

- 9.1 It is necessary to consider whether the terms on which the Council is providing financial assistance for Portico involves the provision of a subsidy. If there were a subsidy, various steps would be required under the Subsidy Control Act 2022 to ensure that the subsidy was lawful. The subsidy control rules are the UK's equivalent to the State aid rules.
- 9.2 A subsidy arises when financial assistance (in any form whatever) is provided by a public authority from public resources and this results in one or more enterprises receiving a specific economic advantage which either does, or could, have an effect on competition or investment within the UK or on trade or investment between the UK and somewhere outside the UK.
- 9.3 The Council is required to have regard to the statutory guidance (see section 79(6) of the Subsidy Control Act 2022) when giving a subsidy. The statutory guidance also contains useful information and guidance on how to go about demonstrating that financial assistance is not a subsidy.
- 9.4 It will be possible for the Council to follow a 'no subsidy' approach for its investment in Portico if it is satisfied that the investment is in line with normal market conditions, and so in accordance with the so-called Commercial Market Operator principle (CMO Principle). If the Council's investment complies with the CMO Principle, there will be no economic advantage for Portico and therefore no subsidy. The CMO Principle is the UK equivalent to the Market Economy Investor Principle under EU State aid law.
- 9.5 In order to conclude that the CMO Principle is satisfied, the Council must be satisfied that its overall investment in Portico (taking into account both its existing investment and the proposed further investment outlined at 2.4 above) based on Portico's Business Plan, is an investment which a commercial market operator in an equivalent position to the Council and driven only by commercial objectives would be willing to make. The measures in place and set out in this report seek to demonstrate that the Council adheres to the CMO Principle when making decisions regarding its financial support for Portico and when keeping that investment under review. These steps are in accordance with the external legal advice which the Council has received in relation to subsidy control compliance.
- 9.6 Investment proposals relying on the CMO Principle justification should ideally be supported by at least one independent report from a reputable source confirming that the terms and conditions would be acceptable to a market investor. The Council has commissioned an independent expert assessment of the proposed investment in Portico, which supports a conclusion that a private investor in the Council's position would be willing to make an equivalent investment based upon Portico's Business Plan and the wider circumstances (including the indirect benefits generated for Portsmouth International Port as a result of Portico's business at the Port).

- 9.7 It is considered likely that the CMO Principle, based on the proposals set out in this report and the outcome of the Council's financial evaluation, would be satisfied. This conclusion has been reached on the basis that the continued investment in Portico is forecast to generate a significantly better return on investment for the Council than any of the alternative investment options considered (as explained further in Exempt Appendix A).
- 9.8 However, the Council must ensure that:
- Conditions are attached to the loan facility to enable it to check that the Business Plan is on track.
  - It continually reviews the progress of the implementation of the Business Plan to check that it continues to present an attractive investment that a rational private investor in the Council's position would be prepared to make.
  - It puts in place adequate regular reporting controls to facilitate such reviews.
  - It regularly reviews its investment and re-visits the alternative options.
- 9.9 In addition to the above it is recommended that the proposed strategy and loan facilitation proposals together with the structuring of Portico (new companies and officers) be scrutinised by reference to independent legal review principally focussing upon establishing that the proposals of this report are fully compliant with current legislation.