



Subsidy Control



# The SAU referral process

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[dwfgroup.com](https://www.dwfgroup.com)

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# Agenda

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1. Background to the Subsidy Advice Unit
2. What measures are subject to referral?
3. Practical tips to navigate the process
4. What can we learn from published reports?
5. Is the SAU becoming tougher?
6. What can we expect in the next year?



# 1. An Independent Authority

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- The overall aim of the Subsidy Control regime is to:
    - fulfil the UK's international commitments in regard to subsidies;
    - ensure that the functioning of the UK's internal market is not undermined by unduly distortive subsidies
  - Article 371 of the TCA commits to creating an “*independent authority*” that can “*act impartially*” with an “*appropriate role*” within the regime.
  - Political opposition within the UK to creating another European Commission.
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the matter. It shall hold its first meeting within 30 days of the request for consultation.

6. The timeframes for the consultations referred to in paragraphs 3 and 5 may be extended by agreement between the Parties.

## ARTICLE 371

### Independent authority or body and cooperation

1. Each Party shall establish or maintain an operationally independent authority or body with an appropriate role in its subsidy control regime. That independent authority or body shall have the necessary guarantees of independence in exercising its operational functions and shall act impartially.

2. The Parties shall encourage their respective independent authorities or bodies to cooperate with each other on issues of common interest within their respective functions, including the application of Articles 363 to 369 as applicable, within the limits established by their respective legal frameworks. The Parties, or their respective independent authorities or bodies, may agree upon a separate framework regarding cooperation between those independent authorities.

## 2. The functions of the Subsidy Advice Unit

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### Review

Undertake evaluations of subsidies and schemes that are referred by public authorities under Sections 52, 55 and 56 of the Act.

Produce reports providing feedback on *the public authority's assessment as submitted along with relevant evidence.*"

Standard Paragraph 1.3 *"This report is non-binding. It does not consider whether the subsidy should be given, or directly assess whether it complies with the subsidy control requirements"*

### Monitor

Review the regime and report to Parliament upon:

- the effectiveness of the Act; and
- its impact upon competition and investment within the UK

CMA's call for Inputs ends 24 June 2024

First report expected Summer 2026.

# 3. What types of subsidy are subject to referral?

Subsidy / Subsidy Scheme of Particular Interest	Subsidy / Subsidy Scheme of Interest
<u>Mandatory duty</u> to refer under S.52(1) SCA.	<u>Option</u> to refer a SOI under s.56(1) SCA
SOPI <ul style="list-style-type: none"> <li>• involves award of a subsidy above £10m</li> <li>• involves award of a subsidy above £5m to a sensitive sector</li> <li>• Any restructuring subsidy</li> <li>• Any relocation subsidy above £1m</li> <li>• Involves award of above £1m and takes cumulative total for related subsidies above £10m / £5m if sensitive sector</li> </ul>	SOI: <ul style="list-style-type: none"> <li>• Any subsidy above £5m</li> <li>• Any relocation subsidy</li> <li>• Any rescue subsidy</li> <li>• Any tax measure</li> </ul>
Cooling off period – 5 days*	No cooling off period

The Subsidy Control (Subsidies and Schemes of Interest or Particular Interest) (Amendment) Regulations 2025 will change the £10m threshold to £25m for awards made on and after 4 August 2025.

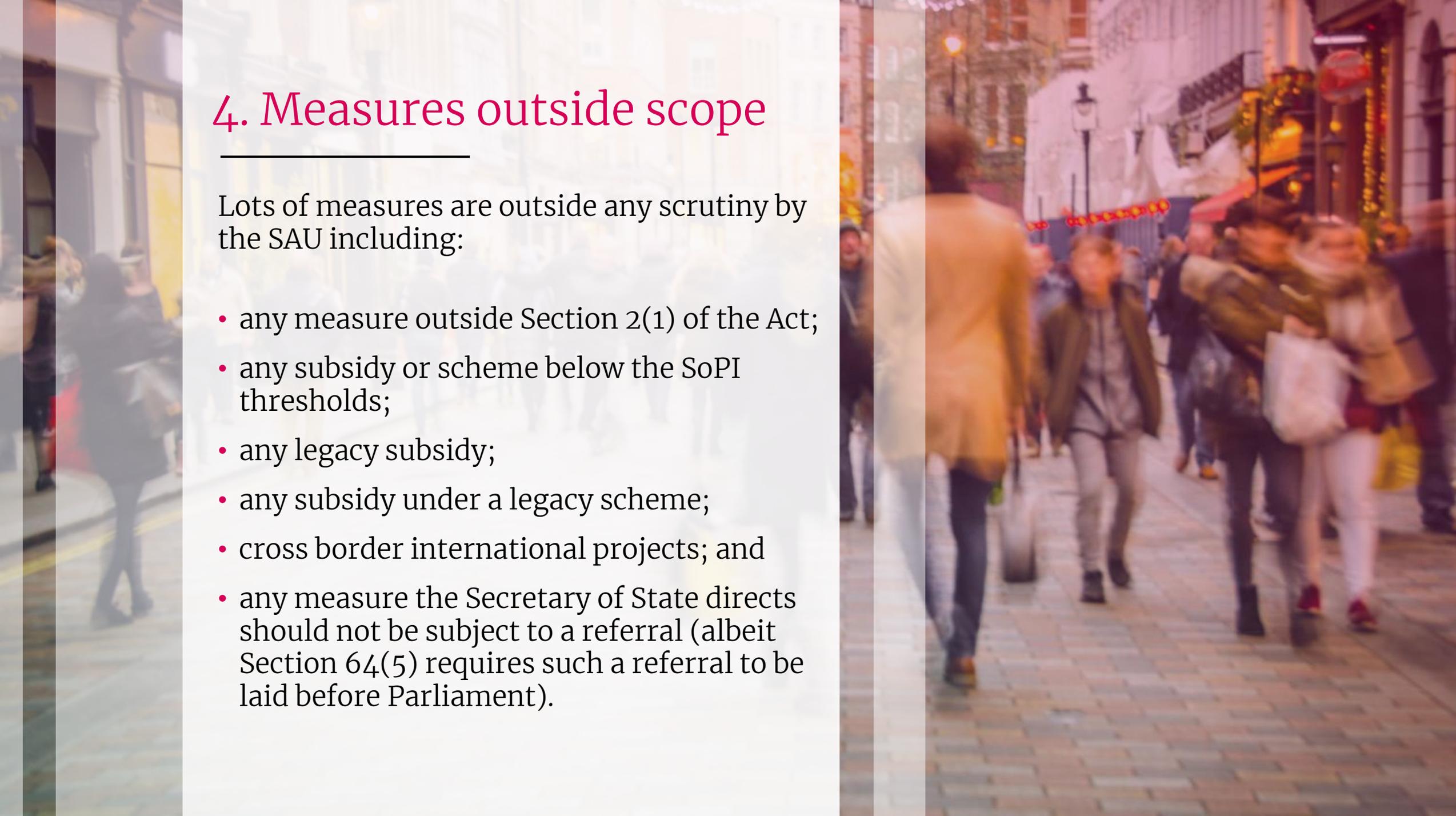
4 \*but this may be extended where the Secretary of State considers that the CMA's report has identified that there are serious deficiencies in the public authority's assessment.

## 4. Measures outside scope

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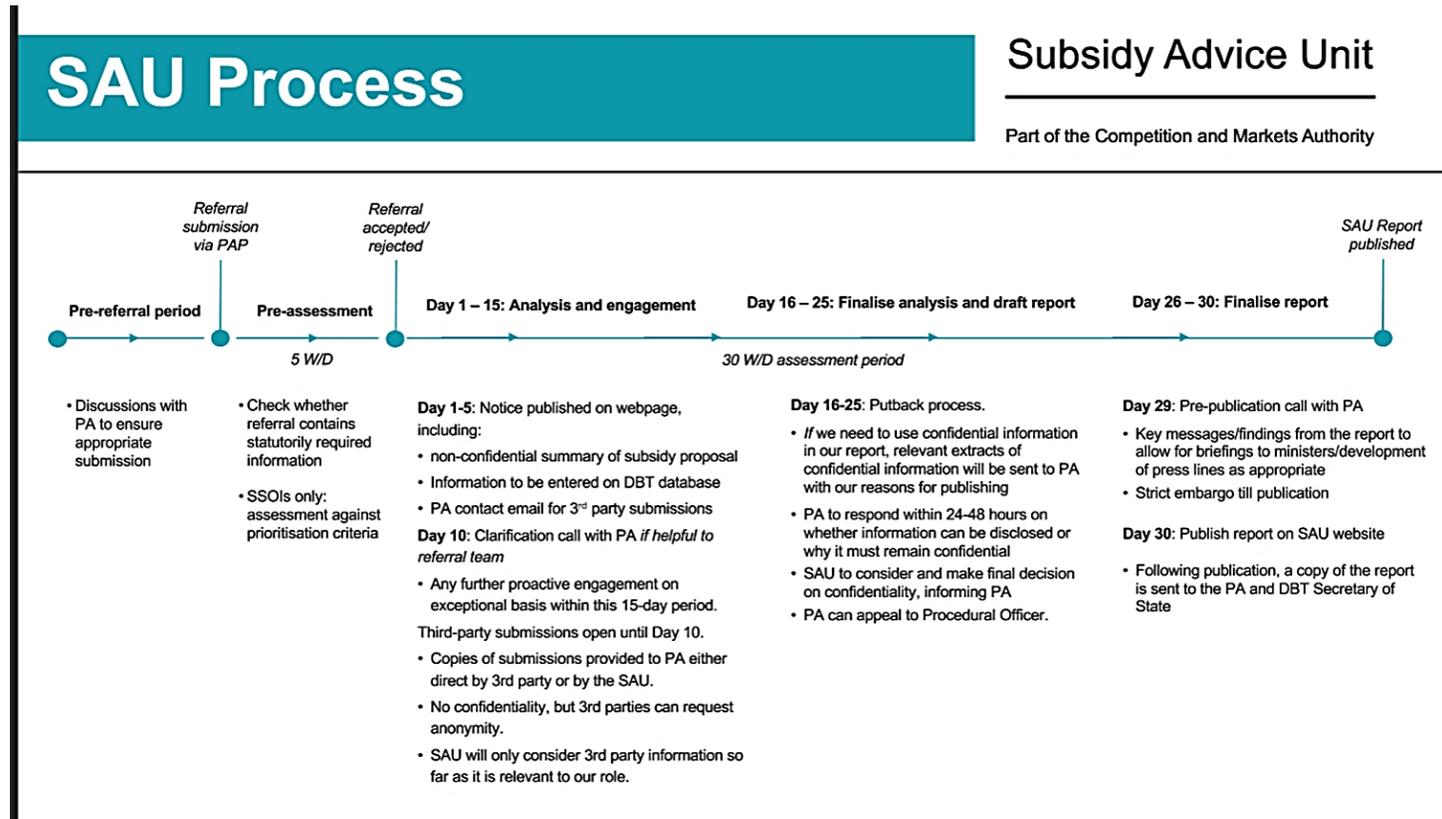
Lots of measures are outside any scrutiny by the SAU including:

- any measure outside Section 2(1) of the Act;
- any subsidy or scheme below the SoPI thresholds;
- any legacy subsidy;
- any subsidy under a legacy scheme;
- cross border international projects; and
- any measure the Secretary of State directs should not be subject to a referral (albeit Section 64(5) requires such a referral to be laid before Parliament).



# 5. Going through the Referral Process

- Pre-Referral discussions
- ‘Requirement’ to liaise with DBT
- PAP submission / preliminary assessment as to whether correct information provided
- Report Publication
- Cooling off period



# 6. Practical Tips

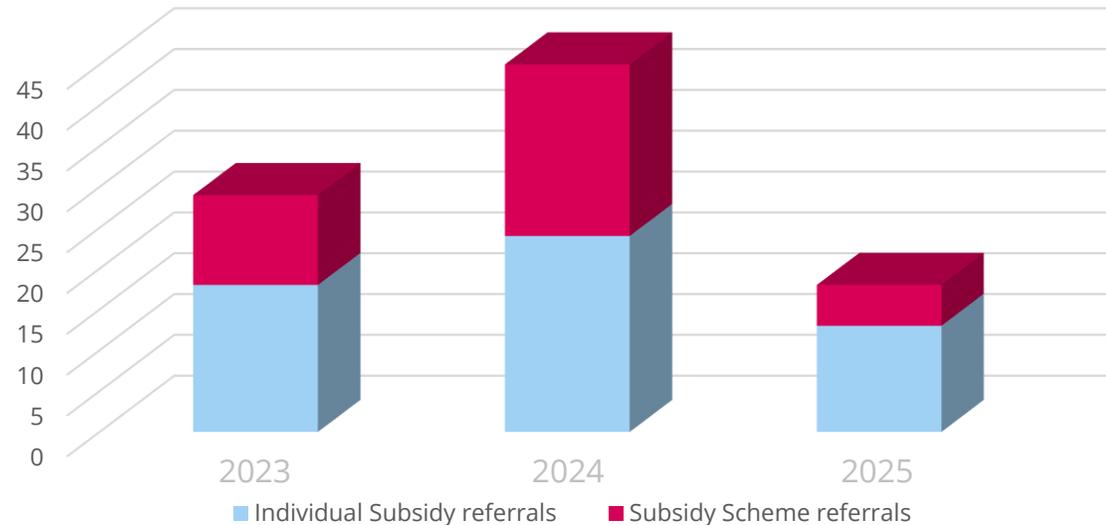
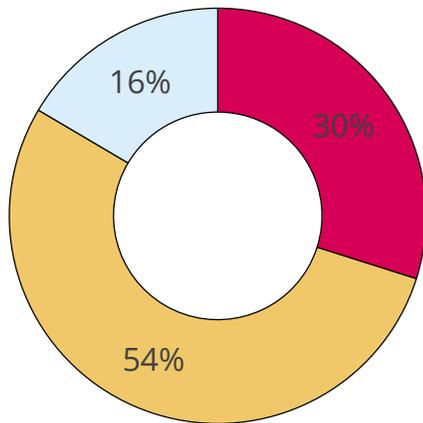
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- Prepare, Prepare, Prepare
- Refer to the Statutory Guidance throughout the Principles assessment.
- Create a data room with evidence to substantiate key points
- Make use of pre-referral discussions with the SAU (but only once you have properly prepared)
- Be considerate about the timescales



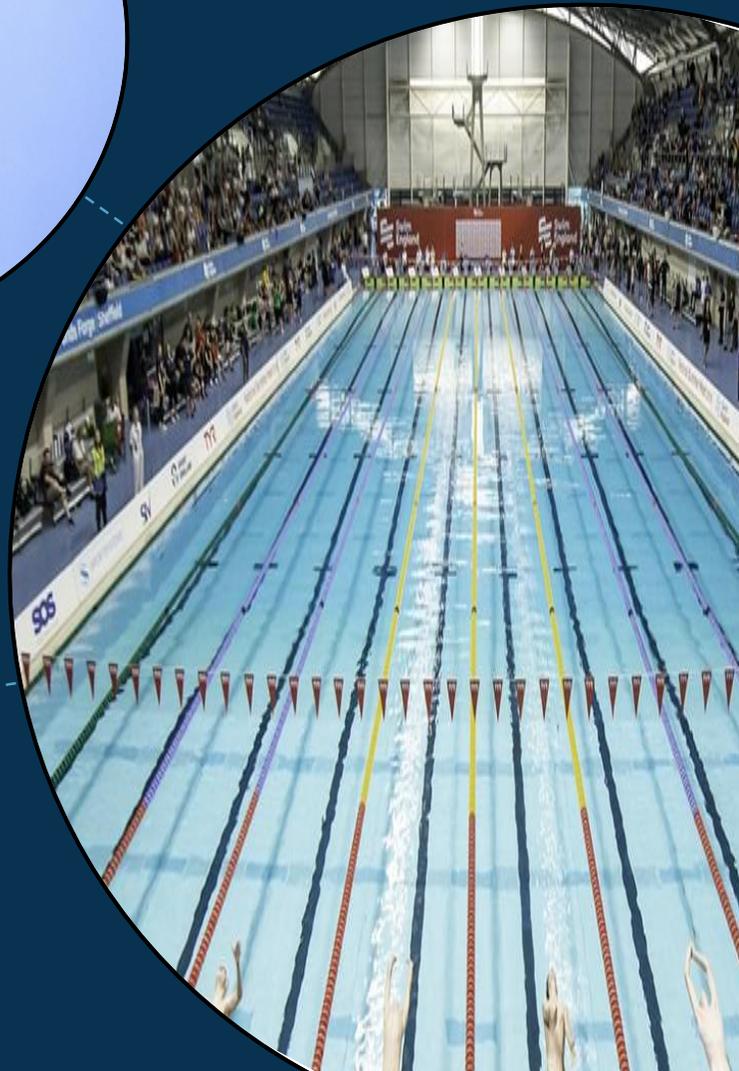
# 7. What can we learn from previous referrals?

- 93 referrals\* so far – 54% come from Central Government and Devolved Administrations, 30% from Local Government (inc. Combined Authorities) and 16% from non-departmental public bodies.
- The Department for Energy Security and Net Zero has referred 22 measures. Seven Post Office referrals.
- Schemes constitute c. 40% of referrals.



8 \* Above the figure anticipated in DBT's [Impact Assessment](#) from March 2022, which predicted ""the independent body will provide advice on 10 Subsidies of Interest and 10 Subsidies of Particular Interest as a central estimate, with 5 and 20 each for sensitivities".

The good, the bad and the ugly...



# 8. Is the SAU regime becoming tougher?

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Based on a review of CMA reports published in mid-2024:

- 60% of reports criticised how public authorities considered principles A,C and F;
- 50% of reports criticised Principles B, E and G; and
- 22% of reports criticised Principle D.

Based on a review of the last twelve CMA reports\*:

- 83% of reports criticised Principle F;
- 75% of reports criticised Principles A and B;
- 58% of reports criticised Principle G;
- 50% of reports criticised Principle E;
- 40% of reports criticised Principle C; and
- 33% of reports criticised Principle D





## 9. Assessing the data

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- The data may show the SAU is becoming tougher, it might also indicate that public authorities continue to fail to properly apply the rules (which are developing additional nuance as the Statutory Guidance is updated).
- Indeed one of the major issues with the Subsidy Control regime is a lack of consistency. The referral process is a rare opportunity for a public authority to “*have its homework marked*”.
- Perhaps the SAU should be tougher?
- In terms of the referral process this could include expressly stating when an assessment is deficient or incomplete. It might also involve the SAU being able to investigate on its own initiative?

# 10. What can we expect next?

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Next year will see the CMA report on the effectiveness of the regime, but also the UK meeting with the EU to review the TCA.

This will be a crunch moment for the regime – politicians may well conclude that the objective is sensible, but changes are needed to drive improved compliance.

In such a situation, a strengthened CMA is likely to be one of the first options considered.

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Alexander Rose has extensive experience advising upon all aspects of public funding, including Subsidy Control compliance.

Highlights include working on the first case under the Subsidy Control Act 2022 (*the Durham Company Limited v Durham County Council*) and the first referral of a subsidy to the CMA's Subsidy Advice Unit.

Alexander was invited to be an expert witness to the Parliamentary Select Committee designing the Subsidy Control Act 2022. He is also a co-author of the *Lexis Nexis* practice notes on Subsidy Control law.

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