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# White Paper Conference Subsidy Control and Infrastructure

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# 4-Part-Test: s2 Subsidy Control Act 2022

(1) In this Act, “subsidy” means financial assistance which—

**(a)** is given, directly or indirectly, from public resources by a public authority,

**(b)** confers an economic advantage on one or more enterprises,

**(c)** is specific, that is, is such that it benefits one or more enterprises over one or more other enterprises with respect to the production of goods or the provision of services, and

**(d)** has, or is capable of having, an effect on—

- (i) competition or investment within the United Kingdom,
- (ii) trade between the United Kingdom and a country or territory outside the United Kingdom, or
- (iii) investment as between the United Kingdom and a country or territory outside the United Kingdom.



## Subsidy Control Act 2022

### 2022 CHAPTER 23

Subsidies out of public resources; and for connected

Majesty, by and with the advice and consent of the Lords  
Ordinary, and by the authority of the same, as follows:—

#### PART 1

##### OVERVIEW AND KEY INTERPRETATION

###### *Overview etc*

“subsidy” and other key terms used in this Act.

“requirements that apply to the giving of subsidies or the meeting of subsidy control requirements”)

imposes duties to apply the subsidy control principles and

imposes prohibitions and other requirements;



## Limb 2 of the 4-Part-Test

- **“(b) confers an economic advantage on one or more enterprises”**
- The Guidance explains that the 2<sup>nd</sup> limb of the test must be considered in two parts:
  - 1) To constitute a subsidy, financial assistance must be given to an “enterprise” meaning a party which is engaged in economic activity, offering goods and services on a market.
  - 2) It must confer an economic advantage on that enterprise over another enterprise.
- **Advantage:** A subsidy is only present where the financial assistance confers an economic advantage, meaning the financial assistance could not have been obtained on the market.



# Subsidy Control to Infrastructure

- **UK Statutory Guidance**
  - General public benefit...not intended to be used primarily to carry out an economic activity... will not fall within the scope of the Act.
  - However, where the infrastructure is used to provide an economic activity ...then public funding for that infrastructure could be considered to be a subsidy within the meaning of the Act.
  - Direct, identifiable benefit of infrastructure is likely to fall within definition of subsidy
- **State Aid**
  - The European Commission Notice on the Notion of State aid (2016)
  - Funding of infrastructure not meant to be commercially exploited is in principle excluded from the ...rules



# State aid assessment

- CJEU in Case C-164/02 Netherlands v Commission [2004] ECR I-1177

*“Financing by the authorities of infrastructure open to all potential users without discrimination and administered by the State does not generally fall within the scope of Article 87(1) of the EC Treaty because it does not favour one undertaking in competition with other undertakings within the meaning of that article. That is the case for most of the funding of transport infrastructure (for example, roads and canals built and maintained by the public authorities)”*

- • Commission Decision 2003/227/EC Terra Mitica OJ 2003 L91/23 *“although the increase in traffic may be due to the park, the roadworks carried out affect everyone living in the area”*
- Commission document COMP/03/2011/ NOTE TO DG REGIO “Application of State aid rules to infrastructure investment projects”: “Public, non-commercially operated roads/motorways”.



# SA. 36019 – Belgium “Financing of road infrastructure in the vicinity of a real estate project – *Uplace*”



- Access roads to private development
- *“The road infrastructure works in the present case relate to the public road network and links between the project site and the public road network. That network and those links are accessible to all for free; hence they are not commercially exploited”*
- State aid could arise where:
  - - developers normally bear cost
  - - tailored to the needs of limited number of undertakings





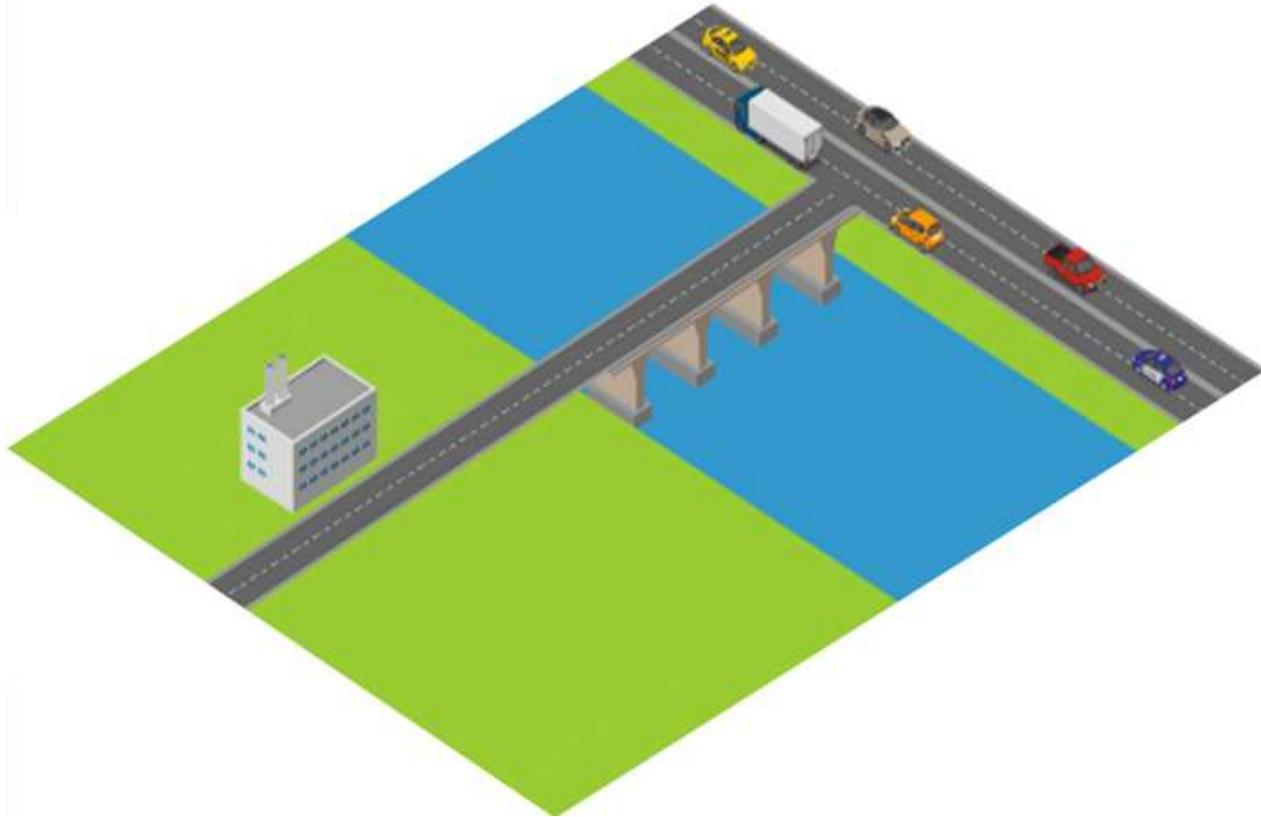
# Examples



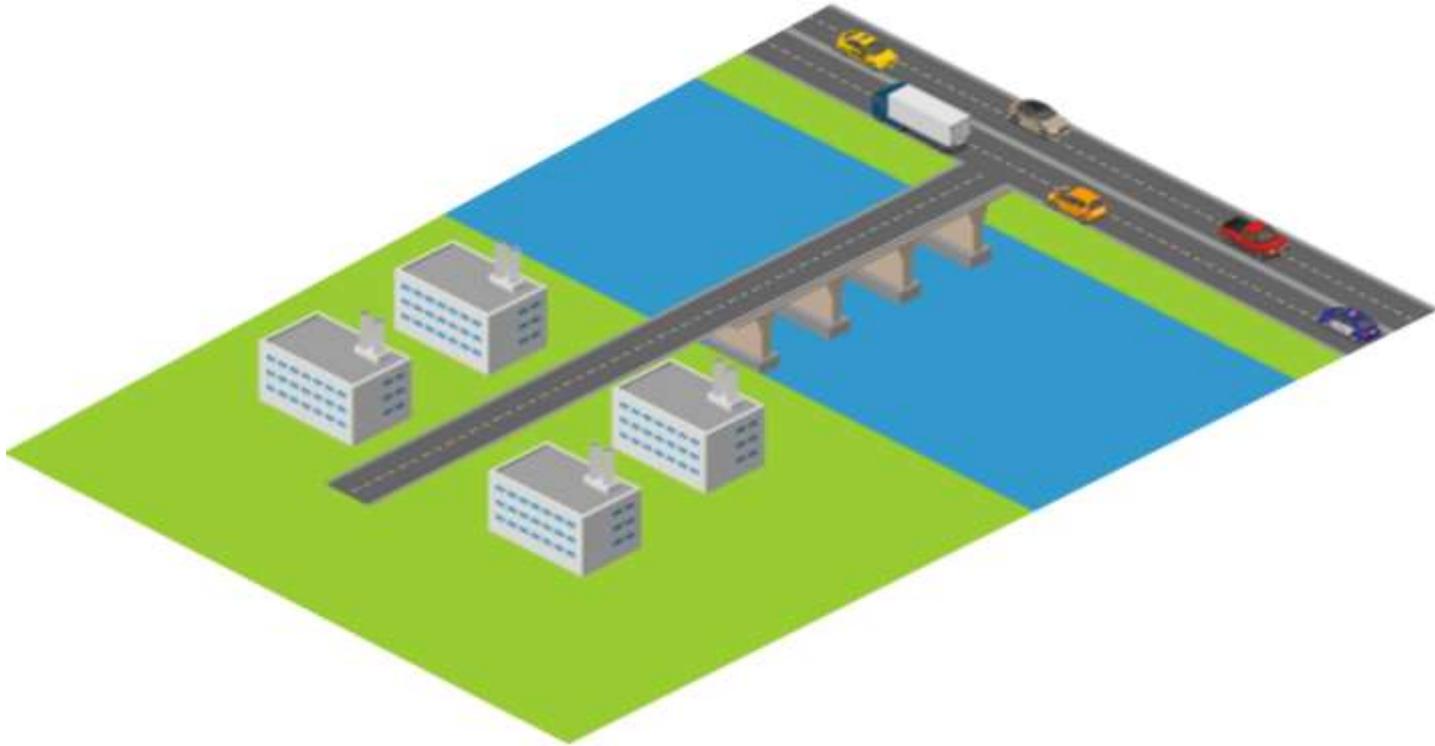
# Example 1



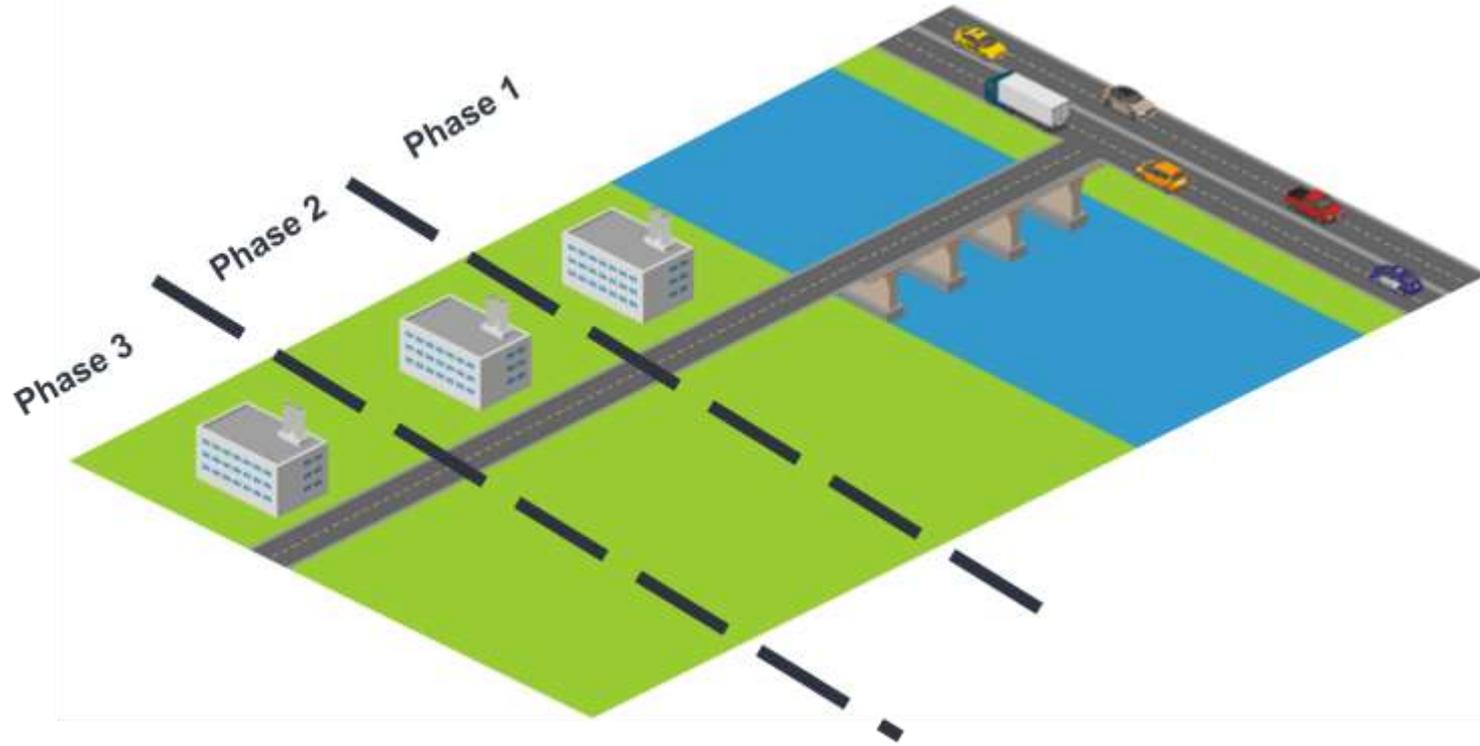
## Example 2



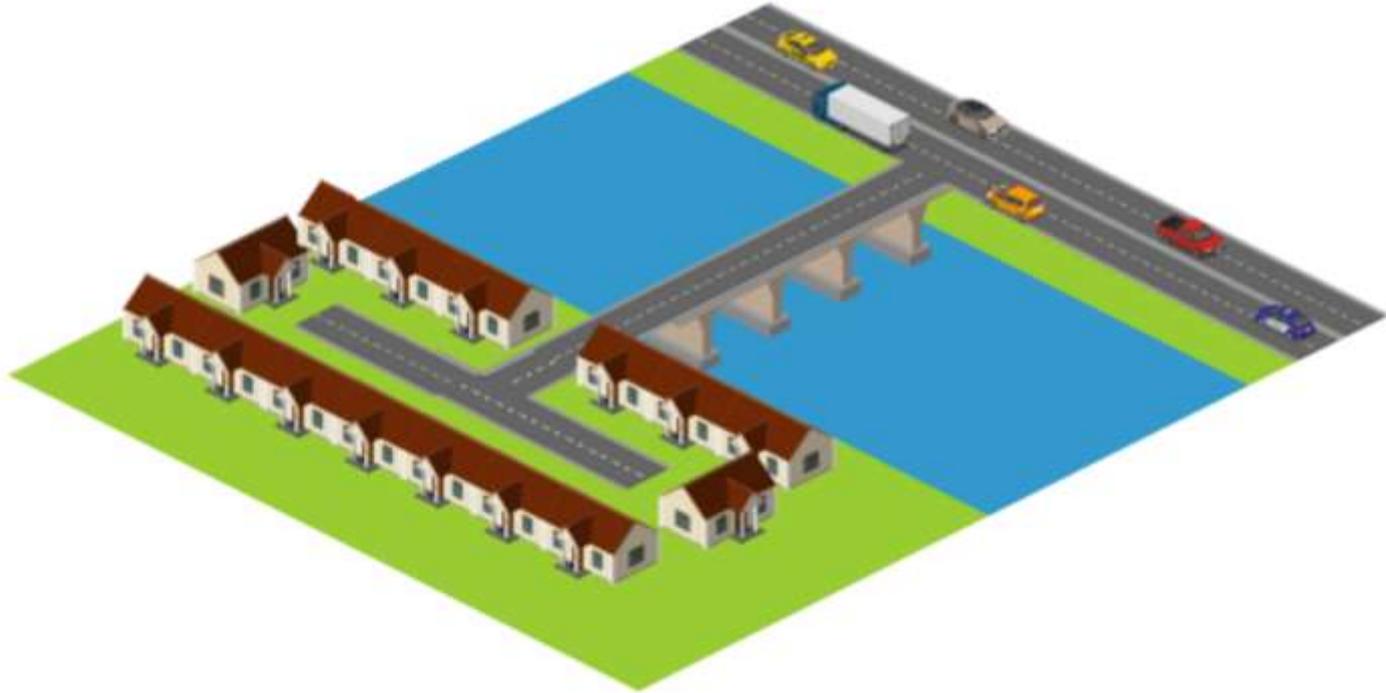
# Example 3



# Example 4

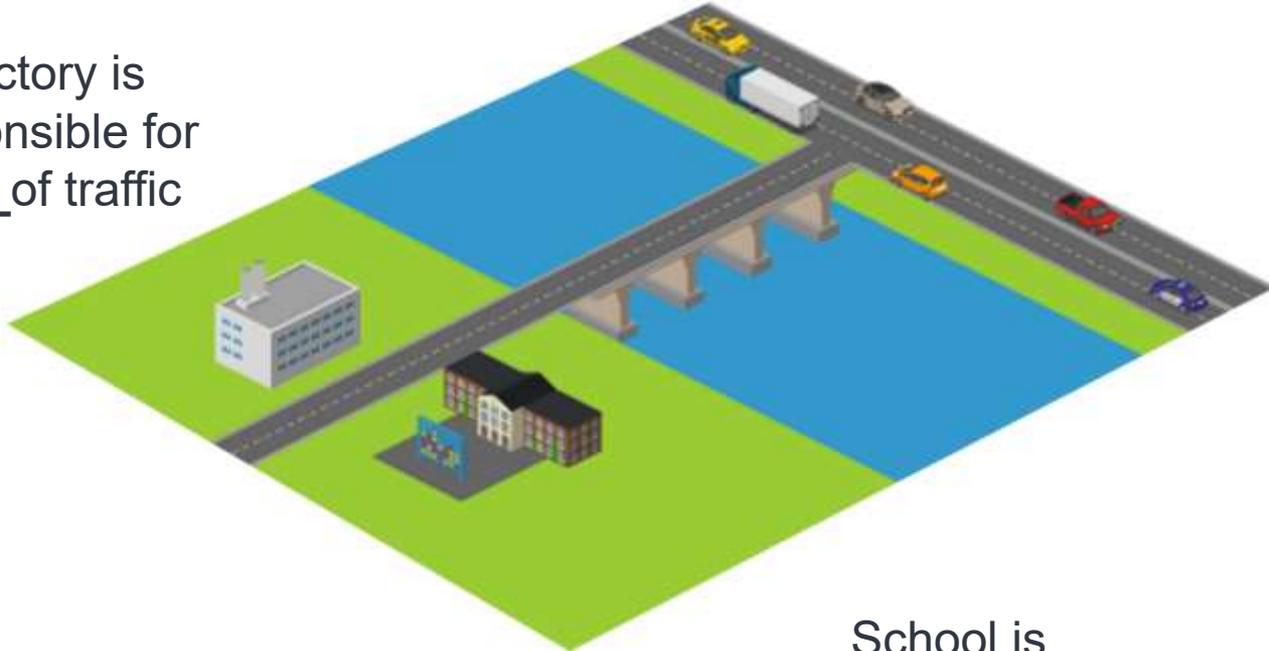


# Example 5



## Example 6

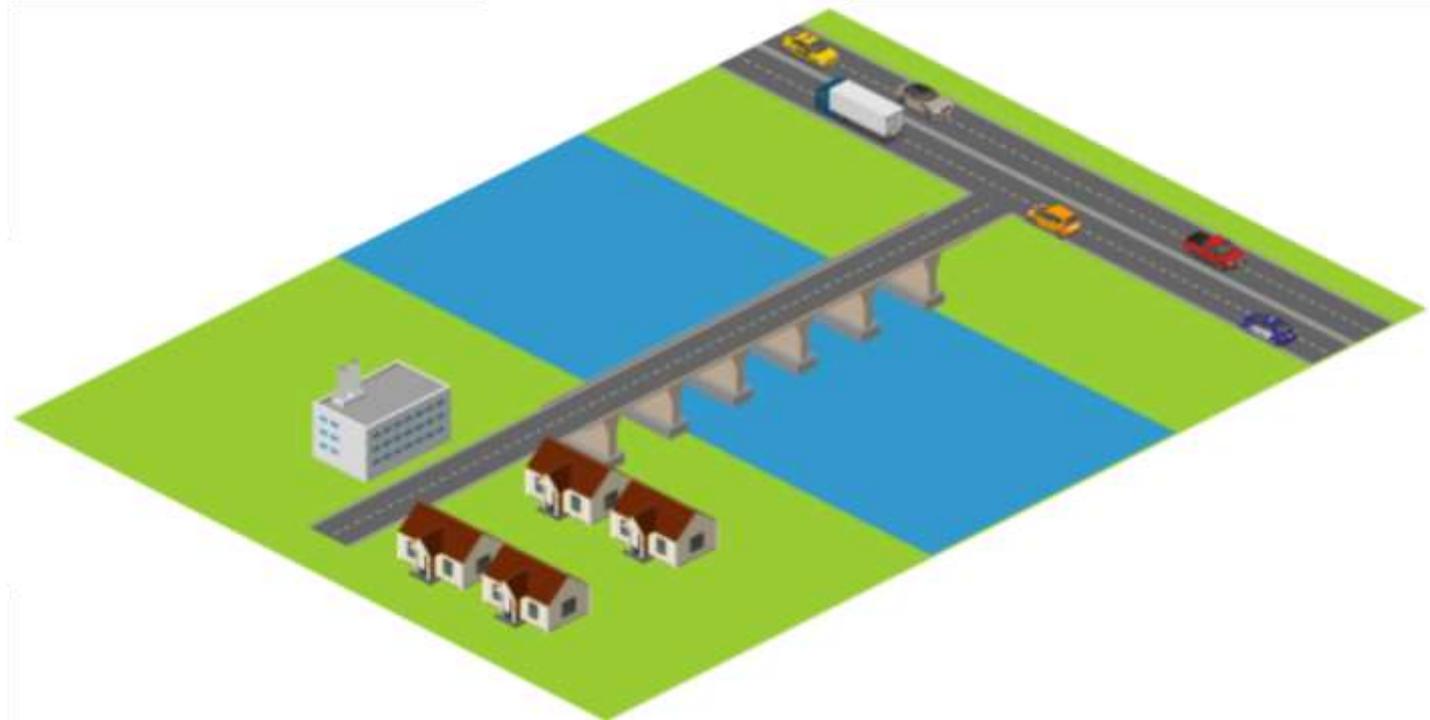
Factory is  
responsible for  
70% of traffic



School is  
responsible for  
30% of traffic



# Example 7



# Subsidy Control Principles

A) Subsidy should pursue a specific policy objective that remedies an identified market failure or address an equity rationale.

B) Proportionate and necessary subsidy should be proportionate to the specific policy objective and limited to what is necessary to achieve it.

C) Designed to change the economic behaviour of beneficiary.

D) Costs that would have been funded anyway. Subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of a subsidy.

E) Least distortive means of achieving the policy objective.

F) The subsidy should be designed to achieve the specific policy objective whilst minimising any negative effect of competition or investment within the UK.

G) The beneficial effects outweigh the negative effects.



# How to enable project development?

- Is it commercially exploited?
- Is it for bespoke requirements of economic activity or is there a broader benefit?
- Consider use of planning obligations to mandate broader development.
- Consider phasing of provision of contribution if assists public character argument.
- Appropriate use of subsidy control principles.





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