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Consultation Response - [redacted], DWF

The Competition and Markets Authority ("CMA") is seeking views on its draft guidance on the operation of the subsidy control functions of the Subsidy Advice Unit[1] ("SAU"). The SAU will have two roles (i) to provide independent non-binding advisory reports regarding certain subsidies that are referred by public authorities[2] and (ii) to periodically monitor and review the operation of the subsidy control regime.

The Government expects 15 - 30 judicial reviews of subsidies under the Subsidy Control Act 2022 (the "Act") each year[3]. It is reasonable to expect that larger subsidies and those in sensitive sectors are more likely to be challenged. Therefore the SAU provides an important safeguard for the system of subsidy control envisaged under the Act.

General Observations

There is a legal duty for Subsidies of Particular Interest ("SoPI") to be referred to the SAU[4] and therefore it is important to the functioning of the new regime that these are considered quickly and decisively. It is our hope that the SAU will be equipped with the right procedures and resources for this to happen.

Fundamentally the value of the SAU assessment is that it scrutinises the substance of the Subsidy Control principles, in much the same manner as a Competition Appeal Tribunal would do in the event of a challenge. Therefore we are concerned that the four steps approach in Chapter 4 may lead to some confusion. We believe it would be better to work through each of the seven Subsidy Control Principles in turn, as this is how the requirements are set out in the Act and therefore how we would expect the Competition Appeal Tribunal to approach any assessment. Each of the Principles are separate and distinct and require separate appraisal in order to satisfy. If this approach is not mirrored in the appraisal then we expect problems to ensue.

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

The objective of the pre-referral engagement stage should be expressly stated, which is to avoid an incomplete referral request being submitted. It is correct that this phase should not be a substitute for taking proper advice in advance, and we note positively that this is emphasised.

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[1]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1089411/SAU_Guidance_Draft.pdf

[2] Noting that the scope of the SAU role is limited under the Act. The reference to subsidies awarded by way of a scheme being outside of the scope of the SAU assessment at footnote 84 is correct, but we anticipate that this will end up being an area of challenge, not only on the basis of the categories within the letter dated 28 March 2022 from Lord Callanan to Lord Fox and Lord McNicol, but also in terms as to whether a generic scheme would ever be able to properly satisfy some of the specific review requirements of the Subsidy Control Principles, for example considering the distortive impact of a subsidy requires an assessment of the market at the time of the award being made.

[3] Paragraph 484, Subsidy Control Bill, Impact Assessment, 14 March 2022. We do however note that this seems to be based on an understanding of c.30 public authorities awarding subsidies (paragraph 417) whereas there are over 550 public bodies capable of making such awards.

[4] Section 52(2) of the Act

We would be wary of replicating the EU system, whereby pre-notification discussions were often used as a protracted means to avoid "starting the clock". For this reason it would be useful to include an indicative period over which the pre-referral engagement may run. Given it is a comparatively limited exercise, we would expect this would take no longer than 14 working days.

In terms of the impact of an incomplete referral, we suggest paragraph 2.15 of the guidance includes an express statement that Section 52(1) of the Act is not considered to be satisfied where the information is regarded by the CMA to be incomplete. Likewise, paragraph 2.16 refers to the 30 day reporting period starting upon notice being given to the public authority that the request is complete, whereas we think this should be amended to be consistent with paragraph 2.31 (i.e. the period starts when the correct information is submitted, rather than when the CMA gives notice that the correct information has been provided).

Figure 3.2 describes a process which is akin to submitting a draft notification until such time as it is considered complete (as is the standard practice for the CMA with merger control). Assuming that is correct this might be confirmed, for simplicity's sake. We believe this would be no surprise nor difficulty, especially for experienced Competition Law practitioners as are likely to be involved.

Last but not least we emphasise that the "client" in a SoPI reference (eg. a local authority) may in some cases have significantly less resource and capability to answer difficult questions than a typical private party notifying a proposed merger. The SAU will need to be sensitive to this in its expectations and demands, whilst also balancing this with a need to ensure that the period prior to the formal reporting period (which we anticipate to be likely to include phases of exchanges of drafts and responses to specific questions, as with merger control) does not become excessive.

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

We agree that transparency is a vital part of the subsidy control regime envisaged under the Act. In particular the new regime only allows interested parties[5] a short period under which to bring a claim, which begins with information being published on the national transparency database[6].

The SAU guidance proposes that the information about the referral is placed on a different website, that of the CMA. We recommend that a system is created whereby the same information is also posted to the national transparency database. This is because we anticipate interested parties are likely to check the national transparency database and if this information is also posted there, then they are more likely to engage with the process set out at paragraph 3.20.

[5] Defined at Section 70(7) of the Act
[6] https://www.gov.uk/guidance/view-subsidies-awarded-by-uk-government

We therefore agree with the notion of publishing information about referrals to the SAU and support the idea of this information also being posted on the national transparency database.

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

Yes, we agree with the approach to confidentiality, subject to the notion in 3.28 that the reports should be published prior to the relevant public authority and the secretary of state receiving notification. We believe the notifying parties should receive very limited advance warning (subject to condition of confidentiality) in the manner adopted by the CMA for merger control. We would expect there to need to be discussions of treatment of confidential information to be discussed in the report in any event. As a result, a more practical approach may be to publish a summary first, to be followed by the full report (subject to confidentiality) shortly afterwards.

As with the referral notice, our view is that the report (subject to confidentiality) should be included as part of the information posted on the national transparency database when a subsidy is made. This is because it is information which an interested party is likely to take into account when considering challenging an award.

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?

Naturally public authorities will want assurances that the substance of the Subsidy Control principles assessment aligns with the requirements of the Act and therefore is likely to be regarded as compliant if assessed by the Competition Appeal Tribunal[7].

Clearly such a specific assurance can't be provided by the SAU, but it ought to be possible to provide an SAU view whether the assessment is or is not in line with the requirements of the Act, as elaborated upon by the Department for Business, Energy and Industrial Strategy ("BEIS") guidance. In doing so, the SAU could use a 'traffic light' system similar to that used by the Government Legal Department[8].

The report should support public authorities to make an informed decision as to whether they should proceed with an award[9]. Therefore it would seem sensible to set out the pros and cons of the award, including a summary of any concerns raised by third parties. Where an assessment has identified areas to improve, in order to comply with the Act, this should be recorded.

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[7] [footnote deleted]

[8] https://www.gov.uk/government/publications/guidance-note-on-legal-risk

[9] what is likely to be problematic is if a report is in any way vague as to whether a subsidy should go ahead or not. We would hope that this could be addressed through pre-notification discussions, ie. if the evidence is insufficient to reach a decisive position, then the CMA should flag this at the earliest opportunity.
You might consider adding a line in somewhere to reflect this.

Finally, we note that public authorities are responsible for the compliance of their own projects and that the SAU will only review a few elements of compliance with the Act. The report will need to make this clear.

As noted above, as a general observation we are concerned that the four steps approach in Chapter 4 may lead to difficulties on the basis that the seven Subsidy Control Principles in the Act are separate and would be evaluated separately in any challenge before the Competition Appeal Tribunal. We therefore believe a clearly delineated seven stage approach (per principle) is appropriate, in order to keep the assessments clear and distinct and thereby ensure clarity of appraisal, recognising that any other approach may lead to confusion and/or inappropriate amalgamation of different assessments.

Specifically in 4.3(b) we would expect inclusion of the word "reasonable" to the conclusions drawn from the evidence of satisfaction of the Principles, on the basis this would be the essence of the public law assessment of the decision making process of the awarding authority in question.

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

The considerations listed seem sensible, in addition we would recommend the monitoring report also takes in to account:

(i) whether the SoPI sensitive sectors are correctly focussed;

(ii) whether the Act should be updated to refine particular rules or to address identified distortions within certain sectors;

(iii) to assess whether the length of the current challenge window is appropriate;

(iv) to identify areas which might benefit from Streamlined Routes; and

(v) whether it would be sensible for the SAU to be able to initiate its own reviews.

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

Provided that the prioritisation principles only apply to Subsidies of Interest (rather than SoPI) these are sensible prioritisation principles.