The Confederation of Swedish Enterprise's view of the European Commission's White Paper on new rules against foreign subsidies

Our overall view

The Confederation of Swedish Enterprise agrees that new rules against foreign subsidies be introduced. It is essential that companies operating in the internal market operate under the same rules; the new proposed rules set out in the White Paper, together with other existing regulations, can lead to more equal conditions where companies can compete on their own terms and on a market economy basis. The proposed rules may be particularly important given the current challenges in the Brexit negotiations, not least on the issue of State Aid rules.

At the same time, the Confederation of Swedish Enterprise wants to emphasise that any rules must be proportionate, should be non-discriminatory and grant legal certainty, should not unduly hinder foreign investment within the EU and should not generate greater administrative costs than necessary. Foreign subsidies should preferably be regulated at a global level, preferably within the framework of the World Trade Organization, where the rules can be based on clear acceptance and thus enjoy a strong mandate from all affected parties. However, pending such rules, it is reasonable to proceed with the central parts of the Commission's current proposal.

The question of whether special notification requirement for acquisitions should be introduced needs to be the subject to an impact assessment before deciding whether it is a proportionate measure. At the same time, the Confederation rejects the idea of a notification of procurement according to the Commission's current proposal, due to the high administrative costs and legal uncertainty involved, as well as its questionable effectiveness. Instead, this should be replaced by a structured method for competitors in a procurement to complain about winning tenders where there are indications that there have been foreign subsidies.

Commission proposal

In its White Paper, the Commission first describes the reasons for the need to deal with foreign subsidies, providing examples of common types of foreign subsidies that seem to undermine the level playing field of the internal market. It then offers an analysis of the legal instruments that already exist to deal with foreign subsidies, and the question of whether there is a loophole in the legislation is discussed. Next, preliminary material and formal proposals are submitted for legal instruments to remedy the gap in the legislation. This applies in the case of foreign subsidies to economic actors who act in different ways in the internal market and who as a result risk distorting competition within it. In addition, special rules are proposed for controlling subsidies in connection with the acquisitions of EU

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companies, procedures for public procurement and finally, subsidies connected to access to EU funding. The proposal is structured in three different so-called modules.

Why the regulations are needed

The Confederation of Swedish Enterprise shares the Commission's view that there is an existing gap, where current regulations within the Union cannot prevent foreign subsidies to companies that act in different ways within the internal market. What is not clear is how common these events are. The Commission is referring to some individual studies on certain specific products, but there is no overarching view as to whether these are exceptions or represent a cross section of a common phenomenon.

The source of this knowledge gap stems from the lack of transparency prevailing with regard to foreign subsidies; as long as there are no mandatory rules, the situation is unlikely to improve. It is therefore reasonable to assume that introducing a basic set of rules can in the long run lead to greater transparency of the existence of foreign subsidies. At the same time, given the shortcomings in knowledge of the scale of the problem, it is important that the regulations are designed in such a way that they can be accurately targeted at those situations where there are indications that foreign subsidies may occur. This will be better than imposing mandatory requirements on large numbers of companies. Disclosure, as it currently stands, cannot be considered proportionate.

In addition to the questions of the extent of the existence of foreign subsidies and that of proportionality, it is reasonable for companies operating in the internal market to be able to do so on the basis of equivalent regulations. In practice, this gives companies equal opportunities for different types of State Aid, but also gives them obligations in connection with any support. Within the EU, there is an existing, well-developed State Aid framework that strictly regulates Member State opportunities to support various forms of economic activity. At the same time, the Acquis gives Member States considerable opportunities to provide support that can be perceived as compatible with EU objectives and that complements what the market itself can achieve. This is, of course, provided that it takes place with due transparency and operates within certain set limits, in order to avoid undue distortions of competition.

It is reasonable that those companies that do receive support from countries outside the EU should have to do so on similar terms, i.e. that it must be subject to transparency and take place in activities that meet certain objectives and conditions. It is ultimately a matter of establishing a level playing field in the internal market, not only for the economic operators operating there but also the States, whether Members or non-Members of the Union, the opportunity to provide equal support to business without distorting competition. Or indeed, for that matter, preventing them leading to restrictions or requirements for compensatory measures directed at the beneficiary company.

Given this, we welcome the development of a new regulatory framework. This should contribute to more equal rules and conditions for economic operators in the internal market and contribute to increased transparency over the use of subsidies in general.

In the long run, such regulations can serve as a model for a future multilateral regulatory framework in the WTO, or at least provide inspiration and lessons that can be learned from these regulations. According to the Confederation of Swedish Enterprise, ultimately the most

desirable thing to achieve is a global regulatory framework which all parties have been involved and can confirm and approve.

Current regulations regarding subsidies within the WTO are, however, far from being something similar to the State Aid regulations within the EU. Even if the initiative presented by the EU, the USA and Japan is a step in the right direction, there is probably a long way to go before it can come to be. The fact that the EU unilaterally develops a regulatory framework for foreign subsidies should not be seen as a substitute for a future multilateral regulatory framework, but rather as a way of creating better conditions and momentum to make such a regulatory framework a future reality.

On the scope and design of the proposed rules

The Commission's White Paper is a vision of how a future regulatory framework could look. The Confederation of Swedish Enterprise recognises that some parts are not elaborated, and it is only to be expected that there is a lot of work to do before a finished proposal, covering all eventualities, can be put in place. Below, however, we present the Confederation of Swedish Enterprise's views on the scope and design of the rules proposed by the Commission.

First, it is fundamental that the new instrument is not more restrictive than the existing EU State Aid rules. If not, the regulations may lead to distortions of competition in the opposite direction. This could be considered protectionist and lead to compensatory trade measures by third countries, which would be to the overall detriment of trade and entrepreneurship. Under no circumstances, therefore, should the instrument be stricter than the current State Aid rules.

Although the State Aid rules are both extensive and complex, there is still the opportunity for Member States to grant large amounts of State Aid each year (something that obviously increased sharply during the economic downturn following the COVID-19). The amount of Aid covered by the rules is determined by the concept of State Aid (i.e. which measures are classified as such), and the lower threshold, which determines the amount required in order to be classified as State Aid (de minimis Regulation). Subsequently, measures covered by the rules can, in many cases, be approved under the various guidelines and frameworks available. There is also the General Block Exemption Regulation (GBER), which covers more than 95% of all new support measures. This leaves Member States considerable room for manoeuvre. They can, on the basis of their own assessment and at their own risk, implement various support measures without examination by the Commission's.

If the measures that will be covered by the new tool are similar to those covered by the State Aid rules (the definition of State Aid and the lower threshold), then in practice the possibilities for granting Aid (subsidies) must also be as extensive as is the case for the rules on State support for the regulations to provide an equivalent financial outcome. This, in turn, would require developing a large number (or alternatively fewer but more comprehensive) of guidelines and regulations to provide equal treatment and predictability for third countries and companies interacting with third countries. This will be a highly time consuming and complicated undertaking.

Given this, consideration should be given to whether the new tool could be simplified, thus avoiding the establishment of a parallel regulatory framework to the entire State Aid

regulatory framework. One way to both simplify the tool, and ensure that it is targeted at the potentially most anti-competitive subsidies, would be to raise the lower threshold. The current threshold of EUR 200,000 appears to be too low to focus on measures likely to have a major impact on competition in the internal market. Determining a more reasonable threshold should ultimately be subject to an impact assessment, but the aim should be to establish one where the effect on the internal market is, in most cases, clear and where issues raised have a good chance of passing an assessment of whether they are affecting competition. It is conceivable, for example, that a lower threshold in the range of EUR 1–10 Mn is more reasonable. Here, the Commission should also consider whether such a lower threshold can also be considered valid in the case of non-transparent aid (for example, alleged benefits due to a commercial agreement with a public authority that is not fully market-oriented). It should also consider whether it is proportionate and can reduce companies' uncertainties over dealing with market transactions with public sectors in third countries, as such an application would allow for certain margins in the assessments.

To create a system equivalent to State Aid rules in terms of its economic effect requires provisions that clarify the types of foreign subsidies that can be considered as being in line with the EU's interests, corresponding to what the State Aid rules describe as compatible with the internal market. Here, the Commission needs to develop how to carry out the test of whether EU interests are being met. Within the State Aid regulations, the corresponding assessment is the so-called balance test; the Commission's EU interest test needs to mimic the balance test if the chances of being able to obtain approval are to be equal. The basic assessment in the balance test is whether the Aid (subsidy) granted can be considered appropriate, necessary and proportionate. The Commission needs to determine how to use these principles for assessing foreign subsidies and describe how to carry out a similar test within the framework of the proposed regulatory framework. The Commission, as in the field of State Aid, should develop comprehensive guidelines and frameworks that clarify the trade-offs it makes in different areas, in order to provide guidance and predictability to the parties involved.

As with the application of State Aid rules, however, the aim should be to develop regulations that provide clear safeguards, within which support can be provided without it being subject to the Commission's individual examination - similar to GBER. As in GBER, therefore, there should be a regulatory framework that sets conditions for support within the existing central categories, particularly on ceiling values for the level of support and the requirements for transparency. It is neither reasonable nor desirable to develop a regulatory framework that governs different specific support measures at the same level of detail; the Commission should have the ambition of developing a regulatory framework with broader provisions that sets both requirements for transparency and reasonable support levels to allow the measure to be accepted.

A more-focused regulation with clarified conditions is essential for providing acceptable predictability for all actors involved. This applies to both European and foreign-owned companies, as they are all covered by the rules - European companies also interact with third countries when they conduct business there in different ways. It is also important for third country states, as these new rules require that State Aid cannot be granted arbitrarily but must follow specific rules and principles. Otherwise, it can be detrimental to the company receiving the Aid, ultimately in the form of redressive measures.

Which authorities should exercise supervision?

For several reasons, the Commission should be given the sole mandate for supervision and sole responsibility for applying the rules. It is the only actor that can marshal the required resources and expertise over time to achieve the quality and strength required to be able to succeed in the very challenging cases that will need to be pursued. This is because the counterparties often will be large global companies with extensive resources and often limited willingness to cooperate. A similar examination of cases occurring in the various Member States will also be required, in order to preserve coherence and predictability. It also reduces the need to coordinate between various responsible actors, which can accelerate the cases to the benefit of all parties involved. In addition, should national authorities be given the responsibility for examining issues of foreign subsidies, there may be suspicions that supervision is not sufficiently rigorous or impartial, as there are incentives for accepting lucrative foreign investment to promote regional or national economic development in the short term. The European Commission is the sole player that can look at the functioning of the internal market as a whole and ignore short-term and more-limited economic gains. The same problem regarding incentives also applies to procurement authorities. These may have the incentive to accept seemingly robust bids, as this may constitute a good deal for the contracting authority, despite the risk that there may be foreign subsidies involved.

On the structure of the proposed rules

The Commission has structured its proposal according to three modules. There is a general module that describes the main functioning of the rules and the ex-post control that the rules entail. In addition, there are two further modules that describe how an ex-ante control will take place in acquisitions and procurements. In addition, there is a description of how the rules will be applied to support connected to EU funding, which is not included in any module.

In developing the current proposals, applying the concept of modules may have been valuable. However, in continuing its work on the Acquis, the Commission should consider departing from this concept. Otherwise, it risks giving the impression that the various modules are independent, when this is not the case. In fact, what is described as Module 1 essentially represents the main bill and what should constitute the core rules, while Modules 2 and 3 - if they are to be retained - should be incorporated into these rules to address these specific actions in the internal market. There, they can provide for special requirements for ex-ante control, in addition to the possibilities for ex-post control that the rules otherwise allow. Modules 2 and 3 essentially address special situations, where it may be justified to give reviewing authorities a special opportunity to investigate for the existence of subsidies, and thus constitute a special method of detecting subsidies. More on Modules 2 and 3 follows below.

Mergers and acquisitions

On the specific issue of prior examination of acquisitions in the internal market, the following should be taken into account. There may be value in introducing an opportunity for the Commission - prior to the acquisition of an economic activity in the internal market - to examine whether that acquisition is being made with the help of foreign subsidies. This is particularly important, as it gives the Commission a favourable starting point in any investigation, as the other party will need to act in an accommodating and transparent

manner if it is to achieve its result, (i.e. complete the acquisition). Any investigations carried out by the Commission will generally be very challenging, therefore any occasion in which the Commission can be given an advantageous starting point or better circumstances to conduct the investigations successfully should be considered.

At the same time, such approaches must be weighed against the proportionality of obtaining information from all companies that wish to make acquisitions above certain thresholds. Here, the Commission applies the concept of *financial contributions*, rather than *foreign subsidies*. A significant proportion of the large companies that can carry out acquisitions of the size that exceed the threshold values may include those that operate foreignly. In such cases, they may have already interacted with the public sector in third countries in such a way that they have received financial contributions and are thus covered by the obligation to provide information. If, at the same time, it is the case that in practice only a fraction of these companies can be suspected of having received foreign subsidies, then the proportionality of the regulations can be questioned. This is because there is always the possibility of an ex-post control in accordance with the main function of the rules.

To provide a simple example to clarify; approximately 300 mergers and acquisitions are tested annually in accordance with current competition rules. If the existing thresholds were to be applied using the new provisions on foreign subsidies relating to acquisitions, and if only five of these would actually have been carried out by companies where it was suspected in advance that foreign subsidies of relevant scope existed, the proportionality can be questioned when 295 acquisitions gets increased administrative costs to no benefit.

Ultimately, this illustrates the need for an impact assessment that investigates and assesses the factors described above. This should examine how different thresholds affect the number of acquisitions covered by the rules annually and how many of these are judged to be covered by the rules based on the concept of financial contributions. It should also assess non-European companies that have made acquisitions in the internal market in recent years, how much the information obligation entails for companies, how much of the information can be coordinated with the collection of information during the usual acquisition control, and so on. Only after a thorough impact assessment can an appraisal be made as to whether a special ex-ante control at acquisition is proportionate to the costs incurred by the companies.

In addition, on the issue of examining acquisitions - provided that such an examination can be considered proportionate - it seems strange to be able to approve subsidies that are specifically aimed at carrying out an acquisition. The State Aid rules do not provide any legal basis for approving acquisition Aid to declare it compatible with the internal market. The same should apply within this proposed regulatory framework, unless the Aid in question can be attributed to a specific investment in connection with the acquired company and where the investment is judged to be in line with the EU interest, where the investment is only made possible thanks to the subsidy and where it meets other requirements in the regulations on proportionality, and so forth. A subsidy that only strengthens a company's financial position in order to be able to buy a company on the internal market, or which directly finances the acquisition itself, distorts competition and brings no benefit that can be accepted in an EU interest test.

Finally, it should be clarified that the reporting of financial contributions within the framework of a possible notification of acquisitions must be covered by a lower threshold in a similar way to foreign subsidies in general. Otherwise, all financial contributions, no matter how

small and insignificant, would have to be reported under the "short information message" that the Commission proposes companies should submit. This requires the company to report "any financial contributions from authorities in third countries received during the past three years". Any failure to do so may constitute a breach of the rules of procedure and trigger penalties in the form of fines. It seems reasonable that only financial contributions of a commercially relevant size should be included. The exact threshold for how comprehensive the information requirement should be needs to be evaluated in an impact assessment.

Public procurement

Concerning procurement, the Commission proposes to introduce a mandatory prior notification for companies submitting tenders for contracts subject to certain thresholds. The information requires, in particular, information on what foreign financial contributions the company has received during the past three years and what contributions are expected during the term of the contract. It must also report which suppliers and subcontractors have received financial contributions.

As previously mentioned, the concept of financial contributions covers a wide range of measures; it is likely that many large companies will be covered by these provisions. In addition, there are great difficulties in determining and listing all such financial contributions and in assessing - in a legally secure manner - those contributions that may be relevant during the contract period. In addition, there is the challenge of compiling the equivalent information for suppliers and subcontractors - actors who often do not have a business relationship in advance, given that such agreements are often signed only after a decision for procurement has been made.

Procurement is already often characterised by problems with a lack of competition and too few tenders being submitted. Additional charges, in the form of administrative costs and legal uncertainty, would be a step in the wrong direction. It is also questionable whether the large amount of information that needs to be provided is an effective way of detecting subsidies. When it seems that a company that has won a tender with the help of foreign subsidies, said company has little incentive to be transparent and set this out in a mandatory prior notification, as there is no basis for designating it as compatible with the internal market or in line with EU interests.

The notification requirement according to Module 3 is therefore neither proportionate nor effective and should not be included in future regulations. What can be considered, however, is to introduce a clear process for handling complaints from other tenderers within the framework of a procurement. This can be deployed in the event that competitors to the winning bidder have access to information that the winning bidder has won the tender thanks to foreign subsidies. Such a process could consist of an opportunity for the complainant to turn to the national supervisory authority during the period when the contract is closed (at least ten days). The national supervisory authority may make an initial assessment at that point and decide whether the information is such that the case should be rejected or should be forwarded to the Commission, which can then choose to pursue the case further.

Predictability and legal certainty

The EU Treaty gives companies a legal right to appeal in cases where their financial interests are affected. The Commission should describe and further clarify these rights in the

future rules. In addition, the companies' procedural rights need to be described in more detail and secured, such as how the companies concerned can gain access to, and transparency in, ongoing cases. There also needs to be the right to be heard, the relevant deadlines that apply, and the companies' rights in cases where site investigations are carried out, just as is the case in the field of traditional competition law.

In addition, the methods for companies to be able to voluntarily notify measures to the Commission to achieve legal certainty should be clearly described and regulated. Companies must be able to ensure that business transactions are not counted as foreign subsidies, thus limiting their ability to act in the internal market at a later stage. There should therefore be a mandatory responsibility for the Commission, at the reasonable request of companies covered by the rules, to make legally binding assessments as to whether a measure constitutes a foreign subsidy.

About us

The Confederation of Swedish Enterprise (Svenskt Näringsliv) is Sweden's largest and most influential business federation representing 50 member organizations and 60 000 member companies with over 1.6 million employees.