

# EUROPEAN UNION CREATES LEVEL PLAYING FIELD FOR EU AND NON-EU COMPANIES HAVING RECEIVED FOREIGN SUBSIDIES

## EUROPEAN CO-LEGISLATORS REACH A PROVISIONAL POLITICAL AGREEMENT ON THE FOREIGN SUBSIDIES INSTRUMENT

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### **EU Antitrust, Competition, and Trade Regulation Alert**

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On 30 June, the Council of the European Union (Council) and the European Parliament (Parliament) reached a provisional political agreement on the regulation on foreign subsidies distorting the internal market<sup>1</sup> (Regulation). As of 1 July, the agreed text has not yet been made publicly available.

The Regulation was first presented by the European Commission (Commission) in May 2021, with the aim to address the potential distortive effect of foreign subsidies in the EU single market. The Regulation's objective is to eliminate the regulatory gap whereby subsidies provided by non-European Union (EU) countries are not subject to the same thorough control as subsidies granted by EU member states.

Subsidies granted by the EU member states are not only subject to state aid control but also to any other EU law applicable guaranteeing fair competition for companies operating in the single market (competition instruments as well as public procurement and trade defense ones). Subsidies from non-EU countries, however, are not subject to the same applicable rules, thereby creating a commercial advantage for foreign state subsidized companies over European companies.

### **MAIN PROVISIONS OF THE REGULATION**

The Regulation will apply to undertakings operating in the EU single market having received subsidies granted by a non-EU government. Following the inter-institutional negotiations, state-owned companies are also explicitly included within the scope of the Regulation.

The Regulation introduces three different tools allowing the Commission to investigate non-EU subsidies granted to companies operating in the EU single market. In first place, the Regulation enacts two notification-based tools: a) one to investigate concentrations (i.e., mergers and acquisitions), in which a financial contribution has been provided to the buyer by a non-EU government; and b) the other to investigate bids in public procurement involving bidders who received a financial contribution by a non-EU government. Both of these notification tools are operating ex-ante, as the concentration in question or the award of the public contract to the bidder cannot proceed until the Commission reviews the notification. They will be applied when the concentration or public

procurement procedure reaches a certain threshold. In the case of concentrations, the notification obligation is triggered when the EU turnover of the company to be acquired (or the turnover of at least one of the merging parties) reaches €500 million or more. For public procurement procedures, the notification obligation triggers when the estimated value of the procurement is €250 million or more.

The third tool set up by the Regulation allows the Commission to investigate all other market situations, as well as concentrations or public procurement procedures that have not reached the threshold for the ex-ante notifications, in case there is a possibility that a non-EU subsidy provided to a company operating in the EU would be distorting the EU single market. This third tool operates as an ex-post mechanism where the Commission can start its investigation on its own initiative and may request ad-hoc notifications.

However, the Regulation enacts a time limit for the Commission to proceed with these ex officio investigations for past subsidies. The Commission will only be allowed to investigate foreign subsidies provided up to five years before the entry into force of the Regulation where the foreign subsidies keep distorting the single market even in the period after the Regulation entered into force. The original Commission's proposal for the Regulation also subjected ex officio investigations to a limitation period of ten years, starting on the day on which a foreign subsidy is granted to the company concerned. It remains to be seen whether this limitation, along with limitation periods for imposing fines and periodic payments, will remain unchanged also in the final text of the Regulation.

## **ENFORCEMENT OF THE REGULATION**

The Regulation provides exclusive enforcement competence to the Commission. Nonetheless, EU member states will be kept informed on a regular basis and will be involved in the decisions adopted while applying the Regulation, acting through an advisory procedure.

Should the Commission observe that the subsidies granted by non-EU governments are distortive, it will be able to apply redressive measures to avoid the distortion in the market or will negotiate and accept commitments from the undertaking to rectify the situation.

The Commission will have to publish guidelines on how it decides whether a foreign subsidy is considered distortive or not and its procedure to perform the balancing test, i.e., the tool used to assess whether the relevant foreign subsidy's distorting effect in the market outweighs the positive effects of such subsidy. This will provide additional legal certainty and transparency to the process.

Furthermore, companies will also have the possibility to consult the Commission to check whether they should disclose the foreign subsidy received and if they are subject to any other obligation provided by the Regulation.

## **CONCLUSION**

The Regulation through its different tools ensures that EU and non-EU subsidies are put at the same level of scrutiny in order to ensure fair competitiveness within the internal single market.

The enforcement of the provisions of the Regulation will be performed at European level, since the Commission has been granted exclusive competence on the matter. Nonetheless, EU member states will still participate by advising the Commission during its case assessment via an advisory procedure.

## **Next Steps**

The Council and the Parliament will need to formally approve the provisional political agreement, after which the Regulation will be published in the EU's Official Journal and will enter into force 20 days after its publication. The Commission expects the Regulation to enter into force mid-2023.

## FOOTNOTES

<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market

## KEY CONTACTS



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