

The Competition and Markets Authority
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Response to the Competition and Markets Authority (CMA) Consultation on the operation of the subsidy control functions of the Subsidy Advice Unit

NNB (Sizewell C) is proposing to build and operate a 3.2GW new nuclear power station in Suffolk (**SZC**), comprising two UK EPR units. Once operational, SZC will generate enough electricity to supply approximately six million (or about 20%) of Britain's homes. SZC replicates the, as built, design of the nuclear plant being currently constructed at Hinkley Point C (**HPC**) but will be tailored to its location. It will benefit from the learning and experience from HPC along with other EPRs operating in Finland and China and France.

SZC is the only nuclear station ready to start construction in the UK in this Parliament (in line with current Government policy) and is currently in negotiations with HMG to become the first nuclear development to use the RAB financing mechanism facilitated by the recently passed Nuclear Energy (Financing) Act 2022¹. SZC has recently received its Development Consent Order (DCO) approval.

The transition to the new subsidy control regime under the Subsidy Control Act 2022 (**Act**) comes at an important time for SZC, as we work towards a Final Investment Decision and capital raise process. We are keen to ensure that all guidance provided by the CMA in respect of the subsidy control functions of the Subsidy Advice Unit is as clear as possible, to avoid unnecessary delays and financial uncertainty.

We welcome the opportunity to respond to the CMA's consultation on its draft guidance on the operation of the Subsidy Advice Unit (SAU) (**Draft Guidance**), and its Statement of Policy in relation to the enforcement by the SAU of its information-gathering powers. We are responding to BEIS's parallel consultation on its draft guidance on the United Kingdom Subsidy Control Regime (**Draft BEIS Guidance**), a copy of our response to which is shared with this document for your information.

We would be happy to discuss any of our response or our suggestions directly, if this would help.

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NNB Generation Company (SZC) Limited

¹ Alongside the potential for government funding of non-RAB activities.

General Comments

We recognise that the SAU will look to a public authority to make the referral, as was the case in the previous State Aid regime. However, much of the information needed to aid the SAU in its decision making will rely on details gathered from the ‘particular businesses and individuals’ (para. 2.39), including those who are looking to benefit from specific subsidy. Given the SAU proposes an enforcement and monitoring process it is therefore important that once published, the Draft Guidance provides clear explanations of the typical timescales for provision of information that are expected.

We believe that wherever possible referrals that are submitted by public authorities should be around a class or method of support, rather than individual business cases. It is also important to note that at the stage where subsidy control is being considered much of the information will be based on appropriate estimates rather than firm figures, and as such we would suggest that the Draft Guidance makes it clear that decisions made by the SAU should take into account significant levels of contingency.

Additionally, the SAU will need to recognise that information shared by stakeholders may be subject to commercial confidentiality, GDPR or sector specific legal preventions². Therefore, we believe that more explanation is needed on the SAU's view on the how data might be used or processed in order to come to its decisions. or in reply to information requests (EIR/FOIA). This includes the acceptability of redacted submissions, and whether forming data sharing agreements with other public authorities might be used to ensure that the use and protection of information provided is maintained appropriately and within sectoral requirements.

Responses to Consultation Questions

Please find below responses to the specific questions raised in the consultation.

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

- We agree with the objectives of pre-referral engagement, this should allow the SAU to triage potential reviews and ensure that the correct information is presented at the time of referral submission.
- We note that the SAU will need to make prioritisation decisions on whether to engage in pre-referral engagement or submissions. In practice there is a risk therefore that if the SAU cannot sufficiently flex resource into this area there will be knock on delays in processing applications. We therefore suggest that the Draft Guidance provides clarity on how far in advance a public authority should approach the SAU for pre-referral discussions. For example, it would be helpful to understand how evolved the public authority's proposal should be before approaching the SAU.
- We note the interplay with the advice that will need to be sought through BEIS and devolved administrations and have responded to the draft BEIS Guidance pointing to the need for this advice to be sufficiently clear to enable public authorities to decide **not** to progress a referral submission.

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)

² for example in the case of nuclear some information may be classed as ‘Sensitive Nuclear Information’ under Regulation 22 of the Nuclear Industries Security Regulations (NISR) 2003 .

- We recognise the desire and benefits of transparency. However, we do have concern that for subsidy decisions around large projects or novel support there is likely to be a considerable amount of commercially confidential information that may be caught by a desire to publish information. It is not clear from the Draft Guidance what level of information would be published at referral point, although we note that the CMA takes a view that it looks to publish if information is core to its decision making. There will need to be a balance as, if too much detailed information is provided, it may be market or commercially sensitive. Alternatively, if it is too high level, third parties will find it difficult to be able to make meaningful representations.
- We believe that if a response is provided by a third party to the SAU that is taken into account in the SAU's report, this information should be made available to the referring public authority so that it has the opportunity to comment on, and if necessary correct, any adverse submissions. This would ensure that the intended transparency in decision making is maintained. We suggest that the Draft Guidance should make it clear that the SAU will engage proactively with public authorities on information received from third parties both during pre-referral discussions and during the reporting period, affording them time to respond to information received in an effort to clear up any issues the CMA identifies before a decision is made.
- Allowing a public authority to provide a response to the report and this to be subsequently published alongside the SAU's report will increase transparency and should reduce the risk of later challenge.
- Alternatively allowing public authorities to refine information on active referrals may prevent unnecessary rejection and resulting submission loops, which could otherwise lead to delays in implementing policies.

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

- We have some concerns with the approach to the treatment of confidential information. The current approach has the potential to delegate responsibility to those making submissions rather than the CMA and the timescales and burden of proof required from the private sector is outside of their control.
- It is unclear how the statement at 3.35, which explains the SAU 'may only disclose such information where it has an express permission to do so' works with the following sections as they seem to indicate that a body has to provide an argument as to why they don't give permission to publish it. As such it would be good for this paragraph to be revised and clarified.
- If information supporting a referral originated in the private sector, there is a risk that the public authority will be unable to provide sufficient justification to retain confidentiality, and the third party may not be aware of timescales for referral. In this scenario, the private sector party would effectively lose control of the confidentiality of their data which could result in detriment, and a reduction of trust with the public authority. More seriously it could impact ongoing commercial negotiations. We would therefore suggest that the Draft Guidance makes it clear that where third-party confidential information is identified in the referral and the CMA is not minded to accept the public authority's justification for the confidentiality claim, that the CMA engage with the source of that information directly as regards disclosure.
- The provisions, as drafted, place the onus on the submitting public authority to provide justification for their view on confidentiality. Given the majority of applications are likely to come from a small number of central government departments, it may save time and effort if

formal MoUs or data sharing agreements with these departments are established. These would allow parties to set out their risk appetite for the sharing of information in the published reports, any specific restrictions and set out how provisions for informal escalation.

- Given that some information may be subject to the requirements of GDPR, it would be appropriate to include reference to appeals to the Information Commissioners Office.
- There is likely to be sector specific levels of protection which will need to be considered³. In the case of nuclear, applicants and the SAU would also need to consider whether the information could be Nuclear Sensitive Information and as such be unlawful to publish.

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)

- Given the importance of clear decisions around subsidy control, it is unclear from the Draft Guidance what level of comfort potential beneficiaries will be able to take from the SAU report. If advice is provided on alternatives or clarifications, it is also unclear whether there will be the ability for the public authority to respond to these. We suggest that the quality of the SAU report will be improved if the SAU were to engage with the public authority, including on whether the proposed alternatives or clarifications are suitable in the circumstances and whether there are better ways of mitigating the SAU's concerns. We accordingly consider that the Draft Guidance should reflect this.
- The current approach could be argued to not match the interpretation as taken by the Draft BEIS Guidance. In particular, paragraph 520 of the Draft BEIS Guidance states:- 'The contents of any SAU report will include an evaluation of the relevant public authority's assessment as to whether the proposed subsidy or scheme would comply with the subsidy control requirements'. This seems slightly different from the reporting of identified shortcomings, without a pass/ or fail assessment (para. 4.27). In our view, all parties, including public authorities, beneficiaries, and interested parties, would benefit from a clear understanding of whether, as proposed by the public authority, the subsidy is lawful. In the case of a 'fail', this may, and in many cases should, be supplemented by a clear identification of why this is the case, including identifying the shortcoming in the assessment and/or evidence base. An 'agree/or disagree with the assessment' outcome might therefore be closer to the BEIS proposal and in any event preferable.
- Given the assessment timings and level of specialist knowledge that is likely to be needed to provide modification advice around improving a scheme, the period of pre-referral discussions will be key for its specialists to be sufficiently well-versed on the proposed subsidy to ensure the SAU can compile its report. Whilst the Act provides for the advice to be given to improve the policy, information on the extent to which the CMA's experts will engage with public authorities during pre-referral discussions and the degree to which such expert advice must be reflected in the referral would be helpful to facilitate preparation of referrals

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

- As with our answer to question 3 there should be consideration as to the level of detail that is provided in the monitoring reports, and in particular whether these will rely on data that is either estimated or restricted.

³ For example the energy regulator has similar statutory obligations to the CMA to protect information in respect of its statutory functions under Section 105 of the Energy Act

- Given the report will include assessments of both the controls and the SAU's performance it may be appropriate for the report to be audited, or these elements of self-assessment written by an external party. This would provide a greater level of confidence in the outputs of the report.
- It would be useful if the monitoring reports included examples and exemplars from the reporting period. These could help to improve the submission quality over time and so would be useful to both applicant and administrator.

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

- Generally, we do not have a view on the SAU's prioritisation principles. As noted, the principles will need to develop over time as maturity increases and providing understandable priorities helps to provide the market with clarity on how the SAU carries out its duties. This maturity is likely to be bilateral and applicants are likely to become more familiar with the processes. As mentioned before, any examples and exemplars that can be shared will aid this process.
- There are a few elements of principle 2 which are likely to be subjective. Additionally, they may lead to result in a slowing of the team's throughput. For example, the desire for 'knowledge growth' and 'information provision' seem to pull against one another. The desire to prioritise knowledge growth, would see novel or first-of-a kind reviews prioritised over more frequent referrals with clearer information available. However, following the 'information provision' prioritisation principle, these novel reviews are likely to have insufficient (or immature) levels of information and so should be deprioritised. Information on how this tension will be managed would be useful.