



UK Subsidy Control Consultation

How the UK can create a better system

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Experience of applying the interim rules

“The new regime is probably a bit more flexible but the lack of clarity arguably negates any benefits of that.”

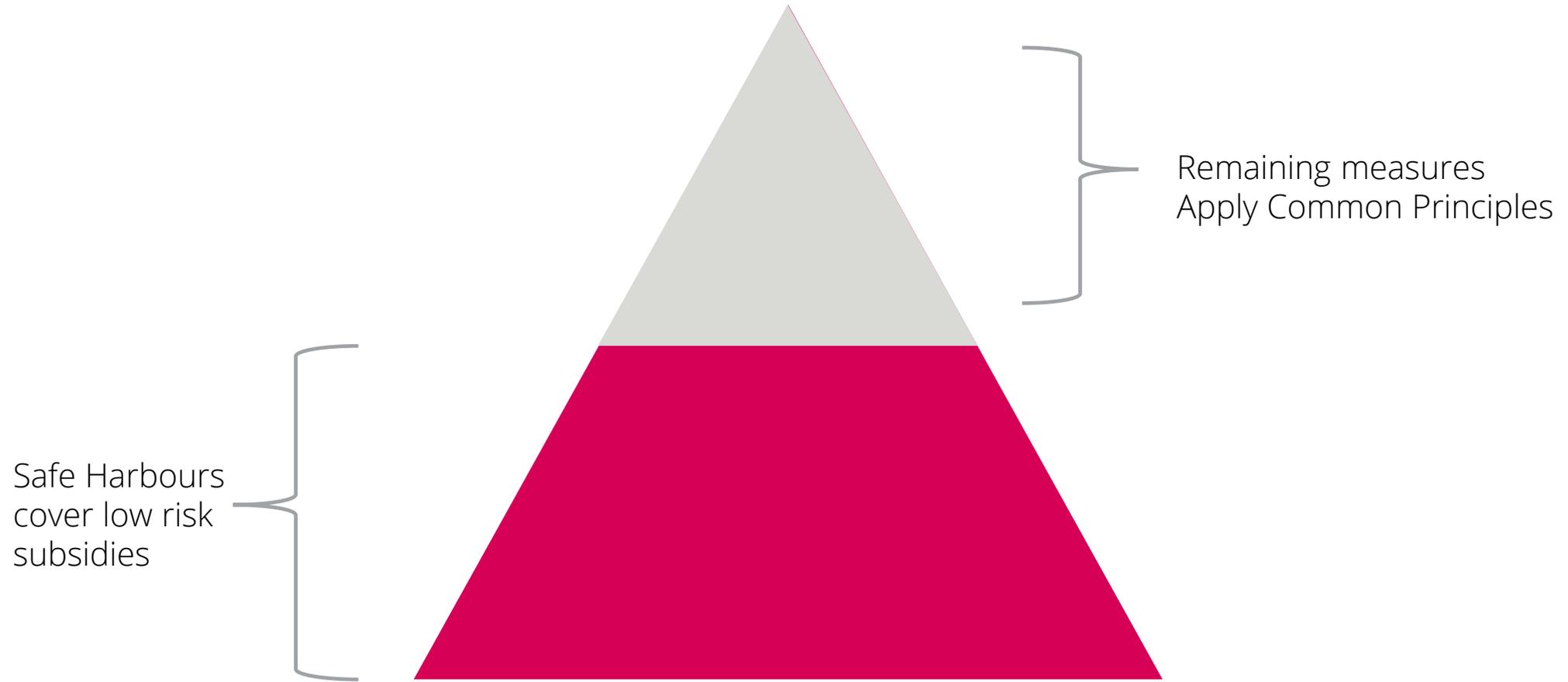
Local Government Lawyer, March 2021

Key improvements needed:

- safe harbours to provide legal certainty for smaller, lower risk subsidies;
- detailed guidance on when a subsidy is not present;
- detailed guidance of how to apply the Common Principles; and
- an independent authority which helps Public Bodies lawfully award subsidies when novel or exceptional circumstances are present.



Safe Harbours will improve the system

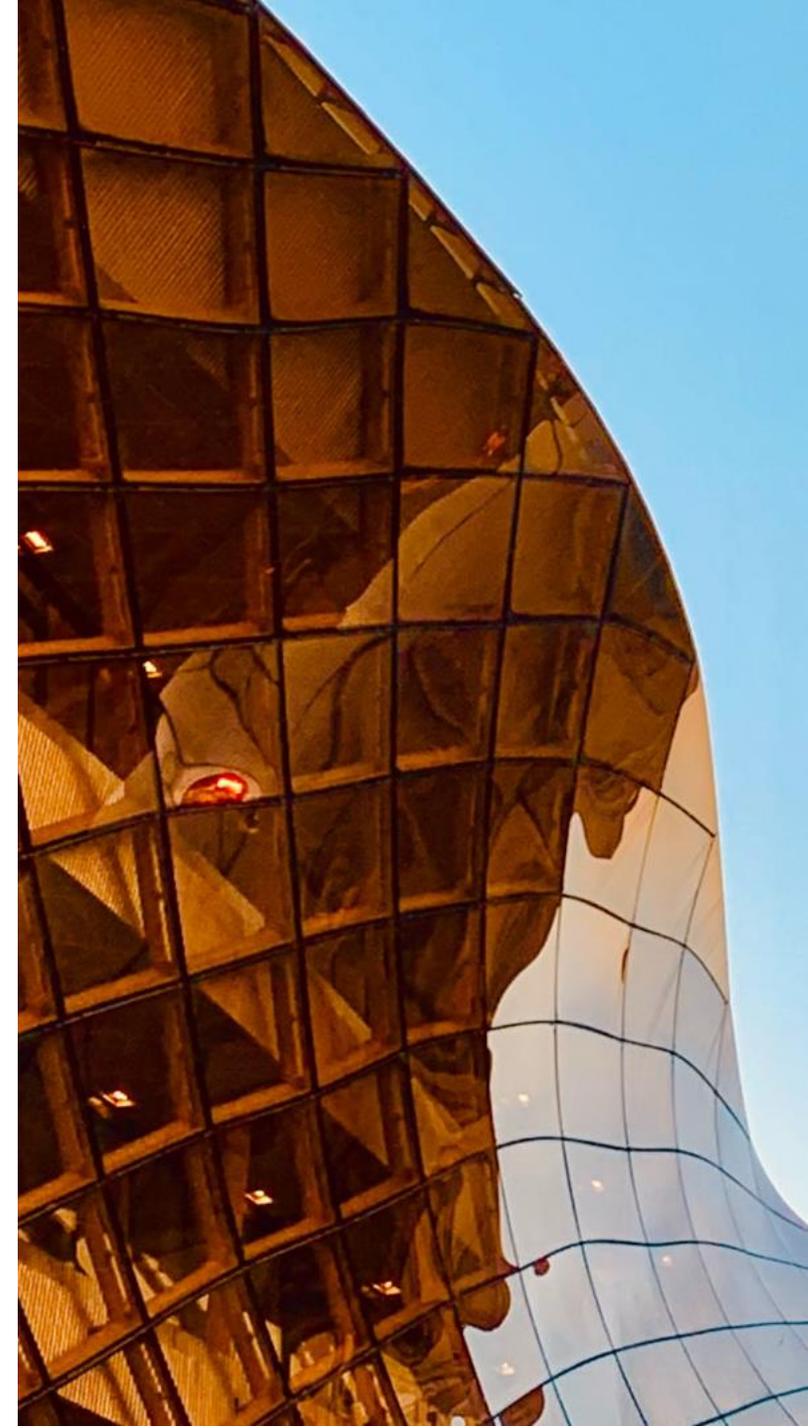


Safe Harbours will improve the system

Safe harbours providing legal certainty for lower risk awards are helpful because:

- recipients of subsidies know that if they comply with the relevant conditions their grant is safe from recovery;
- public bodies know they can award safely, they are subject to less red tape, so can make awards more quickly (and with less expense); and
- they provide a “soft incentive” towards national priorities such as levelling up and achieving Net Zero.

Importantly a public body can still proceed on the basis of the Common Principles. Therefore having safe harbours should not reduce the flexibility of the new system.



The need for guidance

Guidance is needed to assist public bodies to:

- be able to identify whether a subsidy is present; and
- properly apply the substantive tests in the Common Principles and retain a suitable evidence trail.

Given the importance of this guidance at a time when there is no case law, we would recommend the Government draws upon the experience of practitioners who regularly advise in this area.

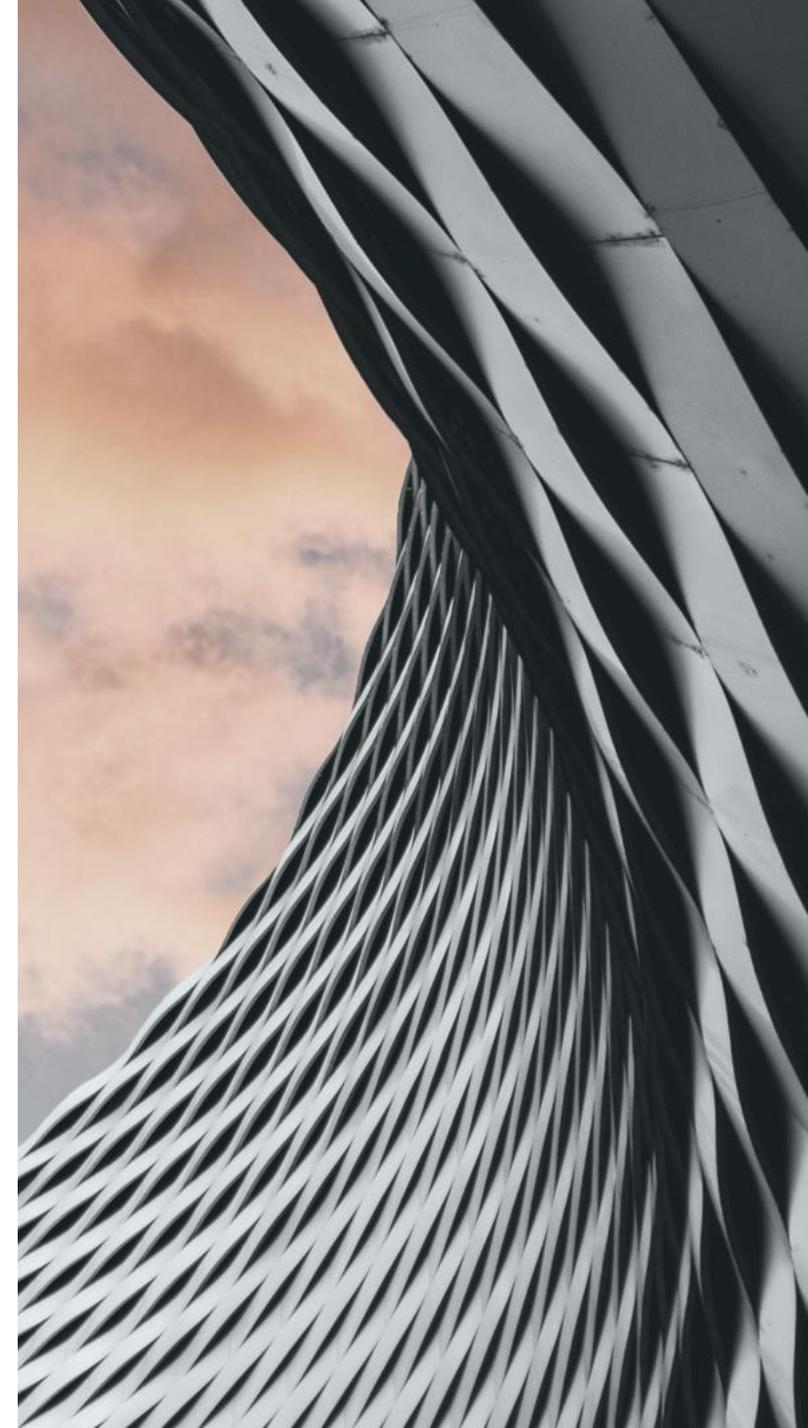


Additional Common Principle

If an additional Common Principle is to be added, we suggest:

"Where possible, subsidies' contribute to environmental protection or achieving the UK's Net Zero objective".

We believe this would be a positive statement in the year the United Kingdom hosts the 2021 United Nations Climate Change Conference.

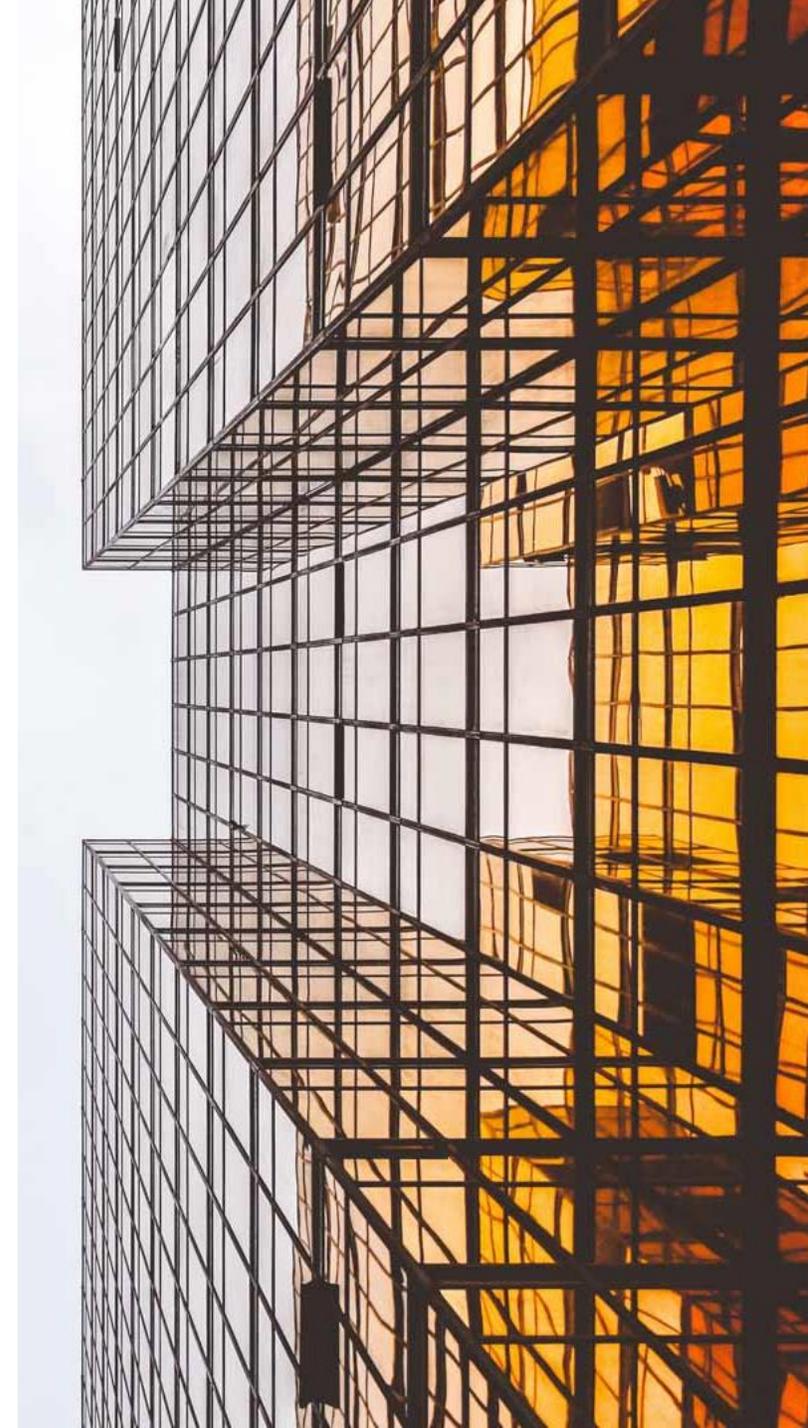


Additional Common Principle

The consultation proposes a principle which reads “Public authorities should seek to minimise any harmful or distortive effects on competition within the UK internal market that might arise from a subsidy”.

We believe this would be very difficult to pin down in practice, potentially creating a significant obstacle for regional inward investment projects and for relocations to disadvantaged areas (NB. the latter being in danger of running counter to levelling up).

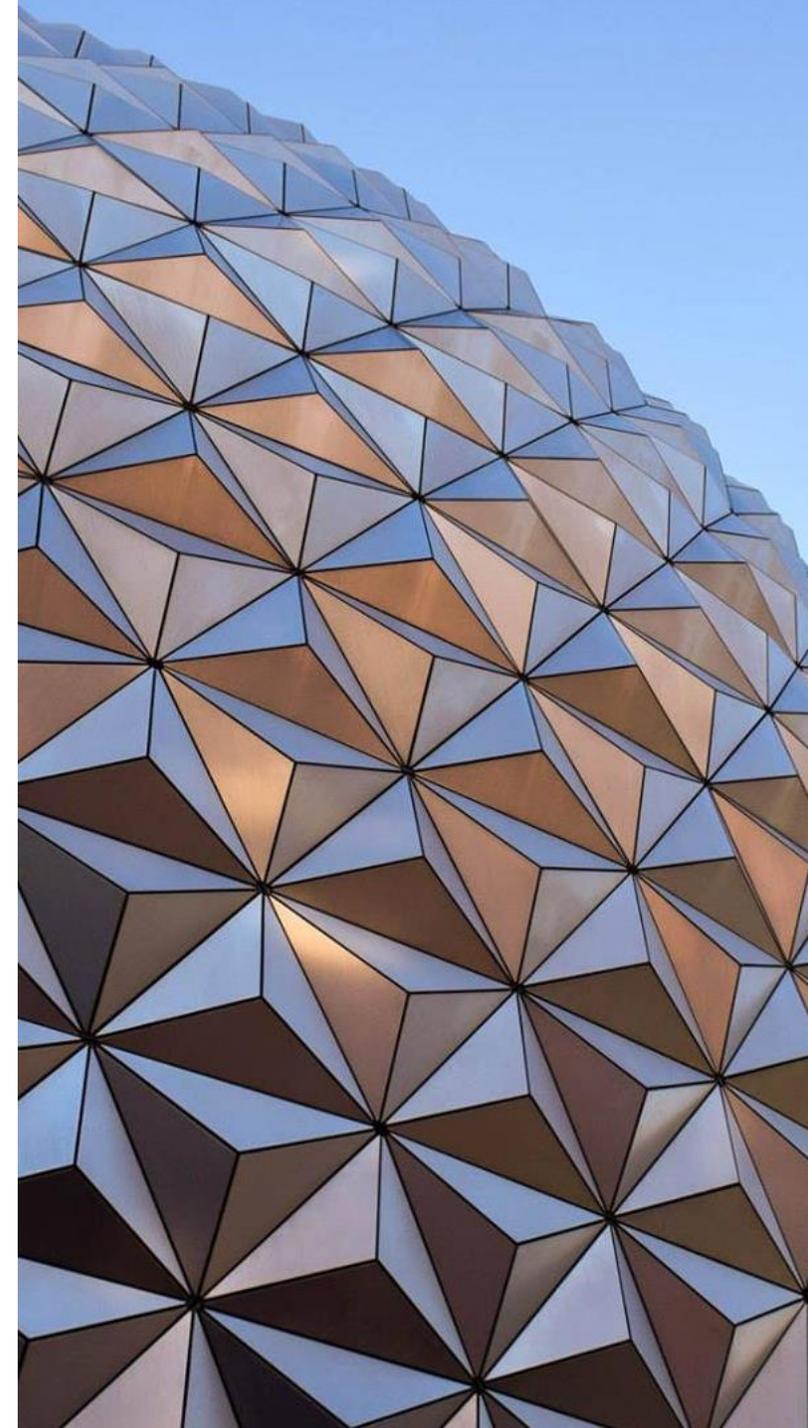
If such a Common Principle is needed it would seem sensible to incorporate this into the final Common Principle, so it forms part of the “balancing test”.



Independent Authority

We would support an Independent Authority which:

- acts as an "Amicus Curiae" for public bodies, with the ability to intervene in challenge cases of note;
- available for guidance to public bodies but only in novel or exceptional circumstances (NB. there should be no presumption of guidance being available and it should not be a general "free advice" bureau);
- creates templates to make the award process simpler; and
- works with public bodies and practitioners to identify new safe harbours for consideration by the Government.



Our team



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