

Subsidy Control Act 2022 (the "Act") – a Guide

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1 Purpose of this guide

- 1.1 This guide is designed to help potential recipients of investment from Big Society Capital Limited ("**BSC**") and Access – the Foundation for Social Investment ("**Access**") ("**Investees**") understand their obligations under the Subsidy Control Act 2022 (the "**Act**"), including the process to follow before receiving financial assistance. Investees will need to be aware of their obligations under the Act, and put in processes to ensure that they comply. Investees should also be aware of the rules that BSC and Access are subject to and (insofar as you can) help BSC and/or Access comply with their obligations by making sure that any financial assistance the Investee receives can lawfully be given by BSC and Access. If they do not, there is a risk of challenge by the Competition Appeal Tribunal which, in the worst case scenario, could require the Investee to return any investment to BSC or Access.
- 1.2 The Act and relevant secondary legislation effectively replace the previous regime under the European Union which referred to subsidy control as "state aid". The requirements of the Act are explained in more detail in the UK subsidy control statutory guidance produced by BEIS¹ (the "**BEIS Guidance**"). This guide is intended to draw attention to the key issues and considerations under the Act, and should be used in conjunction with the BEIS Guidance, as well as the Act itself. Please note that this document is only a guide and so if you have any questions regarding the application of the Act to your particular circumstances, please seek independent legal advice. BSC, Access and Stephenson Harwood LLP cannot accept any responsibility or liability for decisions Investees take in relation to their own financial assistance.

2 How to use this guide

- 2.1 If you are reading this guide as a recipient of investment from BSC (either as an investment manager or a front line organisation) (a "**BSC Investee**"), that investment is potentially a subsidy under the meaning of the Act. You are therefore recommended to comply with the Act (with the help of this guide) to ensure that you are not required to return the investment to BSC.
- 2.2 If you are reading this guide as a recipient of funds from Access (an "**Access Investee**"), you are being asked by Access to distribute the funds in accordance with the Act (with the help of this guide). You may also find it helpful to pass the guide on to your investees as you will be asking them for certain information (for example,

¹ Link here: [UK subsidy control statutory guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/uk-subsidy-control-statutory-guidance)

under the transparency requirements at section 13 of this guide) to enable you to comply with the Act.

3 Background to the Subsidy Control Act 2022 (the "Act")

- 3.1 Investees may of course be familiar with the "old" state aid regime, which was in force in the UK until 31 December 2020, when the Brexit UK-EU transition period expired. Between 1 January 2021 and 31 January 2023, a transitional arrangement was in place.
- 3.2 The operative parts of the Act came into force on 4 January 2023, and so these are the rules that now apply in the UK.

4 Introduction

- 4.1 The UK subsidy control regime is intended to be permissive rather than restrictive. In contrast to the EU state aid regime, the proposed new UK system starts from the position that subsidies are permitted if they are in line with certain subsidy control principles, with no need to obtain any formal approval before granting the subsidy.
- 4.2 Prior to awarding any subsidy, BSC and Access, in conjunction with Investees, will need to consider the following steps:
 - 4.2.1 **Step 1:** Determine whether the funding is a subsidy.
 - 4.2.2 **Step 2:** Check whether the subsidy or scheme needs to be assessed against the subsidy control requirements.
 - 4.2.3 **Step 3:** Ensure the subsidy or scheme complies with the prohibitions and conditions.
 - 4.2.4 **Step 4:** Design the subsidy to ensure compliance with the subsidy control principles.
 - 4.2.5 **Step 5:** Check the criteria for subsidies or schemes of interest or particular interest, and consider referral to the Subsidy Advice Unit.
 - 4.2.6 **Step 6:** Publish the subsidy or scheme on the subsidy database.
 - 4.2.7 **Step 7:** Understand the risk of challenge.

A flow chart setting out the questions involved in the above process is contained at Appendix 1.

5 Step 1: Is the funding a "subsidy"?²

5.1 BSC and Access must establish whether the funding they are proposing to provide amounts to a subsidy under the regime.

5.2 A subsidy is defined as financial assistance which is given directly or indirectly from public resources by a public authority, and which:

- (i) confers an economic advantage to one or more enterprises;
- (ii) is specific insofar as it benefits one or more enterprises over other enterprises in respect of goods or services; and
- (iii) has, or is capable of having, an effect on (i) competition or investment within the UK (ii) trade between the UK and a country or territory outside the UK; or (iii) investment as between the UK and a country or territory outside the UK.

For these purposes, Investees should assume that BSC and Access are public authorities.

5.3 Consider the questions below. If your answer to all of them (1A to 1D) is 'yes', your financing is a subsidy. If one or more of your answers are 'no', it is not a subsidy. As referred to in section 1.1, Investees should bear in mind that if they have received subsidy that is found to be in non-compliance with the Act, the Investee may be required to return that subsidy to BSC/Access (as applicable).

5.4 **Question 1A.** *Is the financial assistance given, directly or indirectly, from public resources by a public authority?*

5.4.1 The answer to this question will be 'yes' if you are receiving financing directly from BSC or Access. If you are providing onward financing (for example, an investment manager) and are using this guide to assess whether it may be a subsidy, please see further guidance below.

5.4.2 "**Public resources**" – any finance deployed using either BSC or Access should automatically be considered "public resources".

5.4.3 A "**Public authority**" is defined as a person who "exercises functions of a public nature". This includes public authorities at any level of central, devolved, regional or local government and non-governmental bodies that are performing a public function. Further case law is required to bring clarity to the meaning of "functions of a public nature", and you will need to form your own view about the activities you carry out and the way you are funded. However, as a general rule:

- (a) **if you are an Access Investee**, please treat yourself as a public authority for the purposes of the Act.
- (b) **if you are a BSC Investee**, you are less likely to be a public authority for the purposes of the Act, but you will need to assess this carefully - particularly if you receive significant public funding,

² Refer to Chapter 2 of the BEIS Guidance

provide a public service or carry out activities in the place of local or central government. This analysis will differ depending on whether you are an investment manager investing in front line organisations, or a front line organisation itself.

5.5 **Question 1B.** *Does the financial assistance confer an economic advantage on one or more enterprises?*

5.5.1 The Investee must be an 'enterprise': any entity engaged in an economic activity, which means offering goods and services on a market.

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

(a) If the financial assistance is provided 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, the relevant public authority would need to be able to show that:

(i) the financial assistance is provided by both the public authority and private operators at the same time;

(ii) the private operator's financial contribution is significant;

(iii) the public authority and private operators provide the financial assistance on identical or equivalent terms (or the private operator is providing assistance on a more generous basis) including those terms that relate to risk and reward;

(iv) 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

(v) the private operators hold a similar 'starting position' in the giving of financial assistance, e.g. if the public authority is a new investor, it cannot rely solely on evidence that existing investors are investing on the same terms.

(b) Examples of financial assistance that may not meet the economic advantage test (and will not confer an economic advantage) include:

(i) Purchasing goods and services following appropriate public procurement processes at market rates;

- (ii) a loan, guarantee or equity investment provided on CMO 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 or profitability analysis, or both.

5.5.3 Appendix 4 provides guidance on how cash and non-cash financial is to be valued, which may be helpful in comparing terms with the market. Cash and cash equivalents of under £315,000 may be capable of falling under the Minimal Financial Assistance exemption in the Act (see section 7).

5.6 **Question 1C.** *Is the financial assistance specific? That is, has the economic advantage been provided to one (or more than one) enterprise, but not to others?*

This covers financial assistance that is provided to specific beneficiaries determined on a discretionary basis by public authorities, as well as assistance that only benefits (directly or indirectly) enterprises in a particular sector, industry or area, or with certain characteristics.

5.7 **Question 1D.** *Will the financial assistance have, or is it capable of having, an effect on competition or investment within the UK, or trade or investment between the UK and another country or territory?*

To constitute a subsidy, the assistance must have a genuine, adverse effect that is more than incidental or hypothetical on domestic competition or investment in the UK, or on international trade or investment.

In determining whether the financial assistance is capable of having an effect on competition, the most important part of the test is the market in which the Investee operates (which, for BSC Investees, will depend on whether the investee is an investment manager or a front line organisation). If there is no evidence of a currently operating competitive UK market, relevant distortive effects are less likely. For example, investment in a social enterprise that helps 16-18 year olds gain work experience is less likely to be considered as having a distortive effect, given the lack of an operating competitive UK market in this area. On the other hand, funding to an investment manager that attracts clients and investment from across the United Kingdom, with a national investment portfolio, is more likely to be seen to have a distortive effect.

Nevertheless, as the assessment is forward-looking, it is important to take into account foreseeable market developments when considering the effects of a measure on competition or investment in the UK. The BEIS Guidance also specifically states that a measure could have a relevant effect on competition and investment in the UK even where the market covers a very small geographical area or where the amount of financial assistance is very low. Therefore, this test represents a relatively low bar, and Investees should take caution before concluding that a subsidy is unlikely to have an effect on competition or investment in the UK (or international trade or investment).

6 Step 2: Check whether the subsidy or scheme need to be assessed against the subsidy control requirements

6.1 Once you have established that your proposed assistance amounts to a subsidy, you will need to consider whether the subsidy or scheme needs to comply with the subsidy control requirements, including the subsidy control principles. Do this by analysing which of the routes below are the most appropriate. If your proposed subsidy falls under a streamlined route, you will **not** need to assess compliance with the subsidy control requirements.

6.2 A "subsidy scheme" is defined as a scheme made by a public authority providing for the giving of subsidies under the scheme (Subsidy Control Act, clause 10(1)), and are generally used to reduce administrative burden because they allow for multiple subsidies to be granted providing they fulfil the same eligibility criteria and have the same policy purpose. The key elements of subsidy schemes are set out below:

6.2.1 In order for a scheme to be treated as a "scheme" for the purposes of the Act (rather than simply being labelled as such), the scheme will need to describe the eligibility, terms and conditions for subsidies that may be given under the scheme.

6.2.2 As with all subsidies, subsidy schemes must be consistent with the subsidy control principles (see section 8) and other requirements in the Act. Compliance with the subsidy control principles is assessed in the same manner as for individual subsidies.

6.2.3 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, public authorities may choose to relaunch the same or a similar scheme, having carried out a new assessment.

For details on the transparency requirements in relation to schemes, refer to section 13 of this guide.

6.3 The government intends for public authorities to be able to grant the vast majority of subsidies through one of the self-assessment routes:

- baseline route
- streamlined route

Route 1 – the Baseline Route – compliance is required with the subsidy control requirements (including the subsidy principles)

6.4 The Baseline Route will be applicable if the proposed subsidy is not appropriate for the streamlined route, or is not covered by one of the exemptions referred to in section 7. This route requires public authorities to undertake an assessment against the main principles (see section 9) in order to consider the benefits and potential distortive impacts of the subsidy. Public authorities can use the template in section 10 to do so.

Route 2 – the Streamlined Route – no assessment needed against the subsidy control requirements.

- 6.5 The Streamlined Route is simpler than the baseline route to allow public authorities to give certain types of subsidy, without having to do their own assessments against the subsidy control principles. Third parties cannot challenge a subsidy given correctly under a streamlined route, but your subsidy may be challenged on the basis that it is not compliant with the route.
- 6.6 The Streamlined Routes are for subsidies relating to:
- 6.6.1 Research, development and innovation (covering subsidies for feasibility studies, industrial research and experimental development projects, and small and medium sized enterprise RD&I support).
 - 6.6.2 Energy usage (covering subsidies for energy demand reduction, green heat networks and green skills training).
 - 6.6.3 Local growth (covering subsidies for SMEs for business development projects and support for the employment of workers with disabilities and disadvantaged workers).
- 6.7 For each of these, BEIS has published a document³ establishing the Streamlined Route and accompanying guidance, explaining the purpose and scope of Streamlined Routes in general and discussing the detail of types of subsidy covered by the subsidy scheme established by the Streamlined Route. We provide further details on the energy and local growth routes (which we believe are most relevant for Investees) below. Please refer to the footnoted documents for more detail.
- 6.8 **Energy usage streamlined route.** The route enables subsidies to be given in three key areas (energy demand reduction, green heat networks, and green skills training) to reduce energy usage:
- 6.8.1 **Energy demand reduction.** This helps public authorities give subsidies to take energy efficiency, clean heat and additional energy infrastructure measures in buildings. This category can be separated into three overarching areas for subsidies that improve buildings. Subsidies in these three areas can be given together or separately. These include:
 - (a) measures relating to improving the energy efficiency levels of a building (such as the upgrading of fabric measures like insulation or double glazing);
 - (b) the integration of low-carbon heating solutions within the building (such as installation of a heat pump or connecting to an existing low carbon heat network); and/or
 - (c) the inclusion of additional energy infrastructure measures (such as the integration of on-site renewable energy like solar PVC, the installation of energy storage for on-site generation or the investment in the digitalisation of the building to prepare it for smart building readiness).

³ Link here: [Local Growth Streamlined Subsidy Scheme](#); [Research, Development and Innovation Streamlined Route](#); [Energy Usage Streamlined Subsidy Scheme](#)

The maximum subsidy for a single project to a single enterprise is £3m. Please refer to the document referred to in the footnote below for further details.

6.8.2 **Green heat networks.** This is designed to address cost barriers for switching from fossil fuel to green heat networks such as heat pumps, by facilitating public authorities to provide subsidies for their set-up. This category is targeted towards undertakings for development of a low carbon heat network. For these purposes a "Green Heat Network Project" means a heat network that delivers thermal energy (heat or cooling) with an average annual carbon intensity of no more than 100 grams of carbon dioxide and equivalent emissions (CO₂e) emitted per kWh of thermal energy delivered to customers. The following preliminary details apply:

- (a) The total award in any project is £15 million.
- (b) Eligible costs include commercialisation costs and construction costs.
- (c) Commercialisation activities cannot exceed 5% of the subsidy. Construction activities will be the final subsidy amount less any costs towards commercialisation.

6.8.3 **Green skills training.** This category specifically focuses on green skills related to the heat and building sector. Subsidies can be given under this category to a range of training providers across the UK. The subsidy will support the delivery of accredited training at scale to areas related to energy efficiency, low-carbon heating installation, maintenance sectors and retrofit coordinators. The following preliminary details apply:

- (a) A subsidy can be provided to a training provider to address shortages of green skills. The training provider must state the professional bodies to which they belong and must be registered with the UK Register of Learning Providers. The training provider must deliver training to national standards resulting in the demonstration of competence from the trainee.
- (b) The eligible costs include the trainers' personnel costs, trainee's personnel costs, operating costs and advisory services, subject to certain limitations. In particular, a public authority must provide subsidies to a training provider where they are addressing a gap in that region's market. This should be conducted through the form of a high-level market review.

6.9 **Local growth streamlined route.** Under this route, support may be given to the following categories:

6.9.1 **Support to SMEs for business development projects.** All start-ups and SMEs that are planning a business development project may be awarded subsidies under this scheme unless they have already listed on a stock exchange. For these purposes, a start-up is a small enterprise that has registered or begun trading within the five years before the award of the subsidy, has not yet distributed any profits and has not been formed by the merger of one enterprise with any other enterprise that would not

independently qualify as a start-up at the time the subsidy is awarded. An SME may receive a subsidy to support the eligible costs of projects that will increase its output or efficiency, or increase the quality of the products or services it supplies. The specific types of project that may be subsidised are any combination of the following:

- (a) the setting up of a first establishment (i.e. a place of business for the production or sale of goods or the provisions of services) or of a new establishment in addition to an existing establishment or establishments;
- (b) an increase in the production capacity or production quality of an existing establishment; and
- (c) the diversification of output of an existing establishment to produce new products or provide new services.

The eligible costs are:

- (a) capital expenditure required for the project;
- (b) wage costs of extra employment directly created by the project;
- (c) training costs directly related to the project; and
- (d) professional advisory services directly related to the project.

6.9.2 Support for the employment of workers with disabilities. Subsidies may only be awarded under this category for the wage costs of workers with disabilities, on an ongoing basis and for certain additional costs to an enterprise of employing workers with disabilities. These costs must be additional to any costs the enterprise is required to incur to comply with legal obligations that apply when employing a person with a disability under the relevant legislation. The maximum award amount to a single enterprise in a single year for any combination of the eligible costs under this category is £5 million. This is subject to the following conditions:

- (a) an enterprise in receipt of a subsidy for wage costs must commit to creating and filling the posts within six months of the date of the subsidy award, or another period agreed between the public authority and enterprise, and the enterprise must commit to retaining the worker with disabilities for a defined minimum period;
- (b) where support is given for the wage costs of a worker with disabilities, this must be in proportion to the extent of the impact that the disability has on the person's ability to do the tasks associated with the post they are to fill; and
- (c) where a subsidy has been provided for the wage costs and additional costs of the same worker or workers for three consecutive years, the public authority should review the case before awarding a further period of subsidy.

6.9.3 **Support for the employment of disadvantaged workers.** A subsidy may be awarded under this category to any enterprise for:

- (a) a portion of the operational costs of access programmes to increase participation by persons in groups that are underrepresented in the labour market, disadvantaged workers, severely disadvantaged workers or a combination of the three. The maximum award to a single enterprise for the operational costs of access programmes is £500,000; and
- (b) a portion of the wage costs and additional costs of employing disadvantaged and severely disadvantaged workers. The maximum award to a single enterprise for the wage costs of employing disadvantaged or severely disadvantaged workers, and for support workers, is £5 million.

An enterprise in receipt of a subsidy for wage costs must commit to creating and filling the posts within six months, retaining the posts for three years after the date of the subsidy award, notifying the public authority when the anticipated number of workers have been recruited, and reporting to the public authority three years after the date of the subsidy award, or at any other interval required by the public authority, informing them of the employment status of those workers within the enterprise.

7 Exemptions to subsidy control requirements

Minimal financial assistance ("MFA")⁴

- 7.1 The subsidy control requirements do not apply to subsidies given to a single enterprise if the total amount of assistance given to the enterprise within the applicable period (the elapsed part of the current financial year and the two financial years previously) is £315,000 or less. This threshold is higher than the EU state aid "de minimus" equivalent of a EUR 200,000 limit.
- 7.2 Subsidies given under MFA provisions are very unlikely to have any distortive impacts on domestic competition or investment and/or international trade or investment. Subsidies given under MFA are therefore exempt from the majority of the substantive requirements of the Act. This means that:
- 7.2.1 no assessment against the subsidy control principles or energy and environment principles is required;
 - 7.2.2 most of the prohibitions and other conditions need not be considered, with two exceptions:
 - (a) the prohibition on giving subsidies relating to goods for export performance; and
 - (b) the prohibition on domestic content.
 - 7.2.3 The transparency obligations (as referred to in section 13 of this guide) do not apply if the subsidy is no more than £100,000 but they do apply if the subsidy exceeds this amount. This means that for every individual subsidy provided of more than £100,000, the public authority needs to include details of the subsidy on the subsidy control database.
- 7.3 Investees distributing subsidies may want to consider using focussed exemptions to Act requirements such as SPEI assistance or the Streamlined Routes as far as possible. This would avoid overreliance on general exemptions such as MFA which would be better suited to more general subsidies that cannot avail themselves of the more focussed exemptions. This 'exemption of last resort' approach to MFA may allow for greater subsidies being provided to single organisations.
- 7.4 **Points to note when receiving an MFA subsidy**
- 7.4.1 Public authorities awarding subsidies as MFA must comply with certain procedural requirements to ensure that enterprises only receive subsidies through the MFA exemption when they are entitled to do so. As referred to in section 1.1, Investees should note that if they have received a subsidy in non-compliance with the Act, they may be required to return the subsidy to BSC/BSC's investment manager/Access (as applicable). Before giving the exempted subsidy, a public authority must give to the enterprise a **minimal financial assistance notification**. The subsidy cannot be granted until the

⁴ Refer to Chapter 7 of the BEIS Guidance for further detail.

recipient provides written confirmation that the total of £315,000 will not be exceeded by the enterprise receiving the proposed assistance.

- 7.4.2 A minimal financial assistance notification means a written statement:
- (a) explaining that the authority is proposing to give to the enterprise a subsidy by way of minimal financial assistance;
 - (b) specifying the gross value amount of the assistance; and
 - (c) requesting written confirmation from the enterprise that the total amount specified in clause 36(1) of the SCA will not be exceeded by the enterprise receiving the proposed assistance.
- 7.4.3 A **minimal financial assistance confirmation** means a written statement confirming that the subsidy is given as minimal financial assistance, the date on which it is given and the gross value amount of the assistance.
- 7.4.4 The enterprise must keep a record of this information for at least three years beginning on the date on which the subsidy was given.
- 7.4.5 You can only award the subsidy when you have received confirmation from the recipient enterprise that the MFA threshold will not be exceeded by the enterprise receiving the proposed assistance.
- 7.4.6 Public authorities can satisfy these requirements as part of the standard communications between the authority and an enterprise before a subsidy is given, for example using email or automated online processes or forms. An example of text that could be used as part of an MFA notification letter is included in chapter 7 of the BEIS Guidance.

7.5 **Services of public economic interest ("SPEI") assistance**

When is a service considered to a SPEI?

- 7.5.1 SPEIs 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. Such services were previously referred to as Services of a General Economic Interest (SGEI) under the EU State aid regime. To designate a service as a 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. This will be dependent on the needs of the local community in question and the prevailing market conditions – there is therefore greater flexibility under the Act than its EU predecessor. By way of example:
- (a) funding for an additional bus service to isolated areas would be considered a SPEI if the service would not be economical for bus providers under normal market conditions;
 - (b) if the service to the isolated areas would be provided anyway, the funding would not be considered a SPEI.

If in doubt, Investees are encouraged to seek legal advice.

When is public spending on a SPEI considered to be a subsidy

7.5.2 The specific rules for subsidies for SPEIs broadly mirror the EU state aid rules on services of general economic interest. The most relevant SPEI exemption for BSC's and Access' purposes is likely to be the exemption on reporting for the provision of certain social services – see section 7.4.8 below.

7.5.3 SPEI subsidies must follow the general principles for all subsidies (i.e. the four limbed test in section 5 of this guide). In particular, the service provided in the public interest must entail an economic activity to be considered a SPEI. Public spending on non-economic services (i.e. services which are not offered on a market) would not be considered to involve a subsidy. By way of example:

A public authority is looking to engage an external training provider to provide IT training to local residents:

(a) if the public authority collaborates with a non-profit organisation that provides free sessions by providing free use of local library facilities, then this would not be a subsidy because the activity is not economic.

(b) if the public authority decides to subsidise bespoke external training provider to provide commercial IT training to local residents, and it does so because the public authority assesses that the service would not be provided on the market in the way that it wishes, then this would be an economic service (because the residents pay a fee to the training provider). This would constitute a SPEI subsidy.

7.5.4 Public authorities should also consider whether public spending on a SPEI confers an advantage on the SPEI enterprise (as per section 5, Question 1B). Payment for goods or services purchased through a competitive process will not generally be considered to confer an economic advantage, as the public authority will be purchasing such goods or services at a market rate.

7.5.5 Any subsidy granted to an SPEI enterprise must be limited to what is necessary to deliver the service, taking into account a reasonable profit.

7.5.6 However, the subsidy control requirements do not apply to SPEI assistance if the total amount of minimal and SPEI financial assistance given to the enterprise within the applicable period (the elapsed part of the current financial year and the two financial years previously) does not exceed £725,000.

Procedural requirements

7.5.7 Before giving SPEI assistance, a public authority must give to the enterprise a SPEI assistance notification (a statement containing: an explanation that the authority is proposing to give to the enterprise a subsidy by way of SPEI assistance; specification of the gross value amount of the assistance; and a request for written confirmation from the enterprise that the total amount of

£725,000 will not be exceeded by the enterprise receiving the proposed assistance), and the public authority may proceed to give the assistance only after receiving confirmation from the recipient that the threshold has not been achieved.

7.5.8 Further procedural requirements include that the public authority must ensure that the subsidy is:

(a) provided in a transparent manner, such that the subsidy is given through a written contract or other written legally enforceable arrangement; and

(b) regularly reviewed (at least once every three years).

7.5.9 However, a public authority does not need to upload onto the subsidy transparency database any SPEI assistance which totals less than £14.5 million per task. Additionally, even if the SPEI assistance is more than £14.5 million, a public authority does not need to upload it if the subsidy is for areas including hospital care and the provision of long-term care, childcare, access to the labour market, social housing and the social inclusion of vulnerable groups.

7.5.10 Given the level of procedural requirements and analysis required to provide SPEI assistance, and the fact that the regime mirrors the more familiar EU state aid rules and requires compliance with the subsidy control principles that Investees will become familiar with, (Access) Investees should be comfortable with issuing (or in the case of BSC Investees, issuing or receiving as applicable) SPEI assistance providing that they have carried out the required level of diligence and analysis.

7.6 **Other exemptions**

7.6.1 Chapter 8 of the BEIS Guidance covers further exemptions, but have not included further detail as we predict these are less likely to be relevant to Investees. Investees should, however, take a look at Chapter 8 to see if any of them are relevant for their particular circumstances.

8 Step 3 – Ensure the subsidy or scheme complies with the prohibitions and conditions⁵

8.1 Public authorities are prohibited from giving certain subsidies, and are subject to other requirements in relation to giving certain other subsidies.

8.2 The general prohibitions are below. We have not included full details where we expect the prohibitions to be less relevant to those reading this guide.

Prohibition	Comment
Unlimited guarantees	Any subsidy that would guarantee an unlimited amount of liabilities or debts, or that would guarantee a finite amount of liabilities or debts but over an indefinite period, is prohibited.
Rescue and restructure	<p>The Act also prohibits rescuing or restructuring subsidies to ailing or insolvent enterprises unless certain requirements are met. "Ailing or insolvent" is used to define an 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.</p> <p>The prohibition on rescue and restructuring subsidies is 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. There is not wider prohibition against giving subsidies that are not rescue or restructuring subsidies to ailing or insolvent enterprises. For example, an access to finance subsidy scheme open to small businesses generally does not constitute rescue and restructuring aid even if one or more recipients (among many) may be ailing or insolvent.</p> <p>Further details of these requirements can be found in chapter 5 of the BEIS Guidance.</p>
Export performance	A subsidy that is contingent upon export performance relating to goods or services is prohibited. In practice this means that public authorities cannot make the award of a subsidy contingent on a recipient agreeing to increase its level of exports to customers abroad. A public authority is free to award subsidies to recipients that export during the course of their ordinary business.
Use of domestic goods or services	Subsidies that are contingent on the use of domestically produced goods or services, often known as 'local content' subsidies, are prohibited. Goods are considered domestic if they originate in the UK.

⁵ Refer to Chapter 5 of the BEIS Guidance for further detail.

<p>Subsidies that result in the relocation of economic activity from one part of the UK to another.</p>	<p>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. Relocation subsidies may be permitted for the purposes of reducing economic or social disadvantage (the guidance explains what the public authority will have to show to establish this). Subsidies that require the enterprise to move within the same area are also not prohibited.</p> <p>The BEIS Guidance explains what is meant by relocation for these purposes (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).</p> <p>The prohibition only applies to subsidies that are contingent on the beneficiary relocating. 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.</p>
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9 Step 4 – Design subsidy to ensure compliance with the subsidy control principles

9.1 A subsidy may be lawfully awarded by demonstrating that the measure respects each of the seven Subsidy Control Principles (the "**Principles**") set out below.

Principle	Subsidy Control Principles
A	<p>Common interest</p> <p>Subsidies should pursue a specific policy objective to:</p> <ul style="list-style-type: none"> • remedy an identified market failure, or • address an equity rationale (such as local or regional disadvantage, social difficulties or distributional concerns).
B	<p>Proportionate and necessary</p> <p>The subsidy should be proportionate to their specific policy objective and limited what is necessary to achieve the objective.</p>
C	<p>Designed to change economic behaviour of beneficiary</p> <p>Subsidies should be designed to bring about a change of economic behaviour of the beneficiary</p> <p>That change, in relation to a subsidy, should be—</p> <ul style="list-style-type: none"> • conducive to achieving its specific policy objective, and • something that would not happen without the subsidy
D	<p>Costs that would be funded anyway</p> <p>Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.</p>
E	<p>Least distortive means of achieving policy objective</p> <p>Subsidies should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive means.</p>
F	<p>Competition and investment within the United Kingdom</p> <p>Subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.</p>
G	<p>Beneficial effects to outweigh negative effects</p> <p>Subsidies' beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including in particular negative effects on—</p> <ul style="list-style-type: none"> • competition or investment within the United Kingdom • international trade or investment

9.2 These principles follow those under the TCA with the exception of principle F which is a new requirement.

10 Principles – assessment framework

10.1 BEIS has published a subsidy control principles assessment template for public authorities to use to record their analysis of compliance with the subsidy control principles. BEIS recommends that public authorities use this template to document their evidence, analysis and conclusions for their principles assessment for most subsidies and subsidy schemes. This should be retained for records and may be requested by the EU or by an interested party.

	Relevant Principles	Public authorities should do the following to show how the subsidy complies with the relevant principle
Step One	Policy objective (Principle A)	<p>Provide details of the specific policy objective.</p> <p>Establish the existence and significance of the market failure and/or the inequality the subsidy seeks to address.</p> <p>Identify how the subsidy will remedy the market failure (i.e. provide a more efficient outcome) and/or address the equity objective (reduce an inequality).</p> <p>State the desired outcome(s).</p>
	Appropriateness (Principle E)	<p>Justify why a subsidy is the most appropriate instrument for addressing the identified policy objective and why other instruments have been set aside such as regulation, direct provision of the good or service by the authority, or loans or equity investment on commercial terms.</p>
Step Two	Baseline no-subsidy scenario (Principles C & D)	<p>Set out the future scenario – over both the short and the long-term – in the absence of the subsidy.</p>
	Additionality assessment (Principles C & D)	<p>Relative to the baseline/no subsidy scenario, provide details of how the subsidy will lead to a change in the economic behaviour of the beneficiary (and therefore brings about something that would not have occurred without the subsidy) which assists with achieving the policy objective.</p> <p>Provide appropriate justification if the subsidy will compensate for the costs the beneficiary would have likely funded in the absence of any subsidy such as business as usual costs.</p> <p>For schemes, please provide details of how it has been designed to exclude any groups of beneficiaries where it can be reasonably determined in advance that there is unlikely to be additional benefits that wouldn't have otherwise happened in the absence of the subsidy.</p>

		Please provide appropriate justification where it has not been possible/reasonable to identify and exclude these groups.
Step Three	Proportionality and Minimising Distortion (Principles B & F)	Demonstrate how the subsidy is proportionate and has been designed to minimise any negative effects on competition and investment within the UK whilst still allowing it to meet the policy objective. This should include details how you have considered the following subsidy characteristics (where relevant): <ul style="list-style-type: none"> • The nature of the instrument • The breadth of beneficiaries and the selection process • The size of the subsidy • The timespan over which the subsidy is given • The nature of the costs being covered • The performance criteria • Ringfencing • Monitoring and evaluation
Step Four	Balancing Exercise (Principle G)	Set out details of the expected benefits of the subsidy (as they relate to the specified public policy objective) and its anticipated negative effects, including in particular any negative effects on competition and investment within the UK, and international trade and investment. This should also include any geographical and distributional impacts. Justify why the negative effects are outweighed. Please note that 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.

11 Energy and environment principles

- 11.1 Subsidies and schemes relating to energy, the environment or both must be assessed against certain additional principles relating to energy and the environment (the "**E&E Principles**"), in addition to complying with the subsidy control principles. The E&E Principles are in line with the UK's net zero commitment.
- 11.2 The E&E Principles apply only to subsidies given and schemes made where the specific policy objective (or one of the objectives) relates to energy, the environment, or both. For example, a subsidy to encourage innovation in renewable energy production, or to improve recycling among small businesses, must be consistent with the E&E Principles.
- 11.3 The E&E Principles are set out in Appendix 2.

12 Step 5 - Check the criteria for subsidies or schemes of interest or particular interest and consider referral to the Subsidy Advice Unit

- 12.1 When receiving a subsidy, Investees should consider whether the subsidy they are to receive or the scheme they are taking part in meets the definition of a subsidy or scheme of interest ("**SSoI**") or of particular interest ("**SSoPI**"). SSoIs and SSoPIs are two distinct categories of subsidy or subsidy scheme that have been identified as having greater potential to lead to negative effects on competition or investment in the UK, or on international trade or investment. As with all other subsidies, Investees should remember that if they have received a subsidy that is in breach of the Act, they may be required to return the funding to BSC/Access (as applicable).
- 12.2 In addition to the recommendation for public authorities to conduct a more in-depth principles assessment in respect of these categories of subsidy (see Step 3), public authorities designing SSoIs have the option to refer, and for SSoPIs are required to refer, the subsidy or scheme to the Subsidy Advice Unit ("**SAU**") for independent evaluation. The SAU is a unit within the Competition and Markets Authority whose role is to evaluate public authorities' own assessments in respect of SSoIs or SSoPIs.
- 12.3 If the subsidy that the Investees are likely to receive is over £1 million, then this may mean that the subsidy is a SSoI or a SSoPIs. Further details on the characteristics of these subsidies are contained in Appendix 3. We have not included full details here as the Government has stated that it anticipates only a very small number of subsidies will be sufficiently likely to have distortive effects on UK competition and investment or international trade to warrant categorisation as SSoI or SSoPIs.
- 12.4 Further information on how to evaluate subsidy amounts and cash equivalents are available at Appendix 4.

13 Step 6 - Publish the subsidy or scheme on the subsidy database⁶

- 13.1 BSC Investees (unless they are a public authority themselves – see section 5.4.3) should make sure they provide information to the public authority providing the subsidy in a timely manner to ensure that the public authority can upload information to the Transparency Database⁷ within three months of making the award/modifying a subsidy. Access Investees (as public authorities) and any BSC Investee that is a public authority will need to upload the information set out below themselves.
- 13.2 The database is free to use and is accessible to the public. 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.
- 13.3 Public bodies that wish to upload information to the subsidy control database should contact the BEIS subsidy control team for a log-in code at subsidycontrol@beis.gov.uk. There is guidance on how to upload subsidies under the “Help” tab in the subsidy control database.

Which subsidies need to be uploaded?

- 13.4 All standalone subsidy awards must be uploaded, as there is no threshold below which there is an exemption from the obligation to upload an award.
- 13.5 Any awards of MFA only need to be uploaded to the database where those awards exceed £100,000.
- 13.6 Subsidy awards given under schemes also only need to be uploaded if they exceed £100,000.
- 13.7 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 (we suggest that best practice is to assume that "confirmation of the decision" runs from when the relevant parties sign the financing documents). 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.

What information needs to be uploaded?

- 13.8 The information which must be placed on the transparency database includes:
- 13.8.1 the power under which the subsidy is given;
 - 13.8.2 the policy objective of the subsidy;
 - 13.8.3 the name of the beneficiary to which the subsidy is given;
 - 13.8.4 the date the public authority confirms the decision to give the subsidy;

⁶ See chapter 12 of the BEIS Guidance for further detail.

⁷ The database is available here: [View subsidies awarded by UK government - GOV.UK \(www.gov.uk\)](https://www.gov.uk/view-subsidies-awarded-by-uk-government)

- 13.8.5 the duration of the subsidy;
- 13.8.6 any time limits or other conditions attached to the use of the subsidy;
- 13.8.7 the amount of the subsidy or the amount budgeted; and
- 13.8.8 the location of any of information mentioned above.

What happens if the public authority fails to upload the information?

- 13.9 Failure to publish the correct information online within three months of the award has potentially negative implications for both the public authority and the recipient.
 - 13.9.1 For the public authority, failure to meet the transparency obligations puts the subsidy at risk of being regarded as unlawful, and it fails to “start the clock” in terms of the potential challenge period, beyond which national court challenges are time-barred.
 - 13.9.2 For the recipient of public funding, failure to meet the transparency obligations puts the subsidy potentially at risk of recovery.

14 Step 7 – Understand the risk of challenge

14.1 The Competition Appeal Tribunal (the "**Tribunal**") has jurisdiction to review subsidy decisions made by public authorities. A subsidy decision is a decision by a public authority to give a subsidy or make a subsidy scheme.

What are the grounds for review?

14.2 When reviewing subsidy decisions, the Tribunal will apply the principles of judicial review. The tribunal will not review the merits or effectiveness of a subsidy or subsidy scheme, but only whether it was lawful.

14.3 The Tribunal may review subsidy decisions on general public law grounds, such as whether the decision was made within the public authority's powers or whether it was fair and reasonable. It may also assess whether a decision was consistent with the subsidy control requirements set out in the Act: most importantly, that the public authority had considered the relevant subsidy control principles and was of the view that the subsidy was consistent with those principles before giving the subsidy or making the scheme. The Tribunal may also determine whether the subsidy contravened any of the prohibitions.

14.4 MFA or SPEI assistance subsidies can also be reviewed by the Tribunal on general public law grounds. However, the only subsidy control grounds on which they can be challenged are that the subsidy breached the prohibitions on subsidies contingent on export performance, and on subsidies contingent on the use of domestic goods and services.

Who can bring a challenge and when?

14.5 An 'interested party' can ask the Tribunal to review a subsidy decision. An interested party is anyone whose interests may be affected by the giving of the subsidy or the making of the scheme.

14.6 Once a reviewable subsidy decision has been uploaded to the subsidy database (see Step 6), an interested party generally has one calendar month to apply to the Tribunal for a review of the subsidy. However, an interested party may apply to the Tribunal before the subsidy or scheme is uploaded onto the database.

14.7 An interested party also has the option to request further information about the subsidy or scheme, if they need it to confirm that their interests may be affected by the subsidy or scheme, and to establish whether there may be grounds for challenging it. An interested party must request this information within one month of the subsidy being uploaded to the transparency database. The public authority then has 28 days to provide the information. After this, the interested party has a further month to decide whether to challenge the subsidy. This does not affect the limitation period for other

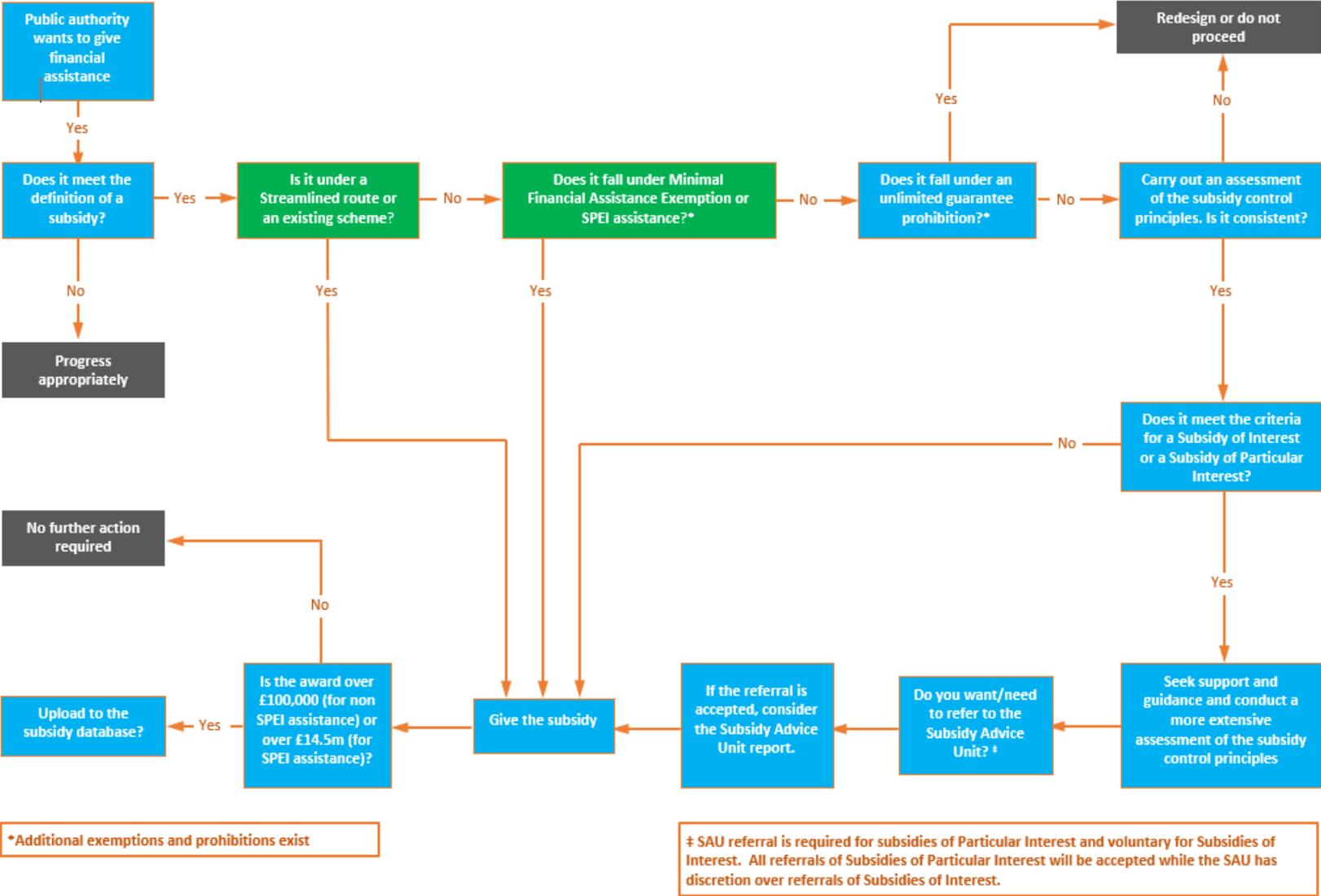
interested parties which remains one month after the subsidy decision has been uploaded to the subsidy database.

- 14.8 For more information about limitation periods, including exceptions to the one-month limitation period, see chapter 13 of the BEIS Guidance.

The Tribunal's powers to grant relief

- 14.9 If the Tribunal finds that a subsidy decision has not been given in compliance with the requirements of the Act or that the subsidy is prohibited, it may order remedies. These remedies reflect those available to the High Court on an application for judicial review in England and Wales and Northern Ireland, and in Scotland, to the Court of Session on an application to the supervisory jurisdiction of that Court. The Tribunal also has the power to make a recovery order, directing a public authority to reclaim a subsidy from the beneficiary.

Appendix 1 – Subsidy control process map (please note we have highlighted options in green that Investees should give particular consideration to as potentially applicable)



Appendix 2 – Environmental principles

Energy and environmental principles and effect	
A	<p>Energy and environment subsidies must be aimed at and incentivise the beneficiary in either:</p> <ul style="list-style-type: none"> ▪ 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.
B	<p>Energy and environment subsidies must not relieve the beneficiary from liabilities arising from its responsibilities as a polluter under the law of any of the nations of the UK.</p>
C	<p>Subsidies for electricity generation adequacy, renewable energy and cogeneration must not undermine the ability of the UK to meet its relevant obligations under the TCA, and are determined by means of a transparent, non-discriminatory and effective competitive process. However, a non-competitive process may be used to determine a subsidy for renewable energy and cogeneration in certain specified circumstances</p>
D	<p>Subsidies for electricity generation adequacy may be limited to installations not exceeding specified carbon dioxide emission limits.</p>
E	<p>Subsidies for renewable energy and cogeneration must not affect beneficiaries' obligations or opportunities to participate in the electricity market.</p>
F	<p>Subsidies in the form of partial exemptions from energy-related taxes and levies in favour of energy-intensive users must not exceed the total amount of the tax or levy concerned.</p>
G	<p>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 are restricted to sectors at significant risk of carbon leakage due to the cost increase.</p>
H	<p>Subsidies for the decarbonisation of emissions linked to industrial activities in the UK must achieve an overall reduction in greenhouse gas emissions, and reduce the emissions directly resulting from the industrial activities.</p>
I	<p>Subsidies for improvements of the energy efficiency of industrial activities in the UK must improve energy efficiency by reducing energy consumption, either directly or per unit of production.</p>

Appendix 3 –Subsidies of Interest and Subsidies of Particular Interest

Subsidies of particular interest are subsidies that meet any of the following criteria:

- subsidies granted outside of sensitive sectors if they are over £10 million, or if they are over £1 million and would cumulate above £10 million together with other related subsidies given within the previous 3 financial years;
- subsidies granted in sensitive sectors if they are over £5 million, or if they are over £1 million and would cumulate above £5 million together with other related subsidies given within the previous 3 financial years;
- restructuring subsidies; or
- subsidies that are explicitly conditional on relocation and meet the conditions set out for an exemption from the general prohibition in section 18 of the Act, which have a value exceeding £1 million.

Subsidies of interest are subsidies that meet any of the following criteria:

- subsidies that do not meet the criteria for a subsidy of particular interest and that are between £5 million and £10 million, or that cumulate to such a value together with other subsidies given within the previous three financial years;
- rescue subsidies;
- tax subsidies; or
- subsidies that are explicitly conditional on relocation and meet the conditions set out for an exemption from the general prohibition in section 18 of the Act, and that have a value of £1 million or below.

Schemes which allow for the giving of one or more subsidy of particular interest qualify as schemes of particular interest. Schemes which allow for the giving of one or more subsidy of interest (but not of particular interest) are schemes of interest.

Appendix 4 - Subsidy amounts calculations – The Subsidy Control (Gross Cash Amount and Gross Cash Equivalent) Regulations 2022 (the "Cash Regulations")

- 14.1 For subsidies given in cash, their values will be determined by reference to the Gross Cash Amount. For subsidies that are not in cash, their amount will be determined by reference to the Gross Cash Equivalent ("**GCE**") of the subsidy.
- 14.2 The Cash Regulations make clear that the general approach when calculating the value (or gross cash equivalent) of the subsidy is to calculate the difference between the terms on which the subsidy is given and the terms on which financial assistance of the same kind might reasonably have been expected to have been available on the market.
- 14.3 Generally speaking, you should determine the GCE of a subsidy in accordance with generally accepted accounting practice ("**GAAP**"). In other words, there is no 'hard and fast' approach. As well as the requirement to determine in accordance with GAAP, there are two other requirements:
- 14.3.1 no deductions should be made for taxes or charges payable on the subsidy; and
- 14.3.2 if a discount rate is used, that rate must be 5.3% per annum⁸.
- 14.4 As well as this general rule, the Cash Regulations also set out 4 sets of criteria which can be used in certain situations:
- 14.4.1 Regulation 6: Provides criteria which, if a **loan** satisfies, means it has a GCE of under £315,000 and therefore is capable of falling under the Minimal Financial Assistance exemption in the Act. Please refer to the flow chart below for a visual representation.
- 14.4.2 Regulation 7: Provides criteria which, if a **guarantee** satisfies, means it has a GCE of under £315,000 and therefore is capable of falling under the Minimal Financial Assistance exemption in the Act.
- 14.4.3 Regulation 8: Sets out a method of calculation to create a **proxy market interest rate for a loan**, which can be used if it is not possible to find real-world comparable market rates.
- 14.4.4 Regulation 9: This sets out a method of calculation to create a **proxy market premium for a guarantee**, which can be used by public authorities if it is not possible to find real-world comparable market prices.

⁸ We would expect that this rate will be varied by the government from time to time.

Flow chart: Process for determining the GCE of subsidies given as loans

