**Response of Clifford Chance LLP to the Subsidy Advice Unit's Consultation on its Proposed Approach to Monitoring under the Subsidy Control Act 2022**

Clifford Chance welcomes the opportunity to respond to the consultation of the Subsidy Advice Unit (**SAU**) on its regulatory duty to review the effectiveness of the operation of the Subsidy Control Act 2022 (**Act**) and the impact of the Act on competition and investment in the UK (**Consultation**).

Our observations below are based on the substantial experience of our antitrust lawyers of advising on State aid proceedings in the EU, proceedings before the CMA (and other equivalent authorities) and mandates on subsidies granted by UK public authorities. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

## 1. GENERAL OBSERVATIONS

1.1 The Act is not prescriptive in terms of the SAU's duty under section 65(1) of the Act to monitor the effectiveness of the operation of the Act and the impact of the Act on competition and investment in the UK (**Monitoring Duty**). Given this legislative lacuna, the SAU is seeking feedback on its understanding of the scope of its Monitoring Duty and the methodology it considers appropriate to adopt in fulfilling this duty so scoped. In addition to its Monitoring Duty, the SAU is also under a duty under section 65(2) of the Act to prepare a report on the outcome of its review which must be laid before Parliament under section 65(8) of the Act (**Reporting Duty**). The SAU also expects that its "*first monitoring report will form a baseline for future monitoring reports*" (para. 2.12). The SAU therefore appreciates the link between its Monitoring Duty and its Reporting Duty.

1.2 The Consultation is silent on the SAU's Reporting Duty, however. This is surprising insofar as any exercise in inquiry is methodologically informed by its objective. By way of example, the SAU proposes gathering "*views of relevant stakeholders on whether the Act works as intended*" (para. 3.6). However, if the SAU would not consider legislative reform to be within the remit of its Reporting Duty, then interview questions would refrain from engagement on that point even though some respondents may be advocates of such reform considering what they perceive to be operational issues originating in shortcomings of the Act or its accompanying statutory instruments. We would therefore welcome an explicit discussion of the SAU's understanding of its Reporting Duty when setting out its understanding of the parameters of its Monitoring Duty.

## 2. THE LIMITS OF CASE STUDIES AND MACRO DATA

2.1 Case studies can be a powerful heuristic device for assessing regimes in their nascency. We therefore welcome the SAU's intention to make use of case studies to supplement its analysis of macro data (paras. 4.11ff). We understand that selection of case studies will be based in the main on the set of characteristics cited at para. 4.13. As the value derived from case studies depends on their being sufficiently representative, we suggest that the following additional parameters be considered: quantum, recipient profile (e.g. whether the size and competitive strength of the recipient), competitor profile (quantum and strength), and Principle A category (market failure and/or equity rationale).

2.2 As for the macro data referenced at paras. 4.9 and 4.10, we have reservations regarding the use of sector-based statistics or surveys produced by industry bodies as a basis for decisions relating to competitive dynamics as such resources are unlikely to adopt correctly defined product and geographic markets as their frame of reference.

## 3. A BALANCED APPROACH TO RESEARCH AND INFORMATION GATHERING

3.1 The SAU proposes to focus its research and information gathering activities on public authorities whereas recipients and their competitors would be adjunctive (para. 3.6). We would recommend a more balanced approach insofar as recipients are those that bear the financial risk of a process before the Tribunal, whereas competitors bear the adverse consequences of a subsidy given in contravention of the Act.

## 4. ASSESSMENT OF THE NEGATIVE

4.1 If public authorities were granting subsidies in contravention of the Act, this would be a striking and serious marker of an ineffective regime. We would welcome the SAU's view as to whether it will attempt to identify any such subsidies in fulfilling its Monitoring Duty, and, if so, the methodology the SAU proposes to adopt, given that there is no record of such subsidies on the UK's subsidy database.

4.2 Given the peculiarities of section 71 of the Act (*viz*. that there is no time limit for challenging measures that are considered to be compliant with the commercial market operator principle), we understand that public authorities may have adopted the view to treat certain measures as a subsidy, request a report from the SAU and enter the relevant details in the subsidy database out of an abundance of caution so as to reduce to one month the period in which such measures could be challenged. By definition, many such measures would not be subsidies. We are concerned that the inclusion of such "subsidies" in the SAU's dataset could undermine the validity of the SAU's analysis and therefore welcome additional methodological safeguards to ensure such subsidies are

properly excluded from the data. The SAU should also investigate and verify the extent to which public authorities are conservatively reporting measures that they do not consider to be subsidies, in particular because they are believed to comply with the commercial market operator principle, as that information could usefully indicate whether reform of the subsidy database disclosure rules may be desirable.

4.3 Subsidies may distort competition and investment for a host of reasons, each of which evidencing some flaw in the process leading to the granting of the subsidy. For example, a subsidy designed based on insufficient economic analysis but nevertheless granted (even in the face of a SAU report citing such concerns) may well lead to distortive effects on competition and investment in the UK. This outcome would be a signal of an ineffective regime. Yet distortion on competition and investment can materialise despite there being no flaw in the process leading to the granting of such a subsidy. For example, the economic analysis underpinning the subsidy design was robust yet flawed, or the recipient made poor use of an otherwise well-designed subsidy. Therefore, if the SAU does identify any subsidies that have distorted competition or trade, or that have not achieved their intended objective (addressing a market failure or an equity rationale), it should also investigate and report on the reasons for that (e.g. whether due to a flawed assessment or incorrect implementation).

4.4 The CAT's judgement in *Durham* introduced a tension between the CAT's interpretation of "person" within the meaning of the Act and the position put forward in the Statutory Guidance published by the Department for Business and Trade which follows State aid jurisprudence on the notion of "undertaking" within the meaning of the Treaty on the Functioning of the European Union. We would welcome the SAU making clear whether it intends to consider whether this tension has had any impact on the decision making of public authorities. In particular, we understand that public authorities may now opt to "in-house" certain functions instead of funding or cross-subsidising a subsidiary to capitalise on the CAT's position that funds circulating in a single "person" cannot, in contrast to EU State aid law, be a subsidy. As there would be no public evidence of such "subsidies", we welcome the SAU's views as to how it intends identifying an such instances of "in-housing" and their associated impact on competition and investment in the UK.

## 5. INDEPENDENCE AND METHODOLOGICAL INTEGRITY

5.1 The SAU proposes to examine the effectiveness of the operation of the Act by reference to a wide array of factors including, among many others, the "*advisory and enforcement functions of the SAU and the Tribunal*" (para. 3.3(b)). We are sceptical of this "self-review" methodology given the perils of confirmation bias (e.g. the SAU is less likely to perceive a distortive impact on competition and investment in UK for those subsidies

in respect of which the SAU issued a favourable report). We therefore recommend that an independent third party be instructed to review the role of the SAU in the operation of the regime, as the CMA is prone to do with respect to merger control.

## 6. IMPROVEMENTS TO THE SUBSIDY DATABASE

6.1 We welcome the SAU's proposal to assess whether the "*transparency and accountability arrangement (in particular the Subsidy Database) allow public authorities to be held to account and interested third parties to challenge subsidy decisions*" (para. 3.4(b)). We would recommend that the SAU specifically ask questions about whether the subsidy database adequately allows businesses to identify subsidies that might adversely affect them and, in particular: (i) whether the search function should be changed so that it is possible to search for schemes, as opposed to individual subsidies; (ii) whether the information relating to schemes should list those businesses that have received subsidies under the scheme (the database says it does that, but it appears not to); and (iii) whether there should be a feed or regular alert emails that list all subsidies and schemes entered onto the database in the past week or day.

6.2 We would also urge the SAU to consider exploring with subsidy recipients and their competitors the merits of introducing a requirement, through an amendment to the Subsidy Control (Subsidy Database Information Requirements) Regulations 2022, on public authorities to enter the names of five (5) competitors to the subsidy recipient in the subsidy database, which would trigger an automatic alert to the competitor.

**Clifford Chance LLP**

**26 March 2024**