

## **Response of Clifford Chance LLP to CMA Consultation on Draft Guidance on the Operation of the Subsidy Control Functions of the Subsidy Advice Unit**

Clifford Chance welcomes the opportunity to respond to the consultation of the Competition and Markets Authority (CMA) on the draft "Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit" (CMA161con) (the **Draft Guidance**). Our observations below are based on the substantial experience of our antitrust lawyers of advising on State aid proceedings in the EU and on proceedings before the CMA (and other equivalent authorities). However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

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

- 1.1 We broadly agree with the proposed objectives for the pre-referral engagement. In our experience, pre-notification discussions are valuable to both the notifying party and the relevant authority. We have two suggestions to make the pre-notification process more efficient.
- 1.2 First, we appreciate that the Subsidy Advice Unit (SAU) should not be required to advise on the design of subsidies and schemes, nor on how a public authority should undertake its Assessment of compliance.<sup>1</sup> However, we consider that the SAU should be open to engaging with public authorities on manifest errors in the assessment undertaken by the authority in referrals. We suggest that it would be inefficient if the SAU were to not engage with such matters in pre-notification, since the SAU will then be required to go through the process of evaluating the referral, engaging with third parties, and producing a report, if the outcome of this is to identify the errors that were manifest from the start. Accordingly, we suggest that the SAU's pre-notification discussions should be wider than merely identifying the information that should be submitted when the subsidy or scheme is formally referred.<sup>2</sup>
- 1.3 Second, we note the Draft Guidance refers to the BEIS Statutory Guidance as regards how public authorities should design subsidies.<sup>3</sup> We suggest that public authorities

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<sup>1</sup> Draft Guidance, paragraph 3.8.

<sup>2</sup> As suggested at paragraph 3.6 of the Draft Guidance.

<sup>3</sup> Draft Guidance, paragraph 3.8.

would benefit from the SAU clarifying that it will not seek to diverge or otherwise look behind the BEIS Statutory Guidance.<sup>4</sup>

**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)**

2.1 We agree that the reporting period should be conducted in an open and transparent manner. We note in this regard that, contrary to the Draft Guidance's stated objective, the proposed approach in the Draft Guidance does not provide for a transparent approach during the review period, however. In our view, this also risks undermining the robustness of the SAU's reports. In particular, the proposed approach for the reporting period envisages that in general, once the public authority notifies the referral request, the SAU will not revert to the public authority until the end of the reporting period.<sup>5</sup> For example:

(a) It appears that the SAU will not seek to invite comments from the referring public authority on the matters the SAU provisionally considers may be in issue. In our experience, matters that a reviewing authority may consider to be in issue can often be explained or ameliorated, and are sometimes based on simple misconceptions (whether a mistake of law, fact, or assessment). The SAU may therefore be assisted if it were to obtain feedback on its provisional conclusions before such conclusions are solidified in the SAU report. It would also be of little assistance to public authorities and interested parties if the SAU's report contained such errors, and therefore carried less weight in subsequent appeal proceedings. We therefore consider that the SAU's reports will be more robust if the SAU were to consult with public authorities on its provisional conclusions within the reporting period.

(b) We note that the CMA adopts this approach in the merger control context in the form of issues statements and case review meetings, which allow the parties to respond to, and present on, the CMA's provisional thinking. In our experience, this process enables the CMA to winnow some of its concerns. We appreciate that the merger context allows the CMA up to 40 working days, whereas the SAU has 30 working days for its report, and that this may require the SAU's consultation with the relevant public authority to be more focussed than in a

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<sup>4</sup> We note that section 79(6) of the Act requires public authorities to have regard to the BEIS Statutory Guidance. Accordingly, we understand that, in any event, the SAU will not seek to diverge from the BEIS Statutory Guidance.

<sup>5</sup> We appreciate the SAU might "*on occasion ask the public authorities for clarification where necessary*" (paragraph 3.22). However, this appears to be an exception to the general position.

merger control context. However, effective pre-notification should enable the SAU to focus its understanding before the review period starts, and the SAU will have possibilities to extend the period in appropriate circumstances. We therefore consider that the review period provides ample time for the SAU to consult with public authorities during the review period.

2.2 We also consider that the proposed approach could benefit from greater clarity on certain matters. In particular:

(a) Paragraphs 3.19-20: We suggest that the SAU clarifies what information will be published on its website. We note that, in a merger control context, the CMA typically does not publish the notifying party's notification and instead provides high-level background information. However, it appears that the SAU is intending to publish greater granularity than the CMA does in a merger control context, since paragraph 3.20 states that "*third parties may raise issues, such as alternative tools, or impacts on markets, competition and investment, that were not considered by the public authority and would not otherwise be brought to the SAU's attention.*" This suggests that the information the SAU will publish will be of a degree of granularity such that third parties know what tools and impacts on markets, competition, and investment were considered by public authorities.

(b) We also suggest that the SAU sets out a typical deadline in which voluntarily submitted third party information must be provided, so as to prevent third parties providing information late in the process, thereby risking the SAU not being able to properly consider, test, and take account of such information. We suggest that 15 working days is appropriate, and that this is consistent with timeframe proposed at paragraph 3.23 as regards information the SAU may seek to obtain proactively.

2.3 Finally, we suggest that the Draft Guidance provides that the SAU will allocate a case officer for each referral, and that the case officer will be the referring public authority's primary point of contact throughout the review period. This is consistent with the stated transparency objective.

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

3.1 We generally support the SAU's proposed approach to confidentiality. We however suggest that the Draft Guidance would benefit from two further clarifications.

- 3.2 First, the sequencing for the publication of the report, as proposed at paragraph 3.28 of the Draft Guidance, is that the SAU will publish its report on its website *before* the end of the reporting period, with the SAU providing a copy of the report to the relevant public authority and the Secretary of State thereafter. Given this, we suggest that the SAU should provide for a "put back" process, equivalent to that which the CMA operates under the merger control regime, in which the SAU provides extracts of its proposed report to the public authority that may contain confidential information. We appreciate that the SAU is proposing that public authorities and other parties provide all submissions with confidential information already identified. However, in our experience, this is not a sufficient basis for an authority to decide on issues of confidentiality for its published report, since the report may need to synthesise the submitted information and/or drawn conclusions, and it will be necessary for the SAU to consult on whether such output is confidential. We do not consider that such a process would risk the SAU being unable to publish its report within the statutory deadlines, since such put backs can be issued in parallel to the drafting of the report, be issued on a rolling basis, and usually do not require lengthy response periods.
- 3.3 Second, we suggest that the fifth and sixth lines of paragraph 3.35 be amended to state "*It may only disclose such information where statute allows it to do so, including for the purpose of facilitating the exercise of its statutory functions.*" This is because, as drafted, the reference to "express permission" could be misconstrued as suggesting that the SAU needs to obtain the consent of the information holder to disclose the information, which it does not.<sup>6</sup>

**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)**

- 4.1 We anticipate that public authorities and beneficiaries will expect the SAU report to contain information that can be used in response to an application for judicial review before the Competition Appeal Tribunal and, similarly, interested parties will expect the SAU's report to contain information that can be used as a way of challenging unlawful subsidies. We therefore agree that SAU reports cannot follow a tick-box exercise, nor can it be mere pass/fail report. In our view, the SAU report should evaluate whether the relevant measure is indeed a subsidy and, if so, whether it is compliant with the Act, including evaluating the measures against the Principles.

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<sup>6</sup> See section 241 of the Enterprise Act 2002.

Public authorities may be disincentivised from referring SSoIs if the eventual SAU reports in such cases are not capable of being used in response to a challenge.

- 4.2 We note in this regard that paragraph 4.3 of the Draft Guidance does not contemplate the SAU report opining on whether the proposed measure is in fact a subsidy. To the extent this is the intention, we suggest that this should be amended. In particular, the value of the SAU's report will be reduced if the question of whether a subsidy has been granted remains unaddressed following the report. Moreover, in our view, the SAU report is required to opine on whether the measures are a subsidy, since: (i) this is an essential jurisdictional question; and (ii) assessing whether a subsidy complies with the Principles requires the SAU to identify the subsidy.
- 4.3 We also consider that it is critical that the Draft Guidance provides greater clarity on the intensity of its evaluation and the standard by which it will assess the referral. In particular:
- (a) We note that paragraph 4.3 of the Draft Guidance contrasts the evaluation of the referring authority's assessment with the SAU's own assessment. However, the boundaries between these two terms are not well understood. We infer from this that the SAU has in mind a distinction similar to that of a 'merits review' as against a 'judicial review'. However, we consider that the SAU should clearly explain whether this is the case. For example, will the SAU's evaluation of the referring public authority's assessment be limited to a review of whether the assessment was irrational?
  - (b) We also note that the Draft Guidance provides seemingly inconsistent messaging in this regard. At paragraph 4.3, the Draft Guidance states that "*the fundamental questions that the SAU will consider are: (a) How well does the public authority's assessment address the subsidy's compliance with the Subsidy Control Requirements? (b) Has appropriate relevant evidence been identified and used in the assessment, and are the public authority's analysis and conclusions generally consistent with that evidence?*" In contrast, at paragraph 3.18, the Draft Guidance states that the SAU invites comments from third parties on issues "*such as alternative tools, or impacts on markets, competition and investment, that were not considered by the public authority.*" This suggests a wider inquiry than that contemplated at paragraph 4.3.
- 4.4 With regards to the level of advice that the SAU should give on how to improve the assessment or modify the subsidy or scheme, we note that the SAU will be mindful that the granting authority remains the decision maker and that the granting authority benefits from a margin of appreciation and manoeuvre. The SAU might therefore avoid being too prescriptive in its advice for modifications. This notwithstanding, the level

of advice should be sufficiently detailed that it allows the public authority to get comfortable that, were it to take remedial actions, the proposed measures would be compliant. The SAU report should therefore clearly identify the failing(s) in the subsidy or scheme and the magnitude of the failing(s). This will often be fairly simple: it may be that the SAU considers that the proposed measure is disproportionate, in which case the SAU should identify what lesser measure would be proportionate.

- 4.5 We also suggest that SAU reports have a vital function in terms of setting up a body of SAU decisional practice, which will provide all parties with increased guidance and legal certainty. Accordingly, we suggest that SAU reports should seek to grapple with novel facts and legal issues and set out the SAU's view on such matters in detail so that public authorities and third parties are able to better understand the SAU's views on such issues going forward.

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

- 5.1 We generally consider that the Draft Guidance provides a fairly comprehensive proposal for the SAU's monitoring reports. We suggest that, in addition, the monitoring reports could cover the following:
- (a) *BEIS / SAU Guidance*: Whether and how these could or otherwise need to be updated to reflect: (i) actual or perceived shortcomings in either / both Guidance; and (iii) decisional practice arising from SAU precedent (in addition to impact of legal challenges to the CAT and international agencies).
  - (b) *The subsidy referral process*: Any actual or perceived problems that public authorities have reported experiencing with the referral process and their engagement with the SAU, and how these could be avoided or remedied.
  - (c) *Block exemptions*: Whether, based on the SAU's experience, certain categories of subsidies are not likely to breach the Principles, and therefore could benefit from being exempted from a mandatory referral requirement.

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

- 6.1 We broadly support the SAU's proposed Prioritisation Principles. In addition, we suggest that, within Principle 2 (significance), the SAU should consider whether interested parties have indicated that they are looking to challenge the public authorities' measures. This is consistent with the proposed "sensitivity" sub-principle, and a report

from the SAU in such circumstances may assist in conserving all parties' resources, as well as valuable Tribunal time.<sup>7</sup>

## **7. Other comments**

- 7.1 We have set out in this section additional suggestions on the sections of the Draft Guidance on which questions were not specifically posed.

### SAU Group

- 7.2 Paragraph 3.24 of the Draft Guidance notes that the SAU may refer a referral to a CMA group and that the "*use of CMA group is likely to be exceptional and dependent on an extension being agreed, where the SAU decides it is appropriate in the circumstances.*" We suggest that, particularly given the potential adverse timing implications, the SAU provides further detail on the circumstances in which a CMA group will be formed and why an extension is likely to be required for review of the referral when a CMA group is formed.

### SAU Report following SSoI Referral

- 7.3 As regards voluntary referrals, we note that the SAU will inform the referring public authority within five working days whether the SAU will prepare a report on the request.<sup>8</sup> We also note that, at paragraph 5.3 of the Draft Guidance, the SAU encourages public authorities to engage with the SAU prior to referring a SSoI. We suggest that the Draft Guidance is more explicit in this regard and states that the SAU will be willing to provide views (even if informal) early in the pre-notification process on whether it would be minded to prepare a report on the request. In our view, there will be a significant volume of cases in which it will be apparent, early in the process, that the Prioritisation Principles are not met. It would be beneficial to both the referring public authority and the SAU if those cases are triaged before significant recourses are spent on drafting the referral.<sup>9</sup>

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<sup>7</sup> This may occur if the SAU reports that the proposed measures: (i) are lawful and, therefore, lessens the likelihood of challenges; (ii) are unlawful and, therefore, lessen the likelihood of the public authority granting the measures; or (iii) should be modified, which may lessen the likelihood of a challenge if the public authority modifies the proposed measure in accordance with the SAU report.

<sup>8</sup> Draft Guidance, paragraph 2.22, and section 57(2) of the Act.

<sup>9</sup> We also suggest that the SAU considers whether it would be beneficial for public authorities to submit short briefing papers to the SAU, as this may assist the SAU in the early identification of cases that may not warrant a SAU report.

Cooling off period

- 7.4 Given the statutory prohibition on the award of SSOPs before the end of the cooling off period, we suggest changing the word "should" in para. 2.15 to "must".

**Clifford Chance LLP**  
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