

Summary of consultation responses

Summary of responses to the draft Guidance on the operation of the subsidy control functions of the Subsidy Advice Unit

Subsidy Advice Unit (Part of the Competition and Markets Authority)

CMA166resp

Subsidy Advice Unit

Part of the Competition and Markets Authority

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Introduction

The Subsidy Advice Unit (the **SAU**¹), a part of the Competition and Markets Authority (**CMA**²), will exercise the CMA's functions under the Subsidy Control Act 2022 (the **Act**³). The SAU published guidance (**Guidance**) on how the SAU will carry out these functions. It will also publish a Statement of Policy on the Enforcement of Information Gathering Powers (**Statement**). On 11 July 2022 the CMA launched consultations on draft Guidance on the operation of the SAU (**draft Guidance**) and on a draft Statement of Policy on the enforcement of its information gathering powers (**draft Statement**).

The SAU will have two functions:

- to provide independent non-binding advice to public authorities regarding **subsidies**⁴ which are referred to the SAU, taking the form of an evaluation of the public authority's assessment (**Assessment of Compliance**⁵) against the **Subsidy Control Requirements**.⁶
- to periodically monitor and review the operation of the **subsidy control regime**,⁷ its impact on competition and on investment within the UK and publish details of the subsidies and subsidy schemes in respect of which it prepared reports.

The consultations closed on 10 August 2022. This Guidance consultation response sets out the key issues raised by the responses to the draft Guidance, our views on these issues, and changes we have made to the Guidance as a result. We will provide a separate response to the consultation on the draft Statement in autumn 2022.

Having considered the consultation responses and made appropriate amendments to the draft Guidance, we have finalised and adopted the Guidance, which is published on the CMA's website alongside this consultation response. As we gain experience of the new regime, we will review and amend the Guidance accordingly.

¹ See [Glossary](#)

² See [Glossary](#)

³ See [Glossary](#)

⁴ What constitutes a subsidy is defined in sections 2-8 of the Act. Further information on the definition of a subsidy can be found in Chapter 2 of [BEIS Statutory Guidance](#).

⁵ See [Glossary](#)

⁶ See [Glossary](#)

⁷ See [Glossary](#)

Overview of the Guidance consultation responses

Responses received

We received 22 responses to the Guidance consultation. A full list of respondents can be found in **Appendix A**. Non-confidential versions of responses are available on the consultation webpage.⁸ We would like to thank all those who responded to the consultation.

Responses were received from a wide range of stakeholders with an interest in the SAU's role and functions, including from public authorities, law firms, academics, and other interested organisations and individuals.

Stakeholder engagement

During the consultation period, we held one roundtable targeted at public authorities, as the main users of our functions, which was attended by a wide range of representatives. We have also continued to work closely with officials from the relevant national authorities over the course of the consultation period and this summary reflects inputs from these contacts.

Guidance consultation questions

The consultation invited respondents' thoughts on all sections of the draft Guidance. We specifically invited responses to the following questions:

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

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

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

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?

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

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

⁸ For responses to the consultation, see [Draft guidance and draft policy statement for the CMA's subsidy advice unit - GOV.UK \(www.gov.uk\)](#)

Overarching comments

Most respondents welcomed the SAU's role in the UK's subsidy control regime and were supportive of its proposed processes, although there was some difference in opinion on the remit of the SAU's responsibilities and the support it could provide to public authorities navigating the regime.

Responses mainly focused on the questions set in the Guidance consultation. The main sections of this Guidance consultation response are structured thematically around these questions. We also received wider comments on the ways in which the SAU will conduct its analysis, which we have summarised in the **Analytical framework** chapter of this Guidance consultation response.

Where reference in this document is made to numbers of responses, this indicates the number of official written responses that the SAU received on the subject. Throughout the document we describe how many official responses discussed a particular topic as: "**several**" (less than 25%), "**some**" (25%-49%), "**majority**" (over 50%). Although comments received from stakeholder engagement discussions were considered in preparing our response, they are not taken into account in any of our calculations.

Issues raised in the Guidance consultation and our response

Question 1: Pre-referral engagement

Position in draft Guidance

The draft Guidance proposed that the SAU could assist public authorities in preparing a request for a **mandatory referral**⁹ or **voluntary referral**¹⁰ through pre-referral discussions. The scope of these discussions included identifying the information that should be submitted for a complete referral, helping public authorities to familiarise themselves with SAU processes, enabling the SAU to plan resourcing, and providing guidance on how the SAU's **Prioritisation Principles**¹¹ would be applied to voluntary referrals.

The draft Guidance set out that advising on the design of subsidies and how to undertake an Assessment of Compliance is outside the scope of pre-referral discussions. Other sources of guidance are available to assist public authorities in carrying out their Assessment of Compliance. Although a voluntary part of the process, the SAU encourages public authorities to engage in pre-referral discussion if measures may meet the definition of **Subsidies and schemes of Interest**¹² (SSoI) or **Subsidies and schemes of particular interest**¹³ (SSoPI) in good time in advance of submitting a referral.

Issues raised by consultation respondents

18 out of 22 respondents answered the question on pre-referral engagement, and the topic was discussed in stakeholder engagement discussions. A majority of the responses were generally supportive of the overall position set out in the draft Guidance. Several respondents agreed with the objectives of supporting SAU planning and helping public authorities understand how to submit a complete application.

Some respondents suggested that the scope of pre-referral discussions proposed in the draft Guidance should be wider. For instance, the SAU should provide public authorities with greater support and initial feedback on Assessments of Compliance with the Subsidy Control Requirements, including on whether the measure qualifies as a subsidy and meets the criteria for referral to the SAU. A range of reasons were given, including that public authorities would find this collaboration useful on complex matters, particularly in sectors

⁹ See [Glossary](#)

¹⁰ See [Glossary](#)

¹¹ See [Glossary](#)

¹² See [Glossary](#)

¹³ See [Glossary](#)

not used to subsidy control, and that this would filter out measures which should not be referred to the SAU. We also received recommendations for **Streamlined Routes**.¹⁴

By contrast, several respondents agreed that pre-referral discussions should not focus on substantive issues, or be used to advise public authorities on the design of subsidies. Several also raised concerns that pre-referral discussions should not delay “starting the clock” for the **reporting period**¹⁵ of 30 working days, or whether they would become too burdensome or quasi-mandatory, thereby holding back time-sensitive interventions. For these reasons, some respondents requested indicative timescales for pre-referral discussions. Several respondents referenced similarities to the CMA’s other functions or the EU State aid regime.

Our response

Pre-referral discussions are voluntary and public authorities can decide when to start discussions and when the referral needs to be made. We recommend that public authorities engage with the SAU before a referral is made.¹⁶ Aside from the objective stated in the draft Guidance, pre-referral discussions will be an opportunity for public authorities to provide an overview of the subsidy and approach to compliance, enabling the SAU to progress the referral more efficiently and reducing the need for clarifications.

The appropriate length of pre-referral discussion may vary referral-by-referral, depending notably on the complexity of the referred subsidy or the public authority’s familiarity with the SAU processes and the Subsidy Control Requirements. We have therefore not indicated when pre-referral discussions should commence. However, we have clarified that pre-referral discussions should generally happen when the Assessment of Compliance is sufficiently developed to be presented for external review. In any event, pre-referral discussions are not intended to delay “starting the clock” or create unnecessary burdens on public authorities.

The SAU’s role is different to the role played by the European Commission in the State aid regime and to the CMA’s other functions. The requirement to conduct an Assessment of Compliance is not specific to subsidies being referred to the SAU, but will apply to all subsidies, unless an exemption applies. In practice, therefore, an Assessment of Compliance will normally need to be documented for all such subsidies, not solely for the SAU process, unlike, for example, State aid or merger notifications. The role of the SAU is to support public authorities in their decision-making process by evaluating the quality of their Assessments of Compliance for the most potentially distortive subsidies. The public authority will then be responsible for taking the subsidy decision, based on its own Assessment of Compliance, having had the benefit of the SAU’s evaluation.

¹⁴ See [Glossary](#)

¹⁵ See [Glossary](#)

¹⁶ Engaging with the SAU in pre-referral discussions will be appropriate in most cases. If in doubt, public authorities are encouraged to at least notify the SAU of an intended referral.

Given the novelty of the regime, we acknowledge the requests for support in conducting the Assessment of Compliance and determining if a measure is a subsidy that meets referral criteria. However, it is outside the SAU's remit to give preliminary views on compliance before a referral is made, and in doing so input into the subsidy design process and Assessment of Compliance. However, if we become aware that the subsidy falls outside the SAU's remit during the pre-referral discussions or during the first five working days after the referral has been submitted, we will discuss this with the public authority. We may advise the public authority that the referral should either be reconsidered or withdrawn.

BEIS has published detailed Statutory Guidance (**BEIS Statutory Guidance**¹⁷) on each part of the Assessment of Compliance. It also indicates that public authorities can request guidance and support on specific cases or scenarios from Subsidy Control teams at BEIS, Department for International Trade (DIT) and Department for Environment, Food and Rural Affairs (Defra), and the Subsidy Control teams in the devolved administrations.¹⁸

Question 2: Transparency and third-party submissions

Position in draft Guidance

The draft Guidance proposed that, as soon as practicable after referral acceptance, the SAU, in the interests of transparency, will publish information about the referral on its website. Third parties will have the opportunity to make representations during the reporting period, and by exception we may approach relevant third parties. The SAU may take account of representations to the extent that they are relevant to the evaluation of the public authority's Assessment of Compliance and are submitted within the time-period specified. Although the SAU may occasionally seek clarification from public authorities during the reporting period, the evaluation will be based primarily on the public authority's original submission.

Issues raised by consultation respondents

18 out of 22 respondents answered the question on transparency and third-party submissions, and the topic was discussed in the majority of our stakeholder engagement discussions. Respondents often addressed the related topics of transparency and confidentiality together in their comments, so where applicable, these have been separated and grouped by theme. A majority of the responses were supportive of the overall position set out in the draft Guidance, and some stated that they supported the publication of information to support the effective functioning of the UK's subsidy control regime, and enable third-party representations.

A majority of respondents requested clarification of the information that would be published at the start of the reporting period and who would be responsible for preparing it. Some

¹⁷ [BEIS Statutory Guidance](#)

¹⁸ [BEIS Statutory Guidance](#)

respondents suggested that we clarify when this information will be published. Several responses raised confidentiality concerns on the publication of information about the referral and its potential impact on managing Freedom of Information Act (**FOIA**) requests, where measures may have commercial or other sensitivities. Some respondents requested the opportunity to refine information after submitting their referral, and several requested that the SAU obtains feedback on preliminary conclusions from the public authority during the reporting process.

Some respondents requested that public authorities should have access to third-party submissions and be able to respond to issues raised during the reporting period. Some respondents explained that to promote accountability and challenge within the regime, third parties should be given sufficient notice and targeted guidance to submit representations, with a clear timescale to do so. Several suggested that third-party submissions should also be published if they influence the SAU's opinion, subject to confidentiality, either in full or in summary form. Finally, several respondents suggested a clearer scope for third-party involvement, including that proactive engagement with third parties (particularly regulators) should not be by exception.

Our response

We believe that transparency plays a crucial role in the UK subsidy control regime. A majority of respondents were supportive of the SAU's approach to transparency, noting its importance to the effective functioning of the regime. We therefore do not propose significant changes to the Guidance in relation to transparency.

We agree with the need for clarity on the information that will be published at the start of the reporting period. We also note that the SAU will balance the need to protect confidential information with providing sufficient transparency. Subject to considering issues of confidentiality, we propose to publish at least the information that will be included in the **subsidy database** under section 34 of the Act, generally within the first five working days after acceptance of the referral.¹⁹ Relevant sections of the Guidance have been amended to reflect this.

We agree with the need to provide clear timescales for third parties to make representations, and we have clarified in the Guidance that this will be typically limited to ten working days. The published notice will indicate the deadline for any third-party submissions, and will be published as soon as practicable (whenever possible within the first five working days after acceptance of the referral). As suggested by several respondents, we have amended the Guidance to state that the SAU may also proactively approach relevant regulators for information where appropriate and, exceptionally, other relevant third parties. We note, however, that the Act does not grant the SAU information gathering powers for the purposes of its referrals function.

¹⁹ Under section 52(2)(a) of the Act, public authorities will be required to submit information that will be included in the subsidy database under section 34 of the Act, in their referrals.

Although we will reference third-party submissions in our report where relevant, we will not publish all third-party submissions. Doing so, without publishing all material about the public authority's original referral could present an unbalanced view of the subsidy. However, in order to properly take account of the outcomes of our report, the public authority, as decision maker on the subsidy, needs to be able to consider all the information and evidence that underpins it, including any relevant third-party views. Third parties are therefore encouraged to send their submissions to the public authority at the same time as to the SAU. In any case, we will send all third-party submissions to the public authority with the copy of the report. Any submissions from third parties should therefore include an express consent for it to be shared with the public authority. We have amended our Guidance accordingly.

Some public authorities considered that they should have the opportunity to comment on preliminary conclusions and refine their submission during the referral process, and in response to third-party submissions. We agree that it is important that the SAU's reports are based on sound and reliable information. We have clarified in the Guidance that, where we consider it helpful, we will request a clarification call with the public authority to check our understanding of the submissions, after an initial review of the documentation. However, to enable a swift and agile 30 working day process, and recognising the nature of our advisory role, we do not envisage an iterative process, and opportunities for engagement during the reporting period will be limited due to operational timescales.

Question 3: Confidential information and report publication

Position in the draft Guidance

The SAU will publish its report on the public authority's assessment before the end of the reporting period. It will provide a copy of the report to the relevant public authority and the Secretary of State as soon as reasonably practicable after publication.

To maximise transparency SAU reports will, where possible, be drafted without reference to confidential information. Public authorities and third parties should clearly identify confidential information in their submissions and in each case provide sufficient explanation for their claim that it should not be disclosed. It is not sufficient to simply mark a referral or whole document as confidential without further explanation, and public authorities should not withhold information from the SAU on confidentiality grounds.

The CMA is under statutory obligations to protect confidential information. If the SAU considers it needs to disclose information which has been identified as confidential, it will inform the relevant public authority or third party, setting out its reasons why it believes that disclosure is necessary. There will be a process for making representations to the SAU and applying to the CMA's Procedural Officer in case of a disagreement. In view of the short statutory deadlines for report publication, confidentiality discussions will necessarily be limited, close to the publication deadline, and require the public authority to respond quickly.

Issues raised by consultation respondents

17 out of 22 respondents answered the question on confidential information and provided further comments on report publication, and the topic was discussed in almost all stakeholder engagement discussions. A majority of the responses were supportive of the overall position set out in the draft Guidance.

Some respondents considered that a draft report should be shared with the public authority in advance of publication. Most of the reasons given for this were to perform confidentiality checks, make representations and check factual errors or prevent misconceptions. An equal proportion of responses and stakeholder comments also highlighted the need to avoid disclosure of information that could cause prejudice to public affairs or undue public scrutiny, citing previous European Commission processes that permitted the redaction of such information. Other rationales for not publishing information included commercial prejudice and legally privileged information.

Several respondents were concerned about how third-party confidential information would be dealt with.

Some respondents requested further clarification of how the SAU would comply with various legal requirements, such as FOIA, UK GDPR, Data Protection Act 2018, or sector-specific regulations.

Our response

Information about the referral will be disclosed at the start of the reporting period to ensure transparency, and in the SAU's report, which (ordinarily) must be published no later than 30 working days after referral acceptance. To protect the confidentiality of their own information and that of relevant third parties, such as subsidy recipients, public authorities will need to clearly identify confidential information when making the referral and provide reasons for any confidentiality claims. This includes all types of information that the public authority considers may cause harm if disclosed. We expect public authorities to plan for these confidentiality checks before submitting a referral, and schedule public announcements appropriately if there are commercial or policy sensitivities to publication. The SAU will consider all confidentiality claims in line with statutory obligations and its approach to other CMA functions.²⁰

The short timescales available for the SAU's evaluation process, including report publication, does not allow for the SAU to share a draft report with the public authority before its publication. All confidentiality and factual checks will have already been completed by that late stage during the reporting period. We will however communicate orally to the public authority the key points in the report, shortly before publication, where this is possible and practicable in the circumstances. This will be done on a strictly

²⁰ For more information, see [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#)

embargoed basis. The Guidance has been amended to reflect this additional step in the process.

The SAU will take account of compliance with all legislative requirements, such as FOIA, sectoral regulations, UK GDPR, Data Protection Act 2018, and standard CMA processes.²¹ We have clarified the circumstances in which we may disclose specified information in the Guidance.

Question 4: Content of reports

Position in draft Guidance

The draft Guidance explained that the SAU's report will include the evaluation of the public authorities' assessment of the subsidy compliance with the Subsidy Control Requirements. It further set out that the report will not take the form of a pass/fail evaluation but will identify shortcomings in the public authorities' assessment or evidence base. It may also include advice on how the public authority's assessment might be improved and advice on modifications to the subsidy or scheme.

Issues raised by consultation respondents

19 out of 22 respondents answered the question on the content of our reports. The majority of responses and stakeholder engagement comments were supportive of the draft Guidance proposals on the content of the SAU's reports.

A majority of the respondents were supportive of the reports including advice on improvements and modifications in the Assessment of Compliance. Respondents expressed diverging views on the level of detail on improvements and modifications that the reports should include. While some respondents argued that specific and practical advice as to how the public authority's assessment could be improved or subsidy modified would be helpful, several respondents requested more general, non-prescriptive advice.

A majority of respondents considered that the reports would build precedent in the new regime and encourage best practice. To this end, several respondents stated reports should acknowledge high quality assessments, and some encouraged feedback on the quality of the assessment and supporting evidence base. Several respondents also suggested that clear identification of any shortcomings in the assessment or evidence base would benefit a range of stakeholders including public authorities, beneficiaries and interested parties. Several respondents suggested that the report should take the form of a pass/fail evaluation. Several respondents said that, as the SAU builds experience, feedback would help to develop greater understanding of the regime, a culture of compliance, and that reports could identify novel facts and legal issues.

²¹ For more information, see [Transparency and Disclosure: Statement of the CMA's policy and approach \(CMA6\)](#)

Some respondents suggested that public authorities will want assurances that the subsidy and the Assessment of Compliance complies with the requirements of the Act. Some respondents suggested the reports would be useful in the context of challenging an unlawful subsidy or scheme.

Several respondents asked for further clarification of how the SAU will consider the effects of a subsidy on UK competition or investment, or international trade or investment.

Our response

We received many useful suggestions on the content of the reports. The SAU's reports will include an evaluation of how well the public authority's assessment addresses compliance with the Subsidy Control Requirements, whether appropriate relevant evidence has been identified and whether conclusions are consistent with that evidence. The SAU's report may contain advice on how the public authority might improve the assessment or modify the subsidy, and it may identify where the Assessment of Compliance is strong, as well as its shortcomings. The Guidance has been changed to further clarify this.

Some respondents commented that the reports should contain advice on whether the subsidy or scheme complies with the Act. However, this is outside the remit of the SAU's functions, which is confined to evaluating the public authority's Assessment of Compliance. Chapter 2 of the Guidance describes the role of the SAU and has been clarified further to reflect this.

Advice on proposed improvements and modifications will be included in reports where the SAU is well placed to offer it, and as it builds experience. The Guidance has been modified to further clarify this.

Chapter 4 of the Guidance explains how the SAU will analyse the public authority's Assessment of Compliance for each **Principle**,²² including the effects on competition and investment within the UK (relevant to Principles F and G), and the effect on international trade or investment (relevant to Principle G). We do not consider that any change to the Guidance is necessary in that regard.

We agree with the views of the majority of respondents that our reports will build precedent and encourage best practice. As suggested by respondents, our approach will develop over time as the SAU builds experience, and the Guidance will be updated over time accordingly. Other stakeholders in the new regime, for example, BEIS and the Competition Appeal Tribunal will also contribute to developing precedent, each within the remit of their functions.

We acknowledge that stakeholders will view our reports as useful in the context of complex subsidies. Accordingly, our reports will focus on the areas where our expertise

²² See [Glossary](#)

will add the most value to mitigating the greatest risk to competition and support the public authority decision making process.

Question 5: Content of monitoring reports

Position in draft Guidance

The draft Guidance set out the monitoring periods²³ and relevant reporting, as prescribed in the Act.²⁴ In order to prepare a monitoring report which reflects accurately the effectiveness of the operation of the Act, we will need to collect information beyond what is available through the referral function. For that reason, it is important that parties respond as fully and as expeditiously as possible to any information requests they might receive from the SAU in exercising this function.

In addition, the draft Guidance discussed the SAU's annual reporting. In line with the Act, this will include details of the subsidies and schemes in respect of which the SAU has prepared a report following mandatory, voluntary, or **post-award referral**²⁵ during the relevant financial year.²⁶

Issues raised by consultation respondents

20 out of 22 respondents answered the question on monitoring, and the topic was discussed in some of the stakeholder engagement discussions. Responses were generally supportive of the overall position set out in the draft Guidance.

Some respondents suggested information to be included in the monitoring report, for example a breakdown of subsidies by volume, value, type, and geographic location. Furthermore, some respondents suggested specific issues to be evaluated as part of the SAU's monitoring exercise.

Several respondents said the monitoring report should assess the main issues with the regime, for example whether regime time limits allow appropriate legal challenges and Secretary of State post-referral intervention. Some suggested that the SAU should evaluate whether thresholds are set at the right level and whether current rules relating to types of subsidies or sectors were appropriate (for example rules on SSoPI, streamlined routes, and exemptions). Some respondents said the SAU should conduct reviews of

²³ Reviews must be carried out in relation to the following periods:

- (a) The first review relates to the period between commencement and 31 March on the third year following the year of commencement;
- (b) The second review relates to the following period of three years;
- (c) Further reviews will relate to each subsequent period of five years (although the timing of this five-year cycle may be altered as a consequence of the Secretary of State directing the SAU to prepare a report in relation to a 'specified period').

²⁴ Section 65 of the Act

²⁵ See [Glossary](#)

²⁶ Section 66 of the Act

individual subsidies post-award and one respondent said the SAU should evaluate the international competitiveness of UK subsidies. The reports should also provide best practice and the SAU should furthermore suggest changes to legislation and guidance.

Several respondents suggested that the monitoring report should contain an evaluation of the SAU's performance, powers, and process. Several respondents commented on the length of the review period, suggesting that the initial three years is too long.

Several respondents sought more guidance on the monitoring process, for example on how the SAU will carry out its evaluation and what information it will require from whom. Several stakeholders mentioned the need to provide stakeholders sufficient time to provide information.

One respondent said the scope of the annual reports should be wider: the SAU should provide an assessment based on data available from the subsidy database.

Our response

We have received many useful suggestions regarding the content of the monitoring report, which we will take into account when preparing our first report. We consider that, given the novelty of the regime, it would be premature to include more detail in the Guidance on monitoring at this stage. We anticipate that as we gain experience of the new regime, we will review and amend the Guidance accordingly. We acknowledge the need for proportionality when it comes to evidence gathering, both in terms of the feasibility of producing information and enabling stakeholders to provide views.

We note the arguments put forward for an earlier monitoring report, however the Act does not provide for this. According to the Act, the annual reports must include details of the subsidies and schemes in respect of which the SAU has prepared a report following mandatory, voluntary, or post-award referral during the relevant financial year. By contrast with the monitoring report, and as provided in the Act, the annual report is to be focussed on the SAU's activity and on quantitative data rather than commentary. As such, we expect to rely on the subsidy database for the purposes of the assessment in the monitoring reports but not for the annual reports.

In light of the above, we have not made any changes on the content of our monitoring report in the Guidance.

Question 6: Prioritisation Principles

Position in draft Guidance

The draft Guidance explained that when the SAU receives a voluntary referral, it can exercise discretion on whether or not to accept the referral. This decision will be informed by the prioritisation principles, which will not be applied in a mechanistic way but will be considered in the round on a case-by-case basis.

The principles may be summarised as follows: the “Impact” that the SAU considers the subsidy will have on competition or investment in the UK or on international trade and investment; the strategic “Significance” of reviewing the subsidy; and the “Resource implication” of preparing a report whilst balancing the SAU’s mandatory workload.

Issues raised by consultation respondents

19 out of 22 respondents answered the question on prioritisation principles, and the topic was discussed in the majority of the stakeholder engagement discussions. Consultation responses indicated broad support for the SAU’s draft prioritisation principles. Some responses highlighted additional factors that could be considered by the SAU as part of its application of the ‘Impact’ and ‘Significance’ principles. These included prioritisation of rescue and relocation subsidies, and consideration of environmental factors, the importance of a sector to the UK economy, and the likelihood of domestic legal challenge to a subsidy. Of those that provided a view, respondents were evenly split in agreeing and disagreeing with the order in which the principles were presented.

Several respondents also suggested that the SAU could indicate the likelihood of an SSol being prioritised during pre-referral discussions. The SAU could also suggest alternative, and potentially more appropriate, sources of advice available to public authorities, particularly in more straightforward cases.

Several respondents highlighted the importance to public authorities (and to a wider audience) of the SAU providing reports on SSols, and considered that the SAU should have adequate resource to enable it to accept voluntary referrals.

Our response

We have explained in the Guidance that our approach to the prioritisation of voluntary referrals will evolve with experience, that the factors listed under each principle are illustrative, and that the principles will not be applied in a mechanistic way. The SAU will consider the principles in the round and on a case-by-case basis, and may base its decisions on any one or a combination of the principles – where appropriate, taking into account other relevant factors. The SAU considers that there is scope for it to take account of many of the additional factors suggested by consultation respondents in its consideration of “Impact” and “Significance”. For example, we will take into account the additional characteristics and design criteria listed in BEIS Statutory Guidance²⁷ in considering ‘Impact’, which includes rescue subsidies. The SAU is committed to keeping its approach to prioritisation, including the prioritisation principles, under review.

The SAU anticipates that it would typically be able to indicate to public authorities during pre-referral discussions whether it is likely to prioritise a voluntary referral. Any indication provided by the SAU at this stage would be provisional. Public authorities will be able to access guidance and support when developing a subsidy from dedicated teams at BEIS,

²⁷ [BEIS Statutory Guidance](#)

other departments, and in the devolved administrations. The SAU will consider whether there may be other, potentially more appropriate, sources of advice available to public authorities,²⁸ particularly in more straightforward cases, as part of its wider consideration of the subsidy against the prioritisation principles.

The Act grants the SAU discretion to decide whether to prepare a report following a voluntary referral. The SAU considers that assessing the resource implications of preparing a report in response to any voluntary referral, whilst balancing its mandatory workload, is a necessary aspect of exercising this discretion. The CMA will, however, keep the resource available to the SAU in the exercise of its functions under review.

In light of the above, we have not made changes to Chapter 5 of the Guidance.

Analytical framework

Several respondents commented on the SAU's 'analytical framework' for reports on referral, as set out in Chapter 4 of the draft Guidance. This is the framework the SAU will use to evaluate a public authority's assessment of a subsidy or subsidy scheme's compliance with the Subsidy Control Requirements.

Issues raised by consultation respondents

Comments received included:

- Provision of commentary on the nature and challenges of analysis relevant to assessing compliance with the Subsidy Control Principles, but the respondent did not suggest substantive revisions to the SAU Guidance.
- Suggestion that a useful addition to the Guidance would be a checklist of materials to be provided by public authorities, and suggested clarification of the level of analysis required.
- A concern that the use of the BEIS 4-step framework for assessments may cause confusion, and that it may be better to work through each of the 7 Principles in turn.
- Request for further clarification as to whether the SAU will consider the public authority's assessment of societal benefits (or whether it will just consider the assessment of the effect of subsidies on competition and investment).
- Suggestion of some specific drafting amendments to the text relating to evidencing the 'Step 1' Principles, and to conducting appropriate analysis to identify markets.

²⁸ For instance, public authorities will be able to access guidance and support when developing a subsidy from dedicated teams at BEIS, other departments, and in the devolved administrations.

Our response

Requirements and suggestions for material to be provided as part of referrals, and indicative types of evidence, are already included in the draft Guidance. The level of analysis undertaken is a matter for the public authority to decide in light of the BEIS Statutory Guidance.

It is for public authorities to decide how to structure their assessments, taking account of the BEIS Statutory Guidance. We have explained in the draft Guidance that public authorities' assessments should address compliance with each of the seven Subsidy Control Principles, and indicated how the 4-step framework broadly corresponds to the Principles.

The Guidance sets out that the SAU will consider how the public authority has evaluated, measured, and balanced the beneficial effects of the subsidy against the potential negative effects.

We think it is reasonable to expect a public authority to be able to identify evidence of what the policy objective is, whilst the wording on identifying markets is consistent with the BEIS Statutory Guidance.

Given the limited extent of comments received in the consultation on this aspect, and the considerations above, we have not made substantive changes to this Chapter of the Guidance.

List of respondents

Professor Colin Reid, University of Dundee Law School

Professor Stephanie Rickard, London School of Economics

Worcestershire County Council

DWF LLP

Frontier Economics

Freshfields Bruckhaus Deringer LLP

Anthony Collins Solicitors LLP

Norton Rose Fulbright LLP

National Lottery Heritage Fund

National Lottery Community Fund

South of Scotland Enterprise

Pembrokeshire County Council

NNB Generation Company (SZC) Ltd

Highlands and Islands Enterprise

Scottish Enterprise

Linklaters LLP

Advanced Propulsion Centre UK Ltd

Arts Council England

Clifford Chance LLP

Dentons LLP

Pinsent Masons LLP

James Webber, solicitor

Glossary

This Glossary explains how certain key terms used in this Guidance can be understood in relation to the SAU functions.

the Act	The Subsidy Control Act 2022
Assessment of Compliance	The assessment carried out by the public authority as to whether the subsidy or scheme complies with the Subsidy Control Requirements and the reasons for that conclusion
BEIS	The Department for Business, Energy and Industrial Strategy
BEIS Statutory Guidance	The guidance issued by BEIS under section 79 of the Act on the practical application of certain aspects of the regime.
CMA	The Competition and Markets Authority, the body responsible for ensuring that competition and markets work well for consumers
Cooling off period	The period after the publication of the SAU's report which must elapse before the public authority gives the subsidy following a mandatory referral
the E&E Principles	The Energy and Environment Principles as set out in Schedule 2 of the Act
Mandatory Referral	A referral made under section 52 of the Act, including referrals of SSoPIs and of subsidies called in by the Secretary of State under section 55 of the Act
the Principles	The Subsidy Control Principles as set out in Schedule 1 of the Act
PAP	The Public Authority Portal, a dedicated, auditable communication channel that will allow 2-way communications between the SAU and public authorities in relation to referrals
Post-Award Referral	A referral made under section 60 of the Act by the Secretary of State after a subsidy has been given or a scheme has been made
Reporting Period	The period within which the SAU must publish its report on a referral.

Subsidy	A subsidy is defined in sections 2-8 of the Act. Further information on the definition of a subsidy can be found in Chapter 2 of BEIS Statutory Guidance.
Subsidy Control Requirements	The requirements under Chapters 1 and 2 of Part 2 of the Act, including the obligation to consider whether a subsidy or scheme complies with the Principles (and the E&E Principles, where applicable), as well as the prohibitions and other requirements as set out in Chapter 2 of Part 2t
Subsidy Database	The database provided for in Chapter 3 of Part 2 of the Act, on which public authorities are required to enter certain information about subsidies they give or subsidy schemes they make
SPEI	Services of public economic interest, as defined in section 29 of the Act
SSol / Subsidies and schemes of Interest	Subsidies and schemes of interest, as defined in regulations made by the Secretary of State under section 11 of the Act
SSoPI / Subsidies and schemes of particular interest	Subsidies and schemes of particular interest, as defined in regulations made by the Secretary of State under section 11 of the Act
Voluntary Referral	The referral of an SSol made under section 56 of the Act