



CMA Consultation on the draft ‘Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit’

1. Introduction

- 1.1 Freshfields Bruckhaus Deringer LLP (*Freshfields*) welcomes the opportunity to respond to the Competition and Markets Authority (*CMA*)’s consultation on the draft guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (the *SAU*) (the *Draft Guidance*).
- 1.2 This response is based on our significant experience and expertise in advising on issues relating to EU State aid rules and our, more recent, experience advising clients on subsidy control rules pursuant to the EU-UK Trade and Cooperation Agreement and the Subsidy Control Act 2022 (the *Act*).
- 1.3 This response is submitted on behalf of Freshfields and does not represent the views of any of Freshfields’ clients.

2. General remarks

- 2.1 We believe that a well-functioning subsidy control regime is not only vital for restoring the UK’s economy from the damage caused by the COVID-19 pandemic and other economic pressures, but also to ensure that the UK remains a competitive and dynamic market economy whilst also acting as a responsible trade partner. Indeed, a regime with clear guidelines and which provides legal certainty for businesses and granting authorities is vital in order to achieve the Government’s objectives for the subsidy control regime.
- 2.2 We view a well-resourced SAU as playing a central role in achieving a well-functioning subsidy control regime, and in particular ensuring that the regime is sufficiently flexible to allow for the efficient granting of subsidies whilst also meeting the need for legal certainty on the part of businesses and granting authorities. Without this careful balance, there is a risk that: (i) private investors would be discouraged from investing in the UK; (ii) the UK market may become less competitive; and (iii) public policy objectives driving State grants / support may be undermined and rendered less effective. In this respect, there is also an opportunity to build on and implement learnings from the EU State aid regime in order to design a system which is most effectively tailored to the UK’s ambitions and objectives.
- 2.3 From this perspective, we provide general comments on the role of the SAU within the regime and more specific comments on the sections of the Draft Guidance addressing: (a) the provision of independent advice to granting authorities in the context of higher risk subsidies, namely Subsidies of Interest (*SSoIs*) and Subsidies of Particular Interest (*SSoPIs*); and (b) the SAU’s function of monitoring and reporting on the effectiveness and impact of the Act.

3. Role of the SAU

- 3.1 As noted above at paragraph 2.2, we view the SAU as playing a central role in achieving a well-functioning subsidy control regime by providing relative certainty to businesses and public authorities as to the legality of proposed subsidies and the risk of legal



challenge. To the extent beneficiaries and relevant stakeholders are unable to achieve sufficient certainty that a subsidy is compliant with the Act and/or assess the risk of a successful legal challenge (and associated risk of recovery), there are likely to be delays in the grant of financial assistance thus hindering the relevant public policy objectives in giving that support and/or appropriate recipients may find it difficult to accept government support even when that is consistent with good public policy outcomes.

- 3.2 In particular, the SAU's advisory role in respect of proposed subsidies will ensure that there is an independent and expert second review of public authorities' assessment of compliance with the principles set out in the Act. Additionally, it will provide an opportunity for public authorities to amend the proposed subsidy to ensure compliance before implementation of impacted subsidies. This should ensure a greater proportion of subsidies are compliant with the Act and potentially minimise the number of (including the number of successful) legal challenges brought.
- 3.3 Beneficiaries would also welcome the SAU's independent and expert review from a risk allocation perspective. It should be noted that, as with the EU State aid regime, the risk that financial assistance would need to be recovered by the granting authority following a successful legal challenge is disproportionately borne by beneficiaries. It is therefore crucial for beneficiaries to have sufficient certainty that the proposed subsidy is compliant with the Act and will not subsequently need to be repaid, especially in the context of SSoPI and SSoI where the financial assistance will provide a key source of support for e.g. large projects with significant capital expenditure. From our experience, this has resulted in public authorities often seeking to place the burden of a substantial portion of the assessment on beneficiaries, even in circumstances where compliance with the rules is difficult for recipients to assess (e.g. where they would be compliant if an appropriate tender process has been conducted by the granting authority).
- 3.4 A positive report following the SAU's independent review process would therefore give beneficiaries (as well as their investors and creditors) a degree of comfort on the risk of recoverability following any potential legal challenge. In the absence of such assurance, legitimate commercial transactions and lawful subsidies could be subject to significant delays and potential abandonment. To illustrate the importance placed by beneficiaries on the SAU's independent opinion, we have been involved in advising clients on the grant of financial assistance where one of the counterparties requested a condition precedent requiring the assessment and approval by the relevant UK authority prior to implementation of the proposed subsidy.
- 3.5 Stakeholders and their legal advisors therefore view independent, expert and clear substantive advice from the SAU as crucial to the workability of the regime, particularly with regards to providing certainty as to compliance with the Act and the risk of legal challenge and recoverability following a successful challenge. There are, in our view, two key considerations to ensure that the SAU fulfils its function as an independent and expert advisor, providing substantive advice on the legality of high-risk subsidy grants (as set out above).
- 3.6 *First*, it is important that the SAU is well-resourced and appropriately staffed. In particular, the resources allocated to this unit in terms of, for example, the number of permanent case team members, should reflect the importance of an effective subsidy control regime for the UK economy and society as well as the important role the SAU



will play in this regime. The unit should also be staffed with individuals from an appropriate range of backgrounds (including competition law, public procurement and economics), with sufficient experience and expertise to undertake the complex legal and economic assessments which will be required in the context of high-risk subsidies. The importance of sufficient resources and team composition can be seen in the resources and staffing allocated by the European Commission to its State aid function.

- 3.7 *Second*, there is an opportunity to build on learnings from the EU State aid regime in order to design a system which is most effective for all stakeholders including beneficiaries who, under the EU system, do not have the right to formal, direct engagement with the European Commission during the review process except in very limited circumstances. The EU system, however, does not sufficiently take account of the risks borne by beneficiaries (as explained above at paragraph 3.3) as well as the insight their significant involvement brings to the process of designing/negotiating the proposed subsidy and ensuring compliance with the rules.
- 3.8 There are significant and meaningful efficiencies that can be gained by providing for greater beneficiary engagement in the SAU's review process, including direct communications with all stakeholders (rather than relying on the granting authority as a 'post box') and leveraging the beneficiary's experience and expertise in the sector in which the subsidy is given. In addition, the process of preparing a fulsome and complete referral request as well as any subsequent clarifications required by the SAU will rely heavily on input from beneficiaries. Beneficiaries therefore have a legitimate expectation to be more directly and substantively involved in the process. We would therefore welcome recognition of the importance of beneficiaries as stakeholders in the grant of financial assistance and assessment process in the Draft Guidance, as well as for the Draft Guidance to set out a mechanism for ensuring that beneficiaries are able to be directly involved in the review process including the right to present evidence of compliance, present views to the SAU on any preliminary advice and to receive information presented by and given to the granting authority (to the extent the granting authority agrees to do so at the outset).
- 4. Specific comments on the Draft Guidance: the provision of independent advice for SSoIs and SSoPIs**

Question 1: Do you agree with the objectives for pre-referral engagement?

- 4.1 We welcome having pre-referral engagement with the SAU for the purposes of ensuring that a request for referral is considered complete. While the timeframe required for pre-referral engagement will likely need to be assessed on a case-by-case basis, it would be helpful for the Draft Guidance to recognise that this should not cause undue delay to the process and that some subsidies may require a shorter timeframe given the urgency for granting the financial assistance (e.g., rescue and restructuring subsidies). It would also be helpful for the Draft Guidance to explicitly recognise the statement in BEIS' draft statutory guidance on the subsidy control regime that "*the depth of analysis conducted [and therefore the volume and type of information required for a complete filing] needs to be commensurate to the size and potential distortive impact of the subsidy*" and that this should be taken into account by the SAU when assessing whether a referral request is complete.



- 4.2 While we note that the aim of this pre-referral engagement is not to provide substantive advice, this initial consultation will naturally also require assessing whether the requirements for referral have been met (and therefore whether the SAU should/is required to prepare a report). In particular, it is very likely that the SAU will need to consider whether the assistance constitutes a subsidy (which can be one of the most contested and controversial aspects of a subsidy assessment), whether the definitions of SSoPI or SSoI are met and whether the Northern Ireland Protocol applies such that the EU State aid rules / Commission have jurisdiction. It would therefore be helpful for the Draft Guidance to recognise this as well as more generally to have alignment between the SAU, BEIS and other teams providing subsidy control advice to public authorities in order to ensure consistency of interpretation of the Act, particularly in the absence of precedents.

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

- 4.3 We do not object to the SAU publishing a notice that a referral has been made for the purposes of giving third parties the opportunity to present views. It would, however, be helpful for the CMA to provide guidance on what this notice will contain. Our view is that this should be limited, at most, to setting out information that would be required to be published on the subsidy database.
- 4.4 Given the advisory nature of the process, it would also be helpful for the public authority and beneficiary to have access to any third party representations on a proposed subsidy (subject to appropriate confidentiality redactions), particularly those submissions which the SAU proposes to take into account when preparing its report and for the purposes of preparing advice on how the subsidy might be modified to ensure compliance with the rules. As an alternative, and in the interests of transparency, we would suggest that a summary of views received should be published in the SAU's reports with an explanation for why the CMA has decided to take this into consideration (or not) when preparing its report.
- 4.5 We would also welcome guidance from the CMA on how it intends to treat and respond to any requests made under the Freedom of Information Act 2000, including its approach to transparency and disclosure around such requests.

Question 3: Do you agree with the proposed approach to the treatment of confidential information?

- 4.6 We agree with the CMA's proposed approach, which aligns with the approach taken regarding the publication of decisions in merger reviews.

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?

- 4.7 As set out in Section 3 above, we view the SAU as playing a central role in achieving a well-functioning subsidy control regime by providing a degree of certainty to businesses and public authorities as to the legality of proposed subsidies and the risk of legal challenge and recoverability. We therefore respectfully submit that the SAU's



reports should provide a conclusion on whether it thinks that, in the round, the proposed subsidy and the public authority's assessment comply with the Act.

- 4.8 While the identification of shortcomings in the authority's assessment and advice on how the proposed subsidy may be modified to ensure compliance are both welcome, the key question for all stakeholders will be whether the proposed subsidy is compliant with the Act and whether there is any basis for a legal challenge. As explained earlier in this response, in the absence of such assurance, lawful subsidy grants and legitimate commercial transactions could be subject to significant delays and potential abandonment, which could chill investment in the UK and undermine public policy objectives driving State grants / support.
- 4.9 In addition to providing a view on whether the subsidy is compliant with the Act 'in the round', it is important for the SAU's advice to recognise that:
- (a) the types of subsidies that will be reviewed by the SAU are, by their nature, commercially and economically complex;
 - (b) there is a wide range of ways in which a proposed subsidy can be designed to be compliant with the Act such that the SAU should be careful not to engender the presumption that the SAU's proposed structure is the only way in which to design a lawful subsidy; and
 - (c) any proposed changes to the terms and design of the subsidy may fundamentally change the commercial and financial agreement between the granting authority and beneficiary.
- 4.10 Consequently, it is important for the SAU to make clear in its report that the advice given is non-binding, to clearly distinguish between 'nice to have' and 'essential' improvements (i.e. which go to whether the proposed subsidy is compliant with the Act), and be careful not to set out an unduly prescriptive way in which the proposed subsidy can be amended to comply with the Act. Indeed, there are various outcomes which may be considered compliant with the rules and the design and assessment will require detailed and complex economic analyses. This would ensure that granting authorities have flexibility/discretion in how to structure a compliant subsidy, taking into consideration the authority's and the beneficiary's specialist knowledge in the relevant industry in which the subsidy is given and the complex commercial negotiations between, and economic analysis conducted by, the two parties.

5. Specific comments on the Draft Guidance: the SAU's monitoring and reporting function

General remarks on the SAU's monitoring and reporting function

- 5.1 We believe it is important for the SAU to recognise the potentially significant cost and burden for beneficiaries and granting authorities in helping the SAU meet its monitoring and reporting function. Without further guidance on, for example, the process which the CMA expects to follow when preparing such reports and the type and volume of information that might be requested, stakeholders will be unable to consider and plan resources for the purposes of assisting the SAU in this process. We therefore think that it would be helpful for the CMA to provide separate guidance on



the information-gathering and invitation of third party views process, including when the CMA expects to begin the process of information gathering, the type of information public authorities and companies might be expected to produce and under what circumstances the CMA expects to utilise its statutory information gathering powers.

- 5.2 On this last point, before exercising its statutory information gathering powers, we expect the CMA to request information via informal requests for information and to consider the proportionality of any information requests (including the time given to respond). In light of the purpose for which this information is collated, i.e. to advise policy-makers on the effectiveness and impact of the Act, enforcement powers would not be appropriate except as a last resort i.e. if there are significant concerns as to the reasonableness of time taken to respond or as to the accuracy of information provided.

Question 5: What might stakeholders find useful to see included in the SAU's monitoring reports?

- 5.3 N/A. This question is more appropriately answered by policy makers for whom these monitoring reports will be relevant when assessing what, if any, changes to make to the regime.

Question 6: Do you agree with the SAU's Prioritisation Principles?

- 5.4 Recognising the need to effectively allocate resources, we believe that it would be helpful for the SAU to publish reports for all voluntary referrals submitted in the early stages of the regime (ideally the first two years). We think that preparation and publication of these early reports will be in the public interest. In particular, it will have significant precedential value for all stakeholders and their legal advisors to consider the interpretation of the Act and to conduct any risk assessments to the extent there is not yet a developed body of case law on issues. For example, our advice to clients in the context of self-assessment regimes (e.g. on the prohibitions set out in Chapter I of the Competition Act 1998) will typically include reference to precedence on a particular issue such that it would be helpful to draw from as wide a pool of prior examples of the SAU's approach to different issues as possible.

- 5.5 Once the regime has been operating for around two years, we agree that the SAU should focus its resources on proposed subsidies which are most likely to have a negative impact on competition, trade or investment in the UK (and therefore most likely to be challenged) and those for which precedential value is important. We welcome an open dialogue with public authorities/beneficiaries in the pre-referral engagement as to the appropriateness of the SAU preparing a report.

6. Conclusion

- 6.1 We view a well-resourced SAU as playing a central role in achieving a well-functioning subsidy control regime, and in particular ensuring that the regime is sufficiently flexible to allow for the efficient granting of subsidies whilst also meeting the need for legal certainty on the part of businesses and granting authorities. This will in turn help ensure that the UK remains a competitive and dynamic market economy, as well as a responsible trade partner. Additionally, this new subsidy control regime is an opportunity to build on and implement learnings from the EU State aid regime in order



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to design a system which is most effectively tailored to the UK's ambitions and objectives by, for example, recognising the important role which can be played by beneficiaries in providing key information and insight during the assessment process and designing a system which allows for greater direct beneficiary engagement with the SAU.

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