

UKG/CMA Consultation on the Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (SAU)

Response from Highlands and Islands Enterprise

[Highlands and Islands Enterprise](#) (HIE) is the Scottish Government’s economic and community development agency covering the north and west of Scotland - half its land mass. Established in 1965, we have a wide remit for supporting economic growth through business and social enterprise support, infrastructure and inward investment to develop the region and address rural disadvantage and depopulation. We are very experienced in providing State aid and subsidy and are invested in ensuring compliance with the relevant competition regimes.

Consultation questions

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

Para ref.	Add comments below
3.6	A pre-referral process is welcomed and will be especially important in the early stages of implementation. The focus appears to be on what would be required to support a complete submission and will be helpful in establishing the extent and depth of supporting information that should be supplied.
3.7	Should also provide scope to discuss whether a voluntary referral would be appropriate or if it is likely to be accepted to minimise abortive effort by PAs. Will there be sufficient focus on both scheme and specific subsidy level referrals?
3.8	Makes it clear what the purpose is “not” for.
3.9	The voluntary nature is understood and opportunity for both sides to provides alerts and maintain dialogue about timescales seems sensible.
3.10	It would be helpful to know if case officers will be assigned to each referral. This section does not make it clear that a PA will be offered the same discussion opportunity for post award referrals. We assume so but the guidance would benefit from including this point.

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).

Para ref.	Comment
3.18	30 working day period is straightforward
3.19	While overall this might flush out potential challenges in advance of a subsidy being awarded, we have some concerns about the transparency approach. “As soon as practicable” – is there a defined time period for publishing information that an SAU review is underway?

	<p>How much information will be published and how will commercially sensitive information be protected?</p> <p>Has any/sufficient consideration been made on compatibility with Freedom of Information principles?</p> <p>Will there be guidance for potential recipients and PAs on how applications and assessments will be treated and what information will be disclosed through the referral process? Will they be able to review the detail to be published in advance?</p>
3.20	<p>Will there be any guidance for third parties on what is appropriate (or otherwise) as <i>relevant representations</i> and how concerns should be raised. We can foresee potential issues with third party competitors making approaches to the SAU during the review period and submitting FOI requests to the PA at the same time. How should this be managed?</p>
3.21	<p>Further information or a definition of <i>relevant submissions</i> would be helpful.</p>
3.22	<p>Public authorities will not routinely be able to refine or clarify information after the submission of their request – this may be at odds with achieving the “right” outcome. If further information can help it may be appropriate for this to be provided, especially if third party questions or comments have been raised. This may merit some flexibility at the outset while subsidy givers are unfamiliar with the process and requirements.</p> <p>There is a need to have regard to commercial interests in any proactive contact with third parties.</p>

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

Para. ref.	Comment
3.28	<p>It seems odd that the SAU report is to be published on its website first, and only provided to the PA and Secretary of State <u>after</u> it is already in the public domain. Will a draft report be made available to the PA?</p>
3.30 and later	<p>It will be important that issues relating to information release are considered more widely than confidentiality. Commercial prejudice, prejudice to public affairs, personal information etc. need to be considered. These should also be considered not just in the SAU reports but other stages in the process e.g. notification of referrals.</p> <p>It is unclear how this approach aligns with Freedom of Information legislation.</p>
3.37 – 3.40	<p>The opportunity to discuss and make representations about disclosure of information is welcome and sensible. This will be particularly important to prevent any errors in PAs not fully identifying confidential information which may occur in the early stages.</p>

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)

Para. ref.	Comment

4.26 – 4.29	<p>In 4.28, in addition to improvements or suggested modifications to the assessment or subsidy, it would also be good to highlight areas of good practice.</p> <p>4.28 (b) is critical to address any non-compliance and it would be helpful if the reports could clearly identify areas of potential strengthening, additional information required etc.</p> <p>For scheme referrals advice on the assessment process will be important as well as feedback on how appropriate the scope of the scheme is and supporting evidence in relation to Principles.</p> <p>For individual subsidies advice on areas of non-compliance or such weak evidence that may make an award unsafe will allow the PA to focus on remedial appraisal.</p> <p>If there are significant modifications the PA decides to make, will there be an opportunity for re-submission of the case?</p>
All	Will there be an approach for comment by the public authority on the draft report before final publication?

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

Add comments below
<p>Good practice that can be shared</p> <p>Common issues found e.g. information deficiencies, standard of submissions, quality of evidence, weaknesses in assessment process, treatment of information etc.</p> <p>Volume and value of referrals by type i.e. schemes and subsidies, of interest and particular interest, rescue and restructuring, also any sector or geographic trends in referrals. Number and nature of cases called in by the Secretary of State.</p>

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

Add comments below
<p>In 5.1 – 5.4 no mention is made about the priority attaching to rescuing or restructuring referrals which can be time critical to avert an imminent failure. Will this be taken into consideration? Pre-referral discussion to give advance warning and the target timescale for decisions will be important.</p>
<p>Principle 2 – Significance – this is an appropriate characteristic. The final bullet relating to information provision does not seem to fit as a prioritisation principle.</p> <p>Principle 3- Resources – it will be important that lack of SAU resource does not result in important activity not being reviewed.</p>

7. Any comments on the CMA Policy on enforcement of the SAU's information gathering powers

Add comments below

Regarding sanctions relating to non-submission of information – it will be important to consider whether there are any issues relating to non-compatibility with other legislation e.g. if the information could be withheld under Freedom of Information legislation

The assessment of reasonable reasons for not providing information should be aligned with exemptions under the Freedom of Information legislation. This should include consideration of the negative consequences of providing the information.

Should provision be included for information to be provided but with some assurance it would not be made public or retained for longer than required for audit purposes.