

## Newsalert

Department of European law  
The Proposal for a regulation on distortive foreign subsidies

Today, the European Commission proposed a new legal framework to tackle foreign subsidies that cause distortions and harm the level playing field in the Single Market and thus integrating EU rules on competition, public procurement and trade defence. The proposal has been adopted in line with the EU Industrial Strategy (also adopted today) and follows the adoption of the June 2020 White Paper.

The Proposal is subject to a public consultation process with all relevant stakeholders that will be open for another 8 weeks.

The Proposal has precisely the objective to close all regulatory gaps concerning foreign subsidies and thus completing its Industrial Strategy. Indeed, the current EU antitrust and merger control rules do not enable the Commission to specifically take into account whether a company may have benefited from distortive foreign subsidies. Analogously, EU State aid rules apply only to financial contributions granted by EU Member States, thus excluding subsidies granted by non-EU governments from their scope of application. By the same token, existing Public Procurement rules do not address distortions to the procurement markets caused by foreign subsidies.

The proposed regulation is without prejudice to the application of the actual Merger Regulation.

### **Scope of application**

The proposed Regulation covers foreign subsidies to undertakings engaging in “an economic activity in the EU”.

“Foreign subsidies” are defined as any financial contribution originating directly or indirectly from the government of a non-EU country that benefits a company engaging in an economic activity in the EU, and which is “selective” (a concept derived from State aid rules, meaning limited to an individual company or industry or to several companies or industries).

According to the Proposal, a distortion in the Single Market “*shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market*”. The Proposal outlines some indexes to assess whether foreign subsidies are distortive, such as, *inter alia*: (a) the amount of the subsidy; (b) the nature of the subsidy; (c) the situation of the undertaking and the markets concerned; (d) the level of economic activity of the undertaking concerned on the Internal Market; (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

At any rate, a foreign subsidy is unlikely to distort the internal market if its total amount is below €5 million over any consecutive period of three fiscal years.

The Proposal assumes that a distortion of the Internal Market occurs in the following cases:

1. in case it is granted to an ailing undertaking, that is to say which will likely go out of business in the short or medium term in the absence of any subsidy;
2. an unlimited guarantee for debts or liabilities of the undertaking;
3. a subsidy directly facilitating a concentration;
4. a subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking would be awarded the public contract.

## **Powers of the Commission and proposed instruments**

The enforcement of the proposed legal framework would lie exclusively with the Commission, to ensure its uniform application in all the Union. The Commission competence on notified concentration or public procurement contracts can lead to prohibition decisions.

### (i) Ex officio intervention

The Commission may, on its own initiative (*ex officio*), examine information from any source regarding alleged distortive foreign subsidies, (i) under a preliminary review or (ii) in the context of an in-depth investigation. In this context, the Commission has several instruments at its own disposal: *interim* measures, requests for information, on-site inspections within the Union and elsewhere (provided that the undertaking concerned has given its consent and the government of the third country has been officially notified).

In the event of non-cooperation by the undertaking concerned, the Commission can take a decision and can impose fines (1% of the aggregate turnover) and periodic

penalty payments (5% of the average daily aggregate turnover) for procedural infringements.

(ii) Notification in the context of concentrations

A specific *ex ante* notification obligation is foreseen with respect to concentrations involving a financial contribution by a non-EU government, in case the EU turnover of the target company (or of at least one of the merging parties) is of at least €500 million and the foreign financial contribution of more than €50 million.

Similarly, the creation of a joint venture shall be notified prior to its implementation when joint venture itself or one of its parent undertakings is established in the Union and generates an aggregate turnover in the Union of at least €500 million; and the joint venture itself and its parent undertakings received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than €50 million.

As to the procedural terms, the Proposal mirrors the EU Merger Regulation deadlines: 25 working days for a preliminary review and 90 working days for an in-depth investigation.

Pending the Commission's review, the concentration cannot be completed (standstill obligation).

The Commission may impose by decision on undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding business year where they fail to notify a notifiable concentration prior to its implementation or in case implement a prohibited concentration.

(iii) Notification in the context of public procurement procedures

A second notification-based tool will investigate bids in public procurements involving a financial contribution by a non-EU government (in cases when the estimated value of the procurement is at least €250 million).

The time limits are set at 60 and 200 days for preliminary review and in-depth investigation, respectively.

Pending the Commission's review, a standstill obligation will apply so that the contract cannot be awarded.

The Commission may impose by decision on the undertakings concerned fines not exceeding 10 % of their aggregate turnover in the preceding business year where they, intentionally or negligently, fail to notify a subsidy during the public procurement procedure.

(iv) Market investigations

Finally, the Regulation states that the Commission may conduct a market investigation in all other market situations and smaller concentrations and public procurement procedures, which the Commission can start on its own initiative and may request *ad-hoc* notifications (even for transactions below the thresholds).

(v) Redressive measures

When ascertaining the negative effects on the Internal Market of a foreign subsidies, the Commission can impose redressive measures or accept commitments, both

structural and/or behavioral (such as the repayment of the foreign subsidy, the divestment of certain assets, the reduction of capacity or market presence, giving access to a certain infrastructure or the prohibition of a certain market conducts).

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