

# The European Commission's new role in controlling foreign subsidies

## - EU proposal to tackle distortions of competition by foreign subsidies -

Following the 17 June 2020 release of its White Paper on ensuring fair conditions of competition on subsidies from foreign countries (COM(2020) 253 final) and an expansive consultation process with stakeholders, on 5 May 2021 the European Commission published a proposal for a regulation on foreign subsidies that distort the Internal Market.

This Proposal aims to complement existing Union instruments with new tools to effectively deal with distortions in the Internal Market caused by foreign subsidies and ensure a level playing field.

### Subject matter and scope: "Distortive foreign subsidy"

The proposal would empower **the Commission**, as a "one-stop shop", to investigate foreign subsidies and impose prohibitions or remedies in relation to those foreign subsidies granted to companies operating in the EU Internal Market, which may cause distortions of competition. Such distortions may arise with respect to any economic activity, and in particular in concentrations and public procurement procedures.

**Foreign subsidy:** A foreign subsidy is defined as a financial contribution which is made by a third country benefiting an undertaking and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries. A **financial contribution** is defined by the proposal as being granted by public authorities (central and local) of a third country or foreign public or private entities whose actions can be attributed to the third country. A financial contribution covers (i) the transfer of funds or liabilities, (ii) the foregoing of revenue that is otherwise due or (iii) the provision or purchase of goods or services.

**Distortions on the Internal Market:** A distortion on the Internal Market shall be deemed to exist when a foreign subsidy improves the competitive position of the beneficiary. Certain indicators help in assessing whether there is a distortion on a case-by-case basis. The proposal lists such indicators as being, for example, the amount and nature of the subsidy, the situation of the undertaking and the markets concerned, the level of the economic activity of such undertaking concerned, the purpose and conditions attached to the foreign subsidy and its use on the Internal Market.

On the one hand, a foreign subsidy the total amount of which is below EUR 5 million over any consecutive period of three fiscal years is considered unlikely to distort the Internal Market.

On the other hand, the proposal specifies categories that would likely distort the Internal Market; namely foreign subsidies granted to firms in financial difficulty, unlimited guarantees, foreign subsidies directly facilitating concentrations and foreign subsidies enabling advantageous tenders.

## A regulatory tool made of three pillars

The Commission shall have the power to investigate financial contributions from foreign public authorities to companies operating in the Internal Market. If the Commission were to identify distortive foreign subsidies, it could take action against these distortive effects as necessary.

For this purpose, the proposal suggests the introduction of three instruments - two notification-based procedures and one general market investigation tool.

The proposal maintains the overall structure of the White Paper. However, the two notification-based instruments for concentrations and public procurement are more focused on the crucial cases. At the same time, the flexibility of *ex officio* reviews is maintained.



### Ex ante notification of concentrations

This notification-based tool aims at assessing concentrations (i.e. mergers, acquisitions of control and the creation of joint ventures) where

- i. the EU turnover of the acquired undertaking or at least one of the merging undertakings is **EUR 500 million** or more AND
- ii. the undertakings concerned received more than **EUR 50 million** from third countries in aggregate financial contributions in the three calendar years prior to the notification.



### Ex ante notification in public procurement procedure

This notification-based tool aims at assessing bids in public tenders with a contract value greater than **EUR 250 million**.



### Ex officio review of foreign subsidies

For all other market situations as well as for concentrations and public procurement procedures for values below the thresholds above, the Commission aims to establish a general possibility of *ex-officio* review of foreign subsidies.

## Scope of investigative and decisional powers of the Commission

### ■ Information requests / Inspections:

- The Commission may request information from the undertaking(s) concerned, associations of undertakings, Member States and third countries concerned.
- Additionally, the Commission would be entitled to carry out inspections within and outside the EU, the latter only with the consent of the undertaking(s) concerned and of the government of the relevant third country. Such inspections shall give the Commission the power, *inter alia*, to enter any premises and land of the undertaking concerned, examine books and other business records and make/request copies and interview representatives or employees.

### ■ Interim measures:

- The Commission may impose interim measures, if there are indications of (i) a foreign subsidy distorting the Internal Market and (ii) a serious risk of substantial and irreparable damage to competition on the Internal Market.

#### ■ Sanctions:

- If the beneficiary and the third country refuse to cooperate in the investigation, the Commission can adopt a decision based on facts available.
- Fines and periodic penalty payments could be imposed if an undertaking intentionally or negligently fails to comply with requests for information or inspections within the EU. Fines shall not exceed 1% of the worldwide turnover of the company group concerned and the periodic penalty shall not exceed 5% of the company group's average daily turnover.

## Remedies

The proposal provides for different remedies to reduce the distortive effects of foreign subsidies:

As regards the **ex officio general review of foreign subsidies**, the Commission may impose redressive measures or accept binding commitments from the undertaking(s) concerned (e.g. repayment of the foreign subsidy, divestments of certain assets, reduction of capacities or market presence, offering access to a certain infrastructure, prohibition of a certain market behaviour). Those commitments and redressive measures shall fully and effectively remedy the distortion in the Internal Market.

As regards **concentrations** and **public procurement** procedures the Commission may

- approve the concentration / issue a no objection decision;
- make the concentration / the award subject to commitments offered by the undertaking(s) concerned or
- prohibit it.

In addition, the Commission may impose the following fines:

- **1%** of the company group's aggregate global turnover in cases of incorrect or misleading information
- **10%** of the company group's global turnover in case of failure to notify, implementation before clearance, or implementation of a prohibited transaction.

Moreover, with regard to concentrations that have already been implemented (i) in breach of commitments or (ii) that are found to distort the Internal Market the Commission would be entitled to require the undertakings concerned to dissolve the concentration or order any other appropriate measure to ensure that the undertakings concerned dissolve the transaction or take other restorative measures.

## Timeframe

The general investigation procedure for third country subsidies includes for all aforementioned tools a preliminary examination and, where there is evidence of a subsidy, an in-depth investigation.

For concentrations and public procurement procedures the proposal defines the following specific timelines:

As regards **concentrations** the envisaged timeframe is in line with that of the EU Merger Regulation. Phase 1 starts from complete notification and lasts 25 working days. If the Commission opens an in-depth investigation (Phase 2) the review period comprises 90 working days from its opening, extended by 15 working days in cases where commitments are offered and possibly extended by up to 20 working days if requested by the notifying undertaking or by the Commission.

As regards **public procurement procedures** the Commission shall carry out and complete a preliminary review within 60 days after it receives the notification. In case of an in-depth investigation the Commission shall adopt a decision no later than 200 days after receipt of the notification. This time limit may be extended in case of exceptional circumstances after consultation with the concerned contracting authority.

## What is next?

The European Parliament and the Member States will now discuss the Commission's proposal within its ordinary legislative procedure in order to then adopt a final version of the regulation.

However, feedback on the proposal can be submitted in a public consultation until 6 July 2021 by all interested parties.

Once adopted, the regulation will be directly applicable throughout the EU.

## Contacts



**Dr. Michael Brüggemann**

Partner, Dusseldorf  
+49 211 8387-450  
m.brueggemann@taylorwessing.com



**Stephan Manuel Nagel**

Partner, Dusseldorf  
+49 211 8387-450  
s.nagel@taylorwessing.com



**Dr. Marco Hartmann-Rüppel**

Partner, Hamburg  
+49 40 36803-127  
m.hartmann-rueppel@taylorwessing.com



**Dr. Melanie Niehren**

Senior Associate, Dusseldorf  
+49 211 8387-175  
m.niehren@taylorwessing.com