

Response to CMA’s consultation regarding the draft guidance on the operation of the Subsidy Advice Unit and the draft Statement of Policy in relation to enforcement by the Subsidy Advice Unit of its information gathering powers

1 Overview

These comments are submitted by Linklaters LLP in response to the consultation documents issued by the Competition and Markets Authority (“**CMA**”) in July 2022 entitled “*Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit: Consultation Document*” (“**draft Guidance**”) and “*Statement of Policy on the Enforcement of the SAU’s Information Gathering Powers*” (“**draft Statement of Policy**”).

Linklaters welcomes the opportunity to comment on the draft Guidance and the draft Statement of Policy. Linklaters supports the creation of detailed guidelines setting out useful clarifications on the role of the Subsidy Advice Unit (“**SAU**”) and the use of the SAU’s information gathering powers in the context of its monitoring and reporting duty under the Subsidy Control Act 2022 (the “**Act**”). Our response offers some practical suggestions to address certain points that could be further clarified or added into the draft Guidance.

A common theme in our comments on the draft Guidance is to offer further clarity to public authorities for the referral system to function as efficiently as possible and to guarantee transparency for third parties to be able to make informed representations. With regard to the draft Statement of Policy, our response proposes some amendments to ensure that the enforcement of the SAU’s information gathering powers allows the SAU to efficiently fulfil its monitoring function whilst also guaranteeing that section 41 notices are used proportionately.

2 Feedback on the draft Guidance on the operation of the SAU

2.1 Summary

We consider that the draft Guidance is generally helpful and provides appropriate clarifications on the operation of the SAU. Given the novelty of the unit, we have proposed certain practical additions and further clarifications to support the smooth functioning of the SAU (and related processes). We consider that this Guidance will need to be kept under review once the SAU becomes fully operational and the Act comes fully into force, as there will no doubt be learnings that may need to be reflected in updated guidance.

2.2 Feedback on Consultation Questions

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

The draft Guidance outlines that the SAU will engage in pre-referral discussions to assist public authorities in preparing the request for a voluntary or mandatory referral.

In principle, we agree with the CMA that, as stated at para. 3.8 of the draft Guidance, “*pre-referral discussions are not a substitute for public authorities making their own assessment or taking appropriate advice*”. In fact, the Act gives public authorities the responsibility to assess the compatibility of their measures with the Subsidies Principles (section 12 of the Act). The SAU should therefore not step into the shoes of the public authorities in making the assessment as to whether a measure qualifies as a subsidy, meets the criteria for referral, or complies with the relevant Subsidies Principles. Further, public authorities already

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have the possibility to seek advice from BEIS or subsidy control teams in other government departments or devolved administrations.¹

However, we consider that the scope of pre-referral discussions as currently envisaged in the draft Guidance is too limited. The draft Guidance states that pre-referral engagement would be limited to “*support[ing] the public authority to identify the information that should be submitted when the subsidy or scheme is formally referred*” (para. 3.6 of the draft Guidance) and “*cover[ing] the SAU’s processes and, for voluntary referrals, the application of its Prioritisation Principles*” (para. 3.7 of the draft Guidance). The combined reading of those two statements appears to suggest that pre-referral discussions would be limited to i) helping public authorities identify relevant information to submit to the SAU with their referral and ii) providing administrative/procedural clarifications on the referral process itself. Whilst we recognise that these two aspects have practical importance, we suggest broadening the scope of pre-referral discussions to the substance of the SAU’s assessment.

We think it would be useful to explicitly allow public authorities to discuss at pre-referral stage whether the proposed measure i) qualifies as a subsidy and ii) meets the criteria for referral. Whilst the SAU would not give any formal or binding advice at that stage, we see benefits in allowing such informal discussions, in particular filtering out referrals of measures that would clearly not constitute subsidies / meet the relevant criteria or identifying measures that are novel and may benefit from being assessed by the SAU despite not clearly falling within the scope of referrals. This would in turn increase legal certainty and allow for open consideration by the SAU as to what cases may have important precedent value so that it can consider the request (where applicable) against its Prioritisation Principles. Pre-referral access to the SAU to discuss the substance of a measure will also help to promote a more consistent approach to subsidy assessment across public authorities.

We also note that the possibility of such advice on substance during pre-referral discussions is not entirely ruled out by the draft Guidance which sets out that “*the SAU encourages public authorities to approach it for discussion before referring any subsidies that may meet the definition of SSol or SSoPI, especially for measures which are complex or novel in nature*” (para. 3.9 of the draft Guidance).

Further, the possibility for public authorities to get advice from BEIS or other subsidy control teams does not cut across the possibility to have substantive pre-referral discussions with the SAU. In fact, as explained above, substantive pre-referral discussions on the existence of a subsidy and the criteria for referrals both aim at filtering in or out requests from public authorities, while discussions with BEIS or other subsidy control teams aim at ensuring the correct application of the Subsidies Principles by public authorities.

It should also be noted that CMA reports may be used as evidence by those seeking to challenge a subsidy to the Competition Appeal Tribunal (“**CAT**”).² It is therefore important for the granting authority to have some early visibility over the CMA’s views of a particular subsidy assessment. This will in turn help the public authority take any steps necessary to address any matters the SAU could identify as problematic and / or take on-board any advice from the SAU.

¹ As per para. 3.8 of the draft Guidance and provided for at para. 54 of the BEIS Statutory Guidance.

² Para. 485 of BEIS Statutory Guidance provides that: “*Although public authorities are not bound to follow the SAU’s advice or implement any conclusions that are offered in it, they should be mindful that where the SAU’s advice is not followed, the risk of successful legal challenge of the public authority’s decision to grant a subsidy or make a subsidy scheme may increase*”.

In any event, we consider that the purpose of the pre-referral discussions should be clarified in the draft Guidance to ensure that public authorities and their advisors understand their scope and avoid making requests which fall outside of that scope.

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

We welcome the provision in the draft Guidance that transparency is “*a fundamental part*” of the new subsidy control regime “*promoting the accountability and challenge that is expected to result in better subsidy design and improved decisions*”. We agree that transparency is a fundamental element to ensuring the SAU receives all relevant information and can consider fair challenges from third parties, which are key in the UK’s new private enforcement-based system. As third parties will have the possibility to make representations during the referral process (paras. 3.20 and 3.21 of the draft Guidance), it is essential that they receive sufficient information as soon as the referral request is accepted by the SAU. We note that representations from third parties at the referral stage can potentially allow the SAU / public authorities to address any concerns they might have before the subsidy / scheme is granted, thereby saving the cost and time of a challenge (for all parties involved) in front of CAT.

The draft guidance provides that the SAU will publish “*information on the referral*” on its website “*as soon as practicable*” after “*[the referral] notice has been issued*”. Given the importance of this publication, we suggest (a) specifying that the publication should typically be made on the same day that the referral is accepted (given the 30-working day reporting period commences at that point); and (b) clarifying the information that it will contain.

In respect of (a), we would encourage the SAU to specify in the draft Guidance that the publication of summary information will “*typically occur on the day on which the SAU notifies the public authority that it has accepted the referral, or otherwise as soon as practicable thereafter*”. This approach will give third parties greater certainty on the date of publication and may provide a greater opportunity for them to make representations during the reporting period.

As to (b), for this to enable third parties to make informed representations to the SAU, we would suggest that the draft Guidance provides that the SAU’s summary must contain the information necessary for third parties to be able to examine the compliance of the subsidy / subsidy scheme with Chapters 1 and 2 of Part 2 of the Act. At the very least, the draft Guidance should require that the SAU’s summary provides the information that the public authority would have had to publish on the subsidy database (under section 34 of the Act) had the subsidy already been granted. For novel/complex subsidies, the CMA should consider whether more detail would be helpful in order to obtain meaningful engagement from third parties which could assist it in its assessment of compliance with the Subsidies Principles.

In relation to third party representations, we note the draft Guidance states that the SAU may take account of third party submissions “*provided they are submitted within a short time-period specified by the SAU*” (para. 3.21 of the draft Guidance). It would be useful if the draft Guidance (or at least each referral publication) also clarifies how long this “*short time-period*” is so that third parties are aware of the day by which they are expected to submit any observations. This would also provide more certainty for the public authority and the SAU as to when they might expect submissions to be made. Having a specific deadline would also encourage third parties to make any representations in a timely manner. Given the reporting period is 30 working days, we consider that 15 working days would be an appropriate

timeframe for third parties to submit representations and this aligns with the guidance for any proactive engagement on the part of SAU. This also links to point (a) above, encouraging the SAU to publish information on the same day as the referral acceptance, in order to maximise the time available to interested third parties to make submissions.

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

We generally agree with the proposed approach to the treatment of confidential information in the draft Guidance. We understand that the SAU will inform the public authority or third party of any confidential information that it considers necessary to disclose and allow them to make representations about why such information should not be disclosed (para. 3.37 of the draft Guidance). However, we are concerned that para. 3.28 of the draft Guidance is inconsistent with this approach as it states the SAU will “*aim to provide a copy of the report to the relevant Public Authority and the Secretary of State as soon as reasonably practicable after its publication*”. In order to fully protect confidential information, we suggest that the SAU should be required to provide a copy of the report to the public authority before publication on the SAU’s website, to allow the public authority to conduct its own confidentiality check and make representations around disclosure where appropriate, rather than relying on the SAU to inform it of potential confidential information. This approach would be in line with that of other regulators and would give public authorities and third parties more confidence that confidential information will be adequately protected.

2.2.4 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?

We welcome the efforts in the draft Guidance to map out each Subsidies Principle from the Act against the four-part framework set out in the BEIS Statutory Guidance, in particular as such an exercise is not included in the BEIS Statutory Guidance. We note that having two frameworks to assess the legality of subsidies or schemes has the potential to create confusion for public authorities and effectively describing how they co-exist should help limiting that risk.

Separately, we would welcome clarification on, and examples of, the type of improvements / modifications that the SAU could suggest to public authorities. Given the SAU’s reports are not binding on public authorities, we would encourage the SAU to make its recommendations as practical, proportionate and as detailed as possible (even suggesting various alternatives where possible) to maximise the utility of the referral process for public authorities (and better ensure consistency in approach across public authorities).

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

We welcome the SAU’s monitoring and reporting role which will be key to assessing the functioning of the new UK subsidy control regime and to identify areas for improvement.

We would however recommend clarifying in the draft Guidance the meaning of some of the considerations for the SAU’s monitoring reports. In particular: “*the general understanding of the regime by public authorities, including the effectiveness of their assessments*” and “*the effectiveness of the SAU’s evaluations*” (para. 4.31 of the draft Guidance). In practice, it would be useful to understand how the “effectiveness” will be assessed in both those cases.

With regard to the effectiveness of the Subsidies Principles, it is made clear that this will be assessed against the aims of the regime. However, for the public authorities' and the SAU's assessments, it is not clear against which criteria they will be assessed. For example, for the SAU's effectiveness, will it be assessed against the number of reports that are complied with by the public authorities? For the public authorities' effectiveness, will it be assessed against the number of successful challenges at the CAT over the period?

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

We consider the Prioritisation Principles proposed in the draft Guidance to be appropriate.

2.3 Other remarks

A useful addition to the draft Guidance would be a checklist of materials to be provided by the public authorities (which could for instance be added to Annex A). Further, it would be appropriate to clarify the level of analysis required and whether this level varies depending on the type of subsidy (e.g., whether independent economic analysis would be required systematically and whether the level of required analysis would be lower for SSoI than for SSoPI).

3 Feedback on the draft Statement of Policy

3.1 Summary

Our comments suggest additional practical clarifications on the use of the SAU's powers, in particular in relation to its use of section 41 notices, its power to grant extensions and its determination of sanctions for non-compliance.

Our overarching comment is that the powers should be used proportionately to their purpose, i.e., the provision of a non-binding monitoring report issued for information purposes only, and this should be reflected in the Statement of Policy.

3.2 Feedback on the draft Statement of Policy

3.2.1 When the SAU will use its information gathering powers

We support the statement in the draft Statement of Policy that sets out when the SAU will decide to use its information gathering powers to fulfil its monitoring and reporting functions: "*Section 41 notices are most likely to be used where the SAU considers it necessary to obtain information for its monitoring reports and that could not be obtained in a timely manner through other means*" (para. 3.4 of the draft Statement of Policy). We consider that this is proportionate to limit the use of section 41 notices to instances where less restrictive tools would not be sufficient to gather the required information in time.

Given the fact that stakeholders (many of whom might not have a dedicated subsidies team and are not necessarily represented by legal counsel) are simply being consulted in order to inform a non-binding monitoring report issued for information purposes only, we consider that regular use of section 41 notices (which carry a penalty in case of delay or non-compliance) would be disproportionate. In this context, we would suggest expressly limiting the use of section 41 notices. More specifically, we would suggest strengthening the start of this statement to provide that "*Section 41 notices will exclusively be used where the SAU considered it...*". As set out at paras. 3.1 and 3.2 of the draft Statement of Policy, the SAU has other tools to gather information from relevant stakeholders which do not attract a sanction for non-compliance (e.g., voluntary meetings, calls or requests for information).

These should be prioritised over Section 41 notices, which should only be used as a measure of last resort by the SAU.

3.2.2 The possibility to grant extensions

Para. 3.15 of the draft Statement of Policy currently provides that *“the SAU will expect recipients to comply with any section 41 notice within the given deadline and will generally only agree to an extension in exceptional circumstances”*. We would suggest setting out a few (non-exhaustive) examples where extensions could be granted, including for example, where, despite best efforts, the request has reasonably taken more time to comply with than initially envisaged or where there was an unexpected failure of the IT system. As the CMA knows from its other processes under the Enterprise Act 2002 (“**EA02**”) and the Competition Act 1998 (“**CA98**”), there are a number of reasons why recipients of information gathering notices (e.g., section 109 EA02 notices, section 26 CA98 notices) may need additional time to respond.

3.2.3 How the SAU will determine sanctions for non-compliance, in particular factors influencing the level of penalty imposed

We welcome para. 4.14 of the draft Statement of Policy which mandates a case-by-case analysis for the determination of an appropriate level of penalty: *“[t]he SAU will assess all the relevant circumstances of the case in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances”*. However, when assessing the relevant circumstances, we consider it appropriate for the SAU to also factor in the broader context i.e., that information is being sought in the context of a non-binding monitoring report issued for information purposes only, and so penalties should only be imposed in respect of the most serious of breaches of a section 41 notice.

Linklaters LLP, 10 August 2022