

## EU FOREIGN SUBSIDIES REGULATION

On 5 May 2021, the European Commission (the Commission) published its proposal for a Regulation on foreign subsidies distorting the internal market (draft Regulation) enabling it to take measures against market-distorting subsidies from foreign governments. The Commission would be empowered to intervene in takeovers of EU companies or public procurement bids when they are supported by state subsidies from third countries.

### GENERAL BACKGROUND

The draft Regulation builds on the White Paper on levelling the playing field regarding foreign subsidies published by the Commission on 17 June 2020, which described a set of potential tools aiming to address instances of unfair competition triggered by non-EU state-owned or state-supported companies receiving financial aid from their respective states of origin. This financial support is not subject to EU State aid rules as these are applicable only to aid granted by EU Member States. Therefore, the draft Regulation aims at filling any existing gaps in related EU legal areas, such as merger control and public procurement.

In particular, it would create a new filing obligation and would give the Commission exclusive competence to assess the existence of distortive foreign subsidies in transactions and public tender bids.

The draft Regulation will be submitted to the European Parliament and Council, which will have to approve it, before it is implemented: a process expected not to be concluded before end 2022.

### DEFINITION AND SCOPE OF FOREIGN SUBSIDIES

The draft Regulation provides that a foreign subsidy exists "*where a third country provides a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market.*" The definition of a financial contribution is quite broad and includes: i) the transfer of funds or liabilities (e.g., capital injections, grants, loans, fiscal incentives); ii) the foregoing of revenue that is otherwise due; or iii) the provision or purchase of goods and services.

When referring to a third country, this includes: i) the central government and government authorities at all other levels, ii) foreign public entities; or iii) any private entity whose actions can be attributed to the third country.

#### Key issues

- New requirement to notify transactions where the turnover in the EU of the EU target exceeds EUR 500 million and where the undertakings concerned have received financial contributions of EUR 50 million or more from third countries;
- Bidders in EU tenders for contracts worth EUR 250 million or more must provide information on foreign subsidies to the relevant contracting authority, which must in turn inform the Commission;
- Commission can intervene in transactions or tenders below these thresholds on its own initiative;
- Additional powers for the Commission to take interim measures or impose fines for incomplete or misleading information or for failing to seek prior approval for a notifiable transaction.

## **FOREIGN SUBSIDIES ASSESSMENT PROCESS**

### **Indicators**

In order to determine the existence of distortive effects of foreign subsidies on the internal market, a non-exhaustive set of indicators has been proposed by the Commission including the amount and nature of the subsidy, the level of economic activity by the recipient of such subsidy on the internal market or the purpose and conditions attached to the foreign subsidy.

As a general rule, foreign subsidies not exceeding EUR 5 million should be deemed unlikely to distort the internal market.

By contrast, the Commission has included examples of foreign subsidies that are most likely to have distortive effects on the internal market. It refers to subsidies granted to an undertaking in financial difficulty, directly facilitating a concentration or enabling the submission of an unduly advantageous tender. Aid in the form of an unlimited guarantee would also be seen as distortive.

### **Balancing test**

When assessing whether a financial contribution from a third country distorts the internal market, the Commission suggests balancing any distortive effects of the foreign subsidy on the market with the positive effects on the development of the relevant economic activity. It remains to be seen whether the guidelines / exemptions relevant for State aid granted by EU Member States will be applicable also to foreign subsidies.

### **Commitments and redressive measures**

The Commission may accept commitments or redressive measures. A non-exhaustive list is provided in the draft Regulation and includes the divestment of certain assets, repayment of the foreign subsidy to the third country with an interest rate, reducing capacity or market presence, offering third party access or even requiring the undertakings to dissolve the concentration.

## **EX OFFICIO REVIEW**

The Commission would have the power to examine on its own initiative information when assessing allegedly distortive foreign subsidies.

The review process will take place in two stages: the preliminary review and the in-depth investigation. During the preliminary review, the Commission may request information and conduct inspections and if it concludes that there are sufficient indications that an undertaking has been granted a distortive foreign subsidy it will initiate an in-depth investigation. During the in-depth investigation, it further assesses the foreign subsidy by requesting additional information and if it finds that the foreign subsidy in question distorts the internal market it may impose redressive measures or accept commitments.

The Commission may also decide to take interim measures in case it considers that "*there is a serious risk of substantial and irreparable damage to competition on the internal market.*"

Undertakings that provide incorrect, incomplete or misleading information could be fined up to 1 percent of their aggregate worldwide turnover and be subject to periodic penalty payments not exceeding 5 percent of the average daily aggregate worldwide turnover.

## MERGERS AND ACQUISITIONS

One of the novelties of the draft Regulation is that it would create a new mandatory review process. If the relevant thresholds are met, takeovers would have to be notified to the Commission in advance and could not be concluded until the Commission has completed its review. The Commission would have 25 working days to review the notified transaction, which could be extended by 90 working days in case the Commission opens an in-depth investigation. This period would be further extended by 15 working days where the undertaking concerned offers commitments.

The draft Regulation sets out the following thresholds triggering such notification to the Commission:

- one of the companies (target or one merging undertaking and, in the case of joint venture, either the joint venture or one of its parents companies) is established in the EU and generates an aggregate turnover of at least EUR 500 million in the EU, **and**
- the undertakings concerned or (in the case of joint venture) the joint venture itself and its parent undertakings received from third countries an aggregate financial contribution of more than EUR 50 million in the last three years.

By defining the second threshold by reference to the amount of financial contribution (rather than the value of any subsidy that arises from such a contribution), the draft Regulation would create new filing obligations for any business that has significant dealings with one or more third countries, which, as noted above, includes public bodies and even some private businesses. That would be the case even if those dealings are on arm's length commercial terms.

The draft Regulation also goes one step further and provides that the Commission may request prior notification of any non-notifiable transaction at any time prior to its implementation if the Commission "*suspects that the undertakings concerned may have benefitted from foreign subsidies*" in the previous three years.

Companies that intentionally or negligently fail to notify a transaction or implement a notified transaction in breach of the Regulation could be fined up to 10 percent of their aggregate worldwide turnover, while providing incorrect or misleading information could lead to a fine of up to 1 percent.

Lastly, although the Regulation would have no retroactive effect, it would apply to foreign subsidies granted in the ten years before its entry into force, where such foreign subsidies distort the internal market after the Regulation's entry into force.

## PUBLIC PROCUREMENT

Distortive foreign subsidies for the purposes of public procurement procedures are those that "*enable an undertaking to submit a tender that is unduly advantageous in relation to the works, supplies or services.*" Undertakings participating in EU tenders involving procurement contracts worth at least EUR 250 million that have received foreign subsidies must provide any information related to the financial aid received to the relevant contracting authority, which must in turn inform the Commission.

The Commission, in turn, shall carry out a preliminary review within 60 days after receipt of notification and may adopt a decision closing the in-depth investigation no later than 200 days after it received the notification.

As in the case of concentrations, the Commission reserves the right to request the notification of the foreign financial contributions received by an undertaking in any non-notifiable public procurement procedure, if it suspects that the undertaking may have benefitted from foreign subsidies.

## **PRACTICAL IMPLICATIONS**

The Commission adds an extra layer of scrutiny with respect to transactions or public procurement bids involving financial aid provided by third countries. This notification obligation will result in an administrative burden on these companies and could create uncertainty about the timeline of the conclusion of the relevant commercial transactions. While much of the practice and procedure under this new filing regime would be similar to that of the EU Merger Regulation, they would be separate filing procedures, and it is uncertain how they will inter-relate and affect each other. Investors receiving any financial subsidies from non-EU countries would have to conduct a detailed assessment of the risks that a potential transaction or bid may entail before proceeding with an investment decision or tender application. Thorough preparation of the required filings would be key to a successful conclusion of any transaction meeting the thresholds.

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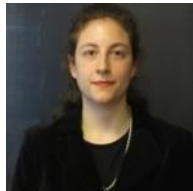
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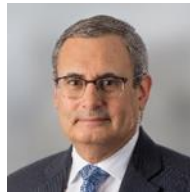
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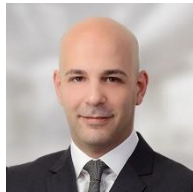
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