

# Summary of consultation responses

Summary of responses to the Subsidy Advice Unit's consultation on its proposed approach to monitoring under the Subsidy Control Act 2022

18 July 2024

**Subsidy Advice Unit**

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Part of the Competition and Markets Authority



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# 1. Introduction

- 1.1 On 1 February 2024 the Subsidy Advice Unit (the SAU) published a consultation seeking views on the proposed approach for its monitoring function as set out in section 65 of the Subsidy Control Act 2022 (the Act).<sup>1</sup> This requires the SAU to monitor and review:
- (a) the effectiveness of the operation of the Act; and
  - (b) the impact of the Act on competition and investment within the UK.
- 1.2 The SAU must carry out reviews in relation to the following periods:
- (a) commencement and 31 March on the third year following the year of commencement (31 March 2026);
  - (b) the following three years (1 April 2026 to 31 March 2029); and
  - (c) each subsequent five years.<sup>2</sup>
- 1.3 The SAU must prepare a report on the outcome of each review.<sup>3</sup> The report will be published in a manner the SAU considers to be appropriate, as soon as practicable after the end of the period to which it relates,<sup>4</sup> and each report will be laid before Parliament.<sup>5</sup>
- 1.4 The consultation set out the SAU's proposed approach for each limb of its monitoring function, including the evidence and analysis.
- 1.5 The consultation closed on 28 March 2024. This document summarises the responses to the questions we posed.

## Next steps

- 1.6 We will take the responses to the consultation into consideration as we finalise our approach. Our intention is to launch our evidence and information gathering activities in early 2025, with our report published as soon as is practicable after 31 March 2026.

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<sup>1</sup> [Subsidy Advice Unit: Proposed approach to monitoring under the Subsidy Control Act 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/subsidy-advice-unit-proposed-approach-to-monitoring-under-the-subsidy-control-act-2022)

<sup>2</sup> See Section 65(3) of the Act. Under section 65(4) of the Act, the Secretary of State may direct the SAU to prepare a report in relation to any 'specified period' from the time that the SAU has prepared its reports in relation to the first two periods specified in section 65(3) of the Act. Where this occurs, subsequent reports will relate to the period between the last day to which the report directed by the Secretary of State relates and 31 March in the fifth year after the year in which the day after the period specified by the Secretary of State falls. From then on, reports will relate to each subsequent five-year period (section 65(6) of the Act).

<sup>3</sup> Section 65(2) of the Act.

<sup>4</sup> Section 65(7) of the Act.

<sup>5</sup> Section 65(8) of the Act.

## 2. Overview of the consultation responses

### Responses received

- 2.1 We received 16 responses to the consultation from 17 stakeholders (this includes one response on behalf of two stakeholders). A full list of respondents can be found in Appendix A. Non-confidential versions of the responses are available on the consultation webpage.
- 2.2 Responses were received from a range of stakeholders with an interest in the SAU's role and functions, including from public authorities, law firms, trade bodies, and other interested organisations and individuals.<sup>6</sup> We would like to thank all those who responded to the consultation.

### Consultation questions

- 2.3 The consultation specifically invited responses to the following questions:
- (a) On the effectiveness of the operation of the Act:
    - (i) 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?
    - (ii) Do you agree with the methodology and evidence proposed? If not, what should be done or used?
  - (b) On competition and investment:
    - (i) Do you agree with 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?
    - (ii) Are there particular factors that should be considered as part of the proposed case studies?

### Overarching comments

- 2.4 Responses did not, overall, raise any significant concerns with our proposed approach, either in terms of scope or evidence. There were suggestions of areas and evidence we should focus on, most of which were already indicated in the consultation but some of which are additional points for us to consider.

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<sup>6</sup> We note that the consultation was held, and responses received, before the 2024 General Election. As such responses from UK Government departments were made under the previous administration.

- 2.5 Responses mainly focused on the effectiveness of the operation of the Act. We did not receive many further suggestions as to how we might approach measuring the impact on competition and investment.
- 2.6 We note that one response focused on matters in relation to foreign subsidies given to companies operating in the UK. This is outside the scope of the Act and therefore of the SAU's monitoring function and so has not been considered further.

## **The effectiveness of the operation of the Act**

### **Position set out in the consultation**

- 2.7 We proposed considering how well the Act is operating with respect to the delivery of the regime's purpose and policy aims (taking account any changes over time). In doing so we proposed considering two overarching questions:
- (a) whether the Act works as intended; and
  - (b) whether the practical arrangements in place to facilitate the operation of the Act are working and sufficient.
- 2.8 To assess whether the Act works as intended, we proposed examining (i) public authorities' ability to design subsidies; (ii) the regulatory framework; (iii) the appropriateness of thresholds; and (iv) the suitability of streamlined routes.
- 2.9 To assess whether the practical arrangements facilitating the operation of the regime work, we proposed examining (i) public authorities' ability to comply with the requirements of the Act; (ii) the support public authorities can access; (iii) the referral process to the SAU; (iv) the transparency and accountability arrangements (in particular the Subsidy Database); and (v) the process of challenging subsidy decisions through the Tribunal.
- 2.10 In carrying out these assessments we proposed to use quantitative and qualitative analysis drawing upon a range of primary and secondary sources. In particular we proposed conducting quantitative surveys and/or qualitative research exercises, analysis of entries to the Subsidy Database, and a review of third-party sources of evidence.

### **Issues raised by respondents**

- 2.11 We have grouped the points raised into three areas:
- (a) evidence gathering;
  - (b) areas of focus; and

- (c) analytical approach.

## **Evidence gathering**

- 2.12 Stakeholders were keen to ensure we take into account the views of beneficiaries and other third parties such as economists and advisers, not just public authorities.
- 2.13 It was suggested that the SAU should obtain internal public authority policy documents and guidance to see whether public authorities' approaches to subsidy policy was stricter than that set out in the legislation and statutory guidance (thereby preventing subsidies that would have been compliant). Another stakeholder suggested looking at whether public authorities were over-reliant on funding recipients for their evidence base.
- 2.14 Stakeholders cautioned against relying on the Subsidy Database to assess effectiveness given its limitations (mainly around the quality and timeliness of the information provided), with a suggestion that the SAU use the Government Grant Information System to cross-check information.
- 2.15 It was suggested that the SAU should follow up referrals on which it has reported to see if public authorities have followed its recommendations.

## **Areas of focus**

- 2.16 Some stakeholders argued that effectiveness of the Act is intrinsically linked to the compliance of the UK with the Trade and Cooperation Agreement (the TCA) with the EU. The TCA requires the UK to have in place an effective subsidy control regime, and the subsidy control principles in the Act mirror those set out in the TCA. Therefore, in order for the UK regime to be effective, it must give effect to and ensure compliance with the subsidy control aspects of the TCA. Consequently, it was argued, the SAU assessment of effectiveness must address whether the effective operation of the Act is sufficient to ensure the UK's compliance with the TCA.
- 2.17 Stakeholders also suggested that, when considering its own effectiveness within the regime, the SAU should consider not just whether it is effective with respect to the role it has been given, but also whether that role is appropriate (for example, whether the public nature of the referral process discourages public authorities from pursuing subsidies that might result in referral, even if otherwise warranted) and whether it needs to be changed (such as by being able to initiate investigations into subsidies).
- 2.18 Stakeholders suggested that the SAU should ensure its review covers:
  - (a) the effectiveness of streamlined routes, and whether they cover the right things;

- (b) awareness and understanding of the regime, including the level of expertise available to public authorities, and the effectiveness and suitability of the Statutory Guidance;
- (c) the appropriateness of thresholds (eg for mandatory referral to the SAU);
- (d) the effectiveness of the Subsidy Database, especially in allowing third parties to identify relevant subsidies to challenge, and the administrative burden on public authorities in ensuring the correct data is there;
- (e) whether the regime provided sufficient legal certainty; and
- (f) the transparency and accountability of the regime, and the ability of third parties to challenge a subsidy.

2.19 Stakeholders also raised the ability and practice of public authorities in correctly identifying subsidies. In particular, these stakeholders suggested that the SAU should investigate the extent to which public authorities are misclassifying subsidies including in two ways:

- (a) public authorities may be categorising subsidies as not being subsidies (such as by misusing the commercial market operator principle<sup>7</sup>) in order to avoid coming under the Act's jurisdiction; and
- (b) public authorities may be categorising non-subsidies as subsidies to purposefully come under the Act's jurisdiction to take advantage of its limited appeal window.

2.20 Additionally, the SAU should consider the extent to which PAs may be "in-housing" services (instead of funding a subsidiary) for the consequent impact on competition and investment.<sup>8</sup>

2.21 Stakeholders suggested that the SAU seek to identify subsidies which are in contravention of the Act, are distortive or which have not addressed the stated market failure/equity rationale (and explain why).

2.22 The SAU should also consider whether the consequences of non-compliance with the subsidy control regime were effective.

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<sup>7</sup> The commercial market operator principle is where the financial assistance provided is on terms that could be considered to be made available in the market by a private operator that is driven by commercial objectives. In such circumstances, the financial assistance would not be classified as a subsidy. See Paragraph 15.59, [UK Subsidy Control Regime: statutory guidance \(publishing.service.gov.uk\)](#).

<sup>8</sup> This was framed as a response to the ruling by the CAT in [The Durham Company Limited vs Durham County Council](#), in which the CAT stated that a public authority giving money to itself was not defined as a subsidy.



## **Analytical approach**

- 2.23 There were some concerns expressed over the SAU reviewing the effectiveness of its role, with a suggestion that procuring a third party to carry out a review of the SAU would be appropriate.
- 2.24 Some stakeholders felt that the proposed counterfactual approach (considering the effect and impact of the regime against what might have been expected to occur absent the regime being in place) was unclear, with scepticism that the SAU would be able to draw meaningful conclusions without a clear measure of success by which to judge the regime. There were suggestions that the EU State Aid regime was an appropriate counterfactual to use.
- 2.25 Stakeholders also suggested the SAU should look at subsidies that were not given, ie subsidies that were deterred by the regime in some way, or which the regime in some way does not support where it should (subsidies abandoned or those considered but rejected by public authorities as a result of the Act).
- 2.26 It was also suggested that any analysis should discount legacy schemes as including them would not give a true reflection of the Act's impact.

## **Competition and investment**

### **Position set out in the consultation**

- 2.27 The SAU proposed examining how the operation of the Act may be having an impact on competition and investment in the UK and the extent to which it achieves the aim of preventing public authorities from giving subsidies in ways which distort competition and investment within the UK. We proposed looking at:
- (a) short-term effects on competition (such as market shares, entry/exit decisions, price changes etc);
  - (b) long term dynamic effects on incentives to invest and compete; and
  - (c) effect on input markets (eg raw materials, land, or labour) including choice of location.
- 2.28 Noting the difficulties in isolating the impact of the Act on competition and investment in general, we proposed to gather a range of evidence which may include (i) available metrics on subsidies granted, and indicators of competition and investment; (ii) statistical research carried out by the SAU, or other available survey evidence; (iii) a number of more granular case studies; and (iv) other relevant sources such as academic literature.

## **Issues raised by respondents**

- 2.29 Most stakeholders expressed agreement with the SAU's proposed approach, with some providing additional suggestions for the SAU to consider.
- 2.30 It was suggested that the SAU assess the impact of subsidies by considering data in relation to competition, prices and the prevalence of undercutting (while presented in the context of foreign subsidies, conceivably this could be applied to domestic ones).
- 2.31 Stakeholders considered the use of case studies was an appropriate approach to assessing the impact on competition but that the SAU should make sure to supplement case studies with other evidence (such as survey data) and be careful in picking cases to avoid bias. There was a suggestion that case studies should also be used to consider the effectiveness of the regime.
- 2.32 Finally, additional factors were suggested for the SAU to consider when choosing the studies, along with a suggestion that case studies involving Energy and Environment subsidies would, given the number of such subsidies, provide sufficient evidence on which to draw conclusions about the regime.

### **3. Appendix A: List of respondents**

Clifford Chance LLP

Arts Council England and Arts Council of Wales (Joint response)

DEFRA (Subsidy Control Team)

DLUHC (Building Safety Grants Team)

Joint Working Party of UK Bars and Law Societies

TLT LLP

City of London Law Society

Alex Kynoch (solicitor)

North York Moors National Park Authority

Innovate UK

Space Forge

Scottish Government

UK Lubricants Association

Womble Bond Dickinson LLP

Welsh Government

Joel Delos Santos (Private individual)

## 4. Appendix B: Glossary

Term	Definition
Act, the	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
Beneficiary	Persons receiving a benefit or advantage (ie from a subsidy)
Competition and Markets Authority (CMA)	The body responsible for ensuring that competition and markets work well for consumers
Competition Appeal Tribunal (the Tribunal)	A specialist judicial body with jurisdiction to hear and decide cases involving competition or economic regulatory issues within the United Kingdom
DBT	Department for Business and Trade
Devolved Administrations	The governments of Scotland, Wales, and Northern Ireland
Local Authority	An administrative body in local government
Monitoring Function	The SAU's statutory responsibility, set out in s65(1) of the Act, to monitor and review the effectiveness of the operation of the Act and the impact of the Act on competition and investment within the UK
Public Authority	Any person who exercises functions of a public nature
Streamlined Route	A type of subsidy scheme made by the UK Government for the use of any public authority in the UK
Subsidy Advice Unit (SAU)	Unit within the CMA with responsibility for giving advice on certain subsidies
Subsidy Control Principles	The Subsidy Control Principles as set out in Schedule 1 of the Act
Subsidy Database	The database provided for in Chapter 3 or Part 2 of the Act, where public authorities are required to enter certain information about subsidies they give or subsidy schemes they make
Subsidy Scheme	A scheme made by a public authority providing for the giving of subsidies
TCA, the	The Trade and Cooperation Agreement between the UK and the EU
UK Internal Market	The trading relationships that exist between all parts of the UK in respect of labour, capital, goods, and services