

Summary of consultation responses

Summary of responses to the draft Statement of Policy on the Enforcement of the SAU's Information Gathering Powers

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

CMA164resp

Subsidy Advice Unit

Part of the Competition and Markets Authority

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Introduction

The Subsidy Advice Unit (the SAU), a part of the Competition and Markets Authority (CMA), will exercise the CMA's functions under the Subsidy Control Act 2022 (the Act). One of the SAU's functions will be to monitor and report periodically on the operation of the subsidy control regime and the impact of the Act on competition and investment within the UK. Under the Act, the SAU has information gathering powers for the purpose of assisting it in carrying out its monitoring function.¹

On 11 July 2022, the CMA launched consultations on draft guidance on the operation of the SAU and on a draft Statement of Policy on the enforcement of its information gathering powers (the draft Statement). The consultations closed on 10 August 2022. The SAU published its guidance on the operation of the SAU on 11 November 2022.²

Following the consultation, the SAU is now publishing its Statement of Policy on the Enforcement of Information Gathering Powers (the Statement). This document, which accompanies the Statement, sets out the key issues raised by the responses to consultation, our views on these issues, and any changes we have made to the Statement as a result.

Having considered the consultation responses and made appropriate amendments to the draft Statement (including those stemming from [the Subsidy Control \(Information-Gathering Powers\) \(Modification\) Regulations 2022](#)), we have finalised and adopted the Statement, 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 Statement accordingly.

¹ The SAU will also provide independent non-binding advice to public authorities regarding subsidies which are referred to the SAU, taking the form of an evaluation of the public authority's assessment against the requirements of the Act. The SAU will not have information gathering powers relating to this function.

² The Department for Business, Energy & Industrial Strategy (BEIS) has separately published [statutory guidance](#) for the Act. The SAU's guidance should be read in conjunction with the BEIS statutory guidance.

Overview of the Statement consultation responses

Responses received

We received six responses to the Statement consultation. A full list of respondents can be found in **Appendix A**. Non-confidential versions of responses are available on the consultation webpage.³ We would like to thank all those who responded to the consultation.

Responses were received from stakeholders with an interest in the SAU's role and functions, including law firms, a public authority, and other interested organisations.

Stakeholder engagement

During the consultation period, we held a roundtable with 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 input from these contacts.

Overarching comments

Respondents who commented on our draft Statement largely accepted the need for us to have powers to impose penalties for non-compliance with information requests, but some raised questions around how and when they would be used.

³ For responses to the consultation, see [Draft guidance and draft policy statement for the CMA's subsidy advice unit - GOV.UK \(www.gov.uk\)](#)

Issues raised in the Statement consultation and our response

Chapter 2: Information Gathering Powers, Enforcement and Penalties

Position in draft Statement

The draft Statement indicated that, where requested information is not otherwise in a legible form, a section 41 notice⁴ may require the provision of a legible and intelligible copy of the information.⁵

Issues raised by consultation respondents

One respondent said that entities headquartered or operating overseas may not have documentation in its original form available in English and it would not be reasonable to interpret the requirement under section 41 of the United Kingdom Internal Market Act 2020 (the UKIM Act) to produce documents that are 'legible and intelligible', as requiring all such documents to be translated into English.

Our response

The ability for the SAU to request a legible and intelligible copy of the requested information stems directly from the UKIM Act.⁶ This may cover situations where the SAU needs a document to be translated to English. However, the SAU will aim to be fair and reasonable in its requests for information and take into consideration any concerns raised by notice addressees about their ability to provide the information required.⁷ We do not consider that any change to the Statement is necessary in that regard.

Chapter 3: Policy Objectives

Position in draft Statement

The draft Statement outlined the circumstances in which the SAU would use its information gathering powers, the type of information that the SAU may request and the process for requesting such information. It underlines the importance of complying with the section 41 notices within the given deadline and that the SAU will generally only agree to an extension in exceptional circumstances. The draft Statement notably indicates that the SAU will, wherever possible, invite addressees of section 41 notices to comment on the section 41 notice, including the information required and the deadline(s) for providing it. Where it is practical and appropriate to do so, the SAU will send a section 41 notice in

⁴ A section 41 notice is a written notice sent by the SAU under section 41 of the UKIM Act requiring a person to provide information or documents, to assist it to carry out its reporting and monitoring functions.

⁵ See paragraph 2.4 of the draft Statement

⁶ Section 41(5) of the UKIM Act

⁷ See paragraphs 3.7 and 3.12 of the Statement

draft, so that it can consider comments from the proposed recipient in advance of issuance.⁸

Issues raised by consultation respondents

Two respondents said that the use of section 41 notices should remain limited given the other options available.

One respondent further stated that the SAU should share draft section 41 notices with the intended recipients to allow them to provide comments. Another respondent thought it would be helpful to have an advance notice of the anticipated timing of such requests and an indication of the format and scope of requests, which would help respondents to provide a swift response.

One respondent queried how the SAU would deal with a scenario where the SAU believed that a person held relevant information that the person did not in fact hold.

One respondent thought the SAU should be willing to grant extensions where necessary and possible, while another suggested setting out a few (non-exhaustive) examples where extensions could be granted.

Our response

The SAU's monitoring functions will play an important role in supporting the effective operation of the UK subsidy control regime. The information gathering powers are granted to the SAU to help obtaining the information needed to carry out these functions. We intend to take a proportionate approach to gathering information as well as any enforcement of our powers.

The SAU will, wherever possible, invite addressees of section 41 notices to comment on the section 41 notice.⁹ This provides advance notice of timings, format and the scope of the request. The Statement also makes clear that recipients of a section 41 notice should make known to the SAU any potential difficulties in responding. Addressees will therefore be able to raise concerns about their ability to respond to requests and the SAU will give these responses careful consideration.

The process for issuing section 41 notices¹⁰ ensures that the deadlines set are proportionate. We encourage respondents to bring to our attention any genuine issues which prevent them responding before the deadline. As such, we believe that extensions to section 41 notice should only be provided exceptionally, and we are not minded to change the Statement in that regard. Whether an extension can be granted will vary on a case-by-case basis and we therefore do not consider it appropriate to set out a list of

⁸ See paragraph 3.8 of the draft Statement

⁹ See paragraph 3.8 of the Statement

¹⁰ See paragraphs 3.7-3.13 of the Statement

examples at this stage. This may be revisited in future in light of practical experience of the operation of the regime.

In light of the above, we do not consider that any change to Chapter 3 of the Statement is necessary.

Chapter 4: SAU's policy on enforcing its information gathering powers

Position in the draft Statement

The draft Statement sets out the factors influencing the SAU's decision on whether it should impose a penalty, the type of penalty to be imposed (which can be a single fixed amount, a daily rate or both) and the level of penalty (subject to the statutory maximum).¹¹ The draft Statement also outlined the procedures SAU will follow when it proposes to apply a penalty.

Issues raised by consultation respondents

One respondent submitted that penalties should only be imposed in respect of the most serious breaches of a section 41 notice, having regard to the fact that the information is requested in the context of a non-binding monitoring report. Another respondent said that, where failure to provide information was effectively remedied, it would not be appropriate to issue a penalty at all.

One respondent submitted that the addressee should have sufficient time to make written representations to the SAU on its provisional decision, and this period may need to be longer than one week.

One respondent said that the assessment of whether the reasons for not providing information are reasonable should be aligned with exemptions under the Freedom of Information Act 2000.

Our response

We agree that penalties should only be imposed for serious breaches of a section 41 notice. The Statement therefore sets out the factors that we will consider when deciding whether to impose a penalty.¹² We consider that these factors provide a good indication of the instances where it might be appropriate to impose a penalty. We also believe that, where an initial failure has been remedied, it may still be appropriate to impose a penalty.

¹¹ The current maxima specified by The United Kingdom Internal Market Act 2020 (Maximum Penalty) Regulations 2021 are:

- £30,000 (fixed amount);
- £15,000 (daily rate); and
- £30,000 and £15,000 (fixed amount and daily rate together).

¹² See paragraphs 4.5–4.7 of the Statement.

This is to reflect the nature and gravity of the failure and/or to deter future non-compliance.¹³

Based on the CMA's experience, we consider that one week is generally sufficient time for addressees to consider and make representation in relation to the SAU's provisional decision. However, in line with paragraph 4.16 of the Statement, the time provided is flexible and the specifics of the case will be considered. A period longer than a week may be provided where necessary.

The SAU will consider what amounts to a 'reasonable excuse' for failing to comply with a section 41 notice on a case-by-case basis. We do not consider that it would be appropriate for this assessment to be made by reference to the exemptions under the Freedom of Information Act 2000, given the different objectives underlying that legislation and our information gathering powers. We also note that the CMA is under statutory obligations to protect confidential information relating to individuals and businesses where that information comes to it in connection with the exercise of its statutory functions. That will include information relating to individuals and businesses provided to the SAU in response to a section 41 notice.

The Statement draws on the experience of the CMA in having the ability to impose administrative financial penalties for non-compliance with formal information gathering powers.¹⁴ The CMA takes a proportionate approach when considering whether to exercise these powers and ensures that recipients of information notices are aware where there are penalties for non-compliance.

In light of the above, we do not consider that any change to Chapter 4 of the Statement is necessary.

¹³ See paragraph 4.11 of the Statement.

¹⁴ Detailed guidance on the CMA's approach to penalties and other sanctions is available in [Administrative Penalties: Statement of policy on the CMA's approach](#) (CMA4).

List of respondents

Advanced Propulsion Centre UK Ltd

Highlands and Islands Enterprise

Linklaters LLP

Norton Rose Fulbright LLP

Pembrokeshire County Council

Scottish Enterprise