Third country subsidies – levelling the playing field

EU reaches political agreement on “Foreign Subsidies Regulation” introducing new investigation and notification tools for the European Commission

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On 30 June 2022, the European Parliament and EU Member States reached a political agreement on the Foreign Subsidies Regulation (FSR). The European Commission will be able to initiate investigations six months and twenty days after the FSR will have entered into force, the notification obligations for the companies will become effective three months later. The FSR is expected to be finalized and to enter into force relatively soon.

Background

Subsidies granted by Member States are subject to in-depth scrutiny by the Commission to guarantee a level playing field within the Single Market. Conversely, subsidies granted by non-EU governments go virtually unchecked. These foreign subsidies have the potential to distort competition in the EU single market. The new FSR gives the Commission ample powers to investigate and control financial contributions granted by non-EU public authorities. It shall contribute to a true level playing field as regards foreign subsidies in Europe.

Scope of the proposed regulation

A foreign subsidy is a financial contribution by a third country which confers an economic benefit to a specific undertaking or industry active on the internal market. Foreign subsidies may distort the internal market where they are liable to improve the competitive position of the undertaking concerned and negatively affect competition on the internal market. Examples of such distortions are, inter alia, subsidies granted to ailing undertakings, unlimited guarantees for debts or a foreign subsidy directly facilitating a concentration.

To tackle the issue, the Commission’s toolbox will be extended by three new tools: (i) general market investigations, (ii) separate notifications of concentrations and (iii) additional notifications in public procurements.

Market investigations

The Commission may on its own initiative (ex officio) examine information from any source regarding alleged distortive foreign subsidies. If any information suggests a distortion, it will conduct a preliminary review and can take the decision to initiate an in-depth investigation. These ex officio powers shall allow the Commission to focus on the most distortive subsidies. Foreign subsidies below a de-minimis threshold of either EUR5 million or EUR4 million, depending on the final version of the proposal, are unlikely to be distortive.

For the investigation, the Commission will seek all the information it considers necessary. It may require an undertaking,
as well as Member States and even third countries, to provide all necessary information. If an undertaking fails to cooperate or provides flawed information, the Commission can impose significant fines. Furthermore, the Commission may conduct on-site inspections of undertakings. Inspections can be carried out at locations outside the EU, if the undertaking concerned has given its consent and the government of the third country has agreed upon its official notification.

At the end of an in-depth investigation, the Commission can take the decision to impose redressive measures or, if the undertaking concerned offers commitments, make these commitments binding.

It is noteworthy that the Commission’s review powers will retroactively extend to foreign subsidies granted up to five years before the entry into force of the FSR, if these subsidies still cause distortions in the internal market.

The Commission can also initiate a more general market investigation of a particular sector, for a particular type of economic activity or a particular subsidy instrument and use the information obtained in the investigation within the above-described procedure.

Notifications of concentrations and public procurements

The notification tools apply in two cases: Where a subsidized foreign investor intends to acquire an EU target company (1.) or where a subsidized undertaking participates in an EU public procurement procedure (2.).

1. Undertakings will have to notify concentrations

- in the case of an acquisition where (i) the target company or one of the merging parties is established in the EU and generates an EU turnover of at least EUR500 million and (ii) these undertakings concerned received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than EUR50 million;
- in the case of a joint venture, (i) either the joint venture or one of its parent companies need to be established in the EU and generates an EU turnover of at least EUR500 million and (ii) these undertakings concerned received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than EUR50 million.

A concentration arises after a change of control resulting from either a merger or an acquisition. The definitions of a concentration, control, and the calculation of turnover follow broadly the definitions in the Merger Control Regulation 139/2004 (ECMR)\(^1\).

Notifiable concentrations must be notified prior to their implementation. After the Commission receives the notification, it can initiate an in-depth investigation as described above. Also, the statutory time periods for the investigation (preliminary and in-depth) are aligned with the time periods under the ECMR, i.e. 25 and 90 working days, respectively. After its investigation, it has the right to adopt one of the following decisions: (i) a decision with commitments, (ii) a no objection decision or, (iii) a decision prohibiting the concentration. Commitments and redressive measures include but are not limited to reducing capacity or market presence, divestment of certain undertaking or publication of results of R&D.

2. Undertakings must notify tenders in public procurements procedures where (i) the estimated contract value amounts to at least EUR250 million and (ii) the bid involves a foreign financial contribution above a minimum amount per third country with the final amount still under legislative discussion.

Foreign subsidies likely to distort a public procurement procedure are those which enable undertakings to submit tenders that are unduly advantageous in relation to the works, supplies, or services concerned. When submitting a tender in a public procurement an undertaking must notify the contracting authority of all foreign financial contributions above the de minimis threshold received in the three years preceding the notification. The final de minimis threshold will likely be EUR4 million to EUR5 million in the FSR. If undertakings did not receive foreign contributions meeting this threshold, they shall declare this to the contracting authority. This obligation extends to main subcontractors and main suppliers. Undertakings which do not submit such information or declaration shall not be awarded the contract.
The contracting authority must submit the notification to the Commission without delay. The Commission carries out a preliminary review no later than 20 to 60 days after it received the notification. The final time limit is yet to be decided and eventually published in the official journal. If the Commission decides to initiate an in-depth investigation within that period, it may adopt a decision closing the in-depth investigation no later than 110 to 200 days after it received the notification. The final time limits will be published in the official journal. If in a public procurement procedure any undertaking submitted a notification, the contract shall not be awarded before the expiry of the time limit for preliminary investigation by the Commission.

Failure to notify in any of the two scenarios can lead to significant fines of up to 10% of aggregate turnover, as well as recurring penalty payments.


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