
Proposed Regulation against Harmful Foreign Subsidies in the European Union



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On 5 May 2021, the European Commission (the “**Commission**”) proposed a legislation that regulates foreign subsidies causing some distortion of competition in the European Union (see [Proposal for regulation](#)).

This major piece of legislation is one of the seven key actions defined in the new EU industrial policy to create and affirm its “*open strategic autonomy*”. Its purpose is to protect the EU through a better control of foreign companies benefiting from foreign subsidies, in particular at a time where the pandemic contributes to make a number of EU companies more vulnerable.

The proposed regulation aims at filling a regulatory gap in the EU and contributes to ensure a fair level playing field for all companies operating in or towards the EU. In the words of Commissioner Vestager: “[...] *this new regulation - together with our State aid rules - will make us the first trading bloc in the world with tools against harmful subsidies, from both inside the Single Market and from Non-EU countries. And that, in turn, will help make our markets more fair and contestable.*”

In fact, this proposal amounts to a control of subsidies granted by foreign countries, in a similar manner as EU companies are subject to State aid control. It complements, among others, the recent EU framework for screening the foreign direct investments in the EU (11 October 2020).

From a policy point of view, the pandemic has accelerated the awareness that the EU must have a solid independent industrial policy, no longer be affected by strategic dependencies, and protect its strategic assets and industries through stricter rules like the proposed regulation.

From a non-EU investors’ point of view, the proposed legislation constitutes a major new regulatory layer that they should seriously consider when contemplating operations and investments in the EU. The Commission will indeed most likely be authorized to control *ex-post* a number of operations.

« Forewarned is forearmed », as they say...

Foreign Subsidies – Wide Scope

The Commission Proposal addresses **foreign subsidies granted to an undertaking engaging in an economic activity in the EU**. A company acquiring control or merging with an undertaking established in the Union, or an undertaking participating in a public procurement procedure is considered to be engaging in an economic activity in the internal market (Article 1).

Further, it provides a definition of the **notion of foreign subsidy**: a financial contribution by a non-EU country conferring a benefit on an undertaking engaging in an economic activity in the EU internal market. Contributions consist in the transfer of funds or liabilities, including grants, loans, loan guarantees, tax incentives, and debt forgiveness. The foregoing of revenues otherwise due amount to financial contributions (Article 2).

The **notion of third country government** includes not only central governments and government authorities, but also foreign public entities whose actions may be attributed to a third country's government as well as any subsidies by private entities for whose actions may be attributed to a third country.

The Commission Proposal defines the concept of **market distortion**: the beneficiary's competitive position in the internal market has been improved as a result of a foreign subsidy which may, actually or potentially, negatively affects competition in the EU (Article 3).

The Proposal lists a number of **indicators** showing the existence of such distortion: the amount and the nature of the subsidy, the market situation and the level of economic activity of the beneficiary on the EU market as well as the purpose and the conditions attached to the foreign subsidy and its use on the European market.

Various categories of foreign subsidies are deemed likely to have anticompetitive effects (Article 4):

- (i) subsidies granted to undertakings likely to go out of business in the short or medium term without any financial aid. This does not apply to subsidies granted in the context of a restructuring plan resulting in a long-term viability of the beneficiary and including a significant contribution of own funds by the latter;
- (ii) subsidies in the form of unlimited guarantees of an unlimited guarantee for debts or liabilities;
- (iii) subsidies directly facilitating the completion of an economic concentration; and
- (iv) subsidies enabling beneficiaries to submit unduly advantageous tenders based on which they would be awarded public contracts.

The Commission Proposal also lays down a **de minimis threshold** of EUR 5 million over any consecutive period of three fiscal years under which foreign subsidies are deemed to have no effects on competition in the market (much higher than the EUR 250,000 in the White Paper).



Balance of Effects and Remedies

The Commission has to balance the negative impact of the market distortions caused by the grant of a subsidy against its possible positive effect, such as the development of an economic activity.

Depending on the outcome of its assessment, the Commission may impose redressive measures or accept commitments, and the nature and level of those redressive measures or commitments (Article 5).

The Commission may impose on beneficiaries various behavioral or structural commitments, including:

- offering access under fair and non-discriminatory terms to an infrastructure acquired or supported by the distortive foreign subsidies unless the right to fair and non-discriminatory access is already provided for by legislation in force in the Union;
- reducing capacity or market presence;
- refraining from certain investments; or
- licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;
- publication of results of R&D;
- divestment of certain assets.

In addition, the Commission may order the parties to a concentration to demerge as well as the repayment of the amount of a subsidy, including an interest rate.

Further, should a beneficiary propose the repayment of a subsidy, it may accept such repayment as a commitment if it can ascertain that the repayment is transparent and effective.

Ex-officio investigations at any time, or ex-ante notification for concentrations and public procurements

The Proposal confers exclusive control over foreign subsidies to the Commission and defines **three different investigation** scenarios:

- (i) Review of foreign subsidies on **the Commission's initiative** (*ex-officio*): The Commission may launch a probe regarding alleged distortive foreign subsidies in any sector of the economy on its own initiative. Such reviews are not limited in scope and may target any instance where foreign subsidies are granted to an undertaking active in the EU market.
- (ii) A prior notification requirement for **concentrations** involving foreign subsidies and meeting two jurisdictional thresholds:
 - the target or at least one of the merging undertakings is established in the EU and generates an aggregate turnover in the EU of at least **EUR 500 million**; and
 - one party has received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than **EUR 50 million**.



The notion of concentration seems to comply with the definition of the EU Merger Regulation on the control of concentrations.

The Commission may request the notification of concentrations not satisfying these thresholds at any time prior to their implementation should it suspect the grant of foreign subsidies over the last three years preceding the transaction

- (iii) A prior notification requirement when participating in **public procurement** procedures. This requirement applies in scenarios where foreign subsidies cause or risk causing a distortion in a public procurement procedure, enabling the beneficiary to submit an unduly advantageous tender in public procurement procedures with an estimated value equal to or above **EUR 250 million**.

Undertakings submitting a tender or a request to participate in a public procurement procedure would be required to inform the contracting authorities or entities of all foreign financial contributions received during a three-year period preceding the notification. Alternatively, undertakings would be asked to confirm in a declaration that they have not received any subsidies (Articles 18-23).

Furthermore, the Commission may launch an investigation when it suspects that the undertaking in question has benefited from foreign financial contributions over the three years preceding the submission of a tender. It must be borne in mind that the review of tenders may be pursued (Article 28).

Important:

- The three types of investigations are **complementary in nature** (Recital 37 and Article 33): in other words, the Commission will be empowered to carry out reviews of **already** implemented concentrations or awarded public contracts on its own initiative (Recital 31);
- Prior notification requirements for concentrations and public procurement procedures may apply even if financial contributions eventually do not qualify as “foreign subsidies” or have no impact on the internal market.

Review Process

The Commission Proposal sets out a two-phase review process:

- (i) **Phase I:** in this preliminary phase, the Commission will assess the existence of a foreign subsidy likely to distort the functioning of the internal market;
- (ii) **Phase II:** should the Commission’s initial review reveal sufficient indications of a foreign subsidy distorting the internal market, the Commission may initiate an in-depth probe.



The Commission Proposal lays down **specific timelines** regarding investigations related to concentrations and public procurement procedures.

- Regarding **concentrations**: preliminary review within **25 days** and in-depth review within **90 working days** from its opening. Investigations in Phase II may be extended by **further 15 working days** where commitments are offered and eventually extended by **up to 20 working days** if requested by the notifying party or the Commission (Articles 23-24).
- For **public procurement**: its preliminary probe within **60 days** and Phase II probe within **200 days** from receipt of the notification. The review period for Phase II probes may be extended “in exceptional circumstances” (Article 29).

The Commission will have far-reaching powers to order **interim measures** and to **request information** from the undertakings concerned, other undertakings, associations of undertakings, Member States or third countries.

It is noteworthy that the Commission will have the powers to carry out **inspections within the EU**, with the assistance of the authorities of the Member States, but also **outside the European Union**, with the consent of the undertakings concerned and of the government of the relevant third country (Articles 12-13).

Redressive measures – Commitments – Fines

The Commission may **impose redressive measures** or accept **binding commitments** by the undertakings concerned in order to remedy the distortion identified.

It may also **prohibit** a concentration.

For concentrations and public procurement, the Commission may impose fines up to 10% the aggregate turnover of the company failing to notify in advance a concentration or its participation to a public procurement as defined above. The fine is limited to 1% of that same turnover when providing misleading or incomplete information.

The Commission may impose fines and periodic penalties in the case of a **breach of the redressive measures** imposed, commitments accepted or interim measures:

- Fines may reach up to 10% of the aggregate turnover of the undertakings concerned in the preceding business year;
- Periodic penalty payments may reach up to 5% of the average daily aggregate turnover of the undertakings concerned in the preceding business year for each working day of delay.

Risks for foreign subsidies granted before the entry into force of the proposed regulation

The Commission Proposal foresees that **subsidies granted prior to the date of application of the proposed regulation** could still be subject to scrutiny in the following circumstances.



The Commission would be entitled to review foreign subsidies granted **within 10 years prior** to date of application of the proposed regulation in cases such foreign subsidies distort the internal market after the date of application of the Regulation.

When notifying concentrations or in the context of public procurement procedures, companies will have to notify all foreign financial contributions granted **over the last three years** prior to the date of application of the proposed regulation. However, the new review mechanism will not apply to (i) concentrations agreed, announced or completed before the date of application of the proposed regulation, nor to (ii) public procurement procedures initiated before the date of application of the proposed regulation.

Next Steps

The Commission Proposal must now go through the EU's ordinary legislative procedure and may be subject to discussions and eventual amendments by the European Parliaments and the Council.

The Commission Proposal is in line with the ongoing trend of a stricter scrutiny by the authorities of several Member States of investments by non-EU investors, which can be witnessed over the past three years. Once entered into force, it will impose stricter transparency obligations to foreign investors.

Investors will need to take into account risks of longer and tougher review process and considerable sanctions for non-compliance with the proposed regulation.

On related topics, please see Janson's blog:

- [COVID-19 - Extended Control over Foreign Direct Investments in the EU](#)
- [The EU Regulation on Foreign Direct Investment Is Now On!](#)
- [Foreign Direct Investments A Future EU Regulation That Matters!](#)

