SVENSKT NÄRINGSLIV

European Commission
DG COMP
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# Regarding the draft Implementing regulation for the foreign subsidy regulation

On the 12th of January 2023, the Foreign Subsidy Regulation (FSR) entered into force, with the aim of making foreign subsidies subject to the same scrutiny as EU subsidies. It will start to apply as of 12 July 2023, while the notification obligation for companies will be effective as of 12 October 2023. Swedish Enterprise has welcomed the regulation ever since it was presented, but also urged that the regulation must be proportionate and not lead to extensive administrative costs for business.

The Commission has now published a draft implementing regulation. The regulation with annexes aims to clarify, amongst other things:

- procedures for notifying, and content of, notifications of concentrations and public procurement bids
- rules for calculating time limits
- procedural rules on preliminary reviews and in-depth investigations in cases of suspected distortive foreign subsidies.

The Confederation of Swedish Enterprise hereby presents its views on the draft regulation.

## Summary


- The uncertainties surrounding the concept of financial contributions are simply unacceptable. It makes the task that companies now face - to prepare for future requirements by setting up systems to collect data based on this concept on a global level - impossible to fulfil in an accurate and legally secure manner. The Commission must clarify the concept so that it is clear beyond all doubt what type of transactions that should be included in the reporting. This can preferably be done in the draft implementing regulation or a separate document attached to it.
- The Commission must take vigorous measures to ease the administrative burden on companies. If not, this will hit business with considerable cost increase, and could also risk cripple the Commission’s ability to deal with those cases where closer examination is warranted.
- Therefore, we suggest ten amendments that focus on how reporting obligations can be made more proportionate and clearer for companies to handle.



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## The concept of *financial contributions* is still unclear

The main task of companies in relation to the pre-notification requirements attached to participation in large public procurement procedures and mergers within the EU that follows from the FSR is the gathering and accounting of financial contributions received globally during a three-year period. This will be relevant for many EU-based companies with activities in third countries, many being part of groups with economic activities all over the world.

To be able to fulfil this task, companies need to be able to determine this concept of financial contributions and delineate the boundaries of the concept and how more precisely information should be aggregated and presented.

It is however still not enough clarified how this concept is to be defined. The definition is given primarily in article 3.2 FSR, which primarily aim to clarify the concept of foreign subsidy. There it is stated that “a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries”.

The existence of a financial contribution is thus the first pre-requisite of there being a potential foreign subsidy. But it is only if the other conditions also are fulfilled that a measure constitute a foreign subsidy. As stated in paragraph 11: “A foreign subsidy in the context of this Regulation should be understood as a financial contribution which is provided directly or indirectly by a third country, which confers a benefit, and which is limited to one or more undertakings or industries. Those conditions are cumulative.”

A financial contribution should thus first of all be “provided directly or indirectly by a third country”, defined more in detail in article 3.2 second paragraph letters a-c. If so, it is considered to be a *foreign* financial contribution.

In addition, to be considered as a foreign subsidy, it also needs to confer a benefit to the recipient. Attached to the term benefit is also the fact that the measure is limited, in law or in fact, to one or more undertakings or industries, similarly to the concept of selectivity in the EU state aid rules.

There is a basic logic in how these concepts relate to each other and how the concept of foreign subsidies is composed.

There are however certain parts in the FSR that might lead to confusion, as they indicate or exemplify with scenarios where a benefit could be understood as a pre-requisite for a financial contribution to be existing. One such piece of text is paragraph 13, which state that a “financial contribution should confer a benefit on an undertaking engaging in an economic activity in the internal market. A financial contribution should be considered to confer a benefit on an undertaking if it could not have been obtained under normal market conditions.” In paragraph 12, it is also stated that the “concept of financial contribution includes a broad range of support measures which are not limited to monetary transfers, for instance, granting special or exclusive rights to an undertaking without receiving adequate remuneration in line with normal market conditions.”

From these sentences, one could get the impression that the existence of a benefit is included in the concept of financial contributions.

Furthermore, the examples of financial contributions listed in article 3.2 does not necessarily entail that a benefit is existing – with the exception of the second example, since “the foregoing of revenue that is otherwise due, such as tax exemptions or the granting of special or exclusive rights without adequate remuneration” can be assumed to bring a benefit to the recipient. For this to follow the general logic that financial contributions does not necessarily include a benefit conferred, it should merely state that taxes, fees and remuneration for performing public tasks should be treated as financial contributions.

The uncertainties surrounding the concept of financial contributions are simply unacceptable. It makes the task that companies now face - to prepare for future requirements by setting up systems to collect data based on this concept on a global level - impossible to fulfil in an accurate and legally secure manner. The Commission must clarify the concept so that it is clear beyond all doubt what type of transactions that should be included in the reporting. This can preferably be done in the draft implementing regulation or a separate document attached to it.

## The huge administrative burden must be addressed

Based on our continuous understanding of the concept of financial contributions, where a benefit is not a prerequisite for a measure to constitute a financial contribution, the task for global companies to account for all financial contributions received in a three-year period is immense.

It would encompass all economic interaction that a company, on group level, has with public authorities of all sorts, publicly owned or controlled companies, or even private companies if their “actions can be attributed to the third country, taking into account all relevant circumstances”.

As there is no lower threshold in general regarding the size of each individual financial contribution, and no prescribed possibility to aggregate several financial contributions – based on for instance expenditure type, recipient, country, type of financial activity – the number of foreign financial contribution could potentially be counted in thousands if not millions for a single company group. This is true in particular since regular and running tax payments, social fees and fees for electricity, water and waste management services would be included in the term.

With this considered, the Commission must take vigorous measures to ease the administrative burden on companies. If not, this will hit business with considerable cost increase, and could also risk cripple the Commissions ability to deal with those cases where a closer examination is warranted. While the FSR no longer can be amended, the Commission has good opportunities to clarify and limit the task for companies within the framework of the draft implementing regulation.

Therefore, we call upon the Commission to focus on these aspects of the implementing regulation during the coming months, and to make itself accessible to the business community to clarify the level of information that will be necessary in these processes. Companies, often together with legal expertise hired to help them, are already looking into the practical challenges and uncertainties that the regulation entails. Without action from the Commission, many companies will likely even over-implement the regulation, to make sure

that the information requirements are met and not risk fines or that an upcoming concentration case is hindered, or a tender in a procurement is disqualified.

## Our suggestions

In light of what has been stated above, Swedish Enterprise therefore suggest the ten amendments found below. These suggestions most certainly need to be complemented by additional adjustments based on more input from particular sectors or companies, as different business models might affect how the reporting should be done and the degree of flexibility there can be.

1. Clarify and delimit the **concept of financial contributions** further in the preamble text or in a separate annex.
2. Further explain **when in time** an undertaking counts as having received a financial contribution and how this should be dealt with in practical sense when reporting. While it is reasonable to mirror the state aid rules and focus on when a company gets the benefit (right) of an economic transaction, dealing with this in the reporting will cause problems if companies sometimes should account for transactions when a contract is written (and thus not account for the concrete transactions that will follow within the framework of the contract) and sometimes when the remuneration is paid out. Simplifying guidance is necessary.
3. Clarify the possibility to **aggregate transactions** in different ways. It is unreasonable to account for every single transaction separately. Transactions should be able to be aggregated based on different characteristics, for instance expenditure type, recipient, country and type of financial activity. If preferred, a company should be able to aggregate information per operating year to the largest possible extent.
4. **Mandatory running payments** such as general taxes and social security fees should in all circumstances be aggregated on a yearly basis and per country.
5. **Make the requirements in Annex 1 and 2 more equal**. There seem to be no real reason why different “levels” of information should be necessary in these two scenarios. Therefore, for instance, we suggest that the 200 000 lower threshold per financial contribution also should be included in procurement proceedings.
6. **The requests for qualitative information on a large quantity of financial contributions is not proportionate**. Qualitative information, as asked for in Annex 1 section 5.2 and onwards, and Annex 2 section 3.1 and onwards, should be restricted to such financial contributions that are related to foreign subsidies listed in article 5.1 of the FSR.
7. **Pre-notification contacts should be made possible even before a public procurement has started**. The majority of the information required on financial contribution will need to be gathered on a running basis, not in front of or during a public procurement procedure. To limit the pre-notification contacts to be possible only during the processes in question makes them much less relevant.
8. In pre-notification contacts, the company should have a **direct contact with the Commission only**, and then it should be up to the Commission to take contact with the contracting authority, should they find that suitable.
9. It should be **clarified how the accounting of financial contributions below 4 million Euro** in accordance with section 7 should be done, and that this only should be an aggregate number per state where financial contributions have been received, to achieve as much simplification as possible.

10. Companies that have not supplied **correct information** due to negligence should not be subject to the fine prescribed in article 26.2 of the FSR if it is due to a mistake or misunderstanding, the mistake is not repeated or systematic, and the information in question does not affect the assessment of whether a foreign subsidy was awarded the company in question.

Yours sincerely,

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