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## Call for evidence – Foreign Subsidies guidelines

The European Commission are consulting stakeholders through a call for evidence to gather views on what to consider when drafting the upcoming Foreign Subsidies guidelines. The guidelines are, for instance, to include descriptions on how to determine when a foreign subsidy distorts the internal market, and how to apply the balancing test to distortive foreign subsidies. Here follows the views from the Confederation of Swedish Enterprise on these matters.

### General views on the FSR and the need of guidance

The upcoming guidelines are much welcomed by the Swedish business community. Companies are in much need to receive more clarity on the key concepts of the FSR. As it is a novel regulation where no real decisional practice have yet been published, companies and legal representatives have limited possibilities to understand how the regulation is interpreted and implemented in practice. It also increases the risk of under-implementation, if companies fail to realise the considerable scope that the rules have, due to the wide definition of foreign financial contributions.

While it is positive that the upcoming guidelines will grant more clarity into concepts such as distortions of competition and the balancing test, these are so far not the concepts that most business struggle with as the ensure compliance with the rules. The most important concept in that regard is rather *foreign financial contributions*, as it determines the scope of what information companies must gather on a regular basis to be able to notify the Commission when they perform a concentration or enters a public procurement that are covered by the thresholds. Therefore, it would be of great value if the Commission would consider, in some form, to address the term of foreign financial contribution in some form to bring more clarity to companies, if not in the upcoming guidelines, then in some other form.

### Distortion of competition

Since the wording in article 4 (1) is that “a foreign subsidy is *liable* to improve the competitive position of an undertaking in the internal market” and where “that foreign subsidy actually *or potentially* negatively affects competition in the internal market”, it is clear that the mere *risk* of competition being negatively affected is sufficient for the criterion to be met. Therefore, the indicators provided in Article 4(1) are largely adequate for the purposes of determining the existence of a distortion of competition the internal market – the interpretation should be similar as in the State aid rules under Article 107(1) TFEU and respective legal criteria.

The difference compared to state aid rules is that these apply to EU Member States, and such aid is typically always given to companies that primarily or partially operate in the internal market. When it comes to foreign subsidies, these are sometimes given by third countries to companies that primarily or partially operate in those countries, but also on the

internal market. This may therefore require additional attention regarding the economic cohesion between an operation in a third country receiving aid and another operation in the internal market that belongs to the same company or group. It may be necessary to clarify to what extent a company can ensure, within the framework of a group, to establish such accounting records so that the operations are separated and a subsidy in a third country cannot be considered to spill over to an operation in the internal market.

In addition, the temporal difference between when the foreign subsidy has been received by the company and the time when the company has entered or acted on the internal market could be considered for inclusion. A longer time span between the subsidy and the action on the internal market could reduce the risk of distortion in the internal market. A subsidy that directly precedes a transaction on the internal market has a greater risk of distorting competition than one that benefits the company several years earlier.

When it comes to the notion of whether *“a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market”*, all foreign subsidies are in principle improving the competitive position of the undertaking receiving the subsidy, as it per definition grants a selective benefit to that undertaking. That typically also leads to an improved competitive position in the internal market, as the company can establish and act on the internal market from a position of increased financial strength. That does not mean that the subsidy “could potentially be used” in the internal market, as subsidies are often tied to specific investments or activities, perhaps in third countries. However, as it is sufficient that the competitive position is improved, this is not relevant. The first things to look at are the conditions attached to the subsidy; if the subsidies have been spent in such a way that no impact on the EU market is conceivable, it is not distortive. If the subsidy is made conditional to an investment outside the EU, this can be a circumstance that could limit the impact the EU market, particularly if the undertaking can show that the economic activity on the internal market is separated from those activities that have received the subsidy.

The improvement of the competitive position can be more or less significant. A small subsidy, that is just above the de minimis threshold of 4 million Euro, can be a significant subsidy on a market where mainly small actors are present. The same subsidy could be less significant where only large, global actors are present with several billion in yearly turnover. Certain types of subsidies are also affecting the competitive position more than others. In addition to those listed in Article 5, subsidies in the form of grants or economic transactions below market value are generally improving the economic strength more than repayable forms such as loans or guarantees.

To sum up, it is only reasonable that there is quite a low threshold for a foreign subsidy to potentially affect competition in a negative way, as competition typically and in the long run are best fostered when companies compete on the merits without interference from subsidies.

That does not mean however that all subsidies that affect competition, potentially or actually, are problematic. In the subsequent balancing test, the Commission can take into account the extent which competition is impacted, or how high the risk is for an impact, and also weigh that against potential positive effects.

## The balancing test

Companies receiving foreign subsidies should in general be able to do so in a similar fashion as companies are being able to receive state aid within the remit of the EU state aid rules, without being limited in their access to the internal market. Therefore, there should be an approximate similarity between these rules to a large extent. That means that companies should be able to receive state aid for investments in, for instance, decarbonization of production, research and development, risk capital, regional development and training and education of workers. That is regardless of whether the activities are being conducted in the EU or in third countries. In addition, the Commission can consider additional beneficial effects in their assessment. Increasing trade flows and economic interaction with third countries is one such positive effect. New entrants can furthermore improve the access to critical or strategic products or raw materials, where the EU is dependent on a single third country.

For companies, it would be beneficial to get more legal clarity in this aspect. In the field of state aid, there are numerous guidelines to inform stakeholders on how the Commission will assess aid with different objectives. Similar guidance in some form will be necessary for companies to understand the view of the Commission in these aspects.

## Call-in powers below the thresholds

The Commission has also asked for views regarding the application of the Commission's power to request the prior notification of any concentration according to Article 21(5) of the FSR or foreign financial contributions received by an economic operator in a public procurement procedure according to Article 29(8) of the FSR.

These powers should be used only when there are strong indications that it would be warranted to do so. In general, the more information and views from competitors and business organizations that the Commission receives, the more inclined it should be to rapidly assess the situation and consider using the power to request a notification in a specific case. There can be specific circumstances of the case, where the merger conditions or the bid content puts it as an outlier compared to other bids or business practice, this can be an indication that could be considered. If there is a history where the same company have been conducting similar transactions, and where competitors have complained, that could also be taken into account.

Questions regarding this should be addressed to:

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