

EXPLANATORY MEMORANDUM TO
THE SUBSIDY CONTROL (SUBSIDIES AND SCHEMES OF INTEREST OR
PARTICULAR INTEREST) REGULATIONS 2022

2022 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 These Regulations make provision as to the meaning of “subsidy, or subsidy scheme, of interest” and “subsidy, or subsidy scheme, of particular interest” for the purposes of the Subsidy Control Act 2022 (“the Act”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Business, Energy and Industrial Strategy has made the following statement regarding Human Rights:

“In my view the provisions of the Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Chapter 1 of Part 4 of the Act provides for certain subsidies and subsidy schemes to be referred to the Competition and Markets Authority (“the CMA”).
- 6.2 Section 52 of the Act provides that a public authority must request a report from the CMA on a “subsidy, or subsidy scheme, of particular interest” before the subsidy is given or the scheme is made. Section 56 of the Act provides that a public authority may request a report from the CMA on a “subsidy, or subsidy scheme, of interest” before the subsidy is given or the scheme is made.
- 6.3 Section 11(1) of the Act provides for the meaning of “subsidy, or subsidy scheme, of interest” and “subsidy, or subsidy scheme, of particular interest” to be set out in regulations made by the Secretary of State.

6.4 This is the first use of the power in section 11(1) of the Act to establish such definitions.

7. Policy background

What is being done and why?

7.1 The Act provides the framework for a new, United Kingdom-wide subsidy control regime. This regime will enable public authorities, including devolved administrations and local authorities, to deliver subsidies that are tailored and bespoke for local needs to deliver government priorities such as levelling up and achieving net zero carbon, as well as supporting the economy's recovery from COVID-19.

7.2 The new subsidy control regime will identify subsidies and schemes that have greater potential to lead to undue distortion and negative effects on competition and investment within the United Kingdom and/or on international trade and investment. These subsidies and schemes should be subject to more in-depth assessment by the public authority before they are given, and in some cases, they will be referred to the new Subsidy Advice Unit ("SAU") within the CMA for additional scrutiny and review of the public authority's assessment

7.3 The Act provides for the following subsidies and schemes to be subject to additional scrutiny before they are given or made:

- Subsidies or Schemes of Interest (SSoI), as defined in regulations, which may be referred to the SAU by the public authority giving or making the subsidy or scheme, and over which the SAU has discretion over whether to accept the referral,
- Subsidies or Schemes of Particular Interest (SSoPI), as defined in regulations, which must be referred to the SAU by the public authority giving or making the subsidy or scheme. The SAU must accept all SSoPI referrals, and
- Subsidies and Schemes where the Secretary of State has directed that a referral must be made under section 55 of the Act. The SAU must accept all such referrals.

7.4 The SAU's review will scrutinise the public authority's assessment of the subsidy or scheme and publish a report which may include non-binding recommendations of ways in which the assessment, or the subsidy design itself, may be improved. Upon acceptance of the referral, the SAU will publish its report within 30 working days, under normal circumstances.

7.5 These Regulations define which subsidies and schemes are defined as Subsidies or Schemes of Interest or Particular Interest. They set out the following general monetary thresholds that will determine whether a subsidy is a SoI or a SoPI:

- Subsidies granted outside of sensitive sectors are SoPI if they are over £10 million. All other subsidies between £5 to £10 million which do not meet the SoPI criteria are SoI.
- Lower monetary thresholds apply for subsidies granted in sensitive sectors. These will be SoPI if they are over £5 million, as these subsidies can be assumed to be more likely to have a distortive effect than those of an equivalent value granted outside of sensitive sectors.

7.6 These monetary thresholds will apply on a cumulative basis, taking into account certain other related subsidies which have been given for the same purpose within the

previous three financial years. A subsidy must also exceed £1 million in its own right in order to be subject to mandatory referral to the SAU.

- 7.7 In recognition of their unique characteristics, these Regulations also set out a bespoke approach for rescue and restructuring subsidies (which are subject to additional requirements under Chapter 2 of Part 2 of the Act for ailing or insolvent enterprises), and for permitted relocation subsidies (which are subject to additional requirements under section 18 of the Act).
- 7.8 All restructuring subsidies will be SoPI, given the higher risk of market distortions that may arise from interventions in such cases.
- 7.9 Rescue subsidies will be SoI. While they similarly have a higher risk of market distortions, mandatory referral is not appropriate in all cases as in some instances, an enterprise would almost certainly go out of business without the expedited receipt of a rescue subsidy. The government will set out in guidance an expectation that rescue subsidies should normally be referred to the SAU wherever feasible.
- 7.10 Regarding subsidy schemes, if the parameters of the scheme allow for the giving of a subsidy that meets the definition of a Subsidy of Particular Interest then that scheme will be defined as a Scheme of Particular Interest. Similarly, a scheme which would allow for the giving of a Subsidy of Interest is defined as a Scheme of Interest. For example, if a scheme allowed for the giving of a subsidy of above £10m (or which could exceed £10m when combined with other related subsidies) then that scheme will be a Scheme of Particular Interest.
- 7.11 Section 63 of the Act provides that subsidies given under schemes are exempt from referral to the SAU (since any referral will take place at scheme level). However, the Regulations also include specific provision for certain types of subsidies given under schemes which will be relevant when determining whether a referral should be made at scheme level:
- Subsidies given under general schemes which are open to enterprises operating in sensitive sectors but which are not specifically targeted at those sectors will not be subject to the lower SoPI threshold for sensitive sectors.
 - The cumulative monetary thresholds set out in the Regulations will apply differently for subsidies given under tax schemes. Only subsidies given under the same tax scheme within the past three financial years will count towards the SoPI threshold. But where that threshold is not met, all other subsidies given under tax schemes will be SoI, meaning that the schemes under which they are given can be referred to the SAU.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The issue of consolidation does not arise as this instrument does not amend any legislation.

10. Consultation outcome

- 10.1 Between 25 March and 6 May 2022 the government undertook a public consultation which sought views on:
- the categories of subsidies and schemes to be defined as Subsidies and Schemes of Interest or Particular Interest,
 - accompanying draft regulations setting out the government’s intended approach to setting criteria and definitions, and
 - the government’s initial proposals for related guidance.
- 10.2 The consultation received 40 responses. Respondents included a broad range of stakeholders from across the UK including charities, academics, members of the public, business representative organisations and trade industry groups, charities, local government and other public sector organisations.
- 10.3 A clear majority of the respondents expressed broad and comprehensive support for the approach set out in the consultation document and in the accompanying regulations. At least 73% of respondents, of those that responded to each particular question, agreed with every proposal set out by the government. Following the consultation the government made some minor changes to the draft regulations. These include introducing the new minimum value for mandatory referral of £1 million and changes to the treatment of subsidies given under tax schemes. A summary of the consultation and the government’s response to the consultation is available at: <https://www.gov.uk/government/consultations/subsidies-and-schemes-of-interest-and-of-particular-interest>.

11. Guidance

- 11.1 Guidance on the application of these Regulations will be included within the final statutory guidance on the Subsidy Control Act 2022. The government undertook a separate public consultation on a draft version of the statutory guidance which is available at: <https://www.gov.uk/government/consultations/statutory-guidance-on-the-subsidy-control-act-2022>.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is estimated to be £2.2m in the central scenario over a standard 10-year appraisal period (in NPV terms). These costs will fall on a small number of recipients who may receive Subsidies of Interest or Particular Interest.
- 12.2 The impact on the public sector is estimated to be £18.5m in the central scenario over a standard 10-year appraisal period (in NPV terms). The majority of the costs (£15.8m in the central scenario) fall on the government for financing the SAU to undertake reviews.
- 12.3 A full impact assessment has not been produced for this instrument as the effect of this instrument on the costs of business, the voluntary sector and the public sector is covered by the impact assessment produced in relation to the provisions of the Act, a copy of which is available at: <https://www.gov.uk/government/publications/subsidy-control-bill-2021-bill-documents>. In addition, a standalone analysis document (using the Impact Assessment template) has been published alongside the consultation response and is also available via the link at paragraph 10.3 above.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The approach to monitoring and review of the new subsidy control regime is set out in full in the impact assessment produced in relation to the provisions of the Act and the standalone analysis document referred to above. These set out a monitoring and evaluation plan covering the following key areas:

- The objectives of the regime as a whole, including SMART objectives
- Past research on the objectives of the regime and how these are impacted by subsidy control arrangements
- Purpose of the various strands of monitoring and evaluation review, methods and approach, and expected end users
- Proportionality, resourcing and data collection.

14.2 This plan sets out that the data collection will primarily be through the Subsidy Database provided for under section 32 of the Act, and that the broader monitoring and evaluation will primarily be through regular CMA reports on the functioning of the regime which are provided for under section 65 of the Act.

14.3 These Regulations will also be included within the same monitoring and evaluation plan and it is anticipated that the SSoPI and SSoI thresholds and criteria will be a key focus of the CMA's monitoring reports. The CMA is required to publish a monitoring report within 3 years after implementation of the regime, and at regular intervals thereafter.

14.4 The instrument does not include a statutory review clause.

15. Contact

15.1 Rubel Ahmed at the Department for Business, Energy & Industrial Strategy Telephone: 0121 221 2500 or email: rubel.ahmed@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Eve Cinnirella, Deputy Director for Subsidy Control, at the Department for Business, Energy & Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Jacob Rees-Mogg MP, the Secretary of State for Business, Energy and Industrial Strategy at the Department for Business, Energy & Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.