

# Response to the CMA's Consultations on Draft Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit

## Introduction

Dentons welcomes this opportunity to provide its views on the draft guidance on the operation of the subsidy control functions of the Subsidy Advice Unit (**SAU**) (**Guidance**).

The Guidance will help stakeholders understand how the SAU's subsidy control functions will be discharged, covering important practical matters not provided for in the relevant legislation. Therefore, it is important that the Guidance is clear and comprehensive.

Dentons regularly advises clients on UK subsidy control and EU state aid issues. Our response to this consultation is informed by our experience of advising clients on the administration and enforcement of these regimes.

We would be pleased to discuss any part of our response further with the CMA.

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

- 1.1 It would be useful to understand whether pre-referral discussions would actually be quasi-mandatory as they are in practice in merger investigations or whether initiating such discussions would be at the discretion of public authorities. We think public authorities would welcome clarification on this point.
- 1.2 We agree with the objective for pre-referral engagement. However, there are no indicative timescales at paragraph 3.5 for the pre-referral discussions stage. Having some indicative timescales for this stage would be helpful for public authorities, so they can anticipate how long the whole process of engagement with the SAU is likely to take and factor that into their wider project timelines.
- 1.3 We appreciate the regime is new to the SAU and so precise timelines are not likely to be known to the SAU but some indications presumably could be provided. It may then be that after six to twelve months the Guidance is updated in this respect to reflect the SAU's experience of the pre-referral phase.
- 1.4 We would also highlight the following in connection with this stage of engagement with the SAU:
  - (a) Paragraph 2.13(a) (i.e. explanation of why a public authority thinks the subsidy / scheme is a SSoPI) could be more prescriptive.
  - (b) In general, paragraph 2.13 could provide more guidance as to how much evidence the SAU wants to receive to avoid the rejection of incomplete report requests at the preliminary assessment stage. Paragraph 3.16 could also offer more guidance on this point.

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### **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)**

- 2.1 It could be further clarified at paragraph 3.21 whether the SAU plans to actively seek comments through publicised requests as the CMA does in its invitation to comment (ITC) process for merger control investigations. Given the relatively limited avenues for scrutiny and challenge in the subsidy control regime, it strikes us that proactively seeking input from interested or affected parties will be important. The SAU will likely need to carefully consider confidentiality in some cases, for example, subsidies that may relate to politically or commercially sensitive projects or crises. It would be useful for the SAU to clarify if it envisages the possibility of some sensitive matters subject to its review not being made public until a later stage (possibly even after the event)..
- 2.2 In terms of third party submissions, unless the third party wants to keep the fact of its representations confidential (and has legitimate reasons for this), publication of such submissions might help public authorities understand the concerns with their proposed subsidy or subsidy scheme.
- 2.3 We understand from paragraph 3.24 that convening a CMA group would be an exceptional measure. It would be useful to include some guidance as to when and under what circumstances this exceptional measure might be used.

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

- 3.1 Yes. However, paragraph 3 of Appendix A could explicitly request public authorities mark the parts that are redacted for reasons of legal privilege, rather than just confidentiality. This would give the SAU a better understanding of the potential consequences of disclosure and assist it in its assessment of confidentiality requests.

### **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)**

- 4.1 The subsidy control principles (i.e. Principles A-E and G) referred to at the beginning of the Analytical framework section are similar to those in EU State Aid law. Therefore, it would be helpful to have further clarification / guidance on whether or not the SAU will have regard to EU guidance on the state aid principles (i.e. regard them as a non-binding useful form of guidance that a public authority could have recourse to, where appropriate, in assessing compliance with certain principles).
- 4.2 Public authorities could benefit from further specific guidance on 'technical reports' referred to at paragraph 4.11(b). For example, considering the importance of economic analysis to assess

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whether there are less distortive means of achieving the policy objective (Principle E), it could be clarified if there is an expectation for certain of the principles that public authorities are expected to use economic input as technical reports to support their applications. In addition, as part of its checklist, would the SAU expect public authorities to confirm that legal advice on compliance with the Act has been obtained (Step 4)? We can see that in some cases, public authorities may wish to furnish a copy of such advice to the SAU but, given the implications for legal privilege, we would be opposed to this being an expectation or requirement.

- 4.3 Our view is that the SAU should offer advice if it thinks a subsidy / scheme can be improved considering the principles. It would be helpful to see clear references to the aspects that should be improved / modified and how they might be improved in SAU reports. This would also assist other public authorities when they design subsidies or schemes. Ideally, the level of advice given should allow public authorities to improve their assessments / modify proposed subsidies and schemes without seeking further clarification / guidance from the SAU.
- 4.4 As a general point, it would also be helpful to have further clarification as to (i) whether the SAU will consider the public authority's assessment of societal benefits in its reports on SSol and SSoPI, or (ii) whether it will merely consider the public authority's assessment of the effect of such subsidies on competition and investment within the UK. We note the Draft Guidance on the UK Subsidy Control Regime paragraphs 473 – 476 and 482 only refer to 'undue distortion or negative effects on competition'.<sup>1</sup>
- 4.5 Finally, we assume that the SAU will publish its reports within or at the end of the reporting period, which is also important in terms of the application of the 'cooling off' period.

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

- 5.1 It would be useful to see reporting on the timescales of each referral stage (i.e. the stages depicted in paragraph 3.5 of the Guidance) to have a better idea of how long the review process and, in particular, how long pre-referral discussions are taking in practice.
- 5.2 We query whether the SAU plans to monitor subsidies they have assessed before to evaluate whether the actual benefits, effects and potential distortions align with the assessment undertaken by the public authority? It strikes us that some form of ex post case studies, at least for an initial period, might be beneficial given that the regime is new.

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

- 6.1 Getting indications on the likely prioritisation of Subsidies or Schemes of Interests (SSol) in pre-referral discussions would be useful for public authorities planning to make a voluntary referral request to the SAU. If the SAU plans to provide such indications in pre-referral

<sup>1</sup> For the Draft Guidance on the UK Subsidy Control Regime see [link](#). Dentons also submitted its responses to the BEIS Consultation on draft guidance for the UK's subsidy control regime on 10 August 2022.

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discussions, we recommend this is made clear in paragraph 5.3. Given it will take a public authority some time and a fair amount of resource to pull together the materials required by the SAU, it would be useful to be able to get some early guidance from the SAU, based on the provision of some reasonably limited information, as to whether it would see the subsidy as falling within its prioritisation criteria.

- 6.2 We recommend that the SAU provides further detail on its statement, 'whether there may be other, and more appropriate, means for the public authority to access advice on the subsidy' under 'Appropriateness' at paragraph 5.7. For example, does this mean that in a straightforward SSol, seeking its own legal advice rather than making a voluntary application to the SAU may be more appropriate for a public authority?
- 6.3 Concerning the Significance principle at paragraph 5.7, will the SAU consider the importance of the relevant sector to the UK economy / society as a factor whilst considering the wider strategic significance of reviewing an SSol (i.e. as part of its prioritisation principles)? Clarity on this would be useful.

**Dentons UK & Middle East LLP**

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