



## SUBSIDY CONTROL ACT 2022: AN UPDATE

Following the Subsidy Control Bill 2021<sup>1</sup> receiving Royal Assent on 28 April 2022, the UK government and Competition and Markets Authority have published draft guidance on the new UK subsidy control regime.

The Subsidy Control Act 2022 (the **Act**) provides a new framework for the provision of subsidies within the UK, replacing the EU State aid regime which was repealed in the UK following Brexit (subject to the Northern Ireland Protocol to the EU Withdrawal Agreement dated 30 January 2020). On 1 July 2022, the Department for Business, Energy & Industrial Strategy (**BEIS**) published draft statutory guidance on the UK Subsidy Control

<sup>1</sup> Subsidy Control Act 2022 - Parliamentary Bills - UK Parliament

Regime<sup>2</sup>. In addition, the Competition and Markets Authority (the **CMA**) has published its own draft guidance document<sup>3</sup> and a draft Statement of Policy<sup>4</sup> which we outline in this briefing.

## Background

Last year, we published a briefing<sup>5</sup> in which we set out the details of the Subsidy Control Bill 2021 (the **Bill**) as it was then drafted. The Bill has since received Royal Assent on 28 April 2022, thus making it onto the statute books. However, it has not yet been fully implemented. It is expected that the Act will come fully into force during late 2022 or early 2023 following the implementation of secondary legislation.

In this briefing, we discuss the government's draft guidance, as well as the parallel draft guidance and Statement of Policy published by the CMA.

## Government draft statutory guidance

The government's draft guidance explains the legal obligations on public authorities under the new subsidy control regime. It is designed to provide a framework for public authorities when awarding subsidies under the Act. The guidance adds that it 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"*.

The draft guidance includes sections covering, but not limited to, the following: (1) how to identify if the support in question is a subsidy for the purposes of the Act (Chapter 2); (2) an explanation of the subsidy control principles, including a four-part framework to support public authorities to design their subsidies in a way which is consistent with the principles (Chapter 3); (3) an outline of the exemptions and permitted modifications to subsidies such as the general exemption for Minimal Financial Assistance (**MFA**) (Chapter 4); (4) an explanation of the provisions for public authorities

to provide subsidies for Services of Public Economic Interest (**SPEI**) (Chapter 7); and a description of the categories of subsidy that are prohibited under the regime (Chapter 10). The guidance further touches on how the referral process to the Subsidy Advice Unit (**SAU**) is intended to operate, and also outlines the transparency requirements and enforcement mechanism of the regime (Chapters 11-13).

In terms of key points from the draft guidance, as a first step the draft guidance states that public authorities must establish *"if the support...they are proposing to provide is considered a subsidy under the regime"*. To be considered a subsidy, the support must meet four conditions: (1) the financial assistance is given, directly or indirectly, from public resources by a public authority; (2) the financial assistance confers an economic advantage on one or more enterprises; (3) 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; and (4) 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.

When making an assessment against the subsidy control principles, the draft guidance states that *"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"* (paragraph 12, page 12). Public authorities will accordingly need to ensure, when considering whether or not to grant a subsidy, that the *"depth of their analysis on a subsidy is commensurate to the size and potential distortive impact of the subsidy"* and they 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"* (paragraph 14, page 12). Furthermore, the draft guidance provides advice to public authorities which are making assessments that are subject to the additional energy and environment principles.

Chapter 3 of the draft guidance sets out the *"four-part framework to help public authorities ensure that a subsidy is consistent"* (paragraph 90, page(s) 26-27) with the above-mentioned principles. The draft guidance sets out, and elaborates on, the following steps:

1. Identifying the policy objective, ensuring it addresses a market failure or equity concern and determining whether a subsidy is the right tool to use;
2. Ensuring that the subsidy is designed to create the right incentives for the beneficiary and bring about a change;
3. Considering the distortive impacts that the subsidy may have and keeping them as low as possible; and
4. Carrying out the balancing exercise.

In particular, on the third step of the above framework, the draft guidance provides examples of how subsidies can distort markets, for example by allowing *"less efficient recipients to remain in the market, when they would otherwise have gone out of business"*. Public authorities should familiarise themselves with these circumstances and should be mindful about how markets can be distorted, so that they abide by the principles set out in the Act. The draft guidance confirms that public authorities need to consider the distortive and potentially harmful impacts of a subsidy and in doing so they should consider: (1) the characteristics of the subsidy and whether they can be redesigned to reduce their negative impacts on the market; and (2) the *"geographical and distributional impacts of the subsidy"*. The draft guidance states that the *"design of a subsidy may be improved by the inclusion of clear performance indicators in the agreement"*. In accordance with

<sup>2</sup> Draft Statutory Guidance on the United Kingdom Subsidy Control Regime Subsidy Control Act 2022 ([publishing.service.gov.uk](https://publishing.service.gov.uk))

<sup>3</sup> Draft guidance on the operation of the subsidy control functions of the Subsidy advice unit ([publishing.service.gov.uk](https://publishing.service.gov.uk))

<sup>4</sup> Statement of policy on the enforcement of the SAU's information gathering powers ([publishing.service.gov.uk](https://publishing.service.gov.uk))

<sup>5</sup> HFW | Subsidy Control Bill 2021: UK announces post-Brexit state subsidy regime.

# “It is anticipated that the government and CMA will publish their final guidance later this year.”

paragraph 164 of the draft guidance, public authorities should therefore carefully consider when drafting subsidy agreements whether performance criteria can be included.

The draft guidance sets out examples of general exemptions from the subsidy control requirements. These include “*measures taken in response to natural disasters and natural or economic emergencies, and for reasons of national security and financial stability*”. The draft guidance also makes clear that “*subsidies and schemes related to the Withdrawal Agreement with the EU (including the Northern Ireland Protocol) and legacy subsidies and schemes*” are also exempt.

There are also separate provisions on subsidies for Services of Public Economic Interest (**SPEI**). These are subsidies for essential services such as “*postal services, social housing and certain transport networks*”. Without these subsidies these services would not be supplied in an appropriate way or may not be supplied at all by the market. Under the draft guidance, where a public authority wants to provide a subsidy in relation to SPEI, it will need to comply with certain requirements. These include that the public authority: (1) must be satisfied that the subsidy is limited to what is necessary to deliver the service; (2) must ensure that the SPEI subsidy is assessed against the subsidy control principles; (3) must ensure that the subsidy is provided in a transparent manner; (4) must ensure that the subsidy is regularly reviewed; and (5) must comply with the duty to include information in the subsidy control database. Public authorities should be mindful of these additional substantive and procedural requirements, and what services they apply to.

The draft guidance states that it is mandatory for public authorities to request a report from the SAU where they are giving or making a subsidy scheme of particular interest, and they may consider requesting a report where they are giving a subsidy scheme of interest. The draft guidance sets out the process that the SAU and public authorities should follow when requesting such a report.

According to draft legislation published by the government on 26 January 2022 a “*subsidy of particular interest*” may arise (as supplemented by the government’s response dated 24 August 2022 to its consultation on subsidies or schemes of interest and subsidies or schemes of particular interest<sup>6</sup>) where one of the following tests are met:

- the subsidy concerns a “*sensitive sector*” in excess of £5 million per enterprise;
- regardless of the sector which the subsidy concerns, it is in excess of £10 million per enterprise;
- the subsidy is given for “*restructuring ailing or insolvent enterprises, including insurance companies and deposit takers*”;
- it is a relocation subsidy of more than £1 million.

Sensitive sectors may include the manufacture of basic iron and steel, aluminium and copper production, motor vehicles and motorcycles, ships and floating structures, air and spacecraft and related machinery and the production of electricity. The rules include provision for supply chain investment linked to the sensitive sectors. As an anti-circumvention provision, all subsidies over one project may be aggregated over three years.

Public authorities will be advised to make a voluntary referral to the SAU when one or more of certain design features are present, including:

- there is evidence of a subsidy race or bidding war, where two or more public authorities are vying for new investment;
- the same, or a substantially similar, subsidy has been repeatedly made to the same recipient;
- the subsidy is linked to the ongoing economic activity of an enterprise, rather than being a one-off activity; or
- the subsidy is only open to one firm (there is no competition in the giving of the subsidy).

The draft guidance also helpfully summarises the position under the Act by outlining what mandatory referral requests should include. For instance, they should include any evidence relevant to making that assessment.

As outlined above, the draft guidance also outlines the transparency requirements and enforcement of the regime. Public authorities must upload details of the subsidies they have granted to a centralised database.

It appears that the final version of the government’s guidance will be published towards the end of 2022. It also appears likely that an outreach programme will be rolled out and secondary legislation enacted before the Act fully comes into force.

## CMA guidance

Running alongside the government guidance, the CMA has published its own draft guidance<sup>7</sup> on the SAU, which we discussed in our previous briefing<sup>8</sup>, and which will act as an independent body overseeing the UK’s new subsidy control regime. According to the CMA press release<sup>9</sup>,

<sup>6</sup> Subsidies and Schemes of Interest and of Particular Interest: government response ([publishing.service.gov.uk](https://publishing.service.gov.uk))

<sup>7</sup> Draft guidance on the operation of the subsidy control functions of the Subsidy advice unit ([publishing.service.gov.uk](https://publishing.service.gov.uk))

<sup>8</sup> HFW | Subsidy Control Bill 2021: UK announces post-Brexit state subsidy regime.

<sup>9</sup> Subsidy Advice Unit calls for views on guidance to assist public authorities - GOV.UK ([www.gov.uk](https://www.gov.uk))

the draft guidance sets out the role of the SAU, which will “provide advice to public authorities at all levels, evaluating their assessments of financial assistance they provide, via subsidies, to organisations”. According to the CMA statement, the “SAU will provide independent, non-binding advice on the assessments of certain high-value subsidies that are referred by public authorities, taking into account any effects that they might have on competition or investment in the UK”. The statement continues that “the SAU will periodically monitor and review the operation of the UK subsidy control regime”, whilst also explaining the “SAU’s proposed approach to transparency, consultation, confidentiality, and publication of its reports”.

The draft guidance provides an overview of the SAU’s functions, the procedures for requesting advice from the SAU and the key processes it will use, the analytical approach that the SAU will adopt in discharging its functions, and also the prioritisation principles which outline the factors the SAU may consider when deciding whether to produce a report following a voluntary referral. The draft guidance sets out what the SAU is required to do which includes: (1) “preparing and publishing reports on assessments of subsidies and schemes which are referred to it”, and (2) “monitoring and reporting on the effectiveness of the operation of the Act and the impact of its operation on competition and investment within the United Kingdom”. There is some helpful guidance on the circumstances in which a public authority will need to make a mandatory referral, i.e. where the subsidy relates to a subsidy scheme of particular interest or where the

Secretary of State directs that a proposed subsidy should be called in.

The CMA has also published a separate draft Statement of Policy<sup>10</sup> on the enforcement by the SAU of its information-gathering powers as set out in the Act and United Kingdom Internal Market Act 2020 (the **UKIM Act**). The draft Statement of Policy “sets out the broad principles which the SAU expects to apply in enforcing its information-gathering powers and the likely factors that may influence its decisions”. The draft Statement of Policy states that the provision of timely and accurate information is crucial to the SAU’s effectiveness and ability to fulfil its functions. The SAU can request that information be provided through informal means, for instance by asking that information be voluntarily provided or by inviting respondents to attend meetings and/or calls, or it can use its statutory information-gathering powers. The draft Statement of Policy confirms that pursuant to section 41 of the UKIM Act, the SAU “has the power to send a written notice...requiring a person to provide information or documents, to assist it to carry out its reporting and monitoring functions under...the Act”. The draft statement goes on to state that the UKIM Act “empowers the SAU to impose a penalty” where it considers that a person has failed to comply with the notice. Before issuing such a notice, the SAU will “have due regard to the impact of any such request on the addressee”. The SAU can ask for information including, but not limited to, internal business reports, strategy documents and other internal data to assist it to fulfil its functions. The draft Statement of Policy sets out the procedure for how the SAU will issue section 41 notices and the SAU’s policy

on enforcing its information-gathering powers. This includes a list of factors that might influence the SAU’s decision whether to impose a penalty, one of which is where the failure to comply is likely to have an adverse impact on the SAU’s ability to fulfil its monitoring and reporting functions and to do it in a timely manner.

### What the future holds for UK subsidies

It is anticipated that the government and CMA will publish their final guidance later this year. It is expected that the government will then implement an outreach programme and publish further explanatory material, alongside the statutory guidance, to ensure that public authorities understand the regime and can fulfil their obligations under the Act. The Act will then come into force.

Public authorities and businesses should familiarise themselves with the draft guidance available. It is likely that the bulk of the guidance will remain the same, when the final guidance is published.

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<sup>10</sup> Statement of policy on the enforcement of the SAU’s information gathering powers ([publishing.service.gov.uk](https://publishing.service.gov.uk))

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