

EU approves new regulation on foreign subsidies

The European Parliament and the Council have approved [Regulation 2022/2560 on foreign subsidies distorting the internal market](#) (“Regulation”), which the Official Journal of the European Union published on 23 December 2022. The Regulation includes a [three-fold mechanism](#) that will allow the European Commission (“Commission”) to monitor [third-country subsidies](#) granted since 12 July 2018 to [companies operating in the European Union](#). The Regulation will not apply until [12 July 2023](#), giving the companies to which it applies ample time to identify which of their subsidies may come under the European Commission’s scrutiny, in particular if they plan to acquire companies or participate in public procurement procedures in the European Union (“EU”). Companies that consider that their competitors have received foreign subsidies that give them an unfair competitive advantage may also alert the Commission.

1. BACKGROUND

The Regulation has formally been approved more than two years after the first draft was published. It allows the Commission to control third-country subsidies to companies operating in the EU. In doing so, the EU aims to eliminate the asymmetry in how Member State aid and foreign subsidies are controlled. While the former is subject to significant regulatory limitations, foreign subsidies have until now generally eluded the EU’s control, potentially distorting the internal market’s level playing field.

The Regulation includes three control instruments: (i) a general one for foreign subsidies; (ii) a specific one for acquisitions supported by foreign subsidies, under which acquisitions by companies whose third-country public funds exceed specific thresholds must be notified; and (iii) a specific instrument to control foreign subsidies that enable companies to participate in public tenders in the EU, under which the subsidies they receive over certain thresholds must be notified.

The Regulation will be effective from 12 July 2023, while the notification obligations will begin to apply three months later (i.e. on 12 October 2023). However, the Commission will be able to examine subsidies received since 12 July 2018 if they still distort the internal market.

2. PRACTICAL IMPLICATIONS

As our previous newsletters on the subject explained,¹ the Regulation could significantly affect foreign companies that operate in the EU, in particular those that receive funding from third countries, such as China, whose presence in the EU is increasing. It could especially affect entities such as investment funds that regularly acquire new companies, as well as companies that participate in tender procedures, who will have the additional burden of having to check whether they and their subcontractors or suppliers may have received subsidies in the previous three years.

Both the Regulation and State aid rules define “foreign subsidy” quite broadly. This term not only includes direct subsidies, but also measures such as access to finance at reduced interest rates, tax incentives, debt write-offs or the purchase of goods or services by third States. Also, while companies’ notification obligations are limited to concentrations and public procurement procedures above certain thresholds, under the general mechanism, the Commission will be able to examine any subsidy exceeding EUR 200,000 over a period of three years.

3. CONTROL MECHANISMS

3.1 GENERAL CONTROL INSTRUMENT

The first instrument is a general one to identify foreign subsidies. While the Commission can analyse any subsidy above EUR 200,000 over a three-year period, in line with the *de minimis* threshold contained in State aid rules the Regulation states that subsidies not exceeding EUR 4 million are unlikely to cause distortion.

But aid exceeding this amount (except as explained below) and Member State aid do not need to be notified, making this an *ex post* control instrument that enables the Commission to act if it becomes aware that a foreign subsidy exceeding this amount has been granted.

The Commission’s analysis will be structured in two phases: a preliminary examination and an in-depth investigation. Although these phases have no time limits, the Commission is expected to be able to decide within 18 months of the start of the in-depth investigation.

3.2 MERGER CONTROL INSTRUMENT

The second instrument aims to control mergers that have been made possible by foreign subsidies, through a system of compulsory notification under which the transaction’s implementation is suspended until it is authorised. Few transactions that meet the notification thresholds set out in the Regulation are expected not to reach the European merger control thresholds included in Regulation 139/2004 and require notification in a Member State under national merger control rules. The aim has been for the proposed regime to align with the one in Regulation 139/2004, which will help identify which transactions need to be notified and enable e both procedures to be handled simultaneously. The proposed deadlines

¹ Our newsletters of [19 June 2020](#) and [7 May 2021](#) analysed the White Paper on Foreign Subsidies published on 17 June 2020 and the Proposal for a Regulation on Foreign Subsidies published on 5 May 2021.

of 25 and 90 working days for the preliminary examination and in-depth investigation match those set for the traditional Phase I and Phase II merger control analysis. Similarly to Regulation 139/2004, the Regulation includes the possibility of extending those terms. Furthermore, although the Regulation does not state this, the Commission has already announced that it expects to maintain the merger control pre-notification of transactions as a good practice.

The Regulation establishes quantitative thresholds based on the acquired company's turnover and the amount of the subsidy. A transaction must be notified if

- the acquired undertaking, at least one of the merging undertakings, or the joint venture (depending on how the transaction is structured) is established in the EU and has a turnover of EUR 500 million or more within that geographic area; and
- the acquiring undertaking, the acquired undertaking, the merging undertakings, the joint venture or its parent companies were granted a financial contribution of EUR 50 million or more from third countries in the previous three years.

The Commission may also require that concentrations that do not meet the abovementioned thresholds be notified, as long as they have not been implemented, if it suspects that the companies involved may have benefitted from foreign subsidies during the three-year period. The Commission also reserves the right to examine, through the first instrument, subsidised concentrations even after they have been implemented, which will also require examining transactions in which the abovementioned entities have received subsidies exceeding EUR 4 million.

3.3 PUBLIC PROCUREMENT CONTROL INSTRUMENT

The final instrument aims to ensure that companies that have received third-country subsidies do not submit unduly advantageous bids in public procurement procedures. As in the previous case, notification is subject to two cumulative thresholds:

- the contract's value is EUR 250 million or more and the company bids for lots valued at a minimum of EUR 125 million; and
- the company participating in the tender (including its subsidiaries without commercial autonomy and its holding companies), or its main suppliers or subcontractors (those whose contribution exceeds 20% of the value of the tender submitted), have received a foreign financial contribution of at least EUR 4 million in the previous three years.

The Commission can require notification of subsidies that do not meet this threshold as long as the contract has not been awarded, and it can review contracts that have already been awarded *ex post* under the general instrument. However, if during this *ex post* review the Commission considers that the internal market has been distorted, this will neither affect the contract's award nor require its termination.

To help the Commission identify and analyse non-notifiable subsidies, the Regulation requires companies not obliged to notify to submit a declaration listing the foreign contributions received, which the contracting authority will send to the Commission.

The Commission will then have 20 working days for the preliminary examination of subsidies, which could be extended by up to ten additional working days. It must then complete its in-depth investigation within 110 working days from the notification, which may be extended by up to 20 additional working days. The public tender procedure can continue during these periods, but the contracting authority may not award the contract.

4. FOREIGN SUBSIDY ANALYSIS

4.1 ANALYSING INTERNAL MARKET DISTORTION

The Commission's analysis will focus on whether a subsidy can distort the internal market by giving the recipient undertaking an undue advantage that improves its competitive position. This analysis must be based on elements such as the subsidy's amount, type and purpose, the undertaking's situation and size and the market's characteristics. The Commission's analysis must also take into account whether the subsidy has had a positive impact that may outweigh the resulting negative effects. The Regulation links such positive impact to carrying out an economic activity that contributes to achieving strategic objectives such as protecting the environment or promoting R&D.

4.2 INVESTIGATION MECHANISMS

The Regulation includes mechanisms to reduce the difficulties the Commission is expected to face in gathering information on these subsidies (to which the Commission may also have recourse in the framework of the specific instruments for merger control and public procurement). In particular, it includes mechanisms that the Commission commonly uses in the antitrust field, such as sending requests for information and carrying out inspections. It also includes fines of up to 1% of turnover in the preceding financial year if the undertaking concerned fails to comply with such requests, provides incorrect information or does not allow inspections to take place. It also includes periodic penalties of up to 5% of daily turnover for each day of delay.

If the Commission is unable to obtain information because a third party or country – or the company that received the subsidy – fail to cooperate, the Regulation allows the Commission to rely on the “best information available”. More importantly, if the company does not provide the information required to determine whether a financial contribution has conferred an advantage, the company may be considered to have actually obtained that advantage.

4.3 REDRESSIVE MEASURES

If the Commission concludes that the subsidy in any event distorts the internal market, it may impose remedies or accept commitments offered by the companies. These measures may include structural remedies (e.g. divesting certain assets or reducing production capacity or market presence), or behavioural remedies (e.g. disclosing R&D results or an obligation to grant access to certain infrastructure), as well as reimbursing the subsidy. In subsidised acquisition cases, the Commission may also prohibit the concentration or order its dissolution if it has already taken place. Similarly, for cases of subsidies that facilitate participation in public procurement procedures, the Commission may prohibit the

contracting authority from awarding the contract to the economic operator that received the subsidy. But this prohibition may only be imposed if no notification was required and the contract was not yet awarded.

Failing to comply with these measures may be sanctioned with fines of up to 10% of the turnover of the undertaking concerned in the preceding business year, as well as periodic penalty payments of up to 5% of the daily turnover per day of delay in complying. Interim measures may also be adopted during the procedure to avoid causing serious and irreparable damage. Failing to notify a concentration or a public bidding procedure when the thresholds set out in the Regulation are reached carries a fine of up to 10%.

5. CONCLUSION

The Regulation complicates foreign companies' operations in the EU, especially in the context of mergers and public procurement procedures. Companies will have until 12 July 2023 to prepare for the application of this new regulation and will have to start notifying subsidies received for mergers and public procurement procedures as from 12 October 2023.

Companies should start identifying potential subsidies received since 12 July 2018 that the Commission may be interested in and that could, among other things, result in them being excluded from future public procurement procedures, being prevented from participating in future mergers or their operations in the EU being limited. In merger cases, the additional notification obligations in the Regulation should also be taken into account, as well as the time it takes to fulfil them, which will be uncertain until we gain more experience on how the Regulation is being applied in practice. While the Regulation contains time limits for formal investigations, it is unknown, for example, how long the pre-notification period may take.

But the Regulation is not just important for foreign companies. Both EU and non-EU companies can also seek redressive measures by drawing the Commission's attention to competitors of theirs who they believe are receiving subsidies that give them an unfair competitive advantage.

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