



## INTRODUCTION

In this article, we will take you on a journey through the key changes brought about by the Subsidy Control Act 2022, how it is designed to operate and how it is poised to reshape subsidy practice and can be used to support growth and innovation.

As of the 4<sup>th</sup> of January 2023, every subsidy granted in the UK falls under the provisions of this Act, as well as the subsidy control rules under the UK-EU trade and co-operation agreement (TCA), UK free trade agreements (FTAs) and the World Trade Organisation (WTO).

## THE ACT

The key concept of the Act is the revolutionary shift of mindset that embraces a permissive approach rather than restrictive. In contrast to the EU state aid regime, the Act 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.

## THE NEW DEFINITION OF “SUBSIDY”

Under this Act, the concept of “subsidy” reaches further and wider than ever before. It not only touches upon domestic matters but also international trade. This is a remarkable contrast to the definition of state aid under EU law which confined only an effect on trade between member states.

A subsidy occurs when a public authority extends support to an enterprise, granting it an economic advantage that could not be secured through commercial means. Financial assistance, in this context, includes the provision of funds, goods, or services, regardless of whether they receive anything in return, including future commitments. The crucial moment is when the public authority commits to providing the subsidy which is a moment transformation for a business and catalyst for growth.



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## SUBSIDY CONTROL POST-BREXIT - SOMETHING TO “FEAR OR EMBRACE.”

Notably, recent case law has sent a clear message in the evolving world of subsidies that deciding to continue with an existing approach could be a new funding decision to provide a subsidy. When dealing with subsidy issues public authorities should seek legal input as legal insight will assist public authorities in navigating the requirements of the Act and mitigate the risk of challenge by entities exploring the limits of the new regime, especially in these uncharted waters.

### THE SUBSIDY CONTROL PRINCIPLES

The Act introduced seven principles that must guide any subsidy decision and compliance with these principles would typically lead to approval:

The seven principles	The Subsidy/ Scheme
<i>“Common interest”</i>	should pursue a specific policy objective to remedy an identified market failure or address an equity rationale (such as social difficulties or distributional concerns).
<i>“Proportionate and Necessary”</i>	should be proportionate to their specific policy objective and limited to what is necessary to achieve it.
<i>“Design to change economic behaviour of beneficiary”</i>	should be designed to bring about a change of economic behaviour of the beneficiary. That change should be conducive to achieving its specific policy objective and something that would not happen without the subsidy.
<i>“Costs that would be funded anyway”</i>	should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy.
<i>“Least distortive means of achieving policy objective”</i>	should be an appropriate policy instrument for achieving their specific policy objective and that objective cannot be achieved through other, less distortive means.
<i>“Competition and investment within the UK”</i>	should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the UK.
<i>“Beneficial effects to outweigh negative effects”</i>	beneficial effects (in terms of achieving their specific policy objective) should outweigh any negative effects, including negative effects on competition or investment within the UK, international trade, or investment.

### NAVIGATING THE NEW LANDSCAPE

For public authorities that venture in and or grant subsidies, the golden rule is to master the principles and ensure your policies or projects align with them. Recent case law emphasised the value of public authorities having a good audit trail of the decision-making process and the invaluable role of legal support.

## SUBSIDY CONTROL POST-BREXIT - SOMETHING TO “FEAR OR EMBRACE.”

The ultimate proactive strategy is to ensure that your subsidy or scheme complies with the subsidy control requirements before you pay out any money or give other assistance. This approach will help to protect against legal challenges and recovering money from recipients.

Whilst each step will require detailed exploration under the Act, keep the following steps in mind:

<b>Step 1</b>	determine whether the support is a subsidy.
<b>Step 2</b>	check whether the subsidy or scheme needs to be assessed against the subsidy control requirements.
<b>Step 3</b>	ensure the subsidy or scheme complies with the prohibitions and conditions.
<b>Step 4</b>	design the subsidy to ensure compliance with the subsidy control principles.
<b>Step 5</b>	check the criteria for subsidies or schemes of interest or particular interest, and consider referral to the Subsidy Advice Unit.
<b>Step 6</b>	publish the subsidy or scheme on the subsidy database.
<b>Step 7</b>	understand the risk of challenge.

## EXEMPTIONS

The Act provides exemptions for specific situations. The key exemptions apply to low-value subsidies and those given in emergency situations, such as natural disasters or economic emergencies.

**Minimal Financial Assistance (MFA)** - MFA allows public authorities to award low-value subsidies without needing to comply with most of the subsidy control requirements. MFA has a **financial threshold so no recipient can receive more than £315,000** over the applicable period.

**Services of Public Economic Interest Assistance (SPEIA)** - The Act provides an exemption from most of the subsidy control requirements for low-value Services of Public Economic Interest (SPEI) subsidies. Public spending on SPEI may be considered to constitute SPEIA if the total amount of “minimal or SPEI financial assistance” given to an enterprise does **not exceed £725,000** over the applicable period.

The same rules and procedures (including cumulation) apply to SPEIA as to MFA, except that the **cap over three years is the higher value of £725,000**.

## SUMMARY

The Act promotes a new era of permissiveness and therefore understanding its principles and expertly navigating this regulatory landscape is key for public authorities in unlocking the potential of subsidies and providing economic support.

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Although EU state aid law might be persuasive in aiding the interpretation of the Act, the UK has its own distinct regime of subsidy control. Legal input in the decision-making process will help public authorities to navigate the new regime.

This article is a general overview of the Act, and it should not replace legal advice tailored to your specific circumstances. When it comes to subsidies, one size does not fit all. Early engagement with legal experts is crucial in minimising legal risks as any proposal to grant subsidy will need to be made on a case-by-case basis.

As you embark on this subsidy journey, remember the path to success begins with informed decisions to unlock the full potential of providing economic support.

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### About Pathfinder Legal Services Ltd

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If you are keen to find out more about Pathfinder Legal Services including how our services work, our billing process and how to instruct us, please contact us at [operations@pathfinderlegal.co.uk](mailto:operations@pathfinderlegal.co.uk)

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