

# Intersection between Procurement and Subsidy Control



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# Elephant spotting (When is a subsidy not a subsidy)

## Subsidy control

- Public authority
- Grants Financial Assistance
- From Public resources
- Confers an economic advantage
- “Specific” – relates to supply of goods or services
- Distorts competition trade or investment



## Procurement

- Contracting authority
- Public Contract
- Supply of goods, services works or concession
- Pecuniary interest

# Financial Assistance

Often overlaps with payment but also broader in scope

Direct Grant /  
Payment for  
Goods and  
Services

Preferential  
Loan/Guarantee

Foregoing of  
revenue

Capital injection

# Public Private Finance Arrangements

**Government Department**

Capital injection 40%

Preferential loan – non commercial terms

Payment for services provided

**SPV JV Co**

Exclusive rights to carry out public service in public interest

Profit share or feedback of cost savings/claw back



# Procurement Risks

- ▶ Direct Award of public services contract to SPV
- ▶ No competitive tender – excludes competitors from equal opportunities (who may be more efficient or better qualified)
- ▶ Softens competitive tension in the market and deprives users of benefits of lower prices or better choice/quality/innovation
- ▶ Lower value for money for taxpayers
- ▶ Lack of transparency
- ▶ Longer term risks to competitiveness if contract is renewed/extended

BUT... CHECK SCHEDULE 1 EXEMPTIONS!

- Vertical “Teckal” Arrangements where control/decisive influence and 80% rule [para 2]
- Horizontal “Hamburg” arrangements [para 3] and 20% rule



# Procurement Risks /2

## **BUT... CHECK SCHEDULE 1 EXEMPTIONS!**

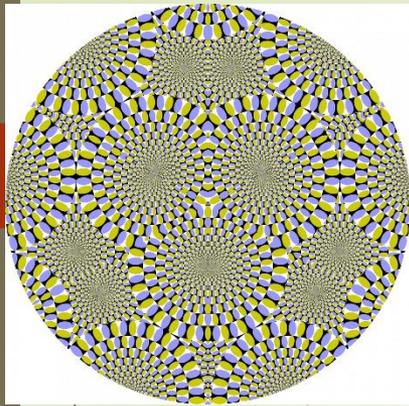
- Vertical “Teckal” Arrangements where control/decisive influence and 80% rule [para 2]
- Horizontal “Hamburg” arrangements [para 3] and 20% rule
- Other exemptions for MOD/Utilities
- Other specific exemptions for particular services [Part 2]
- Direct Award Justifications [Schedule 5] – e.g. single supplier due to IP/exclusive rights or absence of competition for technical reasons

**NB Use of exemption or exclusion to clear procurement will not absolve from subsidy control concerns**

# Subsidy Control Risks

- ▶ Payment for services – is this at market rate in commercial market or does it exceed the going rate?
- ▶ Capital injection – hidden prop-up
- ▶ Loan at preferential low rates
- Risk that SPC gains a competitive advantage over its competitors from excessive remuneration, lower loan costs or capital
- Not available from investors or lenders in the ordinary market
- May not comply with subsidy principles in Schedule 1
- Distorts competition in UK or between UK and other EU markets [Implications for TCA/ Windsor Framework/ WTO/ Other FTAs]

**RISKS: REFERRAL TO CMA – JUDICIAL REVIEW  
CHALLENGE AND MODIFICATION/ RECOVERY ORDER**



# Squaring the Circle

- ▶ EVIDENCE TO MEET SUBSIDY CONTROL PRINCIPLES:
  - Check if the services are truly economic or social in character
  - Check if there is a real economic advantage
  - Evidence of market failure or equity rationale
  - Check underlying policy objective
  - Do benefits outweigh negative effects?
  - Is subsidy necessary and proportionate?
  - Minimise negative effects on competition trade and investment
  - Check if there are other less distortive means of ensuring the policy objectives

# Altmark Criteria for Public Services Contracts

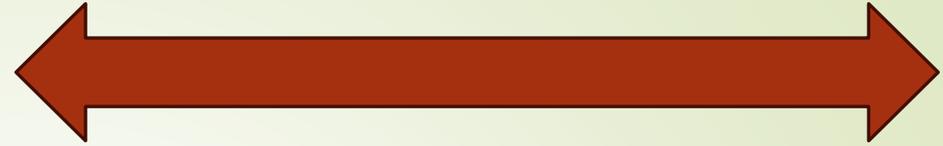
1. **Act of Entrustment:** clear mandate from public authority setting out public interest tasks
2. **Clear Compensation parameters** set out in advance in objective and transparent manner
3. **No unfair competitive advantage**
4. Selection of service provider via **public procurement procedure** creates presumption – if not costs based assessment necessary
5. **No excessive compensation** based on the costs of a typically well- run company and does not exceed what is necessary to cover the costs of providing the company
6. **Clawback measures** if necessary

# Competitive distortion impact assessment

## 1. Summary

- 1.1 Policy makers should conduct an in-depth competition assessment if their proposed policy measure:

1	Directly or indirectly limits the number or range of suppliers
2	Limits the ability of suppliers to compete
3	Limits suppliers' incentives to compete
4	Affects consumers' ability to engage with markets and make choices that align with their preferences
5	Affects suppliers' ability or incentive to introduce new technologies, products or business models



# Proportionality Toolkit

- If there is a significant distortion of competition, authority needs to consider alternatives [Chapter 8]:
- Do Nothing
- Look at spectrum
- Procurement can help!

Table 3: Spectrum of interventions<sup>57</sup>

Policy objectives	More distorting options		Less distorting options
Deliver natural monopolies	Exclusive permanent rights to supply	Time limited rights to supply	Competition for the market (plus economic regulation)  Ensure competition in downstream markets
Oversee access to scarce resources	Permanent access to incumbents (grandfather rights)	Time limited access	Auction to grant access
Reduce negative externalities (eg pollution and congestion)	Fixed quota on the number of suppliers		Tradable permits
Limiting consumer consumption	Minimum prices	Tax on the product	Information and education
Bringing prices down and/or enhancing international competitiveness	Maximum prices	Subsidy	Opening up the market to greater competition
Ensuring quality of goods/services or improve business practice	Prescriptive standards	Performance based standards  Self-regulation (but see caveats below)	Consumer awareness (so poor practices are punished through reduced demand)



# Creating the Evidence Trail to protect against challenge

## ► **Qualitative Evidence:**

- Critical Analysis
- Economic arguments
- Comparative analysis
- Stakeholder consultation responses

## ► **Quantitative Evidence:**

- Impact on prices and costs and other variables
- Economic before and after studies
- Measure consumer harm
- Cost benefit analysis



**Thank You  
for Listening  
Any Questions**

