

EUROPEAN COMMISSION PUBLISHES NEW REGULATION TARGETING FOREIGN SUBSIDIES

On 5 May 2021, the European Commission (EC) published a draft Regulation for a new regime to address the impact of subsidies from non-EU countries on trade within the EU. This follows the White Paper on foreign subsidies that was published by the EC last year (see our previous [briefing](#) on 18 June 2020).

The Regulation seeks to close a perceived regulatory gap in the internal market. Within the EU, existing rules on State aid and public procurement ensure fair competition is maintained when companies receive subsidies from Member States. However, these tools do not apply to subsidies granted by non-EU governments.

Under the proposed Regulation, the EC would have powers to investigate financial contributions granted by public authorities of a non-EU country (which now also includes the UK) where these confer benefits on individual companies engaging in an economic activity in the EU, and to redress their distortive effects.

These proposals are a key part of the EC's "New Industrial Strategy for Europe", launched on 10 March 2020. An updated version of the strategy was published at the same time as the draft Regulation.

Key elements of the proposal

As proposed in the White Paper, the Regulation envisages the introduction of three new "tools" to address third state subsidies:

- An ex ante notification obligation for concentrations involving businesses that have received financial contributions from a non-EU government in the previous three years, where the EU turnover of the company to be acquired (or of at least one of the merging parties) is €500 million or more and the foreign financial contribution is at least €50 million;
- An ex ante notification obligation in relation to bids in public procurements by businesses that have received a financial contribution from a non-EU government in the previous three years, where the estimated value of the procurement is €250 million or more; and

- A general power for the EC to investigate, and to request ad hoc notifications, in relation to all other market situations including smaller concentrations and public procurement procedures below the mandatory notification thresholds.

Where the EC finds that a subsidy exists, the Regulation would give it the power to impose redressive measures, or to accept commitments from the companies concerned, to remedy the distortion. These could include behavioural commitments or structural measures such as the divestment of assets. The EC would also have the power to prohibit an acquisition or to prevent the award of a public contract to a subsidised bidder.

The proposed Regulation would give the EC powers to require the provision of information and, in relation to the general power, to conduct inspections ("dawn raids") within the EU (and outside of the EU with the consent of the undertakings involved and the relevant national government). In circumstances where an undertaking or third country fails to co-operate with an investigation, the EC will be able to take a decision based on the "facts available". This includes the ability to deem that an undertaking has received a benefit.

Key changes from the White Paper proposals

The EC highlights two main changes between the position set out in the White Paper and in the Regulation:

- Whereas the White Paper had suggested that responsibility for enforcement might be devolved to NCAs, the proposal is now that competency will lie exclusively with the EC to ensure uniform application.
- Additional details have been provided on the notification and de minimis thresholds where the EC considers that it has responded to stakeholder concerns about administrative burdens by raising the threshold below which subsidies are generally considered not to have a distortive effect (see further below).

Practical questions and challenges

If the Regulation is implemented, it will introduce a major new regulatory hurdle for non-EU companies seeking to do business in Europe. The concept of “subsidy” that is applied in the draft Regulation is broad and could include support that is not specifically targeted at acquisitions or tender activity in the EU e.g. tax concessions that are targeted at particular business sectors, soft loans, support for the development of production facilities, or funding for R&D&I initiatives. It is not limited to central government support and would include local government and other entities whose actions can be attributed to the relevant State.

The scale of the proposal, and its importance to the EU, is reflected in the level of resource that the EC envisages will be required to implement the regime; the EC papers estimate that implementation of these proposals will involve a total cost of approximately €90 million, including the redeployment or creation of 145 FTE roles.

Practical issues that businesses will need to navigate will include:

- Understanding the circumstances in which subsidy arrangements will, and will not, be regarded as distortive.
 - Article 4 of the draft regulation identifies a “black list” of subsidies that are “most likely” to distort the internal market (e.g. support for failing businesses, unlimited guarantees, direct support for a merger or tender) but there is no safe harbour beyond these provisions; Article 3 indicates only that subsidies below €5 million threshold are “unlikely” to have a distortive effect on the internal market.
 - There is limited guidance on the extent to which other types of subsidy might be regarded as problematic. Article 3 indicates that relevant considerations will include the amount and nature of the subsidy, the market conditions, the level of EU activities of the subsidised business, and the purpose and terms of the subsidy. But there is, for instance, no indication of the extent to which compliance with the principles set out in the GBER, or with subsidy control provisions

that have been agreed as part of trade agreements between the EU and individual states (e.g. the provisions of the UK-EU TCA) might be taken as evidence or as raising a presumption of compliance.

- The interaction of the subsidies regime with the EU merger regulation review. The EC appears to be attempting to align the concept of “concentration” and the time frames for review across the two regimes, but the notification thresholds are different meaning that transactions may qualify for review under one or both regimes. It is not yet clear to what extent the operation of the two regimes might be co-ordinated in practice.
- The interaction of the EC’s review timetable for public procurements (which in the case of an in depth investigation can extend to up to 200 days) with the timetable for contract award. The Regulation proposes that the evaluation of tenders will be able to continue in parallel but that decisions on contract award may not be made before the EC reaches a decision. It is not clear what if any scope there might be to expedite these review timetables in cases of urgency, when procurement timetables might be expected to run faster.
- There also appears to be scope for significant wasted resources both for the EC and the businesses that are subject to these rules - for example, if detailed reviews have to be carried out on multiple bidders for a tender, or in relation to bidders that are subsequently eliminated from a tender competition. More generally, there still appears to be a risk of repeat reviews of the same subsidy arrangements being required where companies are bidding for multiple contracts or engaging in a series of transactions.

Next steps

The proposals will be open for an eight week public consultation. As part of the legislative process there will also be discussions with the European Parliament and the Member States.

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