

SOUTH OF SCOTLAND ENTERPRISE TO THE COMPETITION AND MARKETS AUTHORITY CONSULTATION ON THE GUIDANCE ON THE OPERATION OF THE SUBSIDY CONTROL FUNCTIONS OF THE SUBSIDY ADVICE UNIT

Introduction

South of Scotland Enterprise (**SOSE**) welcomes the opportunity to respond to this important consultation. SOSE remains available should the CMA invite any further input on the developing new UK Subsidy control regime and the SAU.

SOSE is the Economic and Community Development Agency for Dumfries and Galloway and Scottish Borders. It was established by the Scottish Government in recognition of the unique circumstances of the South of Scotland.

Our statutory aims and objectives are provided for in The South of Scotland Enterprise Act 2019, which requires us to further the sustainable economic and social development of the South of Scotland and to improve the amenity and environment of the region. To achieve those aims SOSE takes a wide range of actions to support inclusive and sustainable economic growth, to increase efficiency, innovation and competitiveness, and to tackle inequality within the region.

It is critical SOSE is able to support these aims and objectives within a workable set of UK-wide subsidy control rules including the functions of the SAU. That set of rules needs to be able to take account of these strategic aims and objectives and recognise the specific and often localised nature of the economic and social challenges in the region.

Key themes

SOSE would like to highlight the following key themes:

- **Need for a clear and workable set of rules** - The new regime must provide certainty, and comfort, particularly as regards how authorities can be confident they are not awarding Subsidies that may be subject to challenge. As regards interactions with the Subsidy Advice Unit (SAU), this means having a clear and workable framework within which SOSE can operate, and guidance as to when and how to engage with the SAU.
- **Balanced light touch approach for ‘low risk’ subsidies, but availability of support as needed** - 91% of businesses in the South of Scotland have fewer than 10 employees. By far the majority of the financial support SOSE provides is directed at small or medium enterprises (SMEs), including community enterprises. This assistance is critical to addressing the key socio-economic challenges in the area. The new regime therefore needs to be balanced and proportionate, with a sufficiently ‘light touch’ approach to subsidies that are unlikely to be capable of having an (appreciable) effect on competition or investment within the UK or trade or investment between the UK and another country, but at the same time offer SOSE the appropriate support through the SAU or otherwise as needed (including voluntary SSol applications) – particularly at the start of the new regime.

- **Ability to support disadvantaged areas** - For an organisation like SOSE, it is essential that rural deprivation is appropriately measured locally and accommodated for in terms of addressing socio-economic issues. The South of Scotland is a disadvantaged region with diverse challenges. It is a rural area representing 15% of Scotland's Land Mass (11,000 km²), with only 4 towns over 10,000 people and 24 people per km² compared to the Scottish average of 132 people per km². The region has specific opportunities to address the disadvantages of the area, particularly centred around natural and cultural capital.

Responses to specific questions

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

- Yes. Applying the general objectives for pre-referral engagement seems a reasonable approach in terms of the SAU supporting public authorities to identify the information that should be submitted when a Subsidy or scheme is formally or voluntarily referred, and will reduce the risk of an incomplete application.
- Additionally, it is helpful that the SAU is willing to enter into discussions on the SAU processes, and the application of the Prioritisation Principles for voluntary referrals.
- In practice this should help the applicant to avoid delays caused by the regulator refusing the application at the start of the time limited assessment period due to incompleteness.

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)

- Generally speaking, yes we do agree with the proposed approach to transparency. SOSE itself voluntarily embraces transparency in the ways in which we operate, and we publish the details of every grant awarded on our website – whether or not this is also legally required to be published in the BEIS transparency register.
- However, clarification would be welcomed on the concepts of examples of third-party submissions which will not be taken account of where they are 'not relevant to SAU statutory functions', and how this will be further explained and dealt with in a transparent manner.
- It is also queried whether a more inclusive and transparent approach towards complaints would be preferable than that proposed where they are not published. We are comfortable with publishing limited information and in favour of bringing the wider benefits of proportionate transparency to the process.

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 overall approach to confidentiality, which from the information provided appears to reflect the standard CMA procedure, with an appeal mechanism to the CMA's Procedural Officer.

- There may well be differences in interests/opinions between a third-party beneficiary and a public authority as regards the confidentiality of certain information. It would be helpful to set out how the SAU intends to approach such an issue when there is a difference of opinion, especially where the SAU considers that it needs to disclose information which has been identified as confidential, and in the case a redacted version is initially published.
- We fully support that public authorities and third-parties should not withhold information from the SAU on the grounds of confidentiality. However, we would understand that this would not apply to legally privileged advice. We think that it would be beneficial to make this clearer in the guidance for all, especially given that public authorities are specifically instructed in the draft BEIS Statutory Guidance on the UK Subsidy Control Regime to seek their own legal advice if they are unsure of their legal obligations or the lawfulness of a proposed Subsidy or scheme.

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)

- It is to be welcomed that the SAU will effectively ‘mark’ local authorities’ Subsidy assessments which can then be used as a learning tool for others, particularly in the early stages of implementing the new regime.
- It will be essential to set such precedents up in a practical and user-friendly database in order that other public authorities are easily able to identify and access the most relevant precedents for any given case – especially as time goes on and the number of SAU reviews increase.
- It is expected that more detailed advice on how to improve the reports will be welcomed by all to develop good practices. We think that this would be the case even if this is only applied for an initial trial period in order to help public authorities navigate the Subsidy framework, but at the same time not be overly time consuming for the SAU.
- It may be useful and practical to ultimately issue a compendium of the advice as useful summary guidance in the future.
- However, such an approach must be properly assessed and balanced so as similarly not to be overly prescriptive, demand unreasonable amounts of detail, and/or add an unnecessary burden on the public authorities through precedent.
- Generally speaking, general guidance on good practices and bad would be a good place to start – in addition to teasing out any particularly unique aspects of a case that are relevant to the SSoPI and SSoI reviews.

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

- On the whole, the proposed options for inclusion in the monitoring report appear to be helpful and practical.
- It would also be useful for the monitoring reports to focus on potentially common issues that arise in order to educate public authorities, for instance where a grant has commonly been incorrectly categorised as non-Subsidy, or where a scheme does not meet the Subsidy Principles.

- However, perhaps another type of publication by the SAU would be better to deliver such information in the form of guidance. Further, any such publication could be produced much earlier than the three-year term which is imposed on the SAU monitoring reports, which would be more helpful for public authorities in the short term and most importantly at the commencement of this structured Subsidy regime.

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

- The SAU's Prioritisation Principles appear to try to balance the needs of public authorities making voluntary referrals, and the prioritisation of such, against the workload of the SAU in preparing mandatory reports for SSoPIs referred by public authorities or called in by the Secretary of State. The Principles clearly aim to offer a practicable solution. However, we expect that it is likely that there will be increased voluntary referrals which trigger the SSoI criteria to start with, and it is important that the SAU is available to offer the necessary support to public authorities that is needed.
- It is highlighted that SOSE deals with SMEs around 90% of the time, focusing on rural venues with low value grant awards and low impact. This means that SOSE will not be in a position to make voluntary referrals to the SAU for most of its matters, and it will be essential that SOSE is otherwise provided with sufficient guidance and support in its Subsidy review responsibilities until the new Subsidy framework evolves and develops its own precedents.
- It would be important to have some forms of safeguards that help ensure that any pre-notification contact with the SAU on voluntary referrals does not have the practical outcome of rejecting the cases before enough information has been produced and/or understanding is provided.
- It is not completely clear from this document whether the Prioritisation Principles are directed at reviewing a voluntary case in its entirety, or it is merely that the SAU has discretion in preparing a report (see para 5.2 vs 5.7). Does this imply that there may be some form of informal SAU review of voluntary cases without a report?
- In a similar manner, it would be very useful to understand what level of review, support or guidance a public authority can expect from the SAU at the pre-notification stage, especially where the SAU does not deem the matter to have sufficient impact or significance pursuant to the Prioritisation Principles while nevertheless triggering the SSoI criteria.
- Finally, it would be helpful to clarify what rights of appeal may exist for a voluntary referral that is refused by the SAU.

Ends.