

# Womble Bond Dickinson's response to the Subsidy Advice Unit's consultation: Proposed approach to monitoring under the Subsidy Control Act 2022

27 March 2024

## **WOMBLE BOND DICKINSON'S RESPONSE TO THE SUBSIDY ADVICE UNIT'S CONSULTATION: PROPOSED APPROACH TO MONITORING UNDER THE SUBSIDY CONTROL ACT 2022**

Based on our experience to date, which has been primarily in advising public authorities who are seeking to ensure compliance with the Act when awarding subsidies, we have reviewed the Consultation Paper and have set out our responses as follows.

### **1. THE EFFECTIVENESS OF THE OPERATION OF THE ACT**

#### **1.1 Do you agree with the SAU's proposed scope for monitoring the effectiveness of the operation of the Act? If not, what should be changed and why?**

- 1.1.1 Broadly speaking, yes we agree with the proposed scope for monitoring as set out in sections 3.3 and 3.4.
- 1.1.2 We agree in particular that that the financial levels of thresholds, and the scope of the existing streamlined schemes should form part of the monitoring assessment, since these two aspects will be particularly susceptible to changes in the wider political, economic, social and environmental landscape.
- 1.1.3 We agree that the practical arrangements for particular assessment outlined at 3.4 align with what we would consider to be the priority practical areas for monitoring – i.e. the ability of public authorities to feel comfortable carrying out subsidy control principles assessments; the usefulness of published guidance and other practical support for carrying out assessments; the referral process to the SAU; the effectiveness and functionality of the Subsidy Database in terms of transparency and accountability; and the process for challenging subsidy decisions.

#### **1.2 Do you agree with the methodology and evidence proposed? If not, what should be done or used?**

- 1.2.1 We agree in principle with the four main areas proposed at section 3.5, and consider that all four must be included as methodology and evidence.
- 1.2.2 However, we do see limitations in all of the methods proposed. While the methods can undoubtedly elicit useful illustrations, examples and early trends from the authorities or organisations who have engaged with the Act, it is difficult to see how the methodology could draw any meaningful overarching conclusions about its effectiveness at a macro level in terms of some of the higher level aims of the Act, such as whether it is successfully delivering strategic interventions to support the UK's economic growth and policy priorities, or preventing the distortion of competition. How will the success of these aims be specifically measured?
- 1.2.3 It is not particularly clear what the CMA will be using as a baseline comparator – is it using the counterfactual position (what would have been likely to have happened in the regime's absence), or something else?
- 1.2.4 We are not aware whether the scope of the monitoring function can extend to a comparison of the effects of the regime versus what was the position under the previous EU State Aid regime (or what would have been, had we remained part of that same regime). One clear benefit of taking a predecessor (and 'living') regime such as EU State Aid as a comparator would be a clearer yardstick against which to compare and measure the comparative success of the Act against the regime that went before it (and for which there is clearly ongoing evolution and improvement to be observed).
- 1.2.5 We note that the Consultation Paper acknowledges the limitations of analysing the data contained in the Subsidy Database. We agree that the value of such data in terms of drawing broader conclusions from an analysis of it will be limited, unless the functionality and scope of the Database is to be improved.
- 1.2.6 Aside from the technical/functional limitations to the Database, there will be a lot of relevant information about the operation of the Act which the Database will not hold. For instance, it will not contain data about subsidies which a public authority incorrectly (unlawfully) assessed as not being subsidy and were therefore not uploaded. Nor will it include any details of

potential lawful subsidies which a public authority did *not* award because of perceived barriers imposed by the Act.

- 1.2.7 We agree that analysis of SAU reports and challenges to the Tribunal is vital. The SAU is in the unique position of seeing the totality of a public authority's submission in terms of its Principles assessment in relation to a subsidy. It is therefore in a position to record more detailed (and potentially more critical) analysis about how confident public authorities are at any given time in conducting such assessments than would be contained in a published report. It could also go further than it currently does in recording a view as to the legality of the assessment carried out (if not for regulatory purposes, then only for monitoring function purposes).

## **2. THE IMPACT OF THE ACT ON COMPETITION AND INVESTMENT WITHIN THE UK**

### **2.1 Do you think the proposed evidence and sources identified are appropriate to meet the scope of the review? If not, what other evidence and sources should be considered and why?**

2.1.1 We note and agree with the limitations outlined in measuring the macro impact of the regime.

2.1.2 We also refer to our position set out above at 1.2.2 to 1.2.4 regarding what baseline comparator the CMA will use for its review.

2.1.3 As noted above, the only other potential source of evidence we might suggest is to review the position had the UK remained part of the EU State Aid regime.

### **2.2 Are there particular factors that should be considered as part of the proposed case studies?**

2.2.1 We see the case studies as proposed as being adequate in scope.

2.2.2 In terms of the outputs of the CMA's review (case studies and other sources of evidence and analysis), we think it would be highly beneficial for public authorities to see the detail of any analysis conducted and conclusions drawn by the CMA in terms of the impact on investment and competition of particular types of subsidies.

**Womble Bond Dickinson**

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**womblebonddickinson.com**

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