EXPLANATORY MEMORANDUM TO

THE SUBSIDY CONTROL (GROSS CASH AMOUNT AND GROSS CASH EQUIVALENT) REGULATIONS 2022

2022 No. 1186

1. Introduction

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

These Regulations make provision as how a public authority is to determine the gross cash amount or the gross cash equivalent of a subsidy for the purpose of the following provisions of the Subsidy Control Act 2022 (the Act):

- section 33(7) (duty to include information in the subsidy database),
- section 36(5) (minimal financial assistance),
- section 38(5) (services of public economic interest assistance),
- section 41(2) (exemption for certain subsidies given to SPEI enterprises), and
- provision in regulations or schemes made under the Act.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Extent and Territorial Application

The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

These Regulations set out how public authorities are to calculate the gross cash amount and the gross cash equivalent for the purpose of the Subsidy Control Act 2022. The Act sets a number of thresholds which apply to certain exemptions, requirements and procedures which public authorities are subject to under the Act, as follows:

- Section 33 provides that a public authority is required to make an entry on the subsidy database where the amount of a subsidy given under a subsidy scheme is more than £100,000.

- Section 36 provides that the subsidy control requirements will not apply to minimum financial assistance given to an enterprise where it does not exceed £315,000 within a three-year period.
- Section 38 provides that the subsidy control requirements will not apply SPEI assistance given to an enterprise where it does not exceed £725,000 within a three-year period.
- Section 41 provides that the transparency requirements do not apply to a subsidy given to a SPEI enterprise where the subsidy is no more than £100,000.

In addition, the draft Subsidy Control Act (Subsidies and Schemes of Interest or of Particular Interest) Regulations 2022[1] laid under section 11 of the Act, define what is meant by a subsidy or a subsidy scheme of particular interest (SSoPI) and a subsidy or subsidy scheme of interest (SSoI) by reference to monetary thresholds.

Section 52(1) of the Act provides that a SSoPI is to be referred to the to the Subsidy Advice Unit (SAU) within the Competition and Markets Authority before it can be given or made, and section 56(1) of the Act provides that a SSoI can be referred to the SAU in accordance with the voluntary referral procedure. These Regulations set out how public authorities are to determine the gross cash amount and the gross cash equivalent of subsidies when applying SSoPI and SSoI thresholds.

7. Policy background

What is being done and why?

The Subsidy Control Act 2022 provides the framework for a new, UK-wide subsidy control regime. This regime will enable public authorities, including devolved administrations and local authorities, to give subsidies that are tailored to their local needs and that drive economic growth, while minimising distortion to UK competition and investment and protecting our international obligations.

Subsidies can be given in a variety of forms, for example as cash grants, loans, guarantees, tax reliefs and equity investments. The Act and related regulations and schemes have various provisions that apply, or do not apply, based on the value of the subsidy in question – for example the Act only requires subsidies given under subsidy schemes to be uploaded onto the Subsidy Database (which is set up under section 32 of the Act) if they are above £100,000. These Regulations set out the approach that can be taken by public authorities to determine the value of subsidies for the purposes of complying with the requirements of the Act and associated regulations and schemes.

Regulation 3 sets out the provisions to which these Regulations apply. These are provisions which are in the Act or made under the Act which apply thresholds which are to be determined by reference to the gross cash amount or the gross cash equivalent. Regulation 3 also explains that subsidies given by way of a grant are to be determined by reference to the gross cash amount whilst other subsidies are to be determined by reference to the gross cash equivalent.

[1] https://www.legislation.gov.uk/ukdsi/2022/9780348240023

Regulation 4 provides that where a subsidy is given by way of a grant the gross cash amount is determined by the amount of cash or money which is made available to the enterprise under the grant.

As regards a subsidy other than a tax measure or a grant, the value is to be determined by determining the value of the subsidy on an enterprise by taking in to account the difference between the terms on which the subsidy is given and the terms on which similar financial assistance might reasonably have been available on the market.

In determining the gross cash amount of a grant or the gross cash equivalent of a subsidy which is not a tax measure, the public authority should use generally accepted accounting practice and no deductions are to be made for any taxes of other charges payable.

In relation to a subsidy given by way of a tax measure, the gross cash equivalent is to be determined by reference to the tax liability borne by the enterprise as compared to the tax liability that the enterprise would have otherwise borne under the normal taxation regime.

Public authorities may also discount a subsidy to calculate its present value but where they do so regulation 4(5) provides that public authorities are to apply the discount rate of 5.3%.[2]

A public authority may also provide a reasonable estimate of the maximum foreseeable gross cash equivalent amount of a subsidy where a subsidy is given in the form of a tax measure or where it is not reasonably possible for the public authority to calculate precisely the final amount of a subsidy when it is given. Where a reasonable estimate is made in the circumstances set out in regulation 4(6)(a) or (b) then that estimate can be used for the purposes which are set out in regulation 4(7).

For loans and loan guarantees, public authorities may also use the methodology set out in regulations 6 and 7 to calculate the gross cash equivalent of lower value loans and loan guarantees where certain conditions apply.

In addition, for the purpose of calculating the value of a subsidy in accordance with regulation 4, regulations 8 and 9 provide key estimates which public authorities may use to calculate the gross cash equivalent of certain subsidies. Regulation 8 provides the interest rate that can be used by a public authority to determine the value of a loan that might reasonably have been available on the market and, when a public authority is calculating the premium at which a guarantee might reasonably have been expected to have been available on the market, regulation 9 provides the probability that can be applied to determine whether a guarantor may have to pay a guaranteed amount.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

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

[2] This discount rate represents the latest available average of the monthly Bank of England Sterling Overnight Index Swap forward rate for the 2023 calendar year on the day the Regulations are made, plus 1 percentage point.

10. Consultation outcome

The approach to these regulations has been informed by a public consultation that ran from 3 February 2021 to 31 March 2021 ahead of the introduction of the Subsidy Control Bill[3]. This consultation received 234 responses.

The consultation did not include a specific question on the gross cash equivalent and gross cash amount regulations. It did set out the government's objectives for the regime:

- Facilitating interventions to deliver on the UK's strategic interests.
- Maintaining a competitive and dynamic market economy.
- Protecting the UK internal market.
- Acting as a responsible trade partner.

46% of respondents directly responded to these objectives, 83% agreed with them. Accordingly, the government has developed the regulations to be simple (in order to aid ease of use, and facilitate interventions to deliver on the UK's strategic interests) and accurate (in order that subsidies are treated within the regime in a way that meets the final three objectives).

11. Guidance

Guidance on the application of these regulations is to be included within the statutory guidance on the Subsidy Control Act 2022 and can be found here.

12. Impact

The impact on business, charities or voluntary bodies is estimated to be negligible as the regulations directly impact public authorities rather than enterprises.

The department has produced analysis in accordance with the Better Regulation Framework, that sets out the evidence for this assessment.

13. Regulating small business

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

14. Monitoring & review

The approach to monitoring of this legislation is set out in full in the accompanying analysis and Bill Stage Impact Assessment. These set out a Monitoring and Evaluation approach 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.

This plan sets out that the data collection will primarily be through the Subsidy Database, and that the broader monitoring and evaluation will primarily be through regular CMA reports on the functioning of the regime, including this legislation.

[3] https://www.gov.uk/government/consultations/subsidy-control-designing-a-new-approach-for-the-uk

The valuation methodologies that are the subject of these regulations will also follow the same monitoring and evaluation plan. The CMA is required to publish this report within 3 years after implementation of the regime, and in regular intervals thereafter.

The instrument does not include a statutory review clause.

15. Contact

Callum Ward at the Department for Business, Energy & Industrial Strategy at Telephone: 0121 221 2500 or email: callum.ward@beis.gov.uk can be contacted with any queries regarding the instrument.

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.

Kevin Hollinrake, Parliamentary Under Secretary of State at the Department for Business, Energy & Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.