

Consultation on the operation of the subsidy control functions of the Subsidy Advice Unit ("SAU")

**Response by Anthony Collins
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INTRODUCTION

This response to the consultation has been prepared on behalf of Anthony Collins Solicitors LLP

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OVERVIEW

Overall, we feel the CMA's Draft Guidance is a coherent and comprehensive document and presents as a “good read”. It is particularly welcome that the SAU will have discretion on whether to issue a report on a SSol following a voluntary referral and we agree that a principle-based approach to assessing whether a report is required is appropriate.

Our main comments link to Question 1 as we feel there is an opportunity here for the CMA to really take a leading role in supporting the public sector to comply with the new subsidy control regime in a supportive and collaborative culture - we would be happy to discuss any of our response further if that would be helpful including our thoughts around our response to Question 1.

RESPONSE

1. Question 1: Do you agree with the objectives for pre-referral engagement? (See 3.6-3.10)

We feel the objectives for pre-referral engagement feel quite narrow and risk missing the opportunity to engage in early, collaborative and supportive conversation as could be achieved if the CMA were more open to providing an initial opinion on a subsidy control matter through this first stage of the process. At ACS we regularly provide our initial view on subsidy control issues and, whilst we will appropriately caveat this as merely an initial view and subject to change, our clients find it very helpful to be able to have a collaborative and straightforward discussion from the “get-go” accepting once details are fully explored that initial view will be adapted and may occasionally be significantly altered.

The opportunity here is that the CMA could rapidly develop a rapport with the public sector as a rich resource of talented and knowledgeable subsidy control experts who can assist where genuinely complicated measures warrant further consideration which may then prompt further work by the public authority to refine the measure before making a voluntary referral. In saying this we fully acknowledge and agree it would not be appropriate for the CMA’s involvement to replace specialist legal advice and absolutely this risk would need careful management, but we do think more could be done here to support a collaborative environment for the development of measures governed by the subsidy control regime.



2. Question 2: Do you agree with the proposed approach to transparency (including publication of summary information at the time of a referral)? (See 3.18-3.23)

Largely yes. We do wonder whether the following position in paragraph 3.21 warrants a little further consideration where it says:

“Third party submissions will not be published, although the matters raised may be reflected in the SAU’s reports.”

If a third-party submission is deemed to be influential by the SAU we suggest in that instance it ought to be published in the SAU’s report subject to the same confidentiality considerations as for the public sector – otherwise there is a risk that a finding of the SAU could be influenced by a third party and it remains unclear for the public body concerned what the context is driving the outcome.

3. Question 3: Do you agree with the proposed approach to the treatment of confidential information? (See 3.28- 3.40)

We broadly agree with the proposed approach to the treatment of confidential information. Broadly the CMA takes a clear and coherent stance, though we feel the following statement at the end of footnote 122 jars slightly:

“Public authorities must take their own advice in relation to confidentiality obligations.”

If the CMA is exercising discretion on to what extent confidential information should be published (which is how we read the rest of 3.28 – 3.40) we are unclear why public authorities would be expected to take their own legal advice on this matter.

4. Question 4: What might public authorities, beneficiaries, and other interested parties expect to be included in SAU reports. In particular, how much advice should the SAU give on how to improve the assessment or modify the subsidy or scheme? (See 4.26-4.29)

We consider that the above parties would expect the following to be included in SAU reports:

- An evaluation of the public authority’s Assessment of Compliance – As with the public authorities’ submission, we hope this would be proportionate to the size, potential for distortion and novelty of the subsidy in question. As acknowledged at 4.27 of the draft guidance, we agree the SAU’s report should not take the form of a ‘pass/fail’ evaluation. In addition to identifying shortcomings in the public authority’s assessment, we would like the report to, where appropriate, acknowledge a high-quality evaluation in order to identify and encourage best practice;
- Evaluation of the any effects of the proposed subsidy on competition or investment within the UK – We hope this is substantiated on an evidence-based approach and is not based on vague and generic economic theory. We hope the report should help the above parties identify the SAU’s key concerns;
- Advice about how the public authority’s assessment might be improved and advice about how the proposed subsidy or scheme may be modified to ensure compliance with the requirements of the Act – We note the Act does not create a strict obligation on the SAU to provide this advice. As discussed below, we encourage the SAU to provide as much advice as possible following the first few months/years of the establishment of the SAU.



As the new regime is in its infancy, we hope the SAU will provide as much advice as possible on how public authorities may improve their assessments or modify a subsidy or scheme – the effectiveness of the CMA in undertaking this new role will be heavily reliant on its ability to support the public sector to engage positively with the subsidy control rules, and clear, practical and pragmatic advice is critical to this.

Question 5: What might stakeholders find useful to see included in the SAU's monitoring reports? (See 4.30-4.32)

We consider that stakeholders would benefit from seeing the following included in the SAU monitoring reports:

- Data on the number of referrals made to the SAU by month/quarter. This should include a breakdown of the different types/headings of submissions e.g., SSol, SSoPI and subsidies called-in by the Secretary of State;
- Further breakdown on the number of pre-award and post award-referrals;
- Data on the number of reports issued including statistics on the number of adequate/inadequate Assessments of Compliance;
- Examples of best practice;
- Summaries and analysis of key legal challenges to the CAT and international agencies; and
- Breakdown of the number and value of subsidies provided in a given geographic area including statistical analysis e.g., means/median

6. Question 6: Do you agree with the SAU's Prioritisation Principles? (See 5.1-5.8)

Yes, they seem sensible to us.

