

Response to the Competition and Markets Authority (CMA) consultation on its draft guidance on the operation of the Subsidy Advice Unit (SAU), and the Statement of Policy

Submission from an individual (academic)

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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)

- I agree with the proposed approach to transparency. Transparency is vital to ensure a high-functioning subsidy control regime. Transparency helps to guarantee subsidies' alignment with the UK's subsidy control principles, value for money, and compliance with international agreements. Transparency is also necessary for ex-post assessments of the functioning of the regime and individual subsidy programs.
- I strongly support the publication of summary information at the time of referral. I do, however, have concerns about the text in Section 3.19 on page 27 and specifically the clause stating: "As soon as practicable after such notice has been issued, the SAU will publish information on the referral on its website to help ensure the transparency of the SAU's review." While recognizing the value of flexibility, I would strongly prefer to see a more precise timeline for the publication of this important information, perhaps 5 working days or 2 weeks. The phrase "as soon as practicable" provides too much discretion and potentially does so at the expense of interested parties.
- In Section 3.22 on page 28, I would argue that it should not be "exceptional" for the SAU to "proactively approach relevant third parties for information, including participants in the relevant market(s), and any relevant regulators". I would recommend removing the word "exceptionally" from this sentence. These types of activities should be expected of the SAU by public authorities, even if they are only rarely implemented in practice. While recognizing the increased workload this may place on the SAU, it is arguably best practice to seek out information from all relevant actors when drafting reports, rather than relying exclusively on information provided by the public authority.
- The SAU should make all of their reports publically and easily available free of charge, preferably via an open access web page with stable, long-lasting permalinks. The SAU's advice should be available to everyone, including to potentially interested parties as well as the Competition Appeals Tribunal (CAT).
- Because the SAU does not have the power to prohibit the making of any subsidy or subsidy scheme, making the SAU's advice widely available is vital. By making the SAU's advice publically available, public authorities may have relatively greater incentives to voluntarily follow the SAU's advice. In this way, publically available SAU reports may help to ensure that subsidies reviewed by the SAU conform to the UK's subsidy control principals.

- The SAU must have information gathering powers. However, the SAU's workload could be minimized by requiring all necessary information be included in the Subsidy Control Database. Requiring that such information be included would streamline the information-gathering burden for public authorities, as well as the SAU. It would also serve to maximize transparency.
- In sum, I was highly impressed with the proposed approach to transparency. It aims to achieve a high level of transparency. I was particularly glad to see the inclusion of the following text: "transparency is a fundamental part of the UK's subsidy control regime, promoting the accountability and challenge that is expected to result in better subsidy design and improved decisions."

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

- All of the SAU's monitoring reports should be publically and easily available free of charge, ideally on an open access web page with stable long-lasting permalinks.
- While I agree that a review that "provide a systemic look at the effectiveness of the Act and regime as a whole" would be useful, the SAU must also undertake "post-award" reviews/audits of individual subsidy programs. Ideally, the SAU would do this for subsidies in which it has not been previously involved via a referral in order to avoid any potential bias. Subsidies' impacts should be evaluated using the most up-to-date econometric techniques and appropriate counterfactuals to identify their impacts. For example, are they meeting their intended goals? Are they influencing the geographic patterns of competition and/or investment within the UK?
- It is clear that CAT will not review the merits or effectiveness of a subsidy or subsidy scheme. But this important task must be done by someone. The SAU may be the appropriate body to undertake this task, but only if they were not already involved with a subsidy via a referral/review. For subsidies with which the SAU was involved, a different independent body is needed to investigate the effectiveness and impacts of these subsidies.
- Ex-post review is crucial to ensure a high-functioning subsidy control regime, particularly given that so many diverse bodies in the UK have the ability to provide subsidies with little mandatory oversight. To this end, the SAU's periodic report on the operation of the subsidy control regime analyses should also include estimates of the impacts of individual subsidy programs. Such investigations could ask: did the subsidy program achieve its stated goals? What would have happened without the subsidy? Serious economic analysis is required here. A good reference would be Innovation Norway's reports on the effectiveness of some of their subsidy programs, which are available online.
- The SAU's annual reports should also include information about all of the subsidies granted in the UK during the relevant financial year. These data could be obtained via the Subsidy Control Database. While this may appear to be a duplication of information that is available elsewhere, it is, in fact, a valuable addition to transparency and ensures that the SAU's report does not suffer from "selection bias", which it would do if it included only those subsidies for

which the SAU has prepared a report following mandatory, voluntary or post-award referral during the relevant financial year. Reporting only on these particular subsidies would give an inaccurate picture of the universe subsidies in the UK.

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

- In general, I agree with the SAU's Prioritisation Principles. Specifically, I strongly agree with the "Sensitivity" text listed under Principle 2 – Significance. In 5.7 on page 46, "sensitivity" is defined as "whether a similar subsidy has been subject of a domestic or international challenge or dispute, which may include consideration of the sector to which the subsidy relates."
- Compliance with international subsidy rules is vitally important for the functioning and credibility of the UK's subsidy control regime. I urge the SAU to keep this important point in mind when offering advice on public authorities' proposed subsidies, particularly with respect to subsidy rules included in the WTO, TCA and potential future subsidy commitments articulated in the CPTPP.
- A subsidy's "significance" relates to its impact. Given this, it is somewhat artificial to draw a distinction between the two. Knowing, for example, that a similar subsidy has been the subject of an international challenge provides some information about its impacts. Because it has been the subject of an international challenge, it likely has some negative, non-trivial impacts on interested (international) parties. So this indicator may provide something of a shortcut for the SAU when determining "impact". I wonder then if it might make sense to list "significance" as Principle 1 and "impact" as Principle 2. Reorganizing the Principles in this way would also help to reassure the UK's international trading partners about the UK's commitment to international subsidy rules, as well as the devolved administrations about the SAU's commitment to minimize distortions from subsidies in the UK's internal market.