The City of London Law Society

City of London Law Society Competition Law Committee: Response to the Consultation "Subsidy Advice Unit: Proposed approach to monitoring under the Subsidy Control Act 2022"

1. Introduction

1.1 The Competition Law Committee of the City of London Law Society ("**CLLS**") welcomes the opportunity to comment on the consultation by the Subsidy Advice Unit ("**SAU**") on its proposed approach to monitoring under section 65(1) of the Subsidy Control Act 2022 ("**SCA**").

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent grantors and recipients of subsidies as well as third parties who may have an interest in the grant of particular subsidies.

1.3 We see this review function as an important opportunity for the SAU to add material value to the UK subsidy control regime and its practical operation. The UK regime is novel and serves a number of functions. Without wishing to prejudge the outcome of the review, it seems a reasonable working hypothesis that a regime as new as the SCA, even if overall effective, will have areas within it where there are scope for improvements. Our hope is that the SAU will take the opportunity to conduct a review at a sufficient level of detail that it is able to describe both the advantages and the challenges of the regime, and identify the specific steps that could be taken to improve its operation – whether this is through changes in SAU procedures or through Government action. As explained further below, we also see it as important that, in conducting this review, the SAU considers the issues in the round, and from the perspective of all relevant stakeholders.

1.4 We set out below our more detailed comments by reference to the individual sections of the paper.

2. Background (Section 2)

2.1 Although the consultation does not pose any specific questions in relation to section 2, the analysis in paragraph 2.1 of the consultation paper, on the overall purpose and policy aims of the regime, is important as it is used to frame the scope of the assessment of effectiveness as described in section 3.

2.2 Against that background it seemed to us that, while the individual factors mentioned are clearly relevant to the review function, paragraph 2.1 somewhat underemphasises:

(i) the role of the SCA in enabling the UK to meet its international obligations under the UK-EU Trade and Cooperation Agreement ("**TCA**") specifically. This is a key function of the legislation, particulary as it relates to the creation and operation of the SAU itself, and the role of the UK courts in reviewing compliance with the subsidy control

principles. We would expect an assessment of the effectiveness of the legislation to pay particular attention to those aspects of the regime that are mandated under the TCA. We agree that the SCA, by establishing a new framework for the award of subsidies in the UK, will also contribute more generally to the UK meeting its international commitments on subsidy control, but we see the relationship between the SCA and the TCA as distinct given the direct link between these regimes; and

(ii) the role of the SCA in ensuring that third parties have transparency on subsidy awards and an opportunity to seek further information as well as, where necessary, the ability to seek a review of inappropriate awards.

3. The effectiveness of the operation of the Act (Section 3)

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

3.1 Our impression from section 3 as a whole is that the SAU's proposed approach may lead to a disproportionate focus on the experience of public authorities as award givers. We agree this experience is very relevant but we would suggest that the SAU consider placing a stronger emphasis on also assessing whether the Act is effective in terms of:

(i) meeting the UK's obligations under the TCA. For example, this could include an assessment of the independence of the SAU and whether there may be any improvements that could be made to its ability to exercise an effective review function;

(ii) the perspective of subsidy recipients e.g. whether the regime provides subsidy recipients with sufficient transparency, and an appropriate level of legal certainty that recipients are able to rely on grant awards; and

(iii) the perspective of a third party to a subsidy decision e.g. whether there are barriers to obtaining information on awards and, where relevant, to the ability of third parties to bring a legitimate challenge.

3.2 This broader perspective is important because within the subsidy control regime there are unavoidable trade offs that need to be made between the interests of different participants. For example, transparency and due process requirements may impact on the speed with which public authorities can award subsidies and the level of legal certainty that is available to potential recipients. An assessment of the effectiveness of the regime as a whole needs to recognise these tensions and draw holistic conclusions taking into account the legitimate interests of all stakeholders.

3.3 As set out above, we do not envisage that this would be a single overall assessment of "effective" vs "not effective"; our hope is that the SAU will use the review process to identify specific areas where the overall effectiveness of the regime either works well, or could be improved by adjusting the balance between the different stakeholders. For example, we could see value in the SAU spending time on issues such as (i) the use of streamlined subsidy schemes and whether there is scope to increase usage of these procedural options, either by

raising awareness or by expanding the scope of these schemes and (ii) the experience of both subsidy givers and third parties with the transparency database and whether changes could be made that might improve the experience of all parties.

3.4 We would also suggest that the counterfactual that is identified in paragraph 2.13 ("*what might have been expected to occur absent the regime being in place*") may need to be specified in more detail and could possibly be broadened. It is not entirely clear whether the intention here is to consider the position as if the SCA did not exist but assuming that international obligations including the TCA remain in place (and, if so, whether the assumption would then be that the provisions of s29 European Union (Future Relationship) Act 2020 would remain in effect) or whether the counterfactual is a world where there are no obligations in relation to subsidies. For the purpose of an assessment of effectiveness it seems to us that the review could also sensibly consider (either overall or in relation to specific issues) looking at the impact of the *change* from the EU regime that applied prior to 31 December 2020 to the SCA.

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

3.5 We note that the SAU intends to focus its research and information gathering on public authorities (although it is envisaged that other stakeholders will be consulted). We agree that the experience of public authorities in operating the regime is an important input, and that in this context it will be important to take into account the range of different types of public authorities that use the legislation. However, and for the reasons above, it is important that the assessment of effectiveness is not overly focused on the perspective of subsidy-givers and gives equal weighting to the experience of subsidy recipients and third parties to the process.

3.6 We would also suggest that an assessment of the effectiveness of the regime should look not just at usage of the subsidy control regime, but also at non-usage of the regime. If there are geographic areas, types of authorities, or particular funding circumstances where the subsidy control regime is not being used, then that could also provide useful information on where there maybe gaps in effectiveness and how those might be addressed.

3.7 While we agree that the subsidy control database is a relevant source of information on the regime we would suggest that it should be used with some caution if it is intended to inform conclusions on effectiveness in terms of e.g. analysing the volume and scope of subsidies given. The SCA itself is neutral as to the volume of subsides that are or should be given (which is a political decision) but instead regulates the process by which such subsidies are given. It does not follow that an increase or decrease in levels of funding is directly linked to effectiveness of the regime as a whole. Consideration would also need to be given to the possible counterfactual before attributing changes of this type to the impact of the legislation.

3.8 That said, if the SAU wishes to analyse the impact of the Act on overall levels of funding provided and the geographic distribution of that funding then one option may be to try to compare trends under the SCA with the pre-existing position prior to the TCA rules coming into effect (and see comments above on counterfactuals more generally). We recognise however that this would require access to pre-2021 data and so DBT may be better placed than the SAU to attempt this form of analysis.

4. Competition and Investment (Section 4)

4.1 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?

4.2 We agree with the comments at paragraph 4.5 of the consultation paper that it may be difficult to isolate the impact of the subsidy control regime on competition and investment in the UK given the wide range of other factors that will also have an impact.

4.3 This may place limits on both the ability to conduct direct quantitative analysis of the effect of the SCA regime and the strength of the conclusions that can be drawn from such analysis, and may mean that a correspondingly greater emphasis needs to be placed on qualitative assessment.

4.4 In this regard we have some reservations over the use of case studies if this is intended to be the primary basis for this analysis. Whilst we can see that use of some case studies may be helpful illustratively, and to provide more specific examples of points that are raised in other sources of evidence, use of case studies as the main source of qualitative evidence (which appears to be the proposal in paragraph 4.6) may unduly limit the conclusions that can be drawn. Case studies, particularly in the context of subsidy control, are inevitably specific to their own facts and may be hard to use as a basis for conclusions of more general application. We would suggest that consideration is given to using a wider source of inputs (including the survey evidence options discussed at paragraph 4.10) in addition to case studies.

Are there particular factors that should be considered as part of the proposed case studies

4.5 To the extent that case studies are used it will be important to be clear as to the basis on which they have been selected and the extent to which they are considered to be in some way representative, as opposed to a case study that is individually selected with the purpose of illustrating specific points. We would also suggest that specific consideration is given to the risk of confirmation bias in the selection and analysis of individual case studies.

4.6 As to the number of case studies reviewed, we note that the CMA's most recent case-study based research papers (on carve-out merger remedies (July 2023) and digital mergers (June 2019)), considered only five and four case-studies respectively. Recognising that the SAU will have finite resources available to allocate to the SCA monitoring exercise, we do not think a similarly small set of case studies would provide meaningful insight on the operation of the SCA as a whole.

4.7 It will also be important that case studies include some assessment of the counterfactual position and other options that would have been available to the relevant authorities (e.g. whether there were other structural options that might have avoided or mitigated the need for the subsidy and to what extent the assessment criteria in the SCA assisted in identifying these).

4.8 Where case studies are to be used, it would seem sensible to use these not only in relation to the assessment of competition and investment, but also to inform the assessment of the effectiveness of the operation of the Act (this does not currently appear to be envisaged in the methodology list at paragraph 3.5 of the consultation). This could be done, for example, by looking in-depth at how a selection of public authorities are behaving in practice and how this is impacting on beneficiaries and third parties (e.g. How are subsidy control risks being allocated in contracts? Are public authorities being overly conservative in what they view as compliant/non-compliant with the Act?).

4.9 For the reasons set out above it may also be informative to consider case studies for scenarios where a decision was taken that no subsidy was involved (for example, because of the use of the market operator principle) or the structure of a programme was modified or curtailed in order to fall outside of the SCA regime, and the factors that influenced that decision.

4.10 In considering the impact of the SCA on competition and investment, we also think it is important to bear in mind the particular policy objectives set out in Principle A of the SCA – that is, subsidies should pursue a specific policy objective in order to remedy a market failure or address an equity rationale (provided the subsidy is proportionate, limited to what is necessary to achieve that specific policy objective and any negative impact on competition and investment is minimised). We think it would be sensible for case-study based research to evaluate whether the interventions in question that cite a market failure rationale (rather than an equity rationale) have properly identified a genuine market failure in the economic sense and have in fact worked to address that market failure.

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