

Combined response to the CMA’s consultation on the draft guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (SAU) and on the draft statement of policy on the enforcement of the SAU’s information gathering powers

Introduction

Norton Rose Fulbright welcomes the opportunity to provide our comments on the draft guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (**SAU**) (the **Guidance**) and on the draft statement of policy on the enforcement of the SAU’s information gathering powers (the **Policy Statement**). We appreciate the CMA taking the time to seek feedback from the different stakeholders that might be impacted by the Guidance and Policy Statement. Our public response starts with an executive summary which outlines the main elements of our response. We then focus first on dealing with the six questions that were raised in the Guidance and addressed to stakeholders, and next on providing comments on the Policy Statement.

Our response reflects the views of Norton Rose Fulbright LLP and not those of our clients. We are a global law firm with State Aid (subsidy control) as one of our practices in several offices around the world, including the London and the Brussels Offices. We represent public authorities and businesses in many sectors that could be both affected by the new UK Subsidy Control Act and the Guidance and Policy Statement.

1 Executive Summary

1.1 Guidance

- (a) We support the use of pre-notification contacts for the purpose set out in the Guidance, in a similar way to those that are in place at EU level. These contacts may be particularly helpful for cases involving novel aspects or complexity.
- (b) We believe it is important for the SAU to publish summary information at the time of a referral as this will allow third parties to be aware of referrals, to be represented before the SAU and to raise issues on the planned subsidy or scheme.
- (c) We agree on the importance of publication of the report on the SAU’s website to aid transparency regarding the SAU’s work, as well as providing precedents that other authorities can rely on to ensure their subsidy or scheme is compliant with the subsidy control requirements. Where such publication involves potentially confidential information, sufficient time should be allowed for third parties to provide effective comments.
- (d) We believe it will be useful for the SAU to provide authorities with advice about how their assessment might be improved. The report should also include advice about how the proposed subsidy or scheme may be modified to ensure compliance; the SAU will be well placed to give this advice.
- (e) We support the publication of monitoring reports by the SAU, providing a systemic look at the effectiveness of Subsidy Control Act 2022 (the **Act**). The views of relevant stakeholders should be taken into account by the SAU for this review.
- (f) Finally, when dealing with the prioritisation principles, we consider the most important is the “Impact” principle, i.e. focus on the SSols that have the greatest potential to have a negative effect on competition or investment within the UK, or on international trade and investment.

1.2 *Draft Policy Statement*

- (a) Section 41 notices impose a serious duty and burden on stakeholders, and their use should remain limited. In many cases, a request for information on a voluntary basis, may be sufficient to collect the information necessary.
- (b) Where a section 41 notice is required, the SAU should first share a draft with the intended recipient to allow them to provide comments. While deadlines are important, we believe the SAU should be willing to grant extensions where necessary and possible in the overall timeframe.
- (c) Regarding the potential imposition of penalties, we consider that where a failure to comply has been remedied, this should point against imposing a financial penalty; it should not be only a factor to determine the type and level of penalty.

2 **Draft Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (SAU)**

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

- (a) We agree with the objectives for the introduction of pre-referral engagement. Such contacts will help public authorities identify which information should be submitted when a mandatory or voluntary referral of a subsidy or a scheme is made to the SAU and reduce the risk of a request being rejected as incomplete. The pre-referral engagement may be particularly helpful for cases with novel aspects/features or complexity where additional guidance is required on the assessment process and relevant information that needs to be considered.
- (b) For the SAU, pre-referral discussions will also help with resource planning, and initial preparatory work (as is the current practice of the European Commission during pre-State aid notification discussions). This should enable, as is currently the case at the EU level, faster handling of referrals.
- (c) We understand and agree with the limited scope of these pre-referral discussions which is not for the SAU to advise the public authorities on the design of subsidies and schemes in compliance with the Subsidy Control Requirements, as this would pre-empt the substantive review. This is the same as, for example, pre-notification discussions in merger cases and such pre-notification discussions nevertheless fulfil an important purpose.
- (d) We also welcome the fact that these pre-referral discussions are voluntary even if the SAU strongly encourages public authorities to approach it for discussion before referring any subsidies that may meet the definition of subsidies or schemes of interest (**SSoI**) or subsidies or subsidy schemes of particular interest (**SSoPI**). While such discussions will typically be useful, there may be cases where they are not needed or possible given the circumstances of the case. We believe it is appropriate for the SAU to remain flexible regarding such situations, even if pre-referral discussions are generally strongly encouraged.

2.2 *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)*

- (a) We agree with the proposed approach to transparency including the publication of summary information at the time of a referral. This will ensure visibility of the review, and importantly it will allow third parties to be aware of the referral, to be represented before the SAU and to raise issues that the subsidy or the scheme may create.

- (b) Indeed, certain issues or impacts on markets, competition and investment may not be brought to the SAU's attention without this publication of summary information on the referral.
- (c) In publishing this summary information, the SAU should endeavour to allow third parties a sufficient time period to prepare and make submissions, while ensuring that this time period does not affect the overall timeframe of the evaluation.

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

- (a) We agree generally with the approach to the treatment of confidential information set out in the Guidance. We would note that while timing may be tight it will be important that the SAU allows a sufficient timeframe for relevant parties to discuss the disclosure of confidential information with the SAU. This will be particularly critical for third parties who may have had less involvement in the process generally and may need additional time to understand the implications of any disclosure.
- (b) If the SAU ultimately decides to disclose information that the authority and/or third parties do not agree should be disclosed, we agree with the appointment of the CMA's Procedural Officer to consider applications from the parties regarding why the information should not be disclosed.

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? (See 4.26-4.29)*

- (a) We agree with the proposal to include advice about how the public authority's assessment might be improved in the SAU's report. This will allow the authority to draft more effectively upcoming subsidies or schemes while being compliant with the subsidy control requirements, and minimise the risk of negative outcomes from future referrals to the SAU. This advice on how the authority can improve its assessment might also be useful for other authorities in preparing assessments of their own subsidies or schemes.
- (b) We also agree with the proposal to include advice in the report about how the proposed subsidy or scheme may be modified to ensure compliance with the requirements of the Act. While it is for the authorities to prepare their own proposals and assessments, over time the SAU will build up detailed knowledge of the Principles and experience of applying them in a range of contexts. Guidance from the SAU on possible changes to a proposal may therefore be valuable to public authorities and an efficient use of the SAU process and resources.
- (c) In addition, the inclusion of advice on how the assessment may be improved or the subsidy or scheme may be modified would also confer advantages on potential beneficiaries and other stakeholders, including competitors. Such advantages include a greater general understanding in relation to the design of individual measures or schemes, the elements to be considered during the design and assessment phases respectively, and the information that public authorities may require in this regard. This would also enable competitors and other interested parties (as defined in the Act) to make an informed decision as to whether to lodge a challenge or not, and indicate any potential grounds on which such a challenge may be based.

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

- (a) We believe the SAU's role of monitoring the effectiveness of the operation of the Act and its impact on competition and investment within the UK will be helpful. We support the publication of a report on the outcome of the SAU's review and the review should provide a systemic look at the effectiveness of the Act and regime as a whole, and not focus only on specific issues. Furthermore the review process should at least include consideration of the different elements listed in paragraph 4.31 of the Guidance.
- (b) We also consider it important that the views of relevant stakeholders are taken into account by the SAU during its review of the effectiveness of the Act. To enable this, stakeholders should be provided with a sufficient timeframe to provide their views on the operation of the regime as part of the review process carried out by SAU. The SAU's monitoring reports should, in the first instance, present the relevant views expressed by stakeholders, as well as the evidence that has been gathered by the SAU.
- (c) The SAU should provide commentary on the evidence that has been gathered, and on the relevant views that have been expressed by stakeholders. All the submissions made by stakeholders should be publicly available, subject to confidentiality restrictions.
- (d) The report should include an assessment of the effectiveness of the Act based on the views of stakeholders and the evidence gathered, including any suggestions for ways to increase the effectiveness of the Act.

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

- (a) We agree with "Impact" being the first prioritisation principle of the SAU for it to make a decision as to whether it will prepare a report in respect of any SSols referred by public authorities on a voluntary basis. Indeed, the most important consideration is to determine which of the SSols has the greatest potential to have a negative effect on competition or investment within the UK, or on international trade and investment. We also welcome the non-exhaustive list of different factors that are presented to determine the impact of a SSol, including the subsidy characteristics and the market characteristics which are the most relevant factors to determine the impact on the market.
- (b) Once the SAU has analysed the impact of different SSols to determine whether it will prepare a report in respect of any SSols, and if a decision still needs to be made, we agree on the usefulness of the "Significance" prioritisation principle.
- (c) Finally, the "Resources" factor might be of particular interest as the SAU should ensure that it has sufficient resources to prepare a report in response to any voluntary referral. If the SAU considers that it does not have capacity to provide an answer to a significant proportion of voluntary referrals, we consider that the CMA should consider allocating more resources to the examination of these referrals.

3 Draft Statement of policy on the enforcement of the SAU's information gathering powers

3.1 *Policy Objectives*

- (a) We understand that, to fulfil its functions of monitoring and reporting as provided by section 65 of the Act, the SAU is granted information gathering powers that will allow it to gather information from public authorities, businesses or individuals.

- (b) Under section 41 of the UK Internal Market Act 2020, the SAU has the power to send a written notice (**section 41 notice**) requiring a person to provide information or documents, to assist it to carry out its reporting and monitoring functions.
- (c) We welcome confirmation that the SAU will use section 41 notices only where this is necessary for it to comply with its functions. In many cases, it may be sufficient for the SAU to request information on a voluntary basis or invite relevant respondents to attend meetings or calls. A section 41 notice issued by the SAU imposes a serious duty and burden on stakeholders, and its use should be limited where possible.
- (d) Where a section 41 notice is required, we believe it is important for the SAU to share a draft of the notice in first instance where possible. This will allow the addressee to make comments in advance, which may allow the notice to be more efficient or targeted in scope. The addressee could also make known any difficulties in responding to certain questions or in responding within the reasonable deadline set out for the section 41 notice.
- (e) We understand the importance of the SAU's enforcement powers, through the sending of section 41 notices, to collect information necessary to the SAU's monitoring and reporting functions. However, we believe that the SAU may need to allow extensions to deadlines from time to time. While paragraph 3.15 suggests this will be exceptional, our experience is that unexpected issues can arise which can have an impact on overall timing. We believe the SAU should be open to reasonable adjustments to deadlines, provided the parties have a clear explanation of why this is necessary and of course provided this can be accommodated within the SAU's overall timetable.

3.2 *The SAU's policy on enforcing its information-gathering powers*

- (a) As regards the potential imposition of penalties, we consider that if a failure to comply has been remedied, this should be a relevant factor, not only to determine the type and level of penalty imposed but also to determine whether to impose a penalty or not in the first place. Where a failure has been effectively remedied (for example an error has been corrected in short order) we believe it would not normally be appropriate to impose a financial penalty.
- (b) If the SAU is considering imposing a penalty, it is important that the addressee should have an opportunity and sufficient time to make written representations to the SAU on its provisional decision. Depending on the nature of the provisional decision, this period may need to be more than one week for the recipient to have an effective opportunity to consider the content of the provisional decision and prepare a response.

Norton Rose Fulbright LLP
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