considering whether there is an overall reduction in emissions, public authorities should look in particular at the impact on greenhouse gas emissions from enterprises, locations and/or sectors that are not in receipt of the subsidy. The subsidy is only consistent with this principle if there is an overall reduction in emissions, not simply displacement from one producer to another.
464. When considering whether there is a reduction of emissions directly resulting from the industrial activities in question, public authorities should ensure that the subsidy does not simply reduce emissions in the inputs to the industrial activities. If a subsidy aims at decarbonising emissions, it should be designed to target the industrial activity in question – rather than incentivising the customers of the high-emissions product to avoid it.

## Principle I – Subsidies for improvements of the energy efficiency of industrial activities

465. Subsidies for improvements of the energy efficiency of industrial activities in the United Kingdom shall improve energy efficiency by reducing energy consumption, either directly (by reducing total energy use from one year to the next) or per unit of production.
466. Only subsidies for the improvement of energy efficiency of industrial activities in the UK need to be assessed against Principle I. Examples of industrial activities are suggested above in paragraph x.
467. Nothing in this principle prevents public authorities from giving subsidies for RD&I that supports the development of technologies leading to greater energy efficiency.
468. Examples of energy efficiency improvements that would likely fall into the scope of this principle are below. This is not an exhaustive list – determinations of whether a

particular energy efficiency subsidy falls within the scope of this principle should be made on a case-by-case basis, using the evidence at hand.

469. Process optimisation improvements, including industrial process control systems (for example: discrete controllers, distributed control systems, SCADA systems and programmable logic controllers) that measure, monitor and control equipment within an industrial process to improve energy efficiency.
470. Equipment upgrades, including more efficient driers, ovens, and kilns (including the use of microwave and infra-red heating where this is more efficient).
471. Heat and energy recovery and heat pumps, including heat pumps that provide energy in the form of heat or cooling to an industrial process, where the heat is sourced from the natural environment.
472. Resource efficiency measures, including onsite resource efficiency measures to reduce wastage and optimise use of raw materials.

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# Chapter 10: Subsidies and Schemes of Interest & Subsidies and Schemes of Particular Interest

## Overview of the chapter

473. The subsidy control regime empowers public authorities to grant subsidies that are tailored to their needs, subject to compliance with the subsidy control principles. A small proportion of these subsidies will have greater potential to lead to undue distortion and negative effects on competition or investment within the UK, and/or in relation to international trade or investment. The Government has set out clear criteria on these subsidies, to assist public authorities that are deciding whether a subsidy or scheme requires SAU review; more specifically, there are two distinct categories of subsidy or subsidy scheme that have been identified as having greater potential to lead to distortive effects: Subsidies or Schemes of Interest (SSoI), and Subsidies or Schemes of Particular Interest (SSoPI).

474. SSoI have a potential risk of leading to undue distortion and negative effects on domestic competition or investment, and/or on international trade or investment. Public authorities intending to grant or make SSoI will be encouraged, but not required, to refer their assessment of the subsidy or scheme to the Subsidy Advice Unit (SAU) for review prior to the subsidy or scheme being granted or made, respectively.

475. SSoPI have a higher potential risk of leading to undue distortion and negative effects on domestic competition or investment, and/or on international trade or investment. Public authorities intending to grant or make SSoPI will be required to engage in the mandatory referral process to the SAU before they do so.

476. Subsidies in either of these categories may still provide societal benefit or address a serious market failure.

477. With regard to Schemes of Interest, or of Particular Interest, referral to the SAU will take place at the time the scheme is made but before any subsidies are granted under its terms. Subsidies granted under the terms of a Scheme of Interest or of Particular Interest that has been reviewed by the SAU at the scheme level are not subject to further referral, unless the scheme is modified in a way that is not a permitted modification (see Chapter 6).

## SSoPI/SSoI Definitions

478. [PLACEHOLDER] This section is subject to the Government's response to the consultation on Subsidies and Schemes of Interest, and of Particular Interest.

## Subsidy Advice Unit Referrals

480. The Subsidy Advice Unit (SAU) has been established within the Competition and Markets Authority to provide independent advice on those subsidies or schemes that have greater potential to lead to undue distortion and negative effects on domestic competition or investment, and/or on international trade or investment.<sup>34</sup>
481. The SAU has issued its own guidance regarding the review of SSols and SSoPIs. Public authorities submitting their assessment of a SSol or SSoPI to the SAU for review should refer to this guidance in conjunction with the SAU's guidance when making a referral. The SAU's guidance sets out in more detail how the SAU will give effect to its statutory obligations.
482. The SAU's role is to provide independent advice in the form of a report to public authorities where they are designing subsidies or schemes which have greater potential to lead to undue distortion or negative effects on competition. However, public authorities should be aware that the SAU does not have the power to prohibit the making of any subsidy or subsidy scheme.
483. Public authorities are obliged to refer their assessments of a subsidy or scheme to the SAU for a report only where they are designing subsidies or schemes that meet the definition of a SSoPI or where they have been directed to do so by the Secretary of State. They may not refer other subsidy assessments to the SAU, unless the subsidy meets the definition of a SSol – in which case they may choose to make a referral.
484. The role of the SAU is to support public authorities' decision making regarding the design and assessment of subsidies. It will be for public authorities to decide whether to follow the advice offered by the SAU. However, public authorities should be aware that the advice will be published and be available for the public to view free of charge. This includes potential interested parties as well as the Competition Appeals Tribunal (CAT).
485. Although public authorities are not bound to follow the SAU's advice or implement any conclusions that are offered in it, they should be mindful that, where the SAU's advice is not followed, the risk of successful legal challenge of the public authority's decision to grant a subsidy or make a subsidy scheme may increase. For more information regarding such challenges, please refer to chapter 12. (link to chapter 12]

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<sup>34</sup> For more information regarding the Competition and Markets Authority, please follow this hyperlink – [Link to the CMA's website]

## Does a subsidy or subsidy scheme require referral to the SAU?

486. Whilst developing a subsidy or subsidy scheme, public authorities will need to conduct an assessment against the subsidy control principles and consider compliance with the prohibitions and other requirements.<sup>35</sup> At this stage, they should also consider if their subsidy or scheme meets the definition of a SSoPI or SSol.
487. Where a subsidy or scheme meets or has the potential to meet the definition of a SSoPI, public authorities must refer their assessments of those subsidies or schemes to the SAU for independent evaluation before the subsidy is granted. In this case, the referral to the SAU will be a mandatory referral. Public authorities must wait until the publication of the SAU's advice, and the expiry of a short cooling-off period, before the subsidy or scheme is given or made.
488. Where a subsidy or scheme meets or has the potential to meet the definition of a SSol, public authorities may make a voluntary referral to the SAU for advice, but they do not have to do so. The SAU has discretion to decide which SSols it will review but may choose to produce advice where an SSol is considered to particularly merit advice, in line with the SAU's published prioritisation principles.<sup>36</sup>
489. If the subsidy or scheme is neither a SSoPI nor a SSol, public authorities will have the ability to grant the subsidy or make the subsidy scheme without a referral to the SAU. In this case, public authorities will not be able to request a report from the SAU regarding the subsidy or subsidy scheme.

## Referral to the SAU

490. The following sections explain the process for making referrals to the SAU under the mandatory, voluntary, call-in, and post-award referral procedure.
491. Public authorities should consider if they need to make a request for referral to the SAU as they conduct the assessment of the subsidy or subsidy scheme against the subsidy control requirements. Alternatively, they may be directed to refer the assessment of a subsidy or subsidy scheme to the SAU

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<sup>35</sup> For more information of this assessment, please refer to chapter 2. [Link to chapter 2]

<sup>36</sup> For more information, please refer to the SAU's published prioritisation principles. [Link to the SAU's published prioritisation principles]

by the Secretary of State. Where the subsidy or subsidy scheme falls within the definition of a SSoPI, public authorities are obliged to wait until after the SAU has published its report and an additional 5 working day cooling-off period has expired to grant or make the SSoPI.

492. Public authorities are encouraged to engage with the SAU ahead of any formal referral request in order to discuss the request and ensure the referrals process proceeds smoothly. When making a request to the SAU, public authorities should use the SAU's online Public Authority Portal and refer to the SAU's guidance. [Link to the SAU's guidance]

### **Responding to a mandatory request for the review**

493. This section explains the process for making a mandatory referral to the SAU. This procedure will be followed where the subsidy meets the definition for a SSoPI, or the subsidy has been called in by the Secretary of State, by directing the public authority to request a report from the SAU.

494. Once a public authority has sent its request for a report to the SAU, the SAU will consider the request to ensure it complies with the requirements. In order to make a valid request, the public authority will need to have provided the SAU with all the information listed [in the section entitled 'Information to include when making a mandatory subsidy referral request']/ [at paragraph [xx] below.

495. Before the end of 5 working days, the SAU will notify the public authority to confirm whether or not the request complies with the requirements for a mandatory referral.<sup>37</sup>

496. If the SAU decides not to proceed to a full evaluation of the authority's assessment of the subsidy or scheme, the SAU will provide reasons to the public authority as to why it has decided not to prepare a report. Where the SAU has decided not to prepare a report because it has received incomplete information, a public authority will be required to resubmit their request for a referral. The SAU will once again have 5 working days to inspect the request and notify the public authority as to whether or not it has been accepted.

497. Where the SAU accepts a request, it will have a further 30 working days to evaluate the assessment of the proposed subsidy or scheme and

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<sup>37</sup> The time limit for the SAU to respond to a request for review begins on the day that they receive the request.



publish a report.<sup>38</sup> If necessary, this reporting period may be extended by agreement between the SAU and the public authority.

498. The SAU may also ask the Secretary of State to direct that the reporting period be extended unilaterally.<sup>39</sup> In this case the SAU will provide the Secretary of State with an explanation of the exceptional circumstances which justify the extension. The Secretary of State will provide a copy of the direction to the SAU and the public authority.

### **Cooling-off period**

499. Once the SAU has issued its advice in respect of a subsidy or subsidy scheme, public authorities must not grant that subsidy or make that subsidy scheme until the expiry of a short cooling-off period. Ordinarily, the cooling-off period will be 5 working days from the publication of the SAU's report, after the end of which, the public authority may grant the subsidy or make the subsidy scheme.<sup>40</sup>

500. The Secretary of State may direct that the cooling-off period is extended where they consider that the SAU's report has identified 'serious deficiencies' in the public authority's assessment of the subsidy or subsidy scheme. In such cases the Secretary of State will publish the direction, send the direction to the SAU and notify the public authority.<sup>41</sup>

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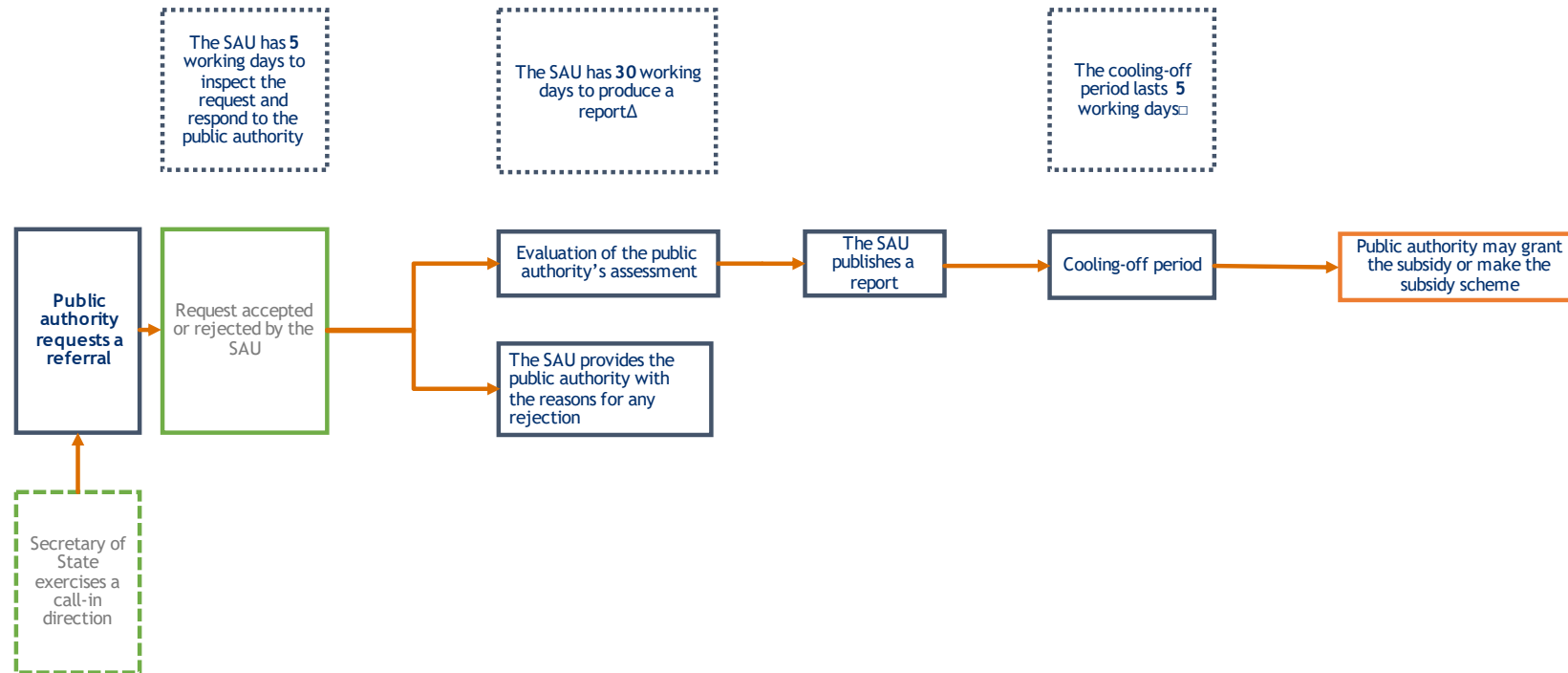
<sup>38</sup> The reporting period for the SAU to produce a report under the mandatory referral process begins with the day on which the notice that a request has been accepted is given to the public authority.

<sup>39</sup> An extension of the reporting period that is directed by the Secretary of State will not exceed 40 working days beyond the end of the original reporting period.

<sup>40</sup> If the SAU has not published a report on the proposed subsidy or scheme within the reporting period, the public authority may grant the subsidy or make the subsidy scheme on the day after the reporting period expires.

<sup>41</sup> Any extension to the cooling-off period will not exceed 30 working days from the day on which the cooling-off period would otherwise end.

## Mandatory referral process diagram



Δ The reporting period may be extended by agreement between the SAU and the public authority or by direction of the Secretary of State

□ The cooling-off period may be extended by direction of the Secretary of State

## Responding to a voluntary request for review

501. This section sets out the process for the voluntary referral of subsidies or subsidy schemes to the SAU.
502. In order to make the request, public authorities must provide the SAU with all the information specified at paragraph 515 below.
503. Once a public authority has sent its request to the SAU, the SAU will decide whether or not to proceed to a full evaluation. The SAU has discretion as to whether or not to provide advice on a subsidy or scheme that has been voluntarily referred. In making its decision on whether or not to prepare a report, the SAU will refer to its published prioritisation principles.<sup>42</sup>
504. Before the end of 5 working days, the SAU will respond to the public authority to confirm whether or not the request has been accepted for evaluation and advice.<sup>43</sup>
505. If the SAU decides not to provide a report it will provide its reasons to the public authority as to why the request has not been accepted. Where the SAU accepts a request for review, it will have 30 working days to evaluate the assessment of the proposed subsidy or scheme and publish a report.<sup>44</sup> Alternatively, a different reporting period may be agreed between the SAU and the public authority, or, if necessary, the reporting period may be extended by agreement between the SAU and the public authority.
506. Public authorities retain the ability to grant a subsidy or make a subsidy scheme throughout the process of voluntary referral to the SAU. Where a public authority decides to grant the relevant subsidy or subsidy scheme before the publication of the SAU's report, the SAU will have discretion to decide if it wishes to publish a report.

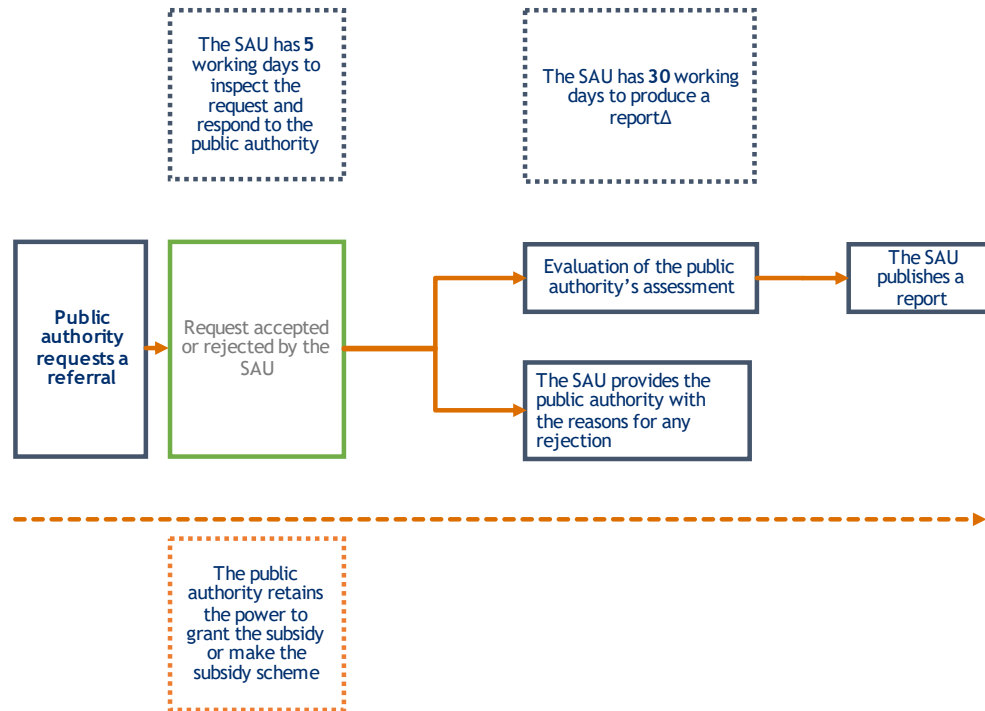
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<sup>42</sup> For more information on the SAU's prioritisation principles, please see the SAU's published prioritisation principles [NB – link to SAU guidance/prioritisation principles]

<sup>43</sup> The time limit for responding to a request for review begins on the day that the request is received.

<sup>44</sup> The reporting period for the SAU producing a report under the voluntary referral process begins with the day on which the notice that a request has been accepted is issued.

## Voluntary referral process diagram



<sup>Δ</sup> The reporting period may be extended by agreement between the SAU and the public authority or by direction of the Secretary of State

## Call-in direction

507. The Secretary of State may also direct that a public authority requests a report from the SAU in relation to any proposed subsidy or subsidy scheme. The Secretary of State may opt to make such a direction if:

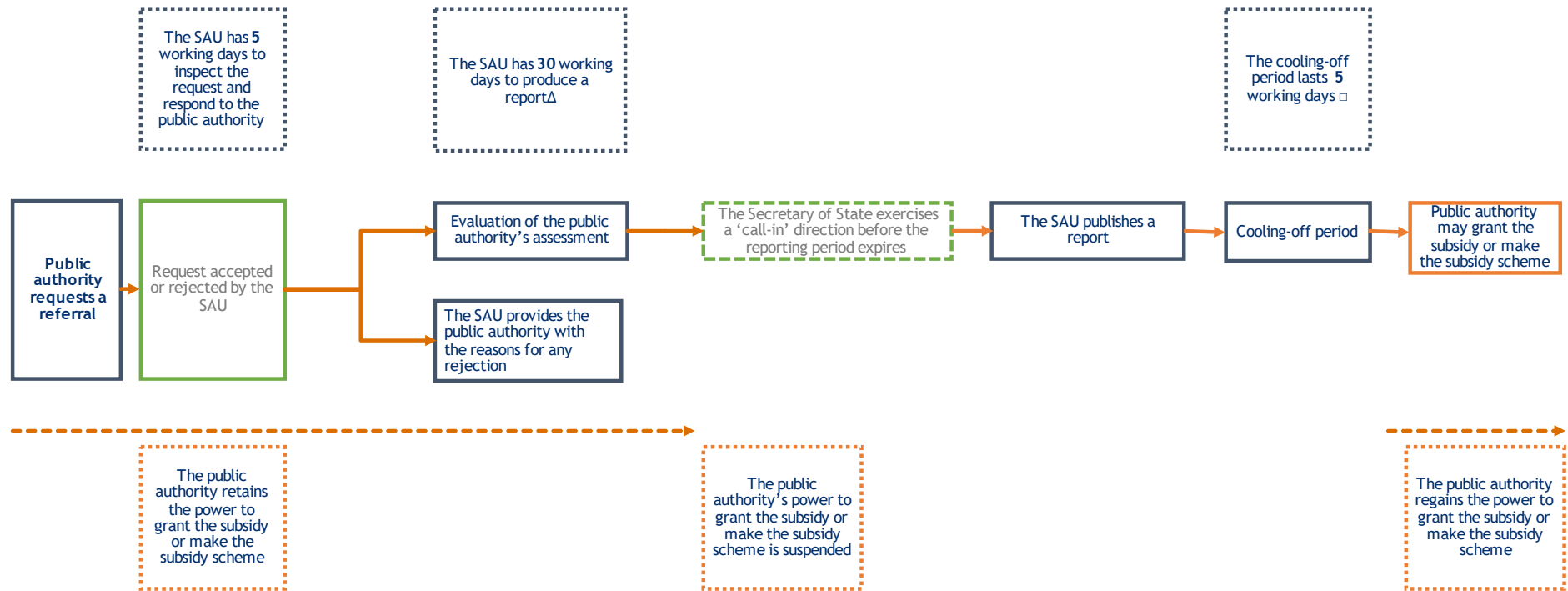
- the proposed subsidy or scheme meets the definition of a SSol; and/ or,
- the Secretary of State considers that there is a risk that the proposed subsidy or scheme would fail to comply with the subsidy control requirements.

508. Where the decision is made to call-in a subsidy or a scheme, the Secretary of State will send the call-in direction to the public authority and the SAU. The subsidy will then be subject to a mandatory referral and the public authority will be required to comply with the process set out above.

509. Where a call-in direction is made following a voluntary referral to the SAU, the voluntary referral will be treated as a mandatory referral from the point the direction is made. In this case the full procedure for concluding the SAU's review will be dictated by reference to the stage that the referral has reached within the SAU's reporting process already, as follows:

- Where a report has not already been published and the reporting period has not already expired, the review will be treated according to the full mandatory referral process set out above.
- Where a report has not already been published but the reporting period has already expired, the process will be altered such that the reporting period is 10 working days from the public authority being notified that the request for review has been accepted.
- Where a report has already been published, but the subsidy or scheme has not already been granted or made, the public authority will need to comply with the requirements specified at paragraph 498 above.

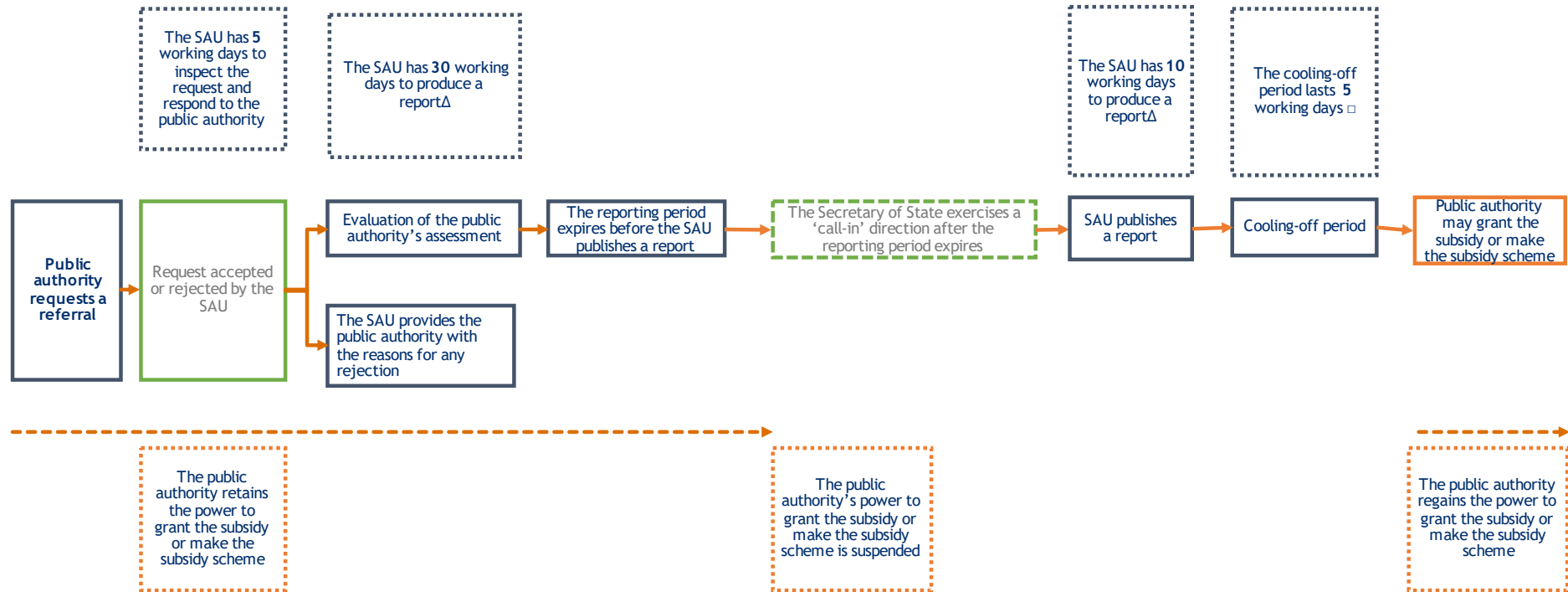
Call-in direction following a voluntary referral process diagram 1



Δ The reporting period may be extended by agreement between the SAU and the public authority or by direction of the Secretary of State

□ The cooling-off period may be extended by direction of the Secretary of State

Call-in direction following a voluntary referral process diagram 2



Δ The reporting period may be extended by agreement between the SAU and the public authority or by direction of the Secretary of State

□ The cooling-off period may be extended by direction of the Secretary of State

## Post-award referral

510. The Secretary of State may also refer a subsidy or scheme to the SAU after the subsidy has been granted or the subsidy scheme has been made. The Secretary of State may opt to make a post-award referral where:

- there has, or may have been, a failure to comply with the subsidy control requirements, or
- there is a risk of negative effects on competition or investment within the United Kingdom.

511. Where the Secretary of State decides to make a post-award referral, the referral must be made before the end of 20 working days from the subsidy or scheme being entered on to the subsidy database.<sup>45</sup>

512. At the same time as making the referral, the Secretary of State must direct the public authority to provide the SAU with the following material:

- any assessment carried out by the public authority before the subsidy or scheme was made as to whether the subsidy or scheme would comply with the subsidy control requirements;
- any evidence relevant to that assessment;
- where no such assessment can be provided, the reasons for the absence of that assessment; and
- any information that the public authority has failed to enter on to the subsidy database.

513. Public authorities must provide this information to the SAU within 20 working days of the direction being received from the Secretary of State.

514. Within 30 working days of receiving the information from the public authority, the SAU will publish a report on the subsidy or scheme in question.<sup>46</sup> This reporting period may be extended by agreement between the

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<sup>45</sup> In the instance of a referral regarding a subsidy or scheme to which section 41 of the Subsidy Control Act 2022 applies (SPEI subsidies with a value of less than £14,500,500), the time limit for the Secretary of State to make a post-award referral will be 20 working days from the day on which the subsidy or scheme is granted or made by the public authority.

<sup>46</sup> In the event that no information has been received from the public authority, a report will be produced by the SAU within 30 working days of the expiry of the time limit for the public authority to provide the SAU with the relevant information.



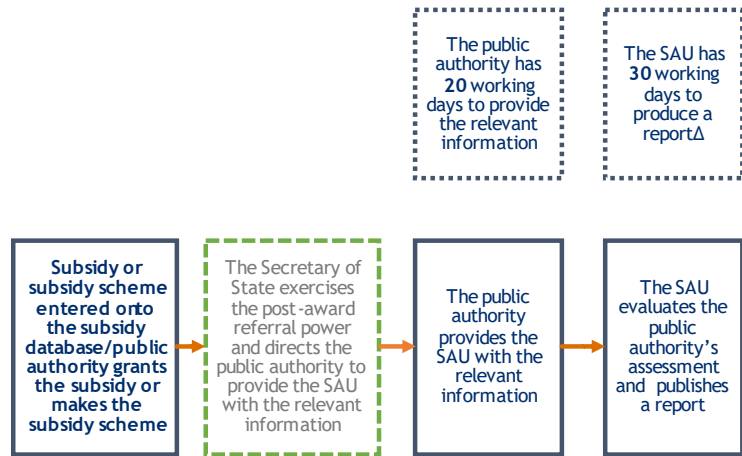
SAU and the public authority. In such cases the SAU will publish a notice detailing the extension.<sup>47</sup>

515. An interested party may apply for a review of the subsidy or scheme to the CAT within one calendar month of the publication of the SAU's report. Please refer to Chapter 12 for more information. [Link to Chapter 12, Challenges and appeals]

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<sup>47</sup> The SAU may also ask the Secretary of State to unilaterally extend the reporting period. In this case the SAU will inform the Secretary of State of the exceptional circumstances which justify such an extension. This extension will not surpass 40 working days from the original reporting period. In such cases, days falling in between the SAU asking for an extension and the Secretary of State directing an extension will not contribute to the reporting period.

## Post-award referral process diagram



Δ The reporting period may be extended by agreement between the SAU and the public authority or by direction of the Secretary of State

## Information to include when making a mandatory subsidy referral request

516. Public authorities are required to include the following information when making their requests to the SAU:

- an explanation of why the public authority considers that the subsidy or subsidy scheme would meet the definition of a SSoPI or SSoI;<sup>48/49</sup>
- the assessment the public authority conducted on the subsidy or scheme's compliance with the subsidy control requirements;
- any evidence relevant to making that assessment; and,
- all the information that the public authority would be required to upload to the subsidy database.<sup>50</sup>

517. Public authorities should also be aware that the SAU has issued its own guidance on the referral process, which provides more direction on the information the SAU would expect to see provided to them when making a referral request. The SAU's guidance should be used by public authorities making a referral request. To view the SAU's guidance, please refer to the SAU's published guidance. [Link to SAU guidance].

518. For more information regarding the information a public authority is required to upload to the subsidy database, please refer to chapter 11. [LINK to chapter 11].

## Content of the SAU's report

519. The SAU's report will be published and available to the public free of charge. The report will evaluate the public authority's assessment of the subsidy or scheme against the subsidy control requirements. The report may also make recommendations on best practice regarding the design and assessment of subsidies.

520. The contents of any SAU report will include an evaluation of the relevant public authority's assessment as to whether the proposed subsidy or scheme would comply with the subsidy control requirements. This evaluation will take into account any effects

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<sup>48</sup> Whichever definition is relevant to the referral process under consideration.

<sup>49</sup> Where a public authority has been directed to request a referral to the SAU by the Secretary of State, but the public authority does not consider that the proposed subsidy or scheme meets the definition of a SSoPI or SSoI, the public authority may opt to provide the SAU with an explanation of why the proposed subsidy or scheme would not meet those definitions.

<sup>50</sup> As defined under section 34 of the Subsidy Control Act 2022 and in relevant regulations.

of the proposed subsidy or scheme on competition or investment within the United Kingdom.<sup>51</sup>

521. The SAU's report may also include advice about how the public authority's assessment might be improved, or advice about how the proposed subsidy or scheme may be modified to ensure compliance with the subsidy control requirements.
522. Although the SAU's reports will only constitute non-binding advice, public authorities should be aware that the SAU's advice is published and that a copy of the report is provided to the Secretary of State. Should the public authority's decision be challenged in the Competition Appeal Tribunal (CAT), the SAU's advice will therefore be available to both the CAT and any interested parties.
523. Where the SAU identifies deficiencies in the design or assessment of a subsidy or scheme, a public authority may wish to use the non-binding advice provided by the SAU to appraise its decision to grant a subsidy or make a subsidy scheme. A public authority may also choose to take any further action that it considers necessary based on the SAU's advice.

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<sup>51</sup> Where a public authority has not provided an assessment of the SSoPI or SSol to the SAU, the SAU is only required to report this fact along with any reasons the public authority has provided for not producing the assessment.

# Chapter 11: Transparency

## Overview of chapter

524. Subsidy transparency is a fundamental part of the UK's subsidy control regime. Most importantly, subsidy transparency is needed to enable interested parties to view subsidies to decide if they want to challenge a subsidy before the Competition Appeal Tribunal (CAT) where the interested party believes the subsidy may not meet the subsidy control requirements. This promotes open and fair competition across the UK's internal market.
525. In addition, transparency promotes accountability and enables the public to see how public money is spent. This is expected to result in better subsidy design and improved policy decisions.
526. The transparency rules require public authorities to upload details of both subsidy schemes and subsidy awards to the subsidy database. Transparency obligations apply regardless of any information that a beneficiary believes is commercially sensitive. Public authorities should consider reminding potential subsidy beneficiaries of the transparency obligations in this context. This will ensure that beneficiaries are aware that any information which they may consider commercially sensitive may have to be uploaded.

## The Subsidy Database

527. BEIS maintains a subsidy database which public authorities must use to meet their subsidy transparency obligations. The database is free to use and is accessible to the public. The subsidy database has two portals.
528. First, the 'search portal' is accessible to the public and can be used by any person to see subsidy information. The website can be found on the GOV.UK website: <https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government> or directly at <https://searchforuksubsidies.beis.gov.uk/> Anyone can access and view the 'search portal'; users do not need a login.
529. The second portal is the 'manage UK subsidies portal' which is used by public authorities to upload subsidy information. The website can be found at: <https://manageuksubsidies.beis.gov.uk/>
530. Public authorities will need to create an account to use the 'manage UK subsidies portal'. This will enable users to upload subsidy schemes and awards. To gain access,

users must email [subsidycontrol@beis.gov.uk](mailto:subsidycontrol@beis.gov.uk). Public authorities are responsible for the accuracy of the data they upload.

531. If a public authority does not have an account, only a person with 'BEIS administrator' access can upload subsidy information on their behalf. Public authorities which may wish to upload subsidy information on behalf of another authority should contact the BEIS subsidy control team about gaining 'BEIS administrator' access. The public authority giving the subsidy remains responsible for the accuracy of the data upload.
532. The 'manage UK subsidies portal' includes a help tab to guide public authorities through the process of uploading subsidy information.
533. The Secretary of State for BEIS will maintain the database and review the data uploads where appropriate. Public authorities may be contacted if BEIS notices that there is information missing from the database or the information uploaded appears to be incorrect.
534. For any practical queries about how to create an account or difficulties uploading subsidies, please contact [subsidycontrol@beis.gov.uk](mailto:subsidycontrol@beis.gov.uk)

## Subsidy Schemes

535. Public authorities must upload the detail of every subsidy scheme they provide, no matter the amount unless an exemption in Part 3 of the Act applies. Subsidy awards given under schemes however only need to be uploaded if they exceed £100,000. The obligation to upload a scheme does not apply to MFA or SPEI Assistance because the only transparency obligations these types of subsidies face is an obligation to upload an individual subsidy award that exceeds £100,000.
536. Subsidy schemes must be uploaded within three months of the public authority's confirmation of its decision to make the scheme.
537. The three-month deadline for the uploading of subsidy schemes applies to all subsidy schemes, no matter which form the subsidies take, unless an exemption in Part 3 of the Act applies. A tax subsidy scheme must therefore also be uploaded within three months of the confirmation of the decision to make the tax subsidy scheme.
538. It is the responsibility of each public authority to determine the date which they consider to be the confirmation of the decision to make the scheme. This provides the public authority with greater flexibility for determining when the upload deadline commences. However, the public authority will need to have a rational reason for justifying what constitutes the confirmation of the decision. The date of the confirmation will vary depending on the circumstances and form of the subsidy scheme.

## Example

A public authority designs a competition for which beneficiaries can apply for funding. The scheme is designed in January 2022 and funding for the scheme is obtained in March 2022. On 1 May 2022, the scheme opens for applications. The earliest payments of subsidy awards is 1 July 2022. The public authority may decide that the relevant confirmation of the decision to make the scheme is 1 May 2022, when the scheme opened for applications. The deadline for uploading the scheme to the database is therefore 1 August 2022. In some cases however, there may be good reason for arguing that the confirmation of the decision to make the scheme was at an earlier date in March or April 2022. The exact date will depend on the circumstances of the case.

539. Streamlined Routes (referred to Streamlined Subsidy Schemes in the Act) are a particular type of subsidy scheme, made by Government for the benefit of public authorities. For the purposes of transparency on the database, there is no difference between a Streamlined Route and any other subsidy scheme. Streamlined Routes will therefore appear on the database alongside other subsidy schemes and will have associated subsidy awards.

## Subsidy Awards

540. Subsidy awards can be made as part of a scheme, or as standalone subsidy awards. The process for uploading subsidy awards varies between whether that subsidy award is standalone or part of a scheme.

541. Standalone subsidy awards can be challenged in the CAT in the same way that subsidy schemes can. All standalone subsidy awards must be uploaded, there is no threshold below which there is an exemption from the obligation to upload an award (unless an exemption in Part 3 of the Act applies).

542. Where a subsidy award is part of a scheme, the scheme must have first been uploaded to the database. The scheme will have a unique subsidy control number generated by the database. Subsidy awards can then be uploaded to the database with a link to the scheme. Subsidy awards can be uploaded to the database individually or in bulk.

543. The threshold for the uploading of subsidy awards given under schemes is those exceeding £100,000. Any amounts above this threshold must therefore be uploaded to the database. This is not cumulated per beneficiary but applies per subsidy award.

544. However, where a subsidy award given under a scheme is divided into smaller payments which each fall below the £100,000 threshold, the relevant amount to be

uploaded remains the full amount of the subsidy award, as will likely be specified in an offer letter or other relevant documentation.

### Example

A beneficiary is awarded a £240,000 subsidy award, paid in three instalments of £80,000. All three £80,000 payments will need to be uploaded to the database (as a single subsidy award upload of £240,000) because it is part of one subsidy award which exceeds the £100,000 threshold.

545. Subsidy awards, with the exception of subsidy awards in the form of tax measures, must be uploaded within three months of the confirmation of the decision to give the subsidy award. It is up to the public authority to determine what date is the confirmation of the decision to give a subsidy. This provides flexibility for the public authority but it must be justified. The confirmation of the decision may vary between subsidy awards depending on the form of the subsidy award.

## Subsidy awards in the form of tax measures

546. Where a subsidy award is given in the form of a tax measure, the upload deadline is one year beginning with the date of the tax declaration. In most cases, a tax declaration will be the tax return. As stated above, all schemes must be uploaded within three months, including tax subsidy schemes. Tax subsidy awards, if given under a scheme, will then be linked on the database to the tax subsidy scheme.

547. It is the responsibility of public authorities granting tax subsidies to determine the date of the tax declaration.

## Information to be uploaded

548. The Government will introduce regulations specifying what information must be uploaded with regard to subsidy schemes and subsidy awards ( Section 34 of the Act). This applies to all subsidy schemes and awards but will contain certain exceptions for Minimal Financial Assistance (MFA) and Services of Public Economic Interest (SPEI) Assistance award uploads, which will have fewer information requirements, (see section on MFA and SPEI below).

549. The UK has international subsidy reporting obligations which will be included in the Section 34 regulations. This guidance outlines some of the information requirements, including those international obligations. However, further information requirements may be added by the final regulations and this guidance will be updated accordingly.



550. Where subsidy information must be uploaded but the database cannot host that information, public authorities are required to provide on the database the location of such information, for example by uploading that information to a publicly accessible website and providing a link to that website on the subsidy database. Any further information required, such as subsidy scheme eligibility, must be available on this linked website.

551. Subsidy scheme entries must include:

- The name of the public authority that has made the subsidy scheme. This facilitates interested parties possible pre action information requirements. Although other public authorities may upload subsidies on behalf of other public authorities, the name on the database should always be the public authority that has made the scheme.
- The amount budgeted for the scheme and maximum eligible amounts. Public authorities will need to show the budget for the entire scheme as well as the maximum individual subsidy amount that may be given under the scheme. For subsidy schemes in the form of tax measures, the scheme estimate may be used as the budget for the purposes of making an entry on the database. This budget or estimate can be provided in a range but the maximum amount must be the accurate figure. The total spend of a scheme may be lower than the amount budgeted. A public authority is not required to update the budget entered in the database in light of actual spend, provided it is lower. A higher spend indicates that the budget has been exceeded and may constitute a permitted modification to a scheme or if it is not a permitted modification it may mean the scheme must be treated as the making of a new scheme for the purposes of applying the subsidy control requirements. For further information on permitted modifications, see Chapter 5.
- The terms and conditions for eligibility to receive a subsidy under the scheme. An explanation of what kind of eligibility criteria the scheme uses to determine whether a beneficiary may receive a subsidy under the particular scheme.
- The categories of beneficiary eligible to receive subsidies under the scheme. A public authority will need to explain what categories of beneficiaries are eligible for subsidy awards under the scheme. For example, an Research and Development (R&D) scheme for Small and Medium sized Enterprises (SMEs).
- The basis for calculating the subsidy. A public authority will need to show how it has calculated the subsidy amount that can be given under the scheme, including any relevant conditions relating to subsidy ratios
- Legal basis. An entry will need to include the legal basis upon which the scheme is made. This does not mean that a public authority must provide legally privileged advice it has received on the lawfulness of the subsidy. For example, some subsidy schemes have a legal basis in an Act of Parliament such as the Industrial Development Act 1982.
- Policy objective. The public authority must provide the policy objective of the subsidy scheme. This policy objective should reflect the objective in Principle A.

- Purpose of the subsidy. The database allows for multiple subsidy purposes to be selected from a dropdown menu when adding a subsidy scheme. This will then determine which subsidy purpose can be selected when adding an award under that scheme.
- Date of the confirmation of the decision to make the scheme. A public authority will need to indicate the date it confirms the decision to make the scheme. This is separate from the upload date, which is added by the database automatically.
- Duration of the subsidy scheme. The database enables a public authority to indicate the start and end date for a scheme. Some schemes may not have end dates. Although it is technically possible for a subsidy scheme to not have an end date, a public authority will need to have very strong evidence that the scheme meets the conditions of the subsidy control principles despite not having an end date. The database allows public authorities to leave the end date blank thereby indicating that the scheme does not have an end date.
- Time limits or other conditions attached to the use of the subsidy scheme. A public authority must indicate any time limits or other conditions which are attached to the use of the subsidy scheme and show this on its database entry.
- The location of any information which cannot be provided on the database. Although the database facilitates most of the information a public authority must upload, it may not be able to host all the relevant information a public authority must or wishes to upload. Therefore, the database allows public authorities to provide the location of such information, for example, the inclusion of a URL link to a public authority's website where any further information can be added and accessed by the public. However, the information provided in a different location such as a website must be limited to the information which a public authority cannot provide on the database. This means that a public authority cannot evade its obligation to upload information to the database by merely providing a link to a website which contains the information.

552. When a public authority has successfully uploaded a subsidy scheme it may upload subsidy awards associated with that scheme. Subsidy awards can be added individually or in bulk.

553. Subsidy awards given under published schemes must include:

- The amount of the subsidy award or the amount budgeted for the subsidy. For subsidies given in the form of tax measures, this budget can be provided in a range.
- Name of the subsidy award beneficiary.
- Name of the public authority giving the subsidy. This may be different from the name of the public authority which made the scheme.

- Policy objective. As with the upload of a scheme, the public authority will need to provide the policy objective of the subsidy award as reflected in Principle A.
- Purpose of the subsidy. A subsidy award entry will need to have an associated subsidy purpose which can be chosen from a dropdown menu on the database. The dropdown menu will have been narrowed down by the subsidy scheme under which the subsidy award is given.
- Date of the confirmation of the decision to give the subsidy award. This is separate from the uploaded date of confirmation of the decision to make a scheme .
- Location of any further information which cannot be provided on the database. As with a scheme entry, a public authority may need or wish to provide the location of further information, for example a link to a website. The database provides a text box to allow a public authority to do this . However, the information provided in a different location, such as a website must be limited to the information which a public authority cannot provide on the database. This means that a public authority cannot evade its obligation to upload information to the database by merely providing a link to a website which contains the information.

554. There are more information requirements necessary for standalone subsidy awards. Standalone awards do not have the protection of being given under a published scheme and therefore face a greater need for transparency.

555. Standalone subsidy awards must include the following information requirements for each entry:

- The amount of the subsidy award or the amount budgeted for the subsidy. For subsidies given in the form of tax measures, this budget, or estimate, can be provided in a range.
- Name of the subsidy award beneficiary
- Name of the public authority giving the award. This may be different from the name of the public authority which made the scheme.
- Basis for the calculation of the subsidy award. Similar to a subsidy scheme entry, a public authority must indicate how it has calculated the subsidy award. This is necessary for any interested party who may wish to challenge the subsidy award to determine whether they are affected by the subsidy or not.
- Legal basis of the subsidy award. A standalone subsidy award must have a legal basis and a public authority must include this in its database entry. As with subsidy scheme entries, the legal basis may be an Act of Parliament, or primary legislation made by one of the Devolved Governments.
- Policy objective of the subsidy award. The database allows for a public authority to choose from a dropdown menu of policy objectives for the standalone award.

- Purpose of the subsidy award. The database includes a dropdown menu of purposes from which one can be selected as applicable to the standalone award.
- Any time limits or other conditions attached to the use of the subsidy award. The database provides a free text box which public authorities can use to enter any conditions related to the use of the standalone subsidy award. This information may be needed by interested parties to determine whether or not they are affected by the standalone subsidy award.
- The location of any further information which cannot be provided on the database. As is the case with subsidy schemes and awards under schemes, the database allows for public authorities to provide the location of further information. This must be limited to that information which cannot be hosted on the database.
- Date of the confirmation of the decision to give the subsidy award. This date will be separate from the date of upload, which is created by the database automatically.

## Subsidies for Services of Public Economic Interest (SPEI)

556. The following paragraphs [X and X] relate to SPEI subsidies given under section 29, but not SPEI Assistance given under section 38, which is covered further below under the heading “Minimal Financial Assistance (MFA) and SPEI Assistance”. SPEI subsidies must be uploaded to the database where the award exceeds £100,000. As with conventional subsidy schemes, SPEI schemes must also be uploaded to the database as well as any SPEI subsidies exceeding £100,000.

557. Unlike conventional standalone subsidy awards, standalone SPEI subsidies do not have to be uploaded to the database if they do not exceed £100,000. For example, a £50,000 SPEI standalone subsidy award does not need to be uploaded to the database but it can be challenged in the Competition Appeal Tribunal (CAT)

## Minimal Financial Assistance (MFA) and SPEI Assistance

558. Although subsidies given as MFA and SPEI Assistance do not have to apply the subsidy control principles, the £100,000 transparency threshold still applies per MFA or SPEI Assistance award. Therefore, any awards of MFA or SPEI Assistance which exceed £100,000 must be uploaded to the database.

559. As will be outlined in the regulations, MFA and SPEI Assistance awards do not face the same reporting obligations as conventional subsidy awards and schemes. Instead, MFA and SPEI Assistance transparency need only include the following:

- Public authority providing MFA or SPEI Assistance
- Amount of the award

- Beneficiary of the award
- Date of confirmation of decision to give the award
- Upload date (automatically generated by the database)

560. As is the case with all subsidy database uploads, if the public authority wishes to provide more detail than the minimum required by legislation, it may do so.

## Maintaining the database entry

561. Public authorities are responsible for the accuracy of the information they are required to upload. Inaccurate entries may mean the duty to upload subsidy information has not been satisfied. Subsidy information must be maintained on the database for at least six years, starting with the date of upload. If the duration of the subsidy scheme is longer than six years, the duty to maintain the entry continues for as long as the duration of the subsidy scheme. The subsidy database will automatically generate the upload date which determines the start date of the six year period. Subsidy information will not be automatically deleted following this six year period and public authorities are encouraged to leave this subsidy information on the database. However, at the end of this six year period, or at the end of the duration of the subsidy scheme if longer than six years, the public authority is no longer responsible for the database entry.

562. Public authorities should regularly check that the information they have uploaded is accurate. This includes checking that the weblinks provided continue to link the user to the appropriate information uploaded outside the database, where this is applicable. BEIS will also check the database and may contact public authorities where subsidy information appears to be misleading, wrong or out of date.

563. Public authorities should ensure that if any changes are made to an uploaded subsidy scheme or award, those changes are reflected in the database. If those changes are sufficient as to constitute a new subsidy scheme or standalone award, the limitation period for challenging in the CAT will start again. For further information see chapter on Challenges and Appeals.

## Modifications to subsidies

564. Subsidy schemes and subsidy awards may be modified. Public authorities are obliged to keep information on the database up to date and as a result, modifications (including 'permitted modifications' within the meaning of Section 81, see chapter [x]) must be uploaded to the database unless they are otherwise exempt from transparency requirements.

565. However, subsidy awards of no more than £100,000 given under schemes do not, in any case, need to be uploaded and so any modifications to such subsidies do not need to be uploaded provided the subsidy remains below this threshold as modified. If the modification leads to a subsidy award exceeding £100,000 it must be uploaded, even where it previously was exempted as a result of being below the threshold and given under a published scheme.
566. The deadline for uploading modifications mirrors the original upload deadlines. That is, within three months of the date of modification for both schemes and tax schemes. The deadline for modifications to tax awards is 12 months from the date of modification.

### **Example**

A subsidy scheme provides grants of up to £70,000 per beneficiary. The scheme has been uploaded to the database but each subsidy award benefits from the exemption from transparency. The scheme is modified to allow for grants of up to £120,000 per beneficiary. The uploaded scheme must be modified on the database within three months of confirmation of the decision to make the modification. From the point of the modification onwards, any award which exceeds £100,000 given under the scheme must be uploaded to the database.

567. Certain permitted modifications to subsidies or schemes must be uploaded to the database. Please refer to the section on permitted modifications for details on when a modification must be uploaded to the database.
568. Modifications in relation to subsidies or schemes given in accordance with Regulation (EC) No 1370/2007, legacy subsidies relating to agriculture, fish and fish products, or the audiovisual sector, and withdrawal agreement subsidies or schemes given in accordance with Article 10 of the Northern Ireland Protocol or to which Article 138 of the EU Withdrawal agreement applies, do not need to be uploaded to the database.

## **Possible future changes**

569. The Subsidy Control Act provides the Government with the ability to set the transparency rules by regulations and, if necessary, change these regulations in future.
570. The Act provides the power to make regulations which may change the thresholds at which subsidies must be uploaded to the database, as well as the deadlines within which they must be uploaded. In both cases, the Act has limited this by providing a cap to help ensure that the subsidy transparency rules continue to adhere to the UK's international reporting requirements where required.

# Chapter 12: Challenges and Appeals

## Overview of the chapter

571. The Competition Appeal Tribunal (CAT) has been given the jurisdiction to review subsidy control decisions.
572. This chapter explains who can request the review of a subsidy decision, which subsidy decisions can be reviewed, and when an application for review may be made. It also explains the pre-action information request process and suggests steps that public authorities may wish to take so that they can respond to those requests quickly.
573. The purpose of this chapter is to provide guidance on the practical application of the relevant requirements, prohibitions and exemptions contained in the Act in terms of how these relate to enforcement.

## Reviews in the Competition Appeal Tribunal

### Reviewable subsidy decisions

574. Interested parties may apply to the CAT for a review of the following decisions (reviewable subsidy decisions):
- to grant a subsidy (a standalone subsidy not given out under a scheme or Streamlined Route);
  - to create a subsidy scheme for giving out multiple subsidies of a similar type; or
  - to create a Streamlined Route, for public authorities to use for giving out subsidies of a similar type.
575. Subsidies that are considered minimal financial assistance, SPEI assistance and other types of subsidies that are not subject to the subsidy control requirements (see Chapter 8) can also be reviewed by the CAT on general public law grounds. They cannot be reviewed by the CAT on grounds related to breach of the subsidy control requirements where they are not subject to these requirements. The recovery remedy would not be available in these cases.
576. The CAT can review a subsidy decision on general public law grounds, or it can review whether the public authority carried out its duties that are specific to the subsidy control regime. Namely, to consider the relevant subsidy control principles, and to be of the view that the subsidy was consistent with those principles before deciding to give the subsidy. (For energy and environmental subsidies, the principles in Schedule 2 of

the Act apply in addition to those in Schedule 1 (see Chapters 3 and 9).

577. The CAT may also determine whether the subsidy contravened any of the prohibitions set out in Chapter 8 of this guidance.

## Modified subsidies and subsidy schemes

578. Where an existing subsidy or scheme has been modified, the decision to modify the subsidy can be reviewed on grounds related to the subsidy control requirements, except where the modification is a 'permitted modification' (see Chapter 6). Where the modification is not a 'permitted modification' the modified subsidy will be considered a new subsidy or scheme for the purposes of applying the subsidy control requirements and as such could be subject to an application for review like any other subsidy decision.

## The review of subsidies given under subsidy schemes or Streamlined Routes

579. Subsidy schemes and Streamlined Routes allow public authorities to give subsidies that meet certain clear criteria without having done an assessment against the subsidy control principles and prohibitions for each individual subsidy given under the scheme or Streamlined Route. This is because an assessment will have been carried out in relation to the scheme or Streamlined Route and the eligibility criteria for the scheme or route guarantee that a subsidy that meets those criteria will comply with the subsidy control principles and prohibitions (see Chapters 3 and 8). As a result, subsidies granted under a scheme or a Streamlined Route are not subject to review before the CAT.

580. However, this protection only applies where a subsidy genuinely falls within the terms of the scheme or route. If a subsidy does not really fall under the scheme, then the public authority should have treated it as an individual subsidy, and therefore conducted an assessment against the relevant principles and prohibitions. The subsidy could be challenged on this basis.

### Example

A subsidy given to a motorcycle manufacturer is wrongly claimed to fall under the protection of a scheme that is directed at bicycle manufacturers. An interested party could ask the Tribunal to determine whether the subsidy should have enjoyed the protection of the scheme or whether it should have been treated as an individual subsidy.



If the CAT decides it should have been treated as an individual subsidy the CAT could then consider whether the public authority made an assessment against the principles, prohibitions and other subsidy control requirements. If the Tribunal finds that the relevant subsidy control requirements have not been met, then it will be able to order the same remedies as in the review of any standalone subsidy.

581. As with all decisions of a public nature, a person who is aggrieved by the giving of a subsidy under a scheme may also be able to request a review of the subsidy decision on general public law grounds. That is, on the basis that the subsidy decision was, for example, illegal, irrational, biased or otherwise unlawful on any other general public law ground. Such a challenge would need to be in the High Court or Court of Session, as it is not possible to challenge a subsidy under a scheme in the CAT.

## Nature of the review

582. When reviewing subsidy decisions, the CAT will apply the principles of judicial review. This means that the CAT will not determine whether the decision was correct, but whether it was lawful. For example, whether it was made within the authority's powers, was fair and reasonable, and to assess whether it was consistent with the relevant principles and requirements of the Act. The CAT will not review the merits or effectiveness of a subsidy or subsidy scheme.

583. If the CAT finds that a subsidy decision has not been given in compliance with the requirements in the Act or that the subsidy is prohibited, it may order remedies. In England and Wales and Northern Ireland, these are very similar to those available to the High Court on an application for judicial review, with the addition of recovery orders, which are specific to subsidy control. It is entirely at the discretion of the CAT whether it orders remedies and if it does, which remedies it chooses to award. The following remedies are available in cases in England and Wales and Northern Ireland (meaning the public authority that has made the subsidy decision is located in these locations):

- Mandatory order (or 'order of mandamus' in Northern Ireland): to require the relevant public authority to perform its legal duties.
- Prohibiting order (or 'order of prohibition' in Northern Ireland): to prohibit a public authority from carrying out an unlawful act. This might prevent a public authority from giving a particular subsidy, or further subsidies under a scheme.
- Quashing order (or 'order of certiorari' in Northern Ireland): to set aside an unlawful decision and deprive it of any legal effect. This could be used to set aside an unlawful subsidy decision and may require the public authority to reconsider and re-make the decision.

- Declaration: the CAT could make a declaration to clarify a principle of law that was at issue in the case.
- Injunction: an order directing the public authority to do or refrain from doing a specified act, and may be done on an interim basis. For example, the CAT may order a public authority to refrain from giving a subsidy until it has completed its review of the subsidy decision.
- Recovery: an order directing the public authority to take the subsidy back from the beneficiary. The order may specify a timeframe for the recovery and may apply to some or all of the amount of a subsidy or some or all subsidies given under a scheme.

584. In cases arising under the law of England and Wales, the CAT must, however, refuse to grant relief if it appears highly likely that the outcome for the interested party would not have been substantially different if the conduct complained of had not occurred. The Tribunal may, however, disregard this requirement if it considers it is appropriate to do so for reasons of exceptional public interest.

585. When it is reviewing a case in Scotland, meaning the public authority that has made the subsidy decision is located in Scotland, the CAT has the same powers, and will be required to apply the same principles as the Court of Session would apply in an application to the supervisory jurisdiction of that Court. The CAT can grant forms of relief equivalent to those available to the Court of Session in those cases, which include an order for reduction; declarator; suspension; interdict; implement; restitution; and payment (whether of damages or otherwise) and any interim order.<sup>52</sup> See further details below which describe these types of orders. In addition to these forms of relief, the Tribunal can order the recovery of a subsidy (as above).

- Reduction – an order that quashes a decision made by a public authority and may require the public authority to re-consider the decision;
- Declarator – a declaration by the Tribunal clarifying a principle of law that was at issue in the case;
- Suspension – an order for suspension stops an act that is being carried out;
- Interdict – an order which prevents a future act from being carried out, or prevents further continuation of an act;
- Implement – an order requiring the public authority to perform a specified act, for example an order requiring the public authority to perform its legal duties;
- Restitution and damages – damages may be awarded for loss suffered as a result of an unlawful act or omission by a public authority.

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<sup>52</sup> See Rule 58.13(3) of the Rules of the Court of Session 1994

## Appeals

586. A decision of the CAT may be appealed on a point of law. This appeal will be heard in the Court of Appeal in England and Wales or Northern Ireland, or the Court of Session in Scotland. To seek an appeal, the appellant must get permission from either the Tribunal or the appellate court (i.e., the Court of Appeal or the Court of Session).

## Who can request the review of a subsidy decision

587. An 'interested party' can ask the CAT to review a subsidy decision – that is, a public authority's decision to give a subsidy or to make a subsidy scheme. An interested party is anyone whose interests may be affected by the giving of the subsidy or making of the scheme.

588. The subsidy control regime regulates the giving of money or other benefits with a financial value, and the regime is intended to avoid excessive distortions of competition. As such, the possible effects on a person's interests that would make them an interested party will likely be financial.

589. The CAT has discretion to decide whose interests may be affected by a subsidy or scheme and therefore who can seek a review of the subsidy decision. However, an interested party would most typically be a competitor of the person that receives the subsidy (the beneficiary). It could also be a trade association active in the relevant sector and that represents the competitor or competitors of the beneficiary.

590. Local administrations and the devolved administrations may also be considered interested parties in certain circumstances where the subsidy or scheme may adversely affect the interests of people in the areas in which they exercise their responsibilities. For example, where the subsidy has had a material impact on investment in the area in which they exercise their responsibility.

591. The Secretary of State will always be considered an interested party. This is a result of their responsibility to ensure the good operation of the subsidy control regime in the UK, and for the UK's compliance with its international obligations on subsidy control. The Secretary of State may therefore ask the CAT to review a subsidy if they consider that the subsidy poses a significant threat to competition and investment within the UK, or that it may not be consistent with the UK's commitments under the World Trade Organization agreements or free trade agreements.

592. To apply for the review of a subsidy or to intervene in a case, an interested party should set out a notice of appeal, or request for permission to intervene, and send this

to the Registrar of the Competition Appeal Tribunal. An application to review a subsidy decision does not have the effect of suspending that decision unless the CAT directs it.

593. The Competition Appeal Tribunal's 'Guide to proceedings 2015' sets out the requirements for a notice of appeal at paragraphs 4.25 onwards. [NB – to include link to CAT guidance]

## Time limits for requesting a review

594. A public authority must upload the information set out in Chapter 11 to the database within three months of the confirmation of the decision to give the subsidy or make the scheme, or for a subsidy given as a tax measure, within 12 months of the tax declaration.

595. Once a reviewable subsidy decision has been uploaded to the database, an interested party generally has one calendar month to apply to the CAT for a review of the subsidy or scheme. An interested party does not need to wait for the subsidy or scheme to be uploaded to the database before making an application to the CAT.

596. The one-month limitation period does not apply in the following circumstances.

- **Reviewable subsidies that do not have to be uploaded to the subsidy database**  
Where a subsidy or scheme can be reviewed by the CAT but is not required to be uploaded to the subsidy database, then an interested party may apply for a review within one month of the date they first knew or ought to have known of the subsidy. (For example, subsidies for services of public economic interest that are £100,000 or less)
- **Applications about a subsidy referred by the Secretary of State**  
When a subsidy or scheme has already been awarded and the Secretary of State has referred that subsidy or scheme to the Subsidy Advice Unit for a post-award report, an interested party may apply for a review of the subsidy or scheme within one calendar month of the publication of the Subsidy Advice Unit's report (see Chapter 10).
- **Applications after a pre-action information request**  
If an interested party has asked a public authority for further information about a subsidy or subsidy scheme under the pre-action information process (see below), that interested party may apply for a review of the subsidy or scheme within one month of the public authority giving written notice that it has provided the information in response to the request. This extension does not apply to other interested parties.
- **Multiple time limits**  
Where a subsidy has been referred to the Subsidy Advice Unit for a post-award report and has also been subject to a pre-action information request, the interested party that made the information request will be able to make an application before the end of the later of the two time limits.

- **Inaccurate or incomplete uploads to the subsidy database**

Where an upload to the transparency database is required, the one-month time limit only begins after these transparency requirements have been properly fulfilled. If the information uploaded to the database about a subsidy or scheme is inaccurate or incomplete to the extent that the duty to upload the subsidy or scheme to the database has not been fulfilled, then an interested party may be able to request a review of the subsidy or scheme at any time.

For example, this means that if a subsidy is wrongly claimed to come under the protection of a scheme or Streamlined Route, it will remain open to review for as long as its status is incorrectly recorded on the database and until one month after its status is correctly recorded (unless an extension above applies).

597. Where a database entry contains minor errors or omissions, the CAT may disregard these for the purposes of establishing the time limits for requesting a review. An error or omission will be considered minor if the CAT thinks it had no prejudicial impact on the interested party's ability to assess whether its interests may have been affected by a subsidy and therefore whether it should have made a pre-action information request.

598. A calendar month runs from the relevant date. That is, the date the subsidy is uploaded to the database or the date the interested party first knew or ought to have known of the subsidy decision, the post-award report is published or the date the public authority gives notice to the interested party that it has provided the information in response to the request through a pre-action information request. For example, if a subsidy is uploaded on 20 July, the application must be submitted by 20 August. Where the time period for submitting an application expires on a Saturday, Sunday or bank holiday, the application will be in time if submitted on the next day that is not a Saturday, Sunday or bank holiday.<sup>53</sup>

599. In exceptional circumstances, the CAT may amend these time periods.

## Pre-action information requests

600. An interested party (someone whose interests may be affected by the giving of a subsidy or scheme) can ask the public authority that gave a subsidy or made a subsidy scheme for information about the subsidy. This is to help them determine whether the subsidy was given in accordance with the relevant requirements of the Act, and therefore whether to ask the CAT to review the subsidy decision.

601. A pre-action information request (a request) must be made in writing to the public authority, stating that it is being made only for the purpose of deciding whether to apply

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<sup>53</sup> For further detail on the procedure for making an application to the Tribunal, please refer to the CAT Rules 2015.

for a review of a subsidy decision under section 70 of the Act, on the ground that the decision did not comply with the requirements of Chapters 1 and 2 of Part 2 of the Act.

602. An interested party can submit a request from the time that a subsidy has been given or a scheme has been made, up until one month after the information about the subsidy or scheme has been uploaded to the subsidy database, or one month after the interested party first knew or ought to have known of the decision to give the subsidy or make the scheme, where the subsidy or scheme is not required to be uploaded to the database.
603. For example, if a subsidy is given on 22 March and the upload to the subsidy database done on 15 May, an interested party could make a request at any time from 22 March up until 15 June, one month after the transparency upload.
604. A public authority must reply to a request in writing within 28 calendar days. The reply must provide such information as would enable or assist in, the making of a determination as to whether the subsidy was given, or the scheme made in accordance with the requirements of Chapters 1 and 2 of Part 2 of the Act. That is, in accordance with the public authority's duty to consider the principles, to only give the subsidy or make the scheme if it is of the view that this will be consistent with the principles, and to be compliant with the prohibitions and other specific requirements in Chapter 2 of Part 2.
605. If, having received this information, the interested party wants the CAT to review the subsidy decision, then they must apply for a review within one month of receiving notice from the public authority that it has provided information in response to the request.
606. In providing information in response to a request, a public authority may impose some proportionate restrictions on the information provided. This is to protect commercially sensitive information, confidential information, information subject to legal privilege, and information that it would be contrary to the public interest to disclose.
607. In turn, the interested party must only use the information for the purposes of understanding whether the subsidy was given, or the scheme was made, in accordance with the requirements of the Act, and in accordance with any specific restrictions the public authority may impose.

## Responding to a pre-action information request

608. For a public authority (and for the beneficiary of a subsidy), the response to a pre-action information request is an important opportunity to demonstrate that a subsidy was given in compliance with the requirements of Chapters 1 and 2 of Part 2 of the Act.

609. It is important to put in place proportionate restrictions to protect information relating to the beneficiary that is commercially sensitive or confidential. However, a response that is excessively redacted for these purposes could be counterproductive. It will create suspicion and could lead to an interested party requesting an unnecessary review of a compliant subsidy decision.
610. The proportionality of a restriction should be assessed by balancing the risks to the beneficiary of disclosing the information to the interested party against the public authority's duty to provide sufficient information to enable or help the interested party to determine whether the subsidy was given in compliance with the requirements of the Act or not.
611. Where public authorities impose restrictions on the information that is disclosed, they should therefore try to withhold as little information as possible and explain to the interested party the nature of the information that is being withheld and the reason for withholding it. As long as it does not defeat the purpose of withholding the original information, a public authority may wish to give a summary of the information that is withheld.
612. A speedy and complete reply to a pre-action information request may help to avoid the review of a subsidy and minimise uncertainty for beneficiaries. Public authorities and beneficiaries may wish to consider – before a subsidy is given – what information they would need to disclose to give a useful response to a pre-action information request. The degree of consideration should of course depend on the size and nature of the subsidy. In some instances, public authorities may want to stipulate in any agreements relating to the subsidy that certain information can be disclosed in response to a request.

# Chapter 13: Misuse of Subsidies

613. A public authority may recover a subsidy from the beneficiary to the extent that the subsidy has been used for a purpose other than the purpose for which it was intended. A public authority's right to recover a misused subsidy is enforceable as if it were created by contract between the public authority and the beneficiary.
614. The right to recover a misused subsidy in section 77 exists without prejudice to any other rights that a beneficiary may have to recover the subsidy. For example, claims in restitution or under a contract with the beneficiary. Indeed, it is recommended that public authorities make the intended use of a subsidy clear in the terms of any agreement related to the subsidy, and the award of the subsidy conditional on the beneficiary using the support for that purpose. It is also recommended that any provisions in agreements relating to the subsidy that allow the public authority to seek recovery also make provision for interest to be added, on a compound basis to reflect economic benefit the beneficiary received for which it was not entitled.
615. The ability to recover misused subsidies does not imply that public authorities should always devote substantial effort to monitoring the use of subsidies. It may be appropriate to put in place some monitoring process, but this should be done on the basis of the risk that might be presented by a subsidy being misused. For example, if a subsidy is particularly large or is in a sensitive sector, then the public authority may choose to put in place some type of regular monitoring arrangements.
616. Where a subsidy has been misused, public authorities have discretion over whether to recover the subsidy as there may be occasions when it is not appropriate to do so. For example, if the degree of misuse is very small and the subsidy still serves the original policy intent; if the public authority considers that the subsidy is still compliant with the subsidy control principles, prohibitions and other requirements; and that recovery could cause significant harm to the beneficiary.
617. In deciding whether to recover a misused subsidy, the public authority should primarily consider the compliance of the subsidy's new purpose with the subsidy control principles, prohibitions and other requirements. However, it may still choose to recover the subsidy even if the subsidy's new purpose does comply with the subsidy control principles, prohibitions and other requirements. A public authority should also, as usual, have regard to its other responsibilities, such as those set out in 'Managing Public Money', which may lead it to recover a subsidy even in circumstances where this would cause harm to the beneficiary.
618. In the unlikely event that it is not appropriate to recover a misused subsidy, and if, as is probable, the extent of misuse goes beyond a 'permitted modification' (see Chapter 6), the public authority will need to treat this modification as a new subsidy and



re-apply the subsidy control requirements accordingly, such as re-assessment against the principles and making a new upload to the subsidy database detailing the actual use of the subsidy. As with other new subsidies, an interested party may ask the Tribunal to review the subsidy up until one month after the upload date (with the exceptions detailed in Chapter 12).

# Chapter 14: Subsidies in Primary Legislation

## Overview

619. The Subsidy Control Act also sets out rules for subsidies given and schemes made in primary legislation – that is to say, where the financial assistance is provided for directly by the UK Parliament, the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly. In practice, subsidies and schemes provided for by legislation tend to be tax reliefs or exemptions. These subsidies and schemes are covered by the provisions set out in Schedule 3 to the Act. In summary, subsidies given and schemes made in devolved primary legislation must comply with the subsidy control rules (with some differences) whereas those given or made in Acts of Parliament (primary legislation made by the UK Parliament) are exempt from most of the requirements in the Act (but not from our international obligations).

620. These specific rules apply only to subsidies given under a duty imposed by that legislation: it does not include subsidies given under a power in primary legislation. The UK Government or Devolved Administration will have no discretion over whether to give the subsidy because, the primary legislation will require it to be given (although the government may need to calculate the amount and carry out other administrative processes).

### Example

A new Industrial Development Act is made by the UK Parliament, including a power which allows the Secretary of State to provide for financial assistance in certain circumstances. Subsidies given and schemes made by the Secretary of State using this power are not covered by the specific rules for subsidies given in primary legislation.

621. Because of the nature of these subsidies, the concept of the ‘public authority’ is not relevant. Responsibilities of public authorities in the Act fall to two categories of person/body: the ‘promoter’ of the legislation in question, or the ‘appropriate authority’.

622. The promoter will be:

- In relation to a Bill introduced in Parliament, the Member of Parliament in charge of the Bill, usually the Government Minister;
- For the Scottish Parliament, Scottish Ministers or members of the Scottish Parliament in charge of the Bill;
- For the Senedd Cymru, Welsh Ministers or members of the Senedd in charge of the Bill;

- In the Northern Ireland Assembly, the member of the Assembly in charge of the Bill; or
- The member of any of the above who tabled or lodged the amendment, if the relevant provision which provides for the subsidy is introduced by an amendment.

623. The second relevant person will be the ‘appropriate authority’, which is the relevant government minister(s) or NI department with responsibilities for administering the subsidy or scheme as provided for in the legislation.
624. As a general rule, the ‘promoter’ is responsible for the design and assessment before the subsidy is given and as it is set out in the legislation. Once the subsidy is given, the ‘appropriate authority’ is responsible for anything that must take place afterwards (most notably the transparency requirements). Of course, in many cases the promoter and appropriate authority will be one and the same, where the legislation has been proposed by a government minister and it is then to be administered by a minister.
625. In many cases, the guidance that applies to subsidies and schemes given by or made by public authorities is directly applicable to subsidies and schemes given in primary legislation, and this chapter makes reference back to those chapters. In reading those chapters, references to subsidies given by a public authority will need to be replaced so that they apply to the promoter of the relevant legislation or the ‘appropriate authority’. Where those other chapters do not apply in full or in the same way, this chapter will make that explicit.
626. The Act differentiates between subsidies given and schemes made in Acts of Parliament (primary legislation made by the UK Parliament) and those given or made in devolved primary legislation. This chapter will therefore deal with each of those in turn.

## Subsidies given in devolved primary legislation

### Substantive subsidy control requirements

627. Subsidies given and schemes made in devolved primary legislation are subject to the subsidy control requirements in very similar ways to other subsidies. The definitions of a subsidy apply in a comparable way and the same four limbs of the test setting out the meaning of a subsidy in section 2(1) of the Act should be considered. The government minister, member of the NI Assembly or other promoter must then carry out an assessment of the subsidy or scheme in line with the main subsidy control principles (see Chapter 3) and the energy and environment principles as applicable (see Chapter 9). The prohibitions and other requirements and the exemptions also apply (see Chapters 5, 6 and 8).
628. The exception to this is that the procedural requirements set out for the giving of Minimal Financial Assistance and Services of Public Economic Interest assistance in

sections 37 and 39 of the Act do not apply to subsidies given in devolved primary legislation. However, authorities are encouraged to consider these procedural requirements as a matter of good practice, in so far as they can be applied.

## Transparency requirements

629. The 'appropriate authority' must ensure that the transparency requirements set out in Chapter 11 are followed with respect to subsidies in primary legislation in the areas for which they are responsible. This is the case even if the legislation was proposed or amended by a promoter that was not a minister or department [as the requirement to place the subsidy or scheme on the transparency register falls to the appropriate authority].

## Referral to the Subsidy Advice Unit

630. There is no mandatory referral to the Subsidy Advice Unit (SAU) of subsidies given in devolved primary legislation. However, the relevant minister, the Northern Ireland Department or (if different) the promoter of the proposed legislation may choose to refer a subsidy or scheme of interest or particular interest to the SAU. As with other subsidies and schemes referred to the SAU on a voluntary basis, the SAU will have a discretion as to whether to accept the referral. The SAU will carry out the review on the same basis as for any other subsidy or scheme. The SAU will consider the assessment of the subsidy made by the promoter of the legislation, in line with the subsidy control requirements set out in the Act. The process followed is therefore the same as that set out in Chapter 10 and the SAU guidance [NB – link to SAU guidance].

## Challenge and enforcement

631. The challenge and enforcement provisions in Parts 4 and 5 of the Act (see Chapters 12 and 13) apply to subsidies in devolved primary legislation with one key difference. Cases are not heard by the CAT but rather by the general courts: the Court of Session in respect of subsidies given by Acts of the Scottish Parliament; the High Court in England and Wales in respect of subsidies given by an Act or a Measure of Senedd Cymru; and the High Court in Northern Ireland in respect of subsidies given by an Act of the Northern Ireland Assembly.

632. The general rule that it is the 'appropriate authority' (and not the promoter) that takes action after the subsidy is given applies here too. Pre-action information requests are made to the appropriate authority and any recovery orders made by the relevant court should be made to the appropriate authority.

## Subsidies given in Acts of Parliament

### Substantive subsidy control requirements

633. The substantive subsidy control requirements do not apply to subsidies given or schemes made in Acts of Parliament. This is because of the constitutional principle that Parliament is sovereign and one Act of Parliament cannot bind another. However, the UK's international commitments (including the World Trade Organisation Agreement on Subsidies and Countervailing Measures and the UK-EU Trade and Co-operation Agreement) do apply to these subsidies and government departments should have regard to guidance on the UK's international obligations [NB – link to DIT guidance].
634. As with subsidies given in devolved primary legislation, the procedural requirements set out for the giving of Minimal Financial Assistance and Services of Public Economic Interest assistance in sections 37 and 39 of the Act do not apply to subsidies given in Acts of Parliament. However, authorities are encouraged to consider these procedural requirements as a matter of good practice, in so far as they can be applied.

### Transparency requirements

635. The transparency requirements in the Act apply to subsidies made in Acts of Parliament. The relevant minister must therefore ensure that the transparency requirements set out in Chapter 11 are followed for subsidies in primary legislation in the areas for which they are responsible, even if the legislation was proposed or amended by another member of Parliament.

### Referral to the SAU

636. There is no mandatory referral of subsidies given in Acts of Parliament to the SAU – and of course, the Act imposes no obligation on the minister, or the promoter of the legislation to carry out an assessment in line with the requirements of the Act. However, the relevant minister or the promoter may choose to carry out such an assessment and refer to the SAU a subsidy or scheme of interest or particular interest. The SAU will have discretion as to whether to accept the referral and will carry out the review on the same basis as for any other subsidy or scheme (that is, they will consider the government or promoter's assessment of the subsidy in line with the subsidy control requirements set out in the Act). The process followed is therefore the same as that set out in Chapter 10 and the SAU guidance [NB – link to SAU guidance].

## Challenge and enforcement

637. Subsidies given and schemes made in Acts of Parliament are not subject to challenge in court. (They may nonetheless be subject to challenge under the WTO rules or other international agreements, according to the terms of those agreements.)

# ANNEX 1: Additional guidance for determining whether a financial measure is a subsidy

## Limb A: Financial assistance given, directly or indirectly, by a public authority from public resources

638. In order to constitute a subsidy, the granting of financial assistance must be given to an enterprise (whether directly or indirectly)<sup>54</sup> by a public authority from public resources.

### What is a public authority?

639. The definition of public authority is wide and captures any person who exercises functions of a public nature,<sup>55</sup> including public authorities at any level of central, devolved, regional or local government and non-governmental bodies that are performing a public function.<sup>56</sup>

640. Some bodies will exercise a mix of functions of a public and private nature: in these cases, it is important to look at whether the financial assistance comes from public resources to determine whether it meets this limb of the test. A body will not be a public authority if its functions are entirely of a private nature unless the exercise of those functions are attributable to a public authority (see below).

### When is financial assistance given from public resources?

641. Only financial assistance granted directly or indirectly through public resources can constitute a subsidy. The concept of public resources should be considered broadly. Resources are considered public where they have come under public control prior to being transferred to the relevant receiving enterprises. It will therefore include the resources of public authorities at any level of central, devolved, regional or local government.

642. It will also extend to bodies such as publicly or privately owned companies where a public authority has influence over the body and is able to direct the use of such resources. In such cases the resources of the body may be considered attributable to public resources.

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<sup>54</sup> Section 2(1)(a) Subsidy Control Act 2022

<sup>55</sup> Section 6(1) Subsidy Control Act 2022

<sup>56</sup> The UK Parliament, the Scottish Parliament, Senedd Cymru, and the Northern Ireland Assembly are excluded from the definition of 'public authorities'

## Charges to government expenditure

643. The provision of public resources will not capture situations where, under regulation, money flows directly between private entities, without coming under the control of a public authority. This is because a transfer of resources will not constitute a public resource unless it results in a corresponding charge to government expenditure (or foregone government revenue that was otherwise due, in the case of a relief/exemption from taxation or another payment). However, a transfer of public resources may exist where resources paid for by private bodies transfer through a public authority or other body that is influenced or controlled by a public authority.

### Example

Under a regulatory framework, energy licensees are required to pay charges from one supplier to another.

In this situation, there is no transfer of public resources, as there is no burden (or risk of burden) on public financial resources, rather the burden is on the energy licensees' suppliers' own financial resources even though the charges are mandated by the regulatory system.

644. Expenditure by a body exercises functions of both a public and private nature will not result in a corresponding charge to government expenditure where it is privately derived resources.

## Resources given by bodies where public authorities have influence

645. In some instances, public authorities hold a level of direct or indirect influence over bodies that are not public authorities,<sup>57</sup>. In such situations, it is important to determine whether the financial assistance given by such a body is attributable to a public authority.

646. Where a public authority holds sufficient influence over a body (such as, through control or relationship), that assistance given by the body can be inferred to be given by a public authority for the purposes of subsidy control.

647. The ownership structures of a body alone are not necessarily determinative that the financial assistance is attributable to a public authority. For example, even if where a company is majority owned by a public authority, financial assistance it provides may not be considered to be given from public resources where the management of the company is predominantly run independently of the public authority.

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<sup>57</sup> Such as publicly or privately owned companies, through ownership, financial participation, or governing rules.



648. There is no single test to determine whether financial assistance is attributable to a public body. However, public authorities may consider the following when determining whether sufficient influence is exerted over the body:

- Does the decision-making of the body take account the requirements of other public authorities, such as public policy guidance?
- Is the body in question subject to public law, rather than ordinary company law, and what level of autonomy does such legal status confer on the body?
- Are there any structural and organisational factors which link the body to a public authority?
- What is the nature of the body's activities and how are such activities exercised in the market in normal conditions of competition with private operators?
- What degree of supervision do public authorities exercise over the management of the body?
- Is the body integrated into a role which has a public function?
- Are there any other indicators which show a public authority's involvement in adopting the financial assistance?

### **Example**

A local authority holds a 60% shareholding in a company. The company has a board of 10 directors:

4 of the directors are appointed by the local authority. 1 of these directors, "Director A", is also a senior official at the local authority. The other 3 are not employed by the local authority.

Of the remaining 6 directors, 4 are nominated by the other shareholder and 2 are employee representatives.

None of the directors hold veto powers, or any other voting power that is different to that of the other directors.

At a board meeting, the company decides to provide a capital injection to one of its wholly owned subsidiaries.

Although the company is majority owned by a public authority, this is not sufficient to demonstrate that the capital injection is given as a public resource. Although Director A is employed by the local authority, all other directors are independent from the local authority. In addition, Director A holds no special voting powers or veto rights on board decisions, which means that they cannot by themselves impose decisions over the other directors. Therefore, although the local authority holds structural control, it does not hold

influence over decisions to grant financial assistance. As a result, the granting of the capital injection is not considered to be attributed to the local authority and does not constitute the giving of public resources.

## Limb B1: Financial assistance provided to one or more enterprises

649. The second limb of the subsidy control test must be considered in two parts. Firstly, in order to constitute a subsidy, financial assistance must be granted to persons or bodies that constitute an enterprise.<sup>58</sup> Secondly, it must confer an economic advantage on that enterprise over another enterprise (or multiple enterprises). This means a person, or group of persons under common control, who are engaged in an economic activity, to the extent that such a person, or group of persons, are engaged in such an activity.<sup>59</sup>

### What is economic activity?

650. For the purposes of the subsidy control regime, economic activity entails the offering of goods or services on a market. A person's (or group of persons') status as an enterprise for the purposes of the subsidy control rules is based solely on the activities that such person or persons are engaged in. The legal form of the persons providing the economic activity is not relevant.

651. It is therefore not relevant whether the persons are governed by public, or ordinary company law. It is also not relevant whether the persons in question are privately or publicly financed.

652. The activity in question does not have to generate profits in order to constitute an economic activity. Therefore, public, or private bodies that operate on a voluntary or non-profit basis, such as charities, can also constitute an enterprise, where such bodies offer goods and services on a market.

653. Where a person engages in both economic and non-economic activities, it will be considered to be an enterprise only in relation to those activities which are economic in nature.

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<sup>58</sup> Section 2(1) Subsidy Control Act 2022.

<sup>59</sup> Section 7(1) Subsidy Control Act 2022. A person under common ownership can be considered to be a person under common control for the purposes of this guidance.

### **Example**

A non-profit research organisation mainly carries out scientific research as a non-economic activity. This includes:

- Collaborative research and development projects
- Education and open access teaching
- Publishing data and research.

It also provides commercial research services to life sciences companies. This is a small portion of its overall activities and turnover.

The non-profit organisation is an enterprise only in relation to its commercial research services. A grant to support its non-economic activities would not be considered a subsidy.

654. Where public authorities provide financial assistance in support of a person or body's non-economic activities, such financial assistance will not be considered to constitute a subsidy where it is ensured that the financial assistance cannot be used to cross-subsidise the person or body's economic activities. This can be ensured by the use of a clear separation of accounts.

655. In some instances, bodies may perform economic activities which are ancillary to a primary non-economic activity. Where it is shown that economic activities are intrinsically linked or are directly related and necessary for the performance of the non-economic activity, and where such economic activities are limited in scope, such activities will not be caught under the subsidy control regime. Financial assistance for amenities for traditional non-economic cultural infrastructure sites (such as a café, gift shop or parking at a national museum) are also unlikely to be caught under the subsidy control regime since those customary amenities are unlikely, in themselves, to attract customers from other parts of the UK or internationally unless they are visiting the facility to which the amenities are attached.

### **Example**

A medical research charity, that has a separate retail arm, is granted financial assistance by a public authority to support its independent research operations. These research operations are heavily reliant on a state-of-the-art computer owned by the charity.

Financial assistance that is granted in relation to the charity's independent research operations, and which has been ringfenced for that purpose, would not constitute a

subsidy since the charity does not act as an enterprise in relation to these activities; any profit generated from these operations is re-invested into the charity's independent research activities.

However, the charity also rents out up to 20% of the capacity of its computer to local businesses. As the computer is necessary for its research activities and the rental is limited, it would not change the fact that the charity is not considered to be an enterprise in relation to the ringfenced financial assistance.

If financial assistance were granted in relation to or otherwise benefits the charity's commercial exploitation of that research, these activities would be considered to be economic in nature and, as a result, the charity would be considered to be an enterprise in relation to them for the purposes of subsidy control rules.

656. The fact that a certain activity has been closed to competition and is provided by a public authority does not necessarily entail that the activity should not be considered to be economic in nature. In general, if other operators would be willing and are able to provide goods and services in the market concerned, the activity in question will generally be considered to be an economic activity.<sup>60</sup>

657. However, certain activities form part of a public authority's responsibilities and, by consequence, the exercise of activities which are intrinsically related to those public powers are not considered to be economic activities. As such, when a person is engaged in activities which are core to the exercise of public powers (such as the detection and prevention of crimes by the police or defence activity by the UK armed forces) that person is not considered to be acting as an enterprise in relation to those activities.<sup>61</sup>

## Healthcare

658. Healthcare services funded through public resources provided for free at the point of access will not be considered to be commercial activities for the purposes of the subsidies control regime.

### Example

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<sup>60</sup> However, where an activity has been closed to competition it is possible to further consider whether the financial assistance would, in fact, distort competition, trade, or investment. See [section [5] of the Guidance] for further information in this regard.

<sup>61</sup> However, as noted above, that person may be considered to be an enterprise in relation to economic activities which are not intrinsically related to the exercise of public powers.

Healthcare services provided by an NHS provider will not be considered to constitute an economic activity for the purposes of the Act.

659. Conversely, where non-NHS healthcare services are provided by medical professionals or healthcare providers, and are paid for by the patients, these activities are considered to be economic in nature.

## Education

660. Education services organised within the national education system, which are both funded through public funds and supervised by the UK Government, are not considered to be economic activities for the purposes of the Act.
661. Equally, where the costs of education services are principally funded, whether directly or indirectly, through public resources, those services will not be considered to be an economic activity despite the fact that students, or their families, pay fees toward the provision of those services.
662. However, where education services are principally funded through private resources, for example the resources of students and parents, or through the operator's own commercial revenues, the operators providing these services will be considered to be enterprises for the purposes of the Act.

## Cultural activities

663. This is a broad category which includes, among others, museums, libraries, galleries, theatres, historical sites, archives as well as cultural and artistic education activities.
664. Cultural activities which can be accessed by the general public free of charge will not be considered to constitute an economic activity for the purposes of the Act.

### Example

A national museum or gallery that provides access to the public free of charge and is primarily funded through public resources is not carrying out an economic activity and will not be considered to be an enterprise for the purposes of the Act.

665. However, the fact that the public are required to pay a fee in order to access cultural activities does not necessarily entail that these activities are commercial in nature.

666. The public authority should consider whether the cultural activities are principally financed through public resources or through the fees paid by the public. Where a cultural activity is primarily funded through the fees paid by the public, that activity will be considered to be economic in nature.

## Infrastructure

667. As a rule, public funding for infrastructure which is not intended to be used to carry out a commercial activity will not fall within the scope of the Act. However, where the infrastructure is used to provide a commercial activity, public funding for that infrastructure could be considered to be a subsidy within the meaning of the Act (provided the other criteria for defining a subsidy have been met).

668. In certain circumstances infrastructure may be owned or operated on the basis of a monopoly (e.g. railway infrastructure management) and the nature of that monopoly excludes competition for that market. Where this occurs, there may be no developed market in the UK or internationally for operating or managing that infrastructure, and consequently financial assistance to that network operator may not constitute a subsidy as long as it is not cross subsidising its operations in other markets where there is competition.

669. The application of this principle to certain specific types of infrastructure has been outlined below.

### **Roads, bridges, tunnels, and inland waterways**

- Where this infrastructure is not intended to be commercially exploited and is made available to the public to use for free, the provision of access to this infrastructure will not be considered to constitute an economic activity and public funding for this infrastructure will not fall within the scope of the Act.
- Conversely, if the management and operation of this infrastructure is assigned to an operator (whether it may be a public or private body) which charges a fee for the use of the infrastructure, public funding for this infrastructure may be considered to constitute a subsidy.

## **Cultural infrastructure**

### **Public funding for cultural and heritage infrastructure**

670. Financing of the construction, development, maintenance and operation of infrastructure and sites used for activities related to culture, heritage and nature

conservation (cultural and heritage infrastructure) will generally not fall within the scope of the Act if it is not intended to be commercially exploited. The determination of whether public funding for cultural and heritage infrastructure falls within the scope of this Act should therefore be made by applying the principles set out in the subsection on cultural activities above.

671. Where infrastructure is used for both economic and non-economic activities, only financial assistance which covers costs associated to non-economic activities will fall outside the scope of the Act.<sup>62</sup> However, if the economic activities undertaken by the operator are purely ancillary to its non-economic activities, public funding for cultural and heritage infrastructure used by the operator may nevertheless fall outside the scope of the Act.<sup>63</sup>

## Persons under common control

672. Public authorities must consider persons under common control as a single enterprise for the purpose of the subsidy control regime. This question will be relevant to public authorities in a number of scenarios as they apply the subsidy control requirements, such as when considering whether an enterprise (taken as a whole) is able to benefit from the Minimal Financial Assistance exemption (see the chapter on Minimal Financial Assistance).

673. It will also be relevant to the question of whether the beneficiary of the financial assistance should be classed as an enterprise (and therefore whether the assistance meets the definition of a subsidy). In some cases, the immediate beneficiary of financial assistance may not carry out an economic activity itself but may be linked to bodies corporate which do. For instance, the immediate beneficiary of financial assistance may be a holding company which does not carry out an economic activity itself but owns a stake in companies which do. In this case, the public authority should consider whether the bodies corporate which carry out an economic activity are under common control with the immediate beneficiary. If so, the immediate beneficiary will also be considered to be an enterprise for the purposes of the Act.

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<sup>62</sup> As highlighted above, public authorities should verify that steps have been taken to ensure that financial assistance cannot be used to cross-subsidise any economic activities undertaken by the operator.

<sup>63</sup> Please refer to the guidance above on when activities are considered to be purely ancillary to non-economic activities.

## When are a group of persons considered to be under common control?

674. The fact that a person is under common control is most clearly established where a corporate body is a subsidiary of another corporate body, or where two or more corporate bodies are subsidiaries of the same corporate body.<sup>64</sup>
675. Common control can also be established as a result of rights which provide a corporate body or group of corporate bodies with the ability to directly or indirectly control or materially influence the economic policy of another corporate body.<sup>65</sup> In practice, a person will be considered to control another corporate body if it has the ability to materially influence the commercial strategy of that corporate body.

### Example

Company A owns 70% of the shares in a Company B and has the ability to appoint a majority of the directors on the board of Company B. As a result of its shareholding and its board appointments, Company A is able to involve itself in the management of Company B and has the power to set Company B's annual business plan. By consequence, Company A is considered to have control over Company B.

676. However, the fact that a body corporate merely owns a majority of another body corporate's shares does not necessarily entail that the two bodies corporate form part of the same enterprise. This may be the case where, despite owning a majority of shares, and having certain rights associated with its shareholding, Company A is not able to exercise material influence over Company B.
677. Conversely, a body corporate may be considered to control another body corporate despite the fact that it does not own the majority of the shares in the latter. This will be the case the first body corporate is nevertheless able to exercise material influence over the latter.

## Limb B2: Financial assistance which confers an economic advantage

678. In order to be considered a subsidy, financial assistance, given by public authorities from public resources, must confer an economic advantage on one or more enterprises.

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<sup>64</sup> Section 8(4) Subsidies Control Act 2022. The term "subsidiary" has the meaning given by section 1159 of the Companies Act 2006.

<sup>65</sup> Section 8(2) Subsidies Control Act 2022.



679. Financial assistance will be considered to confer an economic advantage where the benefit that an enterprise receives is provided on terms that are more favourable to the enterprise than terms that might reasonably have been expected to have been made available to the enterprise on the market. It is not necessary for such financial assistance to, in fact, be currently available on the market – only that it could be provided by a private operator.

680. For some types of financial assistance this will be a straightforward determination, since they are almost by definition not provided on market terms – for example, a grant or a tax relief. For others – such as a loan, an equity investment, or the purchase of goods or services – this will be for the public authority to consider.

## Indirect advantages

681. In certain circumstances, an economic advantage may be conferred indirectly upon enterprises that are not the direct recipients of the public resources that are transferred. Where a recipient of financial assistance automatically passes the economic advantage on to a third party that is an enterprise, it is the third party who shall be regarded as the beneficiary enterprise for the purposes of the subsidy control rules.

### Example

An umbrella organisation that is involved in innovation projects receives capital investment as part of a government fund, to support technology focused research and development projects. On receipt of the fund, the umbrella organisation transfers the majority of the funding to a specialist research body (keeping back the umbrella organisation's reasonable and market-oriented costs for administering the fund). The specialist research body provides commercial research services.

The umbrella organisation will be treated as only an intermediary for the financial assistance, provided that it receives no other economic advantage.

The research body is an enterprise and should be considered the beneficiary, as it receives an economic advantage through receipt of the funding.

682. A distinction can be drawn, however, between an indirect advantage and economic effects that are simply an inherent consequence (or secondary economic effect) of the financial assistance, since almost all subsidies have such effect (for example a subsidy to a car manufacturer may increase the number of cars sold by that manufacturer but there will normally be no indirect advantage to the purchaser of those cars on the market). For there to be an indirect subsidy, it should be foreseeable prior to or at the point when public resources are transferred, that the financial assistance in

question will have an indirect effect by channelling an economic advantage from the subsidy to other identifiable enterprises.

### **Example**

A local authority provides financial assistance in the form of an equity investment to a company that is set up to construct and own a stadium. The company enters into an agreement with a separate operator who is responsible for the operation of services to end-users of the arena. Under the lease agreement, the operator is obliged to only provide services to dedicated end-users that perform competitive sporting activities.

Here, it is possible that, the developer company, the operator and the end-users all gain an economic advantage, even though only the developer company is the direct recipient of the financial assistance. The operator will make use of the constructed stadium which receives financial assistance, whilst the end-users are dedicated and identifiable, meaning that the infrastructure will not be enjoyed on a non-discriminatory basis.

### **How will an economic advantage be assessed?**

683. If there is any doubt as to whether financial assistance confers an economic advantage, public authorities should carry out a detailed analysis, with regard to the market in question.
684. Terms of financial assistance will be considered in line with market terms (i.e. will not be considered more favourable than those that might be reasonably available on the market) where the financial assistance provided is on terms that could be considered to be made available in the market by a private operator that is driven by commercial objectives.
685. Throughout this guidance, this condition is referred to as the Commercial Market Operator (CMO) principle.
686. For the purposes of the CMO principle, it is only a public authority's commercial objectives that are relevant for the assessment. Any public policy objectives should not be included when assessing whether the financial assistance in question confers an economic advantage, on the basis that such objectives would not be applicable to private operators in the relevant market.
687. A private operator can include vendors, investors and creditors. The relevant operator will depend upon on the type of financial assistance that the public authority is providing, which may include loans, direct funds or purchases of goods and services.

For example, a loan provided by a public authority will not be considered to confer an economic advantage to an enterprise, if the loan might be provided by a private sector bank on the same terms.

## How is the Commercial Market Operator principle applied?

688. In terms of scope, the CMO principle will consider the market at the time at which the financial assistance is given (see above).

## How can public authorities show compliance with the CMO principle?

689. Where seeking to rely on the CMO principle, it is important that public authorities obtain sufficient evidence to show that the financial assistance provided could be made available in the market by a private operator with commercial motivations and is provided on terms that would be acceptable to such a private operator. In certain instances, public authorities can establish compliance with the CMO principle directly by using evidence that is specific to the financial assistance in question, for example where financial assistance is given at the same time and on the same terms as a significant investment by a private operator. However, other evidence-based assessments may be undertaken, including the use of benchmarking and profitability analysis.

690. Any evaluation of compliance with the CMO should be undertaken with input from experts with appropriate skills and experience. In cases where the commercial assessment is not straightforward, it is recommended that public authorities commission a reputable third party to conduct a report as evidence that the actions proposed to be taken are in accordance with the CMO principle (as it would be in the case, for example, of co-investment with private operators on the same terms or the procurement of goods and services in accordance with public procurement regulations). Where public authorities are operating schemes, the CMO assessment can be made at scheme level.

## Tendered sale and purchase of goods and services

691. Where financial assistance concerns the sale and/or purchase of goods or services, public authorities can show compliance with the CMO principle where the financial assistance is carried out through a procurement process which is tendered at the market price and is open and competitive. To rely on this method, public authorities should ensure that the procurement process:

- gives equal and non-discriminative treatment to all bidders;
- is open and transparent; and
- is carried out in a proportionate manner.

692. Where public authorities are subject to public procurement regulations, evidence of compliance with such regulations will assist in demonstrating compliance with the CMO principle.
693. In some instances, public authorities may receive only one bid in a tendered process. Where this is the case, it is key that public authorities are able to demonstrate that the process made it possible for more than one tenderer to submit a bid, and that there were adequate safeguards in place to ensure genuine and effective competition in the procurement process. Alternatively public authorities may verify that the outcome corresponds to the market price, using additional analysis, such as benchmarking analysis.
694. Regardless public authorities may seek to undertake further analysis, such as benchmarking or profitability analysis, in order to determine further whether the price of the awarded tender is on market terms. These methodologies are discussed below.
695. Public authorities may also use competitive processes, such as open competitions, to give financial assistance to certain enterprises on terms that are not commercial. These are sometimes referred to as subsidy competitions. Where conditions for a subsidy are met, a competition will not eliminate the presence of a subsidy. However, a competition can assist public authorities to demonstrate that the subsidy is the minimum that is necessary to achieve the objective of the subsidy (see paragraphs 97 and 98 below and Chapter 3).

## Where public authorities and private operators carry out financial assistance on the same terms

696. If the financial assistance provided is carried out on the same terms as a significant intervention by private operators that are driven by commercial objectives in the same market, this can demonstrate compliance with the CMO principle without any need to carry out further analysis or benchmarking. In order to demonstrate that the financial assistance is carried out on the same terms by private operators, public authorities should have evidence that:
- the financial assistance is simultaneously pursued by both the public authority and private operators;
  - the private operator's financial contribution is significant
  - the public authority and private operators provide the financial assistance on identical terms (or the private operator is providing assistance on more generous commercial terms), including those terms which relate to risk and reward;

- the private operators participate in the financial assistance to a significant or comparable level to that of the public authority, for example, by matching the financial assistance of the public authority; and
- the private operators hold a similar starting position in the giving of financial assistance, such as any evidence that private operators concerned face similar commercial costs in relation to the financial assistance.

697. When carrying out financial assistance alongside a private operator, the preparation of a detailed business plan can assist in ensuring that there is detailed evidence to show that the financial assistance is provided on the same terms as the private operators involved.

## Temporary liquidity support

698. Temporary liquidity support provided by the Bank of England to an individual firm by the Bank of England outside of its published Sterling Monetary Framework facilities is not considered to confer an economic advantage on the recipient, provided the loan is fully collateralised, with appropriate haircuts applied, and with a price charged that is at least as high as that of comparable published facilities available to the market.

## Indirect assessment

699. Public authorities may also adopt other methods of economic analysis, that are based on objective and reliable data in order to assess compliance with the CMO principle. Such methodologies may be used where direct evidence relating to the financial assistance is insufficient in demonstrating compliance. Indirect assessment methods assess whether the financial assistance could be made available in the market on terms that are acceptable to a private operator, in line with the CMO principle. Two of the most common methods are described below.

## Benchmarking analysis

700. Where financial assistance is not provided on the same terms by private operators, nor under a competitive tender at market price, public authorities may undertake benchmarking analysis, in order to obtain sufficient evidence that the financial assistance is given in compliance with the CMO principle. Benchmarking analysis may also be undertaken alongside direct assessment methods.

701. Benchmarking assesses the terms of the financial assistance against any comparable financial assistance, such as investments or loans, that has been carried

out by private operators in comparable situations. Benchmarking analysis will usually result in a range of values, within which the financial assistance in question should fall, in order to demonstrate compliance with the CMO principle.

### Example

A local authority, which is providing a loan of £5m to a start-up company for the development of an innovative medical science technology, uses benchmarking analysis to assess whether the financial assistance results in an economic advantage. Appropriate benchmarking analysis may include benchmarking of the interest rates of the loan arrangement against the interest rates of comparable loans offered by private banks, which have a similar credit rating.

### Profitability analysis

702. Public authorities may also use profitability analysis to assess compliance with the CMO principle. Profitability analysis assesses the expected rate of return to the public authority compared with the rate of return that a private operator under comparable circumstances would likely require to invest.

703. Where the expected return is higher, or equal to the return of a private operator would require when investing in projects that have a comparable level of risk, it will be considered that the financial assistance complies with the CMO principle and does not create an economic advantage. Profitability analysis should involve the following:

- **a clearly defined scope of the financial assistance:** analysis of the scope should include factors described above;
- **the public authority's expected return on investment:** acceptable calculation methods include an estimate of the internal rate of return (IRR) or net present value (NPV). NPV considers the difference between cash inflow and outflow across the period of the financial assistance in question, such as the lifetime of an investment. IRR is the discount rate that makes the NPV equal to zero.
- **a comparison of the public authority's expected return of investment against the market expected return:** the market expected return will be the average expected return that the market requires to invest, on the basis of factors which include the investment risk, the enterprise's financial position and any other features that are relevant to the market in question.

## Rate-based assessments

704. [NB – additional guidance on rate-based assessments will be included in the final, published guidance in light of the forthcoming regulations on Gross Cash Equivalent]

## Subsidy Competitions

705. Public authorities may also use competitive processes, such as open competitions, to give financial assistance to certain enterprises on terms that are not commercial. These are often referred to as subsidy competitions. Such processes should apply appropriate assessment criteria for choosing recipients of the grant or other assistance, including financial criteria to assist in ensuring that the funding is provided at value for money.

706. Where conditions for a subsidy are met, a competition will not eliminate the presence of a subsidy. However, a competition can assist public authorities to demonstrate that the subsidy is the minimum that is necessary to achieve the objective of the subsidy.

## Assessment of Guarantees

707. When granting financial assistance via guarantees,<sup>66</sup> public authorities should consider the level of risk and complexity of the guarantee offered in order to determine the compliance with the CMO principle. If the guarantee in question would carry a level of risk or complexity that a private operator, driven by commercial objectives, would not provide, it is likely that the CMO principle will not be met.

708. In addition, there are certain factors that public authorities should consider, when assessing whether the guarantee complies with the CMO principle. A guarantee is unlikely to confer an economic advantage where:

- The guarantee is based on a realistic assessment of the ability of the borrower to repay the loan
- The guarantee is linked to a specific transaction, which has a fixed maximum amount and limited time period;
- Excluding debt securities, the guarantee does not cover more than 80% proportionately of the loan or other financial obligation in question. A guarantee in excess of 80% of the loan may also be justified in some circumstances e.g. if it is given to an enterprise that

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<sup>66</sup> In most instances, the borrower will be regarded as the beneficiary of the financial assistance in the form of a guarantee. However, in some cases, the lender may also be regarded as a beneficiary. For example, this can be the case where a guarantee is given ex post in respect of the loan or other financial obligation that has already been entered into and has not been amended.

only performs a Service of Public Economic Interest (see Chapter 7) or the public authority can otherwise establish that it complies with the CMO principle; and

- The public authority is paid a price for the guarantee premium on market terms. This can be determined through benchmarking against a corresponding guarantee premium on the market, or, where no such premium is available, against the financial cost of the guaranteed loan or other financial assistance should be compared against the price of a comparable non-guaranteed loan in the market.

709. Where public authorities make guarantee schemes, compliance with conditions the first three above should be considered, in addition to the following conditions:

- The terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the borrowing enterprises make it, in all probability, self-financing;
- The scheme provides for the terms on which future guarantees are granted;
- the overall financing of the scheme will be reviewed at least annually to assess the scheme's self-financing; and
- The premiums cover both the normal risks associated with the granting of the guarantee and the administrative costs of the guarantee scheme, and an annual remuneration of an adequate capital.<sup>67</sup> The premiums shall be paid to the public authority on the adequate amount of capital.

## Limb C: Specificity

### When is financial assistance considered to be specific?

710. In order to constitute a subsidy, financial assistance provided by a public authority must be specific – that is, it must benefit one or more enterprises over one or more other enterprises with respect to the production of goods or services.<sup>68</sup> This definition therefore covers financial assistance which is provided to a particular enterprise or type of enterprise, or enterprises in a particular sector, industry, or region.

711. However, measures which make financial assistance available to a large number of enterprises, from a wide range of sectors and industries can also be considered to be specific. This may be the case in the following circumstances:

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<sup>67</sup> Capital should correspond to 8% of the outstanding guarantees. Where guarantees are granted to enterprises with a AAA/AA- equivalent rating, the remuneration on capital can be reduced to 2% of the outstanding guarantees. Where guarantees are granted to enterprises with an A+/A- equivalent rating, the remuneration on capital can be reduced to 4% of the outstanding guarantees.

<sup>68</sup> Section 2(1)(c) Subsidy Control Act 2022.



- where financial assistance is only available to certain enterprises on account of characteristics which are specific to them;
- where administrative authorities have discretion in deciding which enterprises can benefit from financial assistance; and
- where financial assistance is only available to enterprises operating in a certain region.

## Specificity linked to enterprise characteristics

712. A measure which makes financial assistance available to a large number or broad range of enterprises may in some cases be considered to be specific for purposes of the four-limbed test if it exclusively or almost exclusively benefits certain enterprises over others on account of characteristics which are specific to them.

713. For instance, a measure may make financial assistance available on the basis of certain characteristics of the enterprise such as:

- their legal form (e.g., reserving financial assistance to private companies limited by shares or excluding publicly limited companies);
- their size (e.g., reserving financial assistance to enterprises with annual turnover below a certain level or employing less than a certain number of employees); or
- the industry in which they are active (e.g., reserving financial assistance to enterprises active in steel manufacture or the retail sector).

714. Public authorities should bear in mind that it does not matter whether the measure expressly reserves the financial assistance available under the measure to certain enterprises or whether it does so implicitly. For instance, a measure which is ostensibly available to all enterprises may, in practice, almost exclusively benefit certain enterprises on account of characteristics which are specific to them.<sup>69</sup>

715. However, a measure which provides financial assistance to certain enterprises on account of characteristics which are specific to them is not automatically considered to be specific.

716. In order to determine whether a measure which makes financial assistance available to a large number or broad range of enterprises may be considered to be specific, public authorities must establish whether the measure creates a distinction in the treatment of enterprises which are otherwise in a comparable situation. If so, the measure will be considered to provide specific financial assistance, unless the

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<sup>69</sup> It is important to note that a measure may be considered to provide specific financial assistance even if a very small number of enterprises, which do not share the same characteristics as the enterprises which primarily benefit under the measure, also benefit from the financial assistance provided.

distinction in the treatment of enterprises is justified by principles inherent to the design of the arrangements of which that financial assistance is part.

## How can it be determined whether enterprises are in a comparable position?

717. In order to determine whether a measure under which a public authority envisages providing financial assistance is specific, public authorities should:

- identify the policy objectives of the measure used to provide financial assistance;
- identify which enterprises are in a comparable position with respect to that internal policy objective; and
- determine whether certain enterprises are treated more advantageously than one or more other enterprises in a comparable position with respect to those internal policy objectives.

718. If the measure treats certain enterprises more advantageously than one or more other enterprises which are in a comparable position, the measure will be considered specific. Conversely, if the measure does not treat certain enterprises more advantageously than one or more other enterprises which are in a comparable position, the measure will not be considered specific.

### **Example**

A scheme subsidising the purchase of energy efficient commercial vehicles with the objective of reducing carbon dioxide emissions, which is available to self-employed persons and SMEs.

Insofar as large enterprises also contribute to carbon dioxide emissions, and may in fact contribute to a greater degree in certain industries, these enterprises are in a comparable position to self-employed persons and SMEs with respect to the objective of the measure.

As the measure treats self-employed persons and SMEs more favourably than large enterprises, as the latter cannot benefit from the financial assistance provided under the measure, the measure would be considered to be specific in nature.

719. Financial assistance should not be considered specific if the distinction in the treatment of enterprises is justified by principles inherent to the design of

720. the arrangements of which that financial assistance is part.

721. Financial assistance given in the form of a tax measure will not be regarded as specific unless one or more enterprises obtain a reduction in their tax liability that they would have borne under the normal taxation regime, and they are treated more

advantageously than other enterprises in a comparable position under the normal taxation regime. This means a tax measure can only be considered specific if it is targeted (and not a general measure) and confers an advantage on certain enterprises. Unless certain enterprises obtain a reduction in tax liability that they would not receive under the normal taxation regime, and they are treated more favourably than others in a comparable position within that regime, the measure will not be specific.

722. The normal taxation regime is identified from the internal objective and features of the regime (such as the tax base, the taxable person, the taxable event, and the tax rate) and by the ability, competence and autonomy of the public authority to create and design its own taxation regime.

723. Tax measures do not always provide specific financial assistance if they treat enterprises in a comparable position differently, as long as that difference is justified by principles inherent to the design of the normal taxation regime and how the tax measure fits into that regime. The following non-exhaustive list sets out principles that may be relevant in a particular case-

- fight fraud, tax evasion or avoidance
- administrative manageability of the tax regime
- the avoidance of double taxation
- the principles of tax neutrality
- the progressive nature of income tax and its redistributive purpose
- taxpayers' ability to pay

724. Where a special purpose levy is designed for a non-economic public policy objective and those objectives are not discriminatory, the special purpose levy will not be regarded as specific. These objectives could include the need to protect the environment or public health.

### If the financial assistance is in the form of a tax measure, Specificity resulting from administrative discretion

725. A measure which makes financial assistance available to a large number or broad range of enterprises may also be considered to be specific if the measure provides the public authority applying the measure with broad administrative discretion.

726. In particular, a measure will generally be considered to be specific if it provides the relevant authority with broad discretion in deciding which of a number of enterprises

meeting the eligibility criteria for financial assistance can benefit from financial assistance or how much each of those enterprises can receive.

### Example

A public authority introduces a measure aiming to incentivise certain categories of investment by offering to provide a one-off loan at below market rates covering 50% of the value of an eligible investment.

If this measure does not specify which investment it applies to in the event that an enterprise makes a number of eligible investments of differing values, this measure could be considered to be specific. This is because the public authority has a discretion to choose which investment the financial assistance should apply to. As the amount of financial assistance is tied to the value of the investment, the public authority would be able to grant greater or lesser amounts of financial assistance to enterprises depending on which eligible investment it selects. The public authority would therefore have a discretion to treat two enterprises in a comparable position (that is, two enterprises that had made eligible investments) with regard to the measure, e.g., by applying the financial assistance to the investment of the highest value for one enterprise and to the investment of the lowest value for the other enterprise.

727. However, this does not mean that any measure which provides the authority with any degree of discretion will be considered to be specific. If the margin of discretion afforded to a public authority is exercised according to objective principles, which are transparent and which are capable of ensuring that discretion is exercised in a non-discriminatory manner,<sup>70</sup> the mere exercise of discretion does not entail that a measure is specific.

### Specificity based on the geographical area in which the financial assistance is provided

728. In order to determine whether a measure providing regional or local financial assistance should be considered to be specific, public authorities will need to consider what constitutes the relevant reference framework for that financial assistance.<sup>71</sup>

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<sup>70</sup> I.e., it does not treat certain enterprises more favourably as compared to one or more other enterprises which are in a comparable position.

<sup>71</sup> It should be noted that, for the purposes of the preceding subsection, an enterprise which is located outside of the territorial reference framework for the financial assistance envisaged by a public authority is not in a comparable position to an enterprise which is located within that territorial framework.

729. Where a measure providing financial assistance is adopted using a power which is UK-wide, the reference framework for the financial assistance is the UK as a whole. Therefore, financial assistance provided exclusively in a specific geographical area within the UK may be considered to be specific. This is most clearly the case where financial assistance is provided by the UK Government to one particular region or local area in the UK.
730. Equally, when an administration which covers a discrete area such as where a devolved administration provides financial assistance, or where the UK government is acting in relation to powers that are restricted to England, the reference framework will be Scotland, Wales, Northern Ireland or England, respectively. Where financial assistance is made available by a public authority, acting autonomously with regard to process and funding, to all enterprises located within the territorial reference framework for that financial assistance, that financial assistance will not be considered to have been granted on a territorially specific basis, and would therefore not be a subsidy.<sup>72</sup>
731. Conversely, measures adopted by the Scottish Government, the Welsh Government, or the Northern Ireland Executive providing assistance to one particular region or local area within Scotland, Wales or Northern Ireland respectively (or the UK government to a particular region of England when exercising functions that are limited to England) would therefore constitute clear examples of specifically granted financial assistance.

### **Example**

A wage subsidy scheme by the Welsh Government that is equally available to all enterprises in Wales (but is not available in England, Scotland, or Northern Ireland) will in most cases not be specific. However, a wage subsidy by the Welsh Government limited to enterprises in the area of a single local authority, or which was otherwise limited in availability, would be a specific subsidy because it favoured enterprises in that local authority over other enterprises in Wales.

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<sup>72</sup> It is important to note that similar considerations would apply if a devolved administration were to use the powers available to it to modify the rates applicable under a tax measure which is applicable across the UK within the territory that administration is responsible for.

## Limb D: Financial assistance which has, or is capable of having, an effect on domestic competition or and investment, and/or international trade or investment

What kind of effects are relevant?

732. A subsidy is defined as financial assistance which has, or is capable of having, an effect on:<sup>73</sup>

- competition or investment within the United Kingdom; or
- international trade or investment.

733. Financial assistance must be capable of having a genuine adverse effect that is more than incidental on domestic competition or investment, and/or international trade or investment, to constitute a subsidy for the purposes of the Subsidy Control Act (hereinafter a “relevant effect”). Financial assistance will not be considered to produce, or be capable of producing, a relevant effect for the purposes of the Act merely because it improves the financial situation of its beneficiaries.

734. The most important part of this limb of the test is the market or markets in which the beneficiary or beneficiaries operate. That includes the nature of competition in those markets in the UK, any international trade flows, and any investment flows (from the UK or internationally). Generally, this will be the market for the goods and/or services produced by the beneficiary. Where the subsidy has a substantive effect on the market for the inputs used by the beneficiary, that should also be taken into account.

735. It must be foreseeable that the measure will, or is capable of producing, relevant effects. If there is no evidence of a currently operating competitive UK market, of international trade flows, or of prospective investment to enter the market in the UK or internationally, then there are unlikely to be relevant effects.

736. In many cases, it will be straightforward to determine that the measure would have a relevant effect on a competitive market in the UK, and it will not be necessary to determine whether it also has a relevant effect on international trade or investment. If this is in question, more detail on how to identify and assess the market is set out in Chapter 3.

737. It is worth noting that a measure could have a relevant effect on domestic competition and investment even where the market covers a very small geographical

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<sup>73</sup> Section 2(1)(d) Subsidy Control Act 2022. Please note that certain modified rules apply to financial assistance provided to air carriers providing air transport services. See Section 5 Subsidy Control Act 2022 in this regard.

area or where the amount of financial assistance is very low.<sup>74</sup> However there is no presumption that a measure meeting the first three limbs of the test will have a relevant effect and any interested party claiming a relevant effect will need to be able to demonstrate it on the basis of the evidence

738. As the assessment is forward-looking, it is important for public authorities to take foreseeable market developments into account when considering the effects of a measure on domestic competition or investment and/or international trade or investment.

### **Example 1**

The UK-wide market for manufacturing a specific widget consists of only two firms who happen to operate from the same business park. The UK Government gives financial assistance to one of the two firms. This may constitute a subsidy.

Two newsagent shops operate in the same remote rural village. The local council gives financial assistance to one of those businesses. This may also constitute a subsidy.

### **Example 2**

A remote rural village has one barber shop. There is no evidence that others have sought or would seek to open another barber shop in the village. A decision is made to allow the shop to rent local authority land at sub-market rates to use as a parking area. Although there is a theoretical possibility that another barber shop could be set up in the village, this is only a hypothetical effect and is not sufficient to meet the test of having a relevant effect on domestic competition and investment. The financial assistance is not likely to be considered a subsidy.

As noted above, in certain circumstances goods, services or infrastructure may be owned or operated on the basis of a monopoly and the nature of that monopoly may exclude competition for that market. Where a good or service provided by an enterprise cannot be substituted by another service financial assistance to that network operator may not constitute a subsidy as long as it is not cross-subsidising its operations in other markets

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<sup>74</sup> Public authorities should be aware of the Minimal Financial Assistance provisions (as set out in Chapter 4) which exempt low value subsidies from most of the subsidy control requirements. It is important to note that Minimal Financial Assistance subsidies are still subsidies: they must meet the four limbs of the test outlined in this chapter. Exceptionally, however, there may be circumstances where the amount of a subsidy is so low (for example a £250 grant to a SME to attend a trade fair) that the possibility of a distortive effect is entirely hypothetical.

where there is competition. Many cultural activities are also not substitutable (for example, keeping unique public collections) and therefore exclude the existence of competition.

739. This limb of the test is met if the financial assistance has an effect on competition or investment in the UK or trade or investment internationally; that is, it is sufficient that just one of these four effects is present for the financial assistance in question to be considered a subsidy (if the other limbs are also met).

740. In general, it is more likely that a measure will have an effect on domestic competition or investment than on international trade or investment. In most cases, it will therefore be sensible for public authorities to establish that there is an effect on domestic competition or investment to confirm that this limb of the test is met. However, in some cases, there may be an effect on international trade or investment even where there is no competitive market in the UK.

### **Example**

Three testing centres for an advanced technology exist in the world – one in the UK, and two in other countries and all three provide similar services to businesses based all over the world. The UK Government wants to provide significant financial assistance to improve the facilities and quality of testing at the UK centre. Although there may be no effect on domestic competition and investment, the public authority will still need to consider whether the subsidy has or is capable of having an effect on international trade or investment.



# ANNEX 2: Additional guidance for assessing Subsidies and Schemes of Interest and Subsidies and Schemes of Particular Interest

741. SSol and SSoPI have a greater potential for substantial negative impacts on UK competition or investment and/or international trade or investment. This Annex sets out additional and more in-depth assessments a public authorities should undertake when they are granting or making Subsidies or Schemes of Interest (SSol) or Particular Interest (SSoPI). The Annex should be read in conjunction with Chapter 3 once the public authority has determined that the subsidy or scheme is or may be a SSol or SSoPI (see Chapter 11).
742. Public authorities should consider the whole assessment framework set out in Chapter 3 when considering compliance against the principles for Subsidies or Schemes of Interest or Particular Interest. This Annex builds on the third and fourth part of the four-part framework set out in chapter 3. Public authorities are not expected to undertake further or more comprehensive assessment for parts one and two of the framework than is set out in chapter 3.
743. The first section of this annex details how to identify the market or markets that a subsidy may affect. This will assist public authorities in assessing a subsidy's impact on domestic competition or investment and/or international trade or investment. The second section provides more comprehensive methods for identifying the distortive impacts that the subsidy may have and keeping them as low as possible.
744. Please note that this guidance is not intended to be exhaustive. Subsidies will differ in their aims and design and there may be specific assessment techniques that are not covered in this guidance that are relevant for certain subsidies. Public authorities should therefore apply the assessment methods set out in this guidance and elsewhere that are most appropriate for the subsidy or scheme in question.
745. To ensure robustness of the assessment of SSol and SSoPI, public authorities will often have to gather the information and data discussed in the sections below from various sources. As noted in Chapter 3, public authorities should take into account possible incentives of those who provide information or data to let the subsidy appear more or less favourable. Where public authorities obtain contradictory information or data, it may be necessary to gather additional evidence.

## Identifying the market(s) that the subsidy may affect

746. This section sets out how public authorities should identify the market(s) that a subsidy may affect. Public authorities should undertake this exercise for each of the recipient's products and services that are affected by the subsidy. In addition, this exercise may be required for any input or related products (see the relevant section below).
747. This exercise provides a framework for public authorities to easily and systematically assess a subsidy's impact on domestic competition or investment and/or international trade or investment. For example, only after a market has been defined, it is possible to estimate the size of the market and to calculate market shares. It also helps public authorities to acquaint themselves with the determinants of the subsidy's distortive impacts.
748. A carefully delineated market should comprise the most important competitive alternatives to each of the recipient's products and services that are affected by the subsidy. Public authority should consider two main dimensions in this exercise:
- the product or service dimension; and
  - the geographic dimension of the product or service.
  - Each will be discussed below as well as some additional aspects which may be relevant for the assessment in certain cases.

### Product or service dimension

749. First, public authorities will need to identify the products or services (if any) that are important competitive alternatives to the recipients' products and services affected by the subsidy. These are not necessarily the products and services which fulfil the exact same purpose, have similar characteristics, or are most comparable in terms of price. Public authorities should be guided by the actual preferences and behaviour of customers, rely on evidence from a number of various sources, and consider this evidence in the round. The following sources of evidence are often likely to be important:
- the views of customers and competitors;
  - recipients' perceptions and information on which rivals they monitor and competitively interact with; and
  - information on rival products and services.

750. In many cases, this exercise will be straightforward. However, some cases will require additional evidence gathering on actual customer behaviour to assess whether certain products or services are important competitive alternatives. For example, it will depend on the local circumstances and behaviour of customers as to whether certain modes of transport (such as a bus route or rail connection) are important competitive alternatives to each other. These questions cannot be answered in the abstract and answers may differ across areas. Public authorities can obtain information on actual preferences from consumers, e.g., through a survey. In some sectors, intermediaries or other market participants<sup>75</sup> may also be able to provide information on customer behaviour and preference. This may be preferable in markets with a large number of customers.

751. In addition, whenever recipients supply multiple products and services (and in particular when these are related to each other), the exercise may be more complex. Examples of such circumstances include:

- activities of enterprises that are not directly related to a specific product or service (e.g., some R&D activities);
- activities that are related to a range of different products or services of an enterprise (e.g., some training activities);
- when products and services are related to each other (e.g., a product and repair and maintenance services for that product); or
- when an enterprise operates a 'two-sided platform' from which it supplies services to different customer groups, e.g., print media and broadcasters (both bringing together readers, listeners or viewers and advertisers) or shopping centres (bringing together retail tenants and shoppers).

## Differentiation

752. A further complicating factor in identifying the most important competitive alternatives occurs when products or services are differentiated. A subsidy is likely to have greater effects on the suppliers of competitive alternatives that are less differentiated from the products and services of the subsidy recipient. Conversely, a subsidy is likely to have relatively less effect on products and services that are more differentiated.

753. As mentioned above, important competitive alternatives do not need to be similar or fulfil the exact same purpose. Competitive alternatives can differ along dimensions such as quality or service levels. For instance, a luxury car is unlikely to be an important competitive alternative to a compact car. There are also markets where other

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<sup>75</sup> For instance, wholesalers, brokers, operators of marketplaces, purchasing organisations or administrators of framework agreements.

dimensions are relevant. For instance, in broadcasting and publishing markets, a classical music radio station is unlikely to be an important competitive alternative to a contemporary music radio station. Similarly, a weekly tabloid is unlikely to be an important competitive alternative to a daily newspaper.

754. Most products and services are differentiated even if some of them may appear to be similar. For instance, the otherwise homogenous service of providing electricity is differentiated by the different tariffs under which it is provided. Similarly, even if mineral water can be considered as homogenous, branding and other differentiators render this product somewhat differentiated.

755. As a result, products and services which are less differentiated from each other (e.g., two variable rate electricity tariffs, or two branded 'high-quality' mineral water bottles) are more important competitive alternatives to each other than to more differentiated ones (e.g., a variable and a fixed rate electricity tariff, or an own-label and a branded mineral water bottle).

756. There is then often no 'bright line' that can or should be drawn to distinguish enterprises that supply 'important' competitive alternatives and those that do not. Products and services are commonly not either 'differentiated' or 'undifferentiated' (homogeneous); rather, differentiation is a sliding scale. Two strongly differentiated products or services will be less similar from the customers' point of view, and so the intensity competition between this pair will be lower than between a pair of less differentiated products.<sup>76</sup> Gathering this information will provide public authorities with an indication of which products and services will more likely and more strongly be affected by a subsidy.

757. The following sources of information to identify the most important competitive alternatives and differentiation between products and services may often be relevant: customer views; market research reports; win/loss or bidding data from the recipient and competitors (for some products and services, such data can easily be obtained from intermediaries, operators of marketplaces or administrators of framework agreements); or evidence of switching between enterprises in response to price changes or changes in the availability of the products or services in question. Public authorities may also borrow from decisions in the field of antitrust and merger control that have considered the products or services in question.<sup>77</sup>

758. Generic industry classifications used by enterprises (e.g., in their statutory accounts) are unlikely to be a good indicator of the relevant market(s) where an impact on domestic competition, investment, and trade may occur. The competitive conditions or set of competitors that larger enterprises consider internally (e.g., at the level of the

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<sup>76</sup> In technical terms, the enterprises that represent the most important competitive alternatives will be those that recapture the most significant shares of sales in response to a price increase by the recipient.

<sup>77</sup> See for instance: <https://www.gov.uk/cma-cases>.

board of directors (or equivalent body) or senior management) also have the potential to be poor indicators of the relevant markets where an impact on domestic competition and investment may occur. Instead, public authorities may be better informed by the competitive conditions and competitors that are considered at lower levels of organisation within the recipient, e.g., by product teams. Market research reports and public statistics may also provide limited information to identify the relevant market(s) where an impact on domestic competition and investment may occur.

## Geographic dimension

759. Having considered the product or service dimension, public authorities will need to consider whether products or services supplied from different geographic areas or over different distances are important competitive alternatives to the recipients' products and services affected by the subsidy.

760. Many enterprises supply the same products and services in different geographic areas within the UK. When this is the case for subsidy recipients or competitors, public authorities should assess whether the most important competitive alternatives differ between geographic areas. Whenever the most important competitive alternatives are sufficiently similar across geographic areas, public authorities may consider these in combination. In some cases, however, it will be necessary to consider different geographic areas separately because of different competitive alternatives available to customers in each area.

761. In many cases, this assessment is straightforward; for instance, when the products or services of the recipient(s) and the important competitive alternatives are supplied locally and there are no significant competitive constraints from outside of a geographic area; when products or services are supplied nationally with no significant imports; or when the products or services concern transport connections between specific geographic locations. However, in some cases it will require additional evidence gathering to delineate the geographic area(s) relevant for the products or services in question.

762. To assess such differences, public authorities may consider information on, for instance,

- customers' views on the competitive performance of enterprises supplying different geographic areas or customer groups;
- differences in pricing, sales, advertising and marketing strategies, delivery costs or barriers to entry when supplying into an area or to a customer group;
- customer preferences, for instance how far customers are willing to travel to reach a supplier; and

- product characteristics such as perishability, i.e., how far a perishable product can be transported. In addition, information on the geographic scope of competition may be obtained from, for instance: information on enterprises' websites on the location of their outlets; information on enterprises' websites on their delivery areas; or transport network maps.

763. Examples of markets where the geographic scope of competition may require an area-by-area assessment of the most important competitive alternatives are:

- retail markets where enterprises have bricks-and-mortar outlets which customers commonly visit to shop, or consume products or services. As a result, the set of competitive alternatives may differ depending on the location of a particular customer.
- markets in which a good or service is delivered to the customer over a certain distance or within a certain geographic area. As a result, the set of competitive alternatives may also differ depending on the location of a particular customer;
- markets in which the provision of products or services is determined by physical infrastructure (e.g., telecommunications and broadcasting; water supply and sewerage; electricity, gas, or steam supply); and
- transport markets in which customers make 'point-to-point' journeys, and as such demand is for transportation between two geographic locations. As a result, competitive alternatives may differ for each 'point-to-point' journey.

## Other dimensions

764. In some cases, public authorities will need to consider additional dimensions. Examples are products or services supplied to different customer groups or where there is a temporal dimension to a market.

765. Many enterprises supply the same products and services to different customer groups and the set of important competitive alternatives may differ between these customer groups. When this is the case, public authorities should identify the most important competitive alternatives for each customer group. Examples include business and end-consumer customers; wholesale and retail customers; customers served through different distribution channels; customers on framework agreements and customers that buy on the open market; large (e.g., customers with demand across many geographic areas) and small customers (e.g., customers with only local demand).

766. In relation to temporal dimensions, some markets may be characterised for instance by a distinction between peak and off-peak periods (e.g., in transport services or utilities supply) or there may be seasonal variation (e.g., between summer and winter). Whenever the important competitive alternatives to the recipients' products and

services affected by the subsidy differ depending on these distinctions, public authorities should assess these separately.

## Input and related markets

767. Public authorities should also identify whether a subsidy may have an impact on domestic competition or investment and/or international trade or investment in input markets (e.g., raw materials, land, or labour) and products or services related to the recipient's activities affected by the subsidy.

768. In addition, public authorities must consider the impacts of a subsidy in any markets not directly targeted by a subsidy but in which it wants to correct a market failure or pursue an equity rationale. This may be the case for instance where a subsidy funds an activity in the supply of an upstream<sup>78</sup> (or downstream<sup>79</sup>) product or service with the intention of bringing about a change in a downstream (or upstream) market. Public authorities should follow the steps of the assessment set out in the sections above to identify the impact of the subsidy on each of these markets.

769. In relation to inputs, a subsidy can have effects on the markets for these inputs in two ways:

770. First, it can directly be targeted at the procurement by the recipient of a particular (type of) input, for example an environmentally friendly alternative to a traditional input.

771. Second, it can indirectly affect the procurement of specific inputs by targeting certain products and services supplied by the recipient. Public authorities therefore require a reasonable understanding of the production process of the recipients. This information can readily be obtained from recipients.

772. Many enterprises will buy more than a single input for the supply of a specific product or service and consequently inputs may come from different sets of suppliers. Public authorities should exercise their judgement to identify input products or services that may particularly be affected by the subsidy to apply the assessment proportionately and limit it to those markets where impacts on domestic competition or investment and/or international trade or investment are most likely to occur. Indicators of such effects are (i) a high degree of dependency between customers or suppliers and the recipient of the subsidy, (ii) where there is prima facie evidence (i.e., before having systematically identified the most important competitive alternatives) that the recipient may be the only or only one of very few suppliers or buyers of a particular good or service.

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<sup>78</sup> For instance, an input such as a raw material.

<sup>79</sup> For instance, an output such as an intermediate or final product.

773. For these input products and services, the public authority should identify the most important competitive alternatives and the geographic scope of competition and then assess whether the subsidy may have an impact on domestic competition or investment and/or international trade or investment in each of these input markets.
774. In relation to other related markets, it may in some cases also be necessary for public authorities to consider whether a subsidy affects those who distribute, wholesale, or retail the products or services of the recipient(s) and those that supply complementary products or services. As mentioned above, public authorities should exercise their judgement to identify related products or services that may be particularly affected by the subsidy to apply the assessment proportionately and limit it to those markets where impacts on domestic competition, investment and trade are most likely to occur. Indicators of such effects are also (i) a high degree of dependency between the recipient of the subsidy and its customers or suppliers of complementary products or services, (ii) where there is prima facie evidence (i.e., without having systematically identified the most important competitive alternatives) that the recipient may be the only or only one of very few suppliers of a particular good or service.
775. In each of these cases, the assessment set out in the sections above will enable the public authority to identify impacts on domestic competition, and domestic and international investment or trade in any of these related markets.

## Conclusion

776. Having identified the relevant market(s) with the most important competitive alternatives in each, public authorities are now in a position to consider (i) the position of the recipient(s) in each market; (ii) concentration in each market; (iii) barriers to entry, expansion and exit for each market; and (iv) the growth (or decline) of each market. With this knowledge, public authorities have also gained an understanding of which third parties may be particularly affected by the subsidy. Public authorities should take this into account when they request information from subsidy recipients and in their evidence gathering process with external stakeholders.

## Identifying the distortive impacts that the subsidy may have and keeping them as low as possible

777. In addition to the steps set out in Chapter 3, public authorities should consider the additional elements and detail set out below that focus on the subsidy characteristics and the market characteristics of the recipient(s) of the subsidy or scheme.



## The characteristics of the subsidy

778. This section sets out in more detail on notable features and how subsidies can be carefully designed in order to less likely distort domestic competition or investment and/or international trade or investment. In addition to the subsidy characteristics outlined in Chapter 3, public authorities should systematically step through the sections below and review each of the relevant characteristics of the proposed subsidy.

## The nature of the costs being covered

779. As set out in Chapter 3, subsidies funding the initial investment or the set-up costs of a project are less likely to distort domestic competition or investment and/or international trade or investment. When funding only initial investment or set-up costs is not possible, public authorities should give particular consideration to how the subsidy will affect the recipient's costs. Subsidies should not alter the recipient's 'day-to-day' costs or costs that vary with output (e.g., variable costs that the beneficiary would have incurred anyway) as these have a greater potential for impacts on competition.

780. As discussed above, public authorities should generally avoid using subsidies to cover ongoing costs related to the normal day-to-day costs of running the project, activity, or (one of) the recipient's facilities as these are more likely to impact domestic competition or investment, and/or international trade or investment.

781. Funding only initial investments or set-up costs also reduces the risk that a project or activity continues to be funded even though it may become obsolete or ineffective during the project's lifetime. This is because public authorities may fall victim to the 'sunk cost fallacy'. This occurs where assistance should cease from a rational economic perspective, but instead is continued due to an aversion to appear wasteful by forfeiting past investment and to publicly admit failure of a project or activity.

782. Information on which of the recipient's cost items can be considered as fixed or as variable costs can be obtained from an assessment of the beneficiary's current run rate and estimates of its run rate in the future. This will also allow public authorities to estimate what cost items are fixed or variable over the duration of the subsidy at specific output levels. This information can be requested directly from the beneficiary and obtained from its annual and management accounts.

783. As SSol and SSoPI are likely more complex and have a greater potential of causing distortions than other subsidies, public authorities should ensure that contractual obligations on the recipient(s):

- restrict the use of the subsidy to the intended purpose and the defined type(s) of cost;
- restrict the use of unused funds; and

- are considered together and are consistent with the other subsidy characteristics, in particular the timespan, ringfencing and monitoring and evaluation.

## **The size of the subsidy**

784. As set out in Chapter 3, public authorities should consider the size of a subsidy in absolute terms as well as in the wider context in which the subsidy is used. In line with principle B, public authorities should design subsidies that represent a small share of the recipient's cost, the overall project costs, and the value of the affected market(s).
785. Establishing the size of the subsidy and the assessments below may be more complicated when the subsidy confers non-monetary advantages to recipients, e.g., guarantees.
786. Having determined the size of the subsidy (i.e., the total subsidy amount) as outlined in Chapter 3, public authorities should then compare that size with the size of the affected market(s), project costs and the operating cost of the recipient as outlined in the sections below.

## **Subsidy size relative to the size of the affected market(s)**

787. Generally (all other things being equal), a subsidy that represents only a small proportion of total market size is less likely to have a significant impact on domestic competition or investment, and/or international trade or investment.
788. The size of a market heavily depends on how this market is defined (see earlier sections of this Annex). The market size should comprise the sales volume or value of the relevant products or services supplied by the recipient and all of the most important competitive alternatives as identified. Public authorities should also ensure that comparisons between the size of the subsidy and market(s) are made on the same basis (e.g., including or excluding VAT; figures should be based on the same time period, on either volume or value, etc.).
789. Public authorities should consider sensitivities around their market size estimates when there are gaps in the available information or when (some of the) products or services are provided free of charge.
790. Each market identified (see section Market Characteristics' below) should be considered in turn with the (share of the) total subsidy that is attributable to it. Different markets can be assessed in combination whenever (parts of) the subsidy are not attributable to individual markets.

791. There is no bright-line threshold for when the value of a subsidy is too large in proportion to an affected market so that impacts on domestic competition, investment, and trade could be disproportionate. It is reasonable to assume that a subsidy value of below 10% of the market value is indicative of a subsidy with a low risk of distortive effects. Public authorities should consider the elements of proportionality listed above (see section 'Introduction') in relation to the depth of this assessment.

792. Sources of information on market size can be data or estimates from subsidy recipients, other market participants (including competitors, customers, and suppliers) or industry associations. Note that market research reports often consider wider sets of competitors and national (or wider) geographic markets and their suitability as a source of market size data should therefore be assessed prior to being used. Refer also to section " below.

### **Subsidy size relative to total project costs**

793. A subsidy that meets principles B and D is unlikely to represent a large share of the recipient's total project costs (see Chapter 3). This is because a well-designed subsidy will only fund the minimal proportionate amount that is necessary to incentivise the recipient to realise the project.

794. Generally (all other things being equal), a subsidy that represents only a small proportion of total project costs is less likely to have significant effects on domestic competition or /or investment and/or international trade or investment. Though the appropriate percentage will likely depend on the circumstances of the market, the broader subsidy design and the market failure or equity rationale being targeted. In some cases, a much larger subsidy may be less distortive than smaller subsidies even when compared to total project costs. Public authorities should consider these factors when considering how to interpret this measure of subsidy size.

795. Information on project costs will have been gathered for the preparation of the business case and in the assessment of Principle B.

796. A subsidy should only fund an amount of money slightly above the level to make the recipient(s) indifferent whether to undertake the project or desired activity. As simplified examples:

- A project with a negative present value to the recipient (i.e., it would not be undertaken in the absence of the subsidy) should only be subsidised up to the level at which its present value is just above zero and the recipients breaks even.
- Similarly, if a public authority wants a recipient to adopt a desirable activity over another (with a higher present value to the recipient, i.e., it would be the recipient's preferred

option), it should only subsidise it slightly more than the amount necessary to make the recipient(s) indifferent between the two activities.

797. The same logic applies even when enterprises use different measures to calculate the costs of a project or activity depending on the circumstances (e.g., total cost of ownership (TCO) instead of net present value): the public authority should only make recipients indifferent between either (i) undertaking a desired activity and doing nothing; or (ii) between the desired activity and the recipient's preferred alternative option.
798. There is no bright-line threshold for when the value of a subsidy represents too large a share of total project costs so that impacts on domestic competition, investment, and trade could be disproportionate. Public authorities should consider the elements of proportionality listed above in relation to the depth of this assessment. Only for complex subsidies will expert advice, e.g., from accountants, be necessary.
799. The available funds for a subsidy may sometimes be predetermined by another public body and the awarding public authority may have no influence over the size of the subsidy. In such cases, the awarding public authority should consider this feature in combination with the selection process for recipients and the timespan over which the subsidy is given.

### **Subsidy size relative to the operating costs of the recipient**

800. Generally, a subsidy that represents only a small proportion of the normal operating costs of the recipient is less likely to have a significant impact on domestic competition or investment and/or international trade or investment. The beneficiary's normal operating costs serve as a benchmark for the size of the subsidy to give public authorities an indication of the importance of the subsidy in the day-to-day business of the beneficiary and hence of its ability to significantly alter its incentives. As these costs exclude expenses not directly related to core business activities, they represent a more reliable benchmark which is also less prone to be influenced by one-off financial transactions and other irregular operations of the business.
801. Public authorities should only take into consideration the recipient's operating costs for the markets for the relevant products and services as identified above. This is because a (targeted) subsidy may represent only a very small proportion of the overall cost of a large enterprise supplying many products and services, but it may represent a substantial proportion of the costs attributable to a subset of these products and services. This assessment may be more complicated when recipients of their relevant business units operate in multiple markets or overseas as allocation of cost items to the activities affected by the subsidy may not be straightforward. However, this assessment does not need to arrive at a precise estimate; rather, it is intended to provide an

indication of the importance of the subsidy for the day-to-day business of the recipient as mentioned above.

802. There is no bright-line threshold for when the value of a subsidy represents too large a share of normal operating costs of the recipients so that impacts on domestic competition, investment, and trade could be disproportionate. Public authorities should consider the elements of proportionally listed above (see section 'Introduction') in relation to the depth of this assessment. Only for complex subsidies or complex business structures will expert advice, e.g., from accountants, be necessary.

803. Information on normal costs of the recipient for the supply of the relevant products or services can be obtained from the recipients. In particular, management accounts for the division(s) responsible for the supply of the relevant products or services will enable the public authority to estimate normal operating costs.

### **The timespan over which a subsidy is given**

804. Public authorities should assess whether the subsidy is sufficiently time-limited as outlined in Chapter 3. This is because time-limited and one-off subsidies are less likely to distort domestic competition or investment and/or international trade or investment. The timespan of the subsidy or investment can provide an indication of the longevity of any effect on the market.

805. Public authorities should make use of subsidies that provide one-off lump-sum payments. Whenever that is not appropriate, public authorities should design subsidies that are time-limited and payment schedules should be linked to the achievement of specific milestones of a project. Public authorities should consider this feature in combination with the cost impact of the subsidy (see section 'The cost impact of the subsidy' above). Providing recurring subsidies over a period of time compared to a one-off lump sum is likely to have a greater impact on domestic competition or investment and/or international trade or investment, including on enterprises' entry and exit decisions.

806. First, recurring and open-ended subsidies incentivise recipients to ask for continued funding of a project or desired activity. Second, potential entrants could be deterred from entering the market if they have to compete with incumbents that are expected to receive further subsidies. Third, recurring and open-ended subsidies increase the risk of projects or activities continuing even after they have become uneconomic, obsolete, or ineffective. Recurring subsidies could also prevent efficient rationalisation – an enterprise may remain in a market when this is no longer the best option for it either because it has committed to it as part of a subsidy programme or because it has reason to expect future subsidies.

## Market characteristics

807. Subsidies in markets where enterprises compete vigorously and where the recipients are not major players are less likely to distort domestic competition or investment and/or international trade or investment. Public authorities should assess whether a market can be characterised as competitive and what effect a subsidy can have on the competitiveness of enterprises in a market by considering the characteristics of markets set out in this section. This assessment is supplementary for SSol and SSoPI. It would go beyond the minimum necessary for other subsidies.

808. As a prerequisite, it is necessary to define markets by identifying the most important competitive alternatives for each of the recipient's products and services affected by the subsidy. The reference here is to 'competitive alternatives' and not 'competitors' as public authorities should focus their assessment on products and services (which may not always be supplied by enterprises) rather than who supplies them. This is because of the reasons set out in the section below (see in particular 'Geographic dimension' which explains that suppliers of identical products or services are not necessarily competitive alternatives, for instance due to the geographical distance to customers). Other reasons for the importance of this distinction include markets where:

- products or services provided both by public authorities and by for-profit firms are competitive alternatives (e.g., radio or TV);
- free products or services and paid-for products or services are competitive alternatives (e.g., free newspapers or public broadcasting);
- one product or service is a competitive alternative to another, but the reverse is not true (e.g., high-bandwidth fibre broadband may be a good competitive alternative for customers of low-bandwidth copper broadband, but copper broadband may be a poor alternative for customers of fibre broadband); or
- the distinction between competitors is not straightforward (e.g., subscription streaming services may be a competitive alternative to cinemas).

809. However, in following the analytical steps below, public authorities will identify the competitors and other third parties that are most affected by the subsidy. Competitors can be directly affected by a subsidy since, as is set out above, they are in a relationship of rivalry with the subsidy recipient whose behaviour and operations subsidies are intended to change. Other third parties can be affected indirectly, for instance because they are suppliers of inputs or operate in closely related markets. This assessment consists of different steps, each of which is outlined in the section below. To reiterate, market definition is a tool and not an end in itself; it merely allows public authorities to undertake some of the assessments outlined in this document.

810. The section then outlines the most important characteristics of markets and their potential to alleviate or exacerbate the subsidy's impacts on domestic competition or

investment and/or international trade or investment. Having identified the relevant market(s) and the players therein, public authorities should then systematically step through and review each of the relevant characteristics of the market(s). In doing so, the public authority should show evidence of having considered each of the following factors:

- The degree to which markets are concentrated;
- The position of the recipient(s) in each market;
- The barriers to entry, expansion, and exit, and whether the subsidy raises these barriers; and
- Market growth.

811. Having identified the relevant market(s) with the most important competitive alternatives in each, public authorities are now in a position to consider (i) the position of the recipient(s) in each market; (ii) concentration in each market; (iii) barriers to entry, expansion and exit for each market; and (iv) the growth (or decline) of each market. The steps for public authorities to go through of each of these assessments are set out in the sections below.

812. With this knowledge, public authorities have also gained an understanding of which third parties may be particularly affected by the subsidy. Public authorities should take this into account when they request information from subsidy recipients and in their evidence gathering process with external stakeholders.

## **Concentration**

813. In general, the fewer the enterprises in a market, the larger their share of the market, and the less competition one would expect to observe. Having identified the most important competitive alternatives to the subsidy recipient and the market size (see sections above), the public authority will be able to calculate measures of concentration in each market.

814. Concentration measures can be based on (i) the number of enterprises active in the market; (ii) volume (e.g., the number of products or services sold or the number of customers who use the products or services); or (iii) value (e.g., turnover). The public authority may consider several measures of concentration in its assessment. Since many measures such as sales volumes and values of the most important competitive alternatives in the geographic area(s) of interest may often be commercially sensitive, the public authority may consider incorporating an obligation on all applicants for the subsidy to provide such information in its subsidy design.

815. If any of the markets identified above is concentrated, and the subsidy recipient is a major player, then it is more likely that competitors will alter their business in response

to the subsidy. Conversely (all other things equal), a subsidy to a small or fringe enterprise (provided the market has been carefully defined) with many competitors is less likely to have a significant impact on domestic competition and investment.

816. When products or services are differentiated (as is likely to be the case in most markets), concentration measures should be assessed in light of the public authority's assessment of which enterprises offer the closest competitive alternatives (see section 'Differentiation' above). Concentration measures do not reflect the degree of differentiation between the competitive alternatives in a market. As outlined above, the presence of more differentiated competitive alternatives to the recipient's products and services are less important constraints and therefore concentration in the market and the relative position of the recipient in the market tend to be underestimated.

### **Barriers to entry, expansion and exit**

817. Barriers to entry, expansion and exit are important in the assessment of the distortive effects that subsidies may have for two reasons. First, subsidies should not lead to raising barriers for enterprises to enter, expand into or exit from markets. Second, subsidies in markets where barriers to entry, expansion and exit are low are less likely to distort domestic competition or and investment and/or international trade or investment

818. Potential or actual competitors may encounter barriers which reduce or even severely hamper their ability to enter or expand into, or exit from a market. Barriers to entry and expansion are specific features of a market that give incumbent enterprises advantages over potential competitors. Barriers to entry and expansion hinder the ability of potential entrants or enterprises looking to expand to constrain the exercise of market power by incumbents.

819. Public authorities should consider in their assessment of market characteristics that subsidies in markets with high barriers to entry, expansion and exit are more likely to lead to negative effects on domestic competition or investment and/or international trade or investment. In addition, public authorities should design a subsidy in a way that does not raise existing barriers to entry, expansion or exit substantially, therefore reducing the risk of impacts on domestic competition or investment and/or international trade or investment.

820. Barriers to entry and expansion can be caused for a range of reasons such as:

- high initial set-up costs where a significant proportion of them are sunk and irrecoverable upon exit from the market;
- customers value reputation, track record or brand of a supplier;



- economies of scale are significant (i.e., large suppliers have lower average costs than smaller ones);
- network effects are significant (i.e., small suppliers are less attractive to customers);
- technological or regulatory barriers are significant (i.e., intellectual property rights, trade barriers or regulations may hinder new entrants);
- early movers may have significant advantages over new entrants.

821. Barriers to entry and expansion might be particularly high if some of these factors are present in combination.

822. Depending on their design, subsidies can raise or lower barriers to entry, exit and expansion. For example, a subsidy that is targeted to provide risk finance to small or new businesses may help newer enterprises compete with existing enterprises with a longer credit history. In contrast, a subsidy that is specifically limited to existing enterprises may inadvertently prevent the efficient entry and exit into the market.

823. The public authority should therefore first assess whether the market(s) identified above can be characterised by the presence of any of the features listed above. In such markets, subsidies are more likely to have a significant impact on domestic competition or and investment and/or international trade or investment.

824. The public authority should then assess whether the subsidy has the potential to raise barriers to entry, exit or expansion, including by creating or worsening any of the features listed above. All other things equal, a subsidy that raises barriers to entry, exit or expansion is more likely to have a significant impact on domestic competition or and investment and/or international trade or investment.

## **Market growth**

825. Subsidies given in markets which are experiencing important levels of growth are less likely to present distortions to competition. This is because a subsidy to one enterprise in such a market is less likely to harm a competitor's growth prospects, given the general growth opportunities in the sector.

826. Subsidies can cause significant distortions to competition in markets in which, for several years, have experienced no growth or decline, or are in overcapacity. A subsidy to an enterprise in such an industry can enable the recipient to increase its market share directly at the expense of competitors, as there is a fixed or reducing amount of business available. In these circumstances, public authorities should pay particular attention to any negative impacts of a subsidy on competitors.

827. As an example, a well-designed subsidy in an emerging and growing market such as the manufacture of fuel cell technology, is less likely to cause competition

distortions or create overcapacity. Similarly, a well-designed subsidy that creates a new market that does not yet exist or that focusses on untapped demand is less likely to create distortions.

# Glossary

Term	Definition
<b>A</b>	
<b>B</b>	
Bank of England	The central bank of the United Kingdom
BEIS	Department for Business, Energy and Industrial Strategy
<b>C</b>	
Competition and Markets Authority (CMA)	The United Kingdom's competition and consumer law regulator
Competition Appeal Tribunal (CAT)	A specialist judicial body with jurisdiction to hear and decide case involving competition or economic regulatory issues within the United Kingdom
<b>D</b>	
Devolved administrations	The governments of Scotland, Wales and Northern Ireland
<b>E</b>	
Energy and Environment Principles	Principles that subsidies or schemes in relation to energy or environment must be assessed against.
EU State aid	Subsidy control regime within the European Union
<b>F</b>	
<b>G</b>	
<b>H</b>	
HMT	Her Majesty's Treasury

<b>I</b>	
<b>J</b>	
<b>K</b>	
<b>L</b>	
Local Authority	An administrative body in local government
<b>M</b>	
Minimal Financial Assistance	Allows public authorities to award subsidies to recipients without the need to comply with the majority of the subsidy control requirements below the financial threshold of £315,000 over the applicable period.
<b>N</b>	
Net Zero	The UK's commitment to be carbon neutral by 2050.
<b>O</b>	
<b>P</b>	
Primary Public Authority	Any of the following: <ul style="list-style-type: none"> <li>• a Minister of the Crown;</li> <li>• the Scottish Ministers;</li> <li>• the Welsh Ministers;</li> <li>• a Northern Ireland Department</li> </ul>
Public Authority	Any person who exercises functions of a public nature.
Public Authority Portal	The online portal which public authorities can use to refer their assessment of subsidy or scheme to the Subsidy Advice Unit for a report
<b>Q</b>	
<b>R</b>	
<b>S</b>	

Services of Public Economic Interest (SPEI)	Essential services provided by a public authority to the public which would not be provided under normal market conditions
Streamlined Route	A type of subsidy scheme made by the UK Government for the use of any public authority in the UK described as a streamlined subsidy scheme in the Subsidy Control Act 2022.
Subsidies or Schemes of Interest (SSoI) and of Particular Interest (SSoPI)	Subsidies or schemes that have greater potential to lead to undue distortion and negative effects on competition or investment within the United Kingdom and/or on international trade or investment.
Subsidy Advice Unit (SAU)	Unit within the Competition and Markets Authority with responsibility for evaluating the assessment against the principles for certain subsidies
Subsidy Control Requirements	The requirements stipulated by the Subsidy Control Act 2022 under Part 2
Subsidy Database	The database public authorities are required to upload certain information regarding their subsidies and schemes for transparency purposes
Subsidy Scheme	A scheme made by a public authority providing for the giving of subsidies under the scheme
<b>T</b>	
Trade and Cooperation Agreement (TCA)	The United Kingdom's free trade agreement with the European Union
<b>U</b>	
<b>V</b>	
<b>W</b>	
Withdrawal Agreement	The United Kingdom's agreement with the European Union setting out the terms of the UK's exit from the EU

World Trade Organisation Agreement on Subsidies and Countervailing Measures	The World Trade Organisation agreement regarding subsidies of which the United Kingdom is a signatory
<b>X</b>	
<b>Y</b>	
<b>Z</b>	



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