



**Response to the consultation on the draft guidance on the CMA's Subsidy Advice functions**

[REDACTED], *on behalf of Pinsent Masons LLP*

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

We do. Limited as these objectives might be, they are nonetheless important, necessary, and consistent with the regulatory obligations that the CMA has under the Act.

At the same time, on a related point, we note that para 3.15<sup>1</sup> indicates that authorities “may additionally” provide: (a) a description of the evidence gathering exercise, (b) an explanation as regards the conduct of the assessment, and (c) further explanation of the assessment’s conclusions.

It is not clear to us as to why (a) and (b) should not constitute mandatory requirements. The provision of this information would help the SAU assess more quickly and easily the reliability of evidence that might have been submitted and the extent to which the authority might have disregarded relevant sources or information.

As to (c), the starting point must be that the authority’s Assessment of Compliance should be sufficiently detailed to enable the SAU to carry out a meaningful evaluation and provide further advice as appropriate. On that basis, there should not be any need for “supplementary” explanations that the authority might or might not provide.

With a view to expediting, and to the extent possible, simplifying the SAU’s own review, it would also seem appropriate for para 3.16 to clarify that the provision of evidence relevant to the assessment should also include any evidence that the authority considered for the purposes of carrying out its Assessment of Compliance irrespective of whether such evidence might not support the conclusions it ultimately reached (e.g. evidence that might support the view that there are less distortive means of intervention than the subsidy being reviewed). The

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<sup>1</sup> All references to paragraphs in our response are references to the paragraphs in the consultation document on guidance on the operation of the subsidy control functions of the Subsidy Advice Unit, dated 11 July 2022 (CMA161con).

expectation would be that the authority's assessment would also explain the basis on which the authority concluded that such evidence was not persuasive, reliable or conclusive.

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

We do not have any substantive comments as regards the SAU's proposed approach to transparency, other than, it would seem to us important that interested third parties are given sufficient time to prepare and submit comments to the SAU.

Depending on issues such as the nature and scope of the subsidy or scheme in question, and, ultimately, the timing of the SAU's publication of information on a referral, the time available for interested parties to prepare and submit comments in time for the SAU to take these into account before finalising and publishing its report, might be inappropriately short. In those circumstances, it would seem to us necessary for the SAU to seek to agree with the authority (or, where relevant, request from the Secretary of State) an extension of the period for the preparation for its report, so as to allow third parties, sufficient time to make representations, as well as sufficient time for the SAU to consider those representations for the purposes of preparing its report.

Separately, it seems to us that it would be useful for the SAU to identify the particular issues on which, in the context of a specific review, it would be particularly valuable for third parties to comment (e.g. as to the potential effects of the proposed subsidy on domestic competition) without this precluding the possibility for submissions to address also other relevant issues.

Finally, given the paramount importance of transparency, and as a means of making the most of the generally short period within which the SAU must prepare its report, it would be useful for the SAU to implement a system whereby businesses and other interested parties may register their interest in being alerted via email to the publication of summary information on a subsidy/scheme under review which meets one or more criteria, e.g. value or type of subsidy or the industry or geographic area to which the particular subsidy relates. This should ensure that no time is lost unnecessarily between the SAU publishing information on a particular referral and interested parties that might wish to make representations, being alerted to this.

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

Yes, we do and have no further substantive comments on this issue.

**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?**

Whilst we acknowledge that it for the authorities, and not the SAU, to carry out compliance assessments, it seems to us that it would be in the interest of building up best practice as well as mitigating the risk of unnecessary distortions of competition in the UK, for SAU reports not only to identify clearly any shortcomings in an authority's assessment but also to provide, where necessary, detailed and specific advice as to how the authority's assessment may be improved or the subsidy/scheme modified with a view to rendering it consistent with subsidy control requirements.

In this context, it would also be important for SAU to be clear as to the rationale and basis of its own conclusions, including in cases where it might have concluded that there are less distortive means that can achieve the same policy objective which might involve a lesser subsidy or even, no subsidy at all.

Indeed, it seems to us that it would be helpful for the guidance to make it clearer that SAU's role would be, as it should, that of a "critical friend" which is concerned not only with taking a view as to whether or not, on the basis of the evidence which an authority has provided, the assessment's conclusions are appropriate, but also taking a view as to whether the authority's assessment has disregarded relevant issues and information. That might be the case, for example, where the assessment includes the consideration of certain counterfactuals but disregards others which are equally relevant in a particular context.

In line with this critical friend approach, it seems to us that the two "fundamental questions" that the draft guidance indicates that the SAU will consider in evaluating an authority's assessment (set out in para 4.3) should be slightly modified. According to this modified approach:

- the SAU should first take a view as to whether an assessment is based on appropriate and relevant evidence;
- if it is not, it would seem superfluous, and indeed, inappropriate, for the SAU to go on to consider whether the authority's analysis and conclusions reached are consistent with the (inadequate) evidence on which it is based;
- equally, where the assessment is based on inadequate evidence it would seem most likely that the answer to what is currently the first fundamental question ("How well

does the public authority’s assessment address the subsidy’s compliance with the Subsidy Control Requirements?”) would be relatively brief and in the negative.

On the basis of the above, it seems to us that in carrying out an assessment the key questions which the SAU should consider are the following:

- (a) Is the assessment based on appropriate, relevant and adequate evidence?
- (b) If it is, are the public authority’s analysis and conclusions generally consistent with that evidence so that the assessment may be deemed to address adequately the subsidy’s compliance with the Subsidy Control Requirements?
- (c) If it is not, or if the assessment does not address adequately the subsidy’s compliance with the Subsidy Control Requirements, what shortcomings have been identified and what steps may the authority take to improve the assessment or render the subsidy consistent with the Subsidy Control Requirements?

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

Whilst we generally agree with the issues listed in para 4.31 as subject to consideration in the SAU’s monitoring reports, it seems to us that in monitoring and reviewing the effectiveness of the operation of the Act, the SAU should also be reporting on the extent to which current provisions, including time limits, operate adequately so as to enable:

- the Secretary of State to identify (all) problematic subsidies or schemes that might require post-award referrals;
- businesses or other interested parties to monitor effectively the Subsidy Database so that they might seek further information or, if appropriate, challenge a subsidy decision.

Separately, it would be appropriate for the SAU reports to consider the extent to which the subsidy regime is facilitating the effective control of subsidies that might otherwise distort unjustifiably competition in the UK

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

Yes, we have no further substantive comments on this issue.

## **Other issues**

In para 2.24 it is noted that in circumstances where an authority grants a subsidy (or sets up a scheme) before the SAU has published its voluntarily referral report, the SAU will, in line with the provisions of the Act, take a view as to whether or not to proceed with the preparation and publication of the report.

It would be useful for the guidance to clarify the factors which the SAU will consider in taking a decision on this point. Presumably the “Prioritisation principles” which SAU would have considered when deciding whether to accept the voluntarily referral request, in the first place, and the conclusions reached by reference to those principles, would continue to be relevant.

However, it would seem necessary for an additional factor to be taken into consideration, namely, the question of whether any initial review that might have been carried out by that point, gives rise to material concerns as to the adequacy of the assessment and the likely compliance of the subsidy/scheme in question with subsidy control requirements.

This seems to us to be crucial, in light of the fact that, absent an interested party actively monitoring the Subsidy Database with a view to identifying potentially problematic subsidies within the short statutory limitation period, the opportunity to challenge such measures would be lost, so that potentially unjustified distortions of competition in the UK would persist and cumulate over time.

Indeed, it would seem inconsistent with the CMA’s statutory obligation to promote competition for the SAU not to proceed with the preparation and publication of a report at a point where it has already concluded that there are material concerns with an authority’s assessment and the consistency of the SSoI in question with subsidy control requirements.

In line with the comments above, one must assume that this will in fact, be a factor that the SAU will take into account when considering the question of whether to proceed with the preparation and publication of an SSoI report once the relevant authority decides to implement the measure before the SAU report has been published.

It would be useful for the guidance to clarify this point, not only in the interest of transparency but also because this might have a small, but nonetheless crucial, non-compliance deterrent effect.