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Swedish Enterprise on the proposed EU regulation on foreign subsidies

The preliminary view of the Confederation of Swedish Enterprise on the European Commission's proposal for a Regulation on foreign subsidies distorting the single market.

The Confederation of Swedish Enterprise has been given the opportunity to comment on the European Commission's proposal for a Regulation on foreign subsidies distorting the single market. Due to the short deadline, here are our preliminary views on the proposal.

The Commission's proposal for a Regulation is based on the White Paper that it published in the summer of 2020. The proposal now presented has broadly the same content and structure as set out in the White Paper. Specifically, this is a general capacity for the Commission to examine foreign subsidies, namely those subsidies from third countries to companies engaging in any form of economic activity in the EU single market, provided that the subsidies exceed a certain threshold. This is complemented by a requirement for prior notification of acquisitions and tenders for contracts if the company to be acquired or the contract for which the tender is submitted exceeds certain economic thresholds.

The Confederation of Swedish Enterprise believes that new rules to combat foreign subsidies should be introduced. It is essential that companies operating within the single market do so on an equal basis; the proposed new rules, together with other existing regulations, can lead to a more level playing field. This will mean that companies can compete on their own terms and on the basis of a market economy. In the longer term, these rules could also lead to greater transparency and insight into the prevalence of foreign subsidies.

At the same time, the Confederation of Swedish Enterprise wishes to stress that any such rules must be proportionate, non-discriminatory and legally certain. In addition, they must not unduly hinder inward foreign investment in the EU and should not generate greater administrative costs than necessary. Ideally, such subsidies should be regulated on a global level, preferably within the framework of the WTO. That way, the rules can be built on wide acceptance and thus have a strong mandate from all parties involved. At the same time, we recognise that an ambitious agreement on this issue at global level is unlikely in the foreseeable future and thus foresees a need for the EU to act unilaterally.

In terms of the scope and design of any such rules, it is essential that the new instrument is no more restrictive than the EU's existing State Aid rules. Otherwise, the framework could create distortions of competition in the opposite direction and be perceived as protectionist, leading to retaliatory trade actions by third countries, which would ultimately be detrimental to trade and business overall. Such an outcome could also run counter to WTO rules. Therefore, under no circumstances should the instrument be stricter than the State Aid rules that are currently in use.

The Confederation of Swedish Enterprise notes that the changes that the European Commission has made to the proposals in the White Paper are largely in line with the

suggestions made by the Confederation during the Paper's consultation period. The Confederation is therefore generally positive towards the proposals, and would like to draw particular attention to the following positive and important changes:

- Higher thresholds provide a more proportionate regulatory framework while reducing administrative costs.
- Giving the European Commission principal responsibility for the regulatory framework allows for harmonised and competent supervision.

Higher thresholds

The higher threshold for when foreign subsidies are effectively covered by the regulatory framework. The European Commission had previously proposed a lower threshold of EUR 200,000 over a three-year period during which these subsidies would not be considered to affect competition in the single market. The Confederation of Swedish Enterprise proposed that the threshold should be raised to a much higher level, somewhere between EUR 1-10 million. This was because it believed the framework needed to be more proportionate and more directly targeted at the largest, potentially most distorting subsidies. A higher threshold also reduces administrative costs, as fewer companies and situations would trigger assessments and administration under to the requirements of the framework. The Confederation therefore supports the Commission's proposal for a new lower limit for foreign subsidies of EUR 5 million over a three-year period.

The thresholds that determine which acquisitions and tenders in procurements would be subject to prior notification to the Commission have also been changed in a similar manner. This should mean that the regulatory framework is more proportionate and better targeted at the most potentially competition-distorting subsidies. The White Paper set an indicative threshold of EUR 100 million in terms of the annual turnover of the company being acquired. For procurement, the White Paper did not propose a threshold; rather, it only indicated the possibility of setting a notification threshold at a higher level than the one currently set out in the public procurement Directives. A significantly higher threshold is now proposed, namely one of EUR 250 million in terms of the total value of the contract.

The Confederation of Swedish Enterprise has not had any data on how many acquisitions or procurements currently exceed the proposed thresholds each year. However, it may be assumed that these thresholds will significantly reduce the number of acquisitions and procurements likely to be covered. This will also mean that small- and medium-sized enterprises will not be subject to these prior notification requirements, something that would be seen as highly positive, given the likely administrative burden that would be generated. The Confederation was critical of these pre-notification requirements when they were presented in the White Paper. Given these changes and given that these requirements would only apply to a few situations, they can be viewed as acceptable. However, it should subsequently be evaluated whether these additional prior notification requirements - which apply in parallel with the general possibility for the Commission to examine ex officio the alleged existence of foreign subsidies - had provided any added value. Specifically, this should assess whether the requirements have concretely contributed to the Commission's capacity to detect foreign subsidies in such a way that justifies the additional administrative burden likely to fall on some larger companies.

On the issue of acquisitions, the European Commission is also proposing a threshold based on the level of financial contributions received by the company in the three years prior to the

acquisition, which is set at EUR 50 million. This is something that the Confederation of Swedish Enterprise has also proposed in the past, and which we continue to endorse. This means that companies intending to undertake an acquisition that falls below exceeds the EUR 500 million threshold do not need to provide any prior notification if they have only very minor financial dealings of any kind with third countries.

No similar threshold is proposed for procurement, and it is unclear why the same premises should not apply there. In the field of procurement, it would also be desirable to set some sort of lower limit. This way, companies that operate mainly on a national level or within the single market and that have only marginal dealings with third countries would not have to carry out a full review of their activities and list all financial dealings with third countries in the event of submitting a tender for a contract with a value exceeding EUR 250 million.

Centralised supervision

We welcome the proposal to give the European Commission sole responsibility for supervision. The Commission is the only actor capable of pooling the necessary resources and expertise over time to achieve sufficient quality and strength to have a chance of success in the very challenging cases that will need to be pursued. The counterparties are often large global corporations with substantial resources available and certainly an often-limited willingness to cooperate. It is also necessary to have a similar review of cases occurring in the different Member States to ensure coherence and predictability. It also reduces the requirement for coordination between the various responsible actors proposed, which can speed up the processing of cases to the benefit of all parties involved. Moreover, if national authorities were given responsibility for investigating foreign subsidy issues, there may be suspicions that oversight is not sufficiently rigorous nor impartial. This reflects the reality that there are incentives for national authorities to accept lucrative foreign investment to promote regional or national economic development in the short term.

The Commission is the sole actor that can look at the functioning of the entire single market and discount short-term and more limited economic gains. The same problem of incentives also applies to contracting authorities, who may have incentives to accept bids that are robust from a regulatory perspective, in spite of the fact that there may be foreign subsidies behind them, as this may represent a good deal for the contracting authority.

Commission balance test

The European Commission's balancing test under Article 5, referred to in the White Paper as the 'EU interest test', is described very briefly. The test gives a broad mandate to the Commission to assess whether the positive economic impact on the activity concerned outweighs its negative effects, in terms of distortion of competition within the EU single market. At the very least, this balancing test needs to be described much more clearly and comprehensively if it is to provide any kind of predictability and legal certainty, both for businesses and for third countries. The assessments should be modelled on those made in the field of State Aid, as well as on the underlying principles of proportionality, appropriateness, and necessity. Subsidies directed to specific activities and specific situations should reasonably be considered differently in this respect. For example, it is difficult to see how a subsidy that enables a unique investment in the EU – one which would otherwise not be realised - should be seen in the same light as one to an operator that enables them to win a tender that would otherwise have been won by another, non-subsidised, operator.

Other issues

As stated in the introduction, the Confederation of Swedish Enterprise has not had the opportunity to delve into the full details in the few days since the proposal was published. We therefore request the opportunity to come back in future with further details and comments. However, here are a few specific points that we would like to highlight:

- The Confederation of Swedish Enterprise does not see a mechanism that allows a company to notify a financial transaction at its own initiative and for legal certainty, to the European Commission in order to obtain an assessment of whether the transaction constitutes a foreign subsidy. Such a need could exist, in order to create predictability for a company that is intending to make an acquisition or to participate in a procurement where it may exceed the predetermined thresholds.
- Article 18(3) sets out the thresholds for which mergers are notifiable. It could be clearer as to whether the turnover or financial contributions to be taken into account are considered individually per undertaking or are aggregated for all undertakings involved in the merger. It appears that turnover is calculated for each individual company, but financial contributions are aggregated for all companies, irrespective of whether they come from one or more countries. This should be clarified.
- In Article 28, it should be made clear that the requirement to provide a statement of financial contributions received over a three-year period, or a declaration that no financial contributions have been received during that period, applies only to contracts above the EUR 250 million threshold.