Subsidy Advice Unit Report on a Proposed Subsidy to Warrington LiveWire

Referred by Warrington Borough Council

20 June 2023

Subsidy Advice Unit

Part of the Competition and Markets Authority

Contents

1. Introduction

1.1 This report includes an evaluation prepared by the Subsidy Advice Unit (SAU), part of the Competition and Markets Authority, under section 59 of the Subsidy Control Act 2022 (the Act). The SAU has evaluated Warrington Borough Council's (the Council) assessment of compliance of the proposed subsidy to LiveWire (Warrington) CIC (LiveWire), with the requirements of Chapters 1 and 2 of Part 2 of the Act (the Assessment).[1] The evaluation takes into account any effects of the proposed LiveWire subsidy on competition or investment within the United Kingdom.

1.2 This report is based on the information provided to the SAU by the Council in its Assessment and evidence submitted relevant to that Assessment.

1.3 This report is provided as non-binding advice to the Council. The purpose of the SAU's report is not to make a recommendation on whether the subsidy should be given, or assess directly whether it complies with the subsidy control requirements. The Council is ultimately responsible for granting the subsidy, based on its own Assessment, having the benefit of the SAU's evaluation.

1.4 A summary of our observations is set out at section 2 of this report.

The referred subsidy

1.5 The Council established LiveWire, a Community Interest Company (CIC) in May 2012. A Management Agreement (Contract) was put in place that contracted LiveWire to manage leisure services (eg sports centres and facilities) and several Neighbourhood Hubs, as well as library services and health and wellbeing services. LiveWire is presently not controlled by the Council and the Contract is due to expire in May 2027.

1.6 The Council told us that LiveWire has seen a significant loss of customer income due to enforced closures, Covid-19 safety restrictions and a slow recovery in demand, while there have been significant increases in costs in a number of areas, including salaries (driven by increases to National Living Wage), and cost inflation, particularly energy. It said current projections show LiveWire running out of sufficient liquidity in April 2024.

1.7 The Assessment set out its proposal to provide financial support to LiveWire to ensure both its immediate viability, and its long-term viability following execution of a restructuring plan. As part of this restructuring plan, it is envisaged that LiveWire

[1] Chapter 1 of Part 2 of the Act requires a public authority to consider the subsidy control principles and, where applicable, the energy and environment principles before deciding to give a subsidy. The public authority must not award the subsidy unless it is of the view that it is consistent with those principles. Chapter 2 of Part 2 of the Act requires a public authority to ensure that a prohibited subsidy is not awarded, and that the requirements in relation to the giving of certain other subsidies are satisfied.

will be restructured into a company wholly controlled by the Council and a new contract put in place, with the suite of services supplied by LiveWire being designated as Services of Public Economic Interest (SPEI) under section 29 of the Act.

1.8 The Council set out in its referral submission the proposed subsidy as comprising several measures:

(a) Grant – an initial grant facility of up to £3.5 million;

(b) Fee Subsidy – an immediate increase in the management fee paid to LiveWire under the current contract of £1.328 million in 2023-24;

(c) Subsidy Mechanism - an estimated £1.328 million a year from 2024-25 through to 2026-27, with an ongoing ability to increase the management fee to meet increased costs;

(d) Investment Subsidy – benefits resulting from a capital investment into the Council assets operated by LiveWire: The Council propose to invest an estimated £10 million into building refurbishment/improvement at its Broomfields Leisure Centre, subject to external grant availability. A further £1.1 million in section 106 funding[2] would be provided by developers for improvements in other built leisure facilities and playing pitches. The Council said the value of this subsidy would be equivalent to the value of the uplift in the market rental value of the premises as a result of the refurbishments/improvements made (ie that LiveWire were not being charged a higher rental despite having improved assets to operate), but that this amount was not known;

(e) The Council also noted in its Assessment that LiveWire were currently, and would continue to be, charged no or only a peppercorn rent for all but one of the Council properties required to deliver the services, constituting a further element of subsidy; and

(f) Guarantee Subsidy – the Council proposed that LiveWire's energy would be provided through the Council's energy contract, which could reduce volatility costs through advance purchases and would in effect provide a guarantee by the Council. It said that the value of the subsidy arising from this guarantee had not been calculated.

1.9 The total value of the subsidy was therefore estimated as a ‘minimum’ subsidy of £8,812,000 to run to 2026-27 given that some potential subsidy elements had not

[2] Under section 106 of the Town and Country Planning Act 1990, as amended, contributions can be sought from developers towards the costs of providing community and social infrastructure, the need for which has arisen as a result of a new development taking place.

been valued. The Council have described how the Subsidy Mechanism and Grant will operate to prevent overcompensation being made.

SAU referral process

1.10 On 2 May 2023, the Council referred the LiveWire subsidy to the SAU under section 52(1)(a) of the Act. The SAU notified the Council on 9 May 2023 that the SAU would prepare and publish a report within 30 working days, on or before 20 June 2023.[3] The SAU published details of the referral on 10 May 2023.[4]

1.11 The Council explained that the LiveWire subsidy is a 'Subsidy of Particular Interest' because it is a restructuring subsidy.[5] In this case the immediate Grant and Fee Subsidies are being made in order to enable a restructure of LiveWire.

Subsequent clarifications

1.12 During the referral period, the SAU sought further clarification of the Council's proposals, including whether the proposed subsidy constituted a modification to an existing subsidy,[6] and what specific subsidy components were assessed as SPEI against the requirements of the Act and for what periods.

1.13 Notwithstanding this, there has remained a lack of clarity surrounding certain key elements of the subsidy and subsequent information provided by the Council appeared to materially alter information contained in the referral request, in particular regarding the value of the subsidy.

1.14 The Council's assessment, as originally submitted to the SAU, described the subsidy as comprising the components outlined in paragraph 1.8 of up to a minimum of £8.8 million. In response to the SAU's requests for clarification, the Council has since described the subsidy as a modification to an existing subsidy and, as a consequence of this, referred to the total subsidy valuation as a 'minimum of around £24 million', which reflects both the full management fee over the relevant period from now up to the end of the existing Contract and the other components set out in paragraph 1.8.[7]

1.15 The Council subsequently suggested that the actual subsidy that required consideration by the SAU was just the additional sum of up to £8.8 million as set out in its original referral. The precise value of the subsidy being referred, whether

[3] Sections 53(1) and 53(2) of the Act.

[4]See Referral of proposed subsidy to LiveWire by Warrington Borough Council - GOV.UK (www.gov.uk).

[5] Under section 52(2) of the Act, the Council is required to explain how the proposed subsidy meets the criteria to qualify as a Subsidy of Particular Interest. The Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022 set out the conditions under which a subsidy or scheme is considered to be of particular interest.

[6] Pursuant to section 81 of the Act. This states that (excepting certain permitted modifications), the modification of a subsidy or a subsidy scheme is to be treated for the purposes of the Act as the giving of a new subsidy, or the making of a new subsidy scheme, for the purposes of the application of the subsidy control requirements.

[7] The Council noted that contract had been in place since 2012 and has not been subject to a procurement or State Aid challenge.

it is the higher or lower amount, has remained unclear. The Council's position is that, irrespective of whether the total value is the higher or lower amount, the assessment provided would not change.

1.16 The Council also indicated that all relevant services (ie leisure, libraries and wellbeing services) provided by LiveWire within the present and future contract are intended to be designated as SPEI and sought to supplement the Assessment by providing a further 'preliminary assessment' of the section 29 requirements in respect of the existing contract and the proposed future contract which stated that all requirements of sections 29(2)-(7) are 'potentially complied with'. This did not form part of the Assessment contained in the Council's referral request but, in any event, we note that the Council itself states that its analysis on these points is not fully formed and the additional material contains only a 'preliminary view' of 'potential compliance'.

1.17 It is not the SAU's role to determine what constitutes a subsidy or its value, whether a subsidy can be given, or assess directly whether it complies with the subsidy control requirements. Public authorities are responsible for taking decisions about the subsidies they make.[8]

1.18 Noting the lack of clarity described above, we have provided an evaluation of the Council's Assessment with respect to each of the Subsidy Control Principles (the Principles).[9] The Council's Assessment also considers the requirements and prohibitions set out in Chapter 2 of Part 2 of the Act, specifically section 29 (SPEI) and section 20 (restructuring). Our evaluation addresses the Assessment originally provided and as accepted by the SAU on 9 May 2023. We note in our report where, following later communications about the nature and scope of the subsidy the Council is proposing to make, there could be uncertainty around the applicability of our evaluation to the proposed subsidy.

[8] See SAU Guidance, paragraph 2.3.

[9] Schedule 1 of the Act, see Statutory guidance, page 31.

2. Summary of the SAU's observations

2.1 This report provides an evaluation of the Assessment and supporting documentation provided to the SAU by the Council on 2 May 2023 and accepted on 9 May 2023. As set out in paragraphs 1.12 to 1.16, despite clarification discussions, there are some uncertainties regarding the characterisation of the subsidy that the Council is proposing to make. Public authorities are responsible for determining the scope and value of subsidies and clearly explaining these features as part of any referral to the SAU. As part of our report, we have indicated where our evaluation may be affected by a lack of clarity in the assessment provided.

2.2 As a general point, the Assessment would be strengthened by differentiating between the range of services that LiveWire provides and considering these separately, rather than bundling all services together. This would enable an identification of the relevant competitive market for such services and an assessment of these in turn, for example on whether alternative approaches to providing these services may be possible.

2.3 In relation to the individual Principles, the Assessment would be strengthened :

2.3.1 in relation to Principle A, by better explaining why the chosen subsidy addresses the specific equity rationale. The Council could have clarified whether the key policy objective is the universal provision of services for general public health reasons or the specific provision of services which are more likely to be accessed by vulnerable, marginalised or disadvantaged groups;

2.3.2 in relation to Principle B, had the Council attempted to value all parts of the proposed subsidy;

2.3.3 in relation to Principle E, by further consideration of alternative ways of achieving the policy objectives by considering how any individual services that LiveWire provides could be managed or procured separately; and

2.3.4 in relation to Principle F, again by considering LiveWire's services individually rather than as a bundle, to address directly where impacts on competition and investment in relation to particular activities may arise.

2.4 We consider that the Assessment would be strengthened by a careful consideration (with reference to the Statutory Guidance) of the application of the requirements of section 29 of the Act, relating to Services of Public Economic Interest, to all elements of the proposed subsidy. While the Council sought to supplement the Assessment by providing a further ‘preliminary assessment’ in respect of the existing contract and the proposed future contract, this did not form part of the Assessment contained in the Council's referral request. In any event, this was only described as a 'preliminary assessment' and the Council stated it has not yet fully formed its SPEI analysis and justifications.

2.5 Restructuring subsidies should be based on a credible restructuring plan to return the enterprise to long term viability within a reasonable period of time.[10] The Assessment does not set out how the proposed measures under the Restructuring Plan will address this other than through ongoing subsidy. The Assessment could be strengthened by providing:

2.5.1 further evidence to support the Council's view that the restructuring plan is a credible means of returning LiveWire to long-term viability by, for example, including additional reasoning and evidence as to the operational, financial restructuring and/or revenue enhancing measures which LiveWire will take; and

2.5.2 further evidence of how the subsidy specifically targets services that meet the public policy objective and contributes to an objective of public interest by avoiding social hardship or preventing a severe market failure.

2.6 Our report is advisory only and does not directly assess whether the subsidy complies with the subsidy control requirements.

2.7 We have not considered it necessary to provide any advice about how the proposed scheme may be modified to ensure compliance with the subsidy control requirements.[11]

[10] Statutory Guidance, paragraph 10.18.

[11] Section 59(3)(b) of the Act.

3. The SAU's Evaluation

3.1 This section sets out our evaluation of the public authority's Assessment of compliance with the subsidy control principles. The Council structured its Assessment to address each Principle in turn. Our evaluation follows that structure.

Principle A

3.2 Statutory Guidance sets out that public authorities may only give subsidies to pursue a specific policy objective. The objective must be one which remedies a market failure or addresses an equity concern.[12]

Policy objective

3.3 The Assessment identifies that the subsidy's policy objective addresses both an equity rationale and a market failure. It sets out both national and local policy objectives related to improving health and wellbeing including promoting and advancing participation in sport.

3.4 The primary focus of the policy objective is therefore stated as being the provision of leisure services to promote an active and healthy lifestyle to support good health and wellbeing. The Assessment identifies a particular intention to reduce health inequalities and support affordable access to a wide range of sports and activity facilities.

Equity Rationale

3.5 The Assessment sets out that providing restructuring support will support the continuation of the provision of leisure services by LiveWire and that those leisure services support the policy objectives above including by:

3.5.1 providing concessionary membership rates for low-income households and other target cohorts (such as carers, veterans, children in care). For the 2021/2022 year, 24% (2,423) of all memberships were concessionary memberships;

3.5.2 prioritising access to facilities such as pitches and sports halls for local community clubs at reduced rates;

3.5.3 proactively investing in facilities in low-income areas;

3.5.4 ensuring all facilities are as inclusive as possible; and

[12] Statutory Guidance, paragraph 3.18.

3.5.5 working with schools to enable key, and in some cases statutory, services including to enable physical education curriculum delivery.

3.6 The Assessment also states that the subsidy will support continuation of the provision of the library services being delivered by LiveWire within Warrington. There is reference to educational attainment levels and gaps in progress between disadvantaged and other pupils, showing that the objectives extend beyond physical activity and health issues. The Assessment sets out that the library services support the above objectives and address the equity rationale in a range of ways, including by providing community-based learning facilities.

3.7 In our view the Assessment provides clear evidence that the policy objective is targeted at the provision of leisure services through LiveWire and that the purpose of these leisure services is to improve the levels of physical activity and thereby improve physical and mental health outcomes.

3.8 The Assessment goes on to provide further reasoning as to why the policy objective addresses an equity concern. Here, the Assessment focusses on the provision of leisure services for low-income families and in low-income areas, the provision of accessible services and the provision of a variety of other community and support services. The Assessment lacks clarity as to how the library provision supports the stated policy objective(s). It is also not clear whether the key policy objective is the universal provision of services for general public health reasons or the specific provision of services which are more likely to be accessed by vulnerable, marginalised or disadvantaged groups.

3.9 The Assessment could be improved by better explaining why the chosen subsidy addresses the specific equity rationale and by better explaining how the library provision supports the policy objective(s).

Market Failure

3.10 The Statutory Guidance sets out that market failure occurs where market forces alone do not produce an efficient outcome. The most common cases of market failure which are relevant to subsidy control occur when at least one of the following features is present: the existence of externalities; the involvement of public goods; or imperfect or asymmetric information.[13]

3.11 The Assessment states that there is a market failure in relation to the provision of leisure services in Warrington. It reasons that whilst there is some commercial provision of gym and swimming facilities, there are two respects in which the market does not make sufficient provision.

[13] Statutory Guidance, paragraphs 3.21-3.32.

3.12 First, the Assessment sets out that whilst there are other commercial gym and swimming facilities in the area, they are operated purely on a commercial basis with membership fees being prohibitive for some residents. It goes on to state that LiveWire provides services, such as children's swim and sport playing pitches, at rates which would not be viable for commercial operators.

3.13 Second, it states that whilst the commercial operators who provide gym classes (but not swimming facilities) charge a broadly comparable monthly fee to LiveWire, there are not sufficient facilities being provided by those commercial operators to meet the demand within the administrative area of the Council. It then states that the market does not provide library services at all, meaning that there is a complete market failure in relation to this element of the services being delivered by LiveWire.

3.14 The Assessment also proposes that there is a 'negative externality' associated with the delivery of both community-based leisure facilities and library facilities. It argues that, because these activities are not commercially viable without a public subsidy, the market does not provide enough of these facilities to deliver against the public policy objectives outlined above. Commercial providers do not take into account the positive benefits to wider society which can flow from the increased wellbeing and health of residents through participation in leisure activities and library services.

3.15 In our view, the Assessment could be strengthened by following the Statutory Guidance in describing the market failures relevant to the policy objectives.[14] The presence of undesirable market outcomes as described in the Assessment (ie low levels of provision of services) does not, in itself, constitute a 'negative externality' market failure. Some part of any under provision is likely to result from a lack of affordability of the services in particular areas.

3.16 However, in line with Statutory Guidance, a 'positive externality' market failure can be inferred from the Assessment, namely that private leisure providers cannot capture the full social value of improved physical activity amongst the population (such as improvements to physical and mental health, thus reducing demands on public health services), because consumers will not be willing to pay for it. Suppliers therefore have insufficient incentive to provide such services.

3.17 However, it is not clear from the Assessment if this conclusion relates to all the services that LiveWire provide or a subset of them as, to a large extent, the subsidy supports a set of bundled services.

[14] Statutory Guidance, paragraphs 3.21-3.32.

Principle B

3.18 Principle B states that subsidies should be proportionate to their specific policy objective and limited to what is necessary to achieve it.

3.19 In evaluating this, the Assessment states that the forward modelling of costs and revenues in the Restructuring Plan is a key factor in determining the subsidy's proportionality and that it is limited to what is necessary. The Assessment further outlines recent cost increases and income reductions, the most significant of which is the rise in energy costs, alongside several cost reduction measures implemented by LiveWire.

3.20 The Assessment describes the individual components of the subsidy in more detail. In doing so, it mentions various aspects of the subsidy's design that have the aim of avoiding overpayment. The Assessment describes the role of the Subsidy Mechanism and the Grant in this regard.

3.21 The Assessment further notes that, as is demonstrated in the Restructuring Plan, LiveWire has no equity reserves on its balance sheet that it could draw upon to reduce the size of the subsidy required over the subsidy period, while noting that its existing reserves would sustain LiveWire's operation until April 2024, absent the subsidy.

3.22 The Assessment could be strengthened by evaluating the subsidy’s overall proportionality with respect to its policy objectives as opposed to solely focussing on demonstrating that the subsidy is the minimum necessary to keep LiveWire operational. The Assessment of this principle in particular would also benefit from clarity as to the total valuation of the subsidy given that some elements were not quantified as mentioned in paragraph 1.8(d) and 1.8(e).

Principle C

3.23 Principle C states that subsidies should be designed to change the beneficiary's economic behaviour. The public authority should describe the change of behaviour to achieve the specific policy objective that the subsidy will help spur and which would not happen without the subsidy relative to the counterfactual.[15]

3.24 The Assessment states that without the subsidy, LiveWire would go into liquidation and cease providing services when it runs out of cash in April 2024. The cash-flow forecast in the Restructuring Plan shows that LiveWire would have a negative closing cash/bank balance in the year ending March/April 2024 without the subsidy.

[15] Statutory Guidance, paragraphs 3.46–3.48.

3.25 Accordingly, the Assessment explains that the subsidy will change LiveWire's economic behaviour relative to the counterfactual (liquidation) by keeping LiveWire afloat and thus continuing to provide the services. It would do so by securing LiveWire's (a) short-term financial viability through the Grant and Fee Subsidy in Financial Year 2023/24 and (b) sustainability into the longer term through the Subsidy Mechanism and Investment Subsidy. In doing so, the subsidy would address the equity rationale and market failure and thus help deliver the public policy objective.

3.26 The Assessment would be strengthened with further evidence as to why the Council concluded that the counterfactual of liquidation was the most likely.

Principle D

3.27 Principle D requires that subsidies should not usually compensate for the costs the beneficiary would have funded without any subsidy. The public authority should explain the additional costs that the subsidy will cover and why those costs would not be funded by the beneficiary in the absence of the subsidy.[16]

3.28 The Assessment states that the Grant, Fee Subsidy, Subsidy Mechanism and Guarantee Subsidy are intended to meet the higher (incremental) operating costs of doing business, such as energy and wages, which cannot be met without the subsidy.

3.29 The Assessment also explains that the Fee Subsidy and the Grant are attempting to put LiveWire in a position that it would be under in normal circumstances, and the subsidies are simply putting LiveWire into the position that it would have been in if the higher than normal levels of inflation in energy costs, salary costs and other costs had not occurred.

3.30 Concerning the Investment Subsidy, the Council says it is part of the £10 million investment into the facilities managed by LiveWire. The Council leases these facilities to Livewire for only nominal or 'peppercorn' rents. This investment, therefore, confers an advantage on Livewire (as the tenant) as regards its competitors by improving LiveWire’s market offering. The Council could not determine the value of this subsidy but has reasoned that it is likely related to the difference in rental income that could be achieved due to the improved facilities.

3.31 The Assessment states that the subsidy is the only available route because initiatives to increase revenues or reduce costs are not feasible, and neither is raising external finance. In other words, LiveWire cannot fund the increased cost of trading and thus requires the subsidy. Hence, it indicates that the subsidy is not funding costs that LiveWire could have financed without the subsidy.

[16] Statutory Guidance, paragraphs 3.49–3.53.

3.32 The Statutory Guidance sets out that, when granting a subsidy, public authorities should consider carefully whether the subsidy is intended to cover (a) additional or exceptional costs or (b) business-as-usual costs. Subsidies that cover business-as-usual costs should not normally be given.[17] Such subsidies can allow an inefficient firm to remain in the market despite the presence of otherwise more efficient competitors.

3.33 In our view, the Assessment should have clarified the extent to which the subsidy is designed to cover business-as-usual costs. Where this is the case, the potentially distortive effects on competition should be reflected in the Assessment of Principles F and G. However, as discussed in paragraphs 3.56-3.60, should the Council proceed to designate and assess these services as SPEI, this implies that they would not be provided commercially on acceptable terms. So operational subsidies may be intrinsic to their delivery.

Principle E

3.34 Principle E states that subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive means.[18]

3.35 Statutory Guidance sets out that, once the policy objective has been identified, public authorities must determine whether a subsidy is the best means for achieving the policy objectives. As part of this, there should be consideration of other ways of addressing the market failure or equity issue.[19]

3.36 The Assessment sets out that LiveWire is unable to cover the impact of increased costs and reduced income, whether through its own resources or borrowing. The Council concludes that the only feasible option to deliver the objective is for the Council as contracting authority and owner of the property assets to grant a subsidy.

3.37 In our view, the Assessment clearly states its reasoning that in order to fulfil the described policy aims of maintaining all existing services, a subsidy would be required, as LiveWire would likely fail, absent a subsidy, if required to maintain all its existing services.

3.38 The Assessment then goes on to set out a series of alternative options which the Council considered. These included loans, reduction in service provision, insourcing and retendering:

[17] Statutory Guidance, paragraph 3.52.

[18] Statutory Guidance, paragraph 3.40-3.42

[19] Statutory Guidance, paragraphs 3.40-3.41.

3.38.1 the Assessment sets out that the Council considered the provision of loans (with or without a market rate of interest). However, this was rejected as the Council determined that the services will not generate sufficient revenue to support the repayment of such a loan. Furthermore, with no assets to secure a traditional loan, the likely market interest rate would be prohibitively high;

3.38.2 the Council also considered the potential for a reduction in the level of service provision. The Council provided evidence in its Assessment to support its conclusion that the necessary savings would result in a significant reduction in services and that this would significantly undermine the stated policy objectives;

3.38.3 the Council also considered terminating the contract with LiveWire and bringing services in-house. The Council provided some indicative cost modelling that indicated this would result in higher costs than providing the subsidy set out above. This option was assessed as more distortive than the provision of subsidy; and

3.38.4 the Council also considered terminating the contract with LiveWire and retendering. It concluded that a procurement exercise at this time would not result in achieving best public value for the range of services. However, the Assessment did not include evidence to support this conclusion.

3.39 In our view, the Assessment has considered a range of relevant alternatives to subsidy. The reasons for rejecting loans, and insourcing of leisure services are credible and widespread service reductions are reasonably rejected as contrary to the policy objective. However, there was limited discussion as to why retendering was not feasible.

3.40 The Assessment could be strengthened by further consideration of alternative ways of achieving the policy objectives if the services LiveWire provides could be unbundled, with different possible approaches to the different services, including the possibility of partial retendering.

Principle F

3.41 Principle F states that subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.[20]

3.42 As mentioned at paragraph 3.20, the subsidy design includes aspects that aim at safeguarding against overpayment. Additionally, the Assessment states that the

[20] Statutory Guidance, paragraph 3.60.

subsidy is intended to ensure that LiveWire can continue to provide the existing bundle of services, without aiming to increase service provision beyond catering for population increases. As mentioned under Principle E, it further submits that less distortive instruments, such as debt financing, were not viable.

3.43 The Assessment identifies the markets in which LiveWire is active to be the market for 'gym and fitness classes and swim facilities' and the narrower market for 'gym and fitness classes' in the borough of Warrington. It lists LiveWire's competitors in both markets and their respective per month pricing. As there are a number of competitors in the market, the Assessment submits that 'LiveWire is subject to fairly strong competitive constraints'. However, no market shares are provided as LiveWire does not hold any membership figures for rivals.

3.44 The Assessment concludes that competition impacts occur by virtue of LiveWire remaining in the market, as, in the counterfactual, an unknown proportion of LiveWire's customers would likely have migrated to its rivals. Moreover, the Assessment points to high barriers to entry in the market for 'gym and fitness classes and swim facilities', noting that the market for 'gym and fitness classes' has low barriers to entry.

3.45 Our view is that these aspects of the Assessment go towards an evaluation of effects on competition or investment, but the Assessment bundles together services provided without quantifying what proportion of the subsidy will flow towards specific activities. The Assessment could be strengthened if it further analysed the impacts on competition for services for which there are commercial markets. Additionally, a more dynamic assessment of those markets (eg entries and exits over time) and an identification of LiveWire's closest competitors and likely impacts on them would have strengthened the Assessment.

3.46 In our view, the Assessment could have benefitted from a fuller consideration of the Statutory Guidance, including a more in-depth evaluation of the subsidy and market characteristics as set out under Annex 2 of the guidance. Additionally, whilst the duration of the subsidy is stated to be until 2027, benefits from investment in the facilities operated by LiveWire will last until 2042, meaning there could be some lasting ongoing subsidy effect beyond 2027. The Assessment could be improved by setting out a consideration of any such effect.

3.47 The Assessment could also be improved by comparing the overall size of the subsidy to the size of the affected market(s) as, generally, a subsidy that represents only a small proportion of the total market size is less likely to have a significant impact on competition and investment.[21]

[21] Statutory Guidance, paragraphs 16.8-16.12.

Principle G

3.48 Principle G states that subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including, in particular, negative effects on (a) competition or investment within the United Kingdom and (b) international trade or investment.[22]

3.49 The Assessment identifies that the subsidy may deter new commercial entrants to the market if they can deliver the range of services that the Council want for the town in a commercially self-sustaining way. This is, however, considered unlikely as it states all market intelligence suggests that such services are generally delivered at a premium price, and so do not meet the Council's policy objectives.

3.50 It goes on to state that it is difficult to calculate with any certainty whether the subsidy measures could have a material effect on trade or investment. It is suggested that any such impact would be negligible, and that in any event it would be significantly outweighed by the positive contributions the subsidies would make towards achieving the policy objectives.

3.51 The Assessment concludes that the Council is satisfied that the positive contributions of providing the subsidies and ensuring the continued provision of affordable leisure services, ancillary public health related services and library services in the borough of Warrington clearly outweigh any potential impacts on trade, investment or competition. It supports this statement by setting out a range of performance data setting out participation rates across a range of LiveWire services including leisure sites located in areas of deprivation and libraries.

3.52 In our view, the Assessment's approach to assessing the likely impacts on trade and investment are presented at a high level, but this is commensurate with the description of the proposed subsidy.

3.53 Overall, the Assessment against Principle G could be strengthened by following more closely the Statutory Guidance, including setting out the potential distortive effects on competition, then setting out the subsidies benefits and undertaking an assessment of how it has approached balancing these factors in arriving at its decision.

3.54 More specifically in terms of domestic competitive impacts, the Assessment could be strengthened by differentiating the range of the services that LiveWire provides, effectively undertaking a more comprehensive and disaggregated market analysis. As described in paragraph 3.49, the Assessment suggests that there may be potential negative impacts on competition only in the case where a single provider might deliver the full range of services that LiveWire does, as opposed to a multiplicity of firms each providing a different suite of services. The Assessment

[22] Statutory Guidance, paragraphs 3.96-3.100.

could also be strengthened by setting identifying, disaggregating and assessing the relevant potential competitive markets.

Other Requirements of the Act

3.55 This step in the evaluation relates to the requirements and prohibitions set out in Chapter 2 of Part 2 of the Act, where these are applicable.[23]

Section 29: Services of Public Economic Interest

3.56 The Act sets out additional requirements which apply when giving subsidies for SPEI.[24] The Statutory Guidance defines these to be essential services provided to the public and may include, for example, postal services, social housing, and certain transport networks, particularly in rural or less populated areas of the country.[25]

3.57 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 that the service would not be provided, or would not be provided on the terms required, by an enterprise under normal market conditions.[26] SPEI subsidies must comply with the requirements set out in section 29 of the Act.

3.58 The Assessment refers to the designation of LiveWire services as SPEI. In doing so it differentiates, at times, between the existing Contract in place between the Council and LiveWire and a future ’revised Contract‘ to be put in place later. However, at another point it suggests that the services provided by LiveWire should always have been considered SPEI.

3.59 Clarification was sought from the Council as to how the section 29 criteria applied to this subsidy. The Council provided further detail and analysis in relation to this point, including stating that all elements of the present and future contract are intended to be designated as SPEI, those being leisure, libraries and wellbeing services. It said that it had not fully formed its SPEI analysis and justifications, however it was of the view that the range of services being delivered by LiveWire are for the public benefit and yet not viable for the market to deliver, and whilst there is alternative leisure provision in the borough, such provision is not affordable or accessible to all. As such it is therefore appropriate to classify these as SPEI.

3.60 The Council also sought to supplement the Assessment by providing a further ‘preliminary assessment’ of the section 29 requirements in respect of the existing contract and the proposed future contract which stated that all requirements of

[23] See Statutory Guidance, chapter 5.

[24] Section 29 of the Act.

[25] Statutory Guidance, paragraph 6.1.

[26] Statutory Guidance, paragraph 6.4.

section 29(2)-(7) are ‘potentially complied with’. This did not form part of the Assessment contained in the Council’s referral request but, in any event, we note that the Council itself states that its analysis is not fully formed and the additional material contains only a ‘preliminary view’ of ‘potential compliance’. This may in part be because the details of the proposed future contract are not yet available. Nevertheless,the SAU considers that the Assessment could be strengthened by a careful consideration of the application of the section 29 requirements to all elements of the proposed subsidy described in the referral with reference to the Statutory Guidance.

Section 20: Restructuring

3.61 The Assessment explains that due to an increase in energy costs and a weakened financial position since its emergence from the Covid-19 pandemic, without intervention LiveWire would run out of cash in April 2024 and thus have to file for liquidation. The Assessment further notes that LiveWire does not have the internal financial resources or access to external funding to meet the increased costs of running its services. The Assessment and supporting documentation note that the subsidies being given are to enable a restructure of LiveWire.

3.62 The Act states that an enterprise is ailing or insolvent if it would almost certainly go out of business in the short to medium term without subsidies, it is unable to pay its debts as they fall due, or the value of its assets is less than the amount of its liabilities, considering its contingent and prospective liabilities.[27]

3.63 Subsidies for restructuring ailing or insolvent enterprises are prohibited under section 20(1) of the Act unless certain conditions, set out in section 20(2)-(6) are met.[28] These are discussed in paragraphs 3.64 to 3.72. .

The enterprise has prepared a restructuring plan, and the public authority giving the subsidy is satisfied that the restructuring plan is credible, based on realistic assumptions, and prepared with a view to ensuring the return to long-term viability of the enterprise within a reasonable time period.[29]

3.64 The Council has provided LiveWire’s Restructuring Plan, dated March 2023. The Restructuring Plan aims to stabilise LiveWire's short-term financial position through the subsidy until the current contract ends and LiveWire can become a Teckal compliant model[30] that is owned and controlled by the Council.

3.65 As set out in section 20(3) of the Act, restructuring subsidies should be based on a credible restructuring plan to return the enterprise to long term viability within a

[27] Section 24(1) of the Act.

[28] Statutory Guidance, paragraph 5.33.

[29] Sections 20(2) and 20(3) of the Act.

[30] For an explanation of Teckal see CIPFA article - Teckal: The basics explained | CIPFA

reasonable period of time.[31] The Assessment does not set out how the proposed measures under the Restructuring Plan will address this other than through ongoing subsidy. The Assessment could be strengthened by providing further evidence to support the Council's view that the restructuring plan is a credible means of returning LiveWire to long-term viability by, for example, including additional reasoning and evidence relating to the operational restructuring (how LiveWire's costs could be reduced in the long term), financial restructuring (how the Council could restructure LiveWire's debt/obligations by modifying/deferring the repayment schedule while LiveWire implements its restructuring), and/or revenue enhancing measures (how the different revenue streams could be increased) which LiveWire will take.

The enterprise is a small or medium sized enterprise, or its owners, creditors or new investors have contributed to the cost of the restructuring.[32]

3.66 The Statutory Guidance states that the Public Authority's support should be limited to the smallest amount necessary to make the restructuring possible.[33]

3.67 The Assessment notes that LiveWire is a medium-sized enterprise and, in any event, has no reserves so it cannot draw upon such funding to reduce the subsidy.

3.68 As noted at paragraph 1.5, Livewire was established by the Council and any contributions from its owners or creditors would effectively be funded by the Council which is also the subsidy granter.

The public authority giving the subsidy is satisfied that it contributes to an objective of public interest by avoiding social hardship or preventing severe market failure.[34]

3.69 The Statutory Guidance states that 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.[35]

3.70 The Assessment states that the subsidy is intended to remedy a market failure, as noted under Principle A. However, the Assessment could be strengthened by explaining and evidencing how the subsidy prevents a severe market failure or social hardship.

[31] Statutory Guidance, paragraph 10.18.
[32] Section 20(4) of the Act.
[33] Statutory Guidance, paragraph 5.56.
[34] Section 20(5) of the Act.
[35] Statutory Guidance, paragraph 5.62.

A subsidy has not previously been given for restructuring the enterprise, or at least five years have passed since the last time a subsidy was given for restructuring the enterprise.[36]

3.71 The Statutory Guidance explains that restructuring support should not be given to an enterprise if it has previously received restructuring support on a different occasion in the last five years unless the circumstances that led to the need for the subsidy were unforeseeable and not caused by the beneficiary.[37]

3.72 The Assessment notes that LiveWire received a one-off grant from Warrington Borough Council of £2 million for increased energy costs provided in 2022/23. However, the Council stated that this was not regarding rescue or restructuring.

[36] Section 20(6) of the Act.

[37] Statutory Guidance, paragraphs 5.66-5.77.