

EU, COMPETITION & PROCUREMENT

## The EU Foreign Subsidies Regulation – *European Commission oversight of non-EU subsidies*

On 30 June 2022, the Council and the European Parliament reached a provisional political agreement on the regulation on foreign subsidies distorting the EU's internal market (**Regulation**). The Regulation will allow the European Commission (**Commission**) to review subsidies granted by non-EU countries to companies and industries.

The Regulation, due to come into force in mid-2023, will represent an additional and complex regulatory hurdle for all parties (whether or not based in the EU) before they can: (a) complete certain acquisitions in the EU (in addition to the pre-existing EU and Member State merger control and foreign direct investment (**FDI**) requirements), and (b) participate in certain public procurement tenders. There will also be a general market investigation tool allowing the Commission to review smaller acquisitions and public procurement processes as well as other situations involving potentially distortive foreign subsidies.

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## The Regulation

Subsidies granted by Member States are subject to State aid control under Articles 107-109 of the Treaty on the Functioning of the European Union. However, until now, there has been no EU instrument to review the effect in the EU of subsidies granted by non-EU countries. To address this, the Commission tabled a proposal for the Regulation on 5 May 2021. The Regulation aims to remedy distortions of competition in the EU created by subsidies granted by public authorities of non-EU countries to companies operating in the internal market. Companies affected by the Regulation can include both non-EU companies and companies based in the EU.

## What is a foreign subsidy under the Regulation?

A foreign subsidy under the Regulation exists where a non-EU country, including through a central government or foreign public entities, provides a “financial contribution” which confers a benefit to a company engaging in an economic activity in the internal market and which is limited to an individual company (or industry) or to several companies (or industries).

Financial contributions can take different forms, including the:

- transfer of funds or liabilities (including capital injections, grants, loans, loan guarantees, fiscal incentives, setting-off of operating losses, compensation for financial burdens imposed by public authorities, debt-forgiveness, debt-to-equity swaps or rescheduling), and
- foregoing of revenue that is otherwise due.

The Regulation establishes a framework for the Commission to examine economic activities which benefit from such a foreign subsidy and which may distort competition in the internal market.

The Commission considers that, in many cases, such subsidies would be problematic if granted by Member States when assessed under the EU State aid rules.

In this regard, the Regulation aims to ensure fair competition between all companies - both EU and non-EU - operating in the internal market.

### How will the Regulation enable the Commission to review non-EU subsidies?

The Commission will have three new tools under the Regulation: two notification-based tools and a general market investigation tool.

# 1. The two notification-based tools

## A. Notification of M&A affected by foreign financial contributions

Under the Regulation (and separate from any obligation to notify the Commission under the EU Merger Regulation or under Member State merger control systems), there will be an obligation for companies to notify the Commission of certain acquisitions or full-function JVs (i.e. “concentrations”) where:

- a. at least one of the merging companies, the acquired company or the JV is established in the EU and generates an aggregate EU turnover of at least €500m, and
- b. all the companies involved in the concentration were granted, from non-EU countries, combined aggregate financial contributions in the 3 financial years prior to notification of more than €50m.

The definitions and procedures for notification reflect those under the EU Merger Regulation. The assessment and time-periods for review are similar to those under the EU Merger Regulation (i.e. broadly, 25 working days after receipt of a complete notification if reviewed in Phase 1 and an additional 90 working days if reviewed in Phase 2).

The Commission can approve the concentration in Phase 1 (i.e. where there are no or no distortive foreign subsidies). The Commission may be concerned about foreign subsidies in Phase 1 and then refer the concentration to an in-depth Phase 2 review where the Commission can approve (with or without commitments) or prohibit the concentration i.e. where the Commission finds that the foreign subsidy distorts the internal market.

The Commission will also have a significant “call-in” power regarding sub-threshold concentrations. The Commission may request the prior notification of any concentration which is not a notifiable concentration (as described above) at any time prior to its implementation where the Commission suspects that the companies involved may have been granted foreign subsidies in the 3 years prior to the concentration. That concentration is then regarded as notifiable under the Regulation.

## B. Notification of foreign financial contributions in EU public procurement procedures

Under the Regulation, participants will be obliged to notify contracting authorities of tenders in public procurement procedures where the estimated value of the public procurement procedure is at least €250m and the economic operator (including

subsidiaries and certain subcontractors and suppliers) was granted aggregate financial contributions in the 3 financial years prior to notification of at least €4m per non-EU country.

The contracting authority sends the notification to the Commission for assessment. The Commission then carries-out a preliminary review in Phase 1 in up to 60 days after receipt of a completed notification. If it is then referred to an in-depth Phase 2 review, the Commission will adopt a decision closing the in-depth investigation in up to 200 days after it received the notification. The Commission can issue a no-objection decision, a commitments decision or a decision prohibiting the award of the contract to the participant.

During the Commission investigation, the procurement process can continue, but the contract cannot be awarded to a participant who notified a foreign financial contribution unless and until the Commission issues a favourable decision. If no notification is made, the participant must declare to the contracting authority that it did not receive any applicable foreign financial contribution.

The Commission can also request notifications of foreign financial contributions received by a company in a sub-threshold public procurement procedure.



**Can the affected concentration be completed or the relevant bidder be awarded the bid before Commission approval?**

No – the notification obligations are suspensory. The affected concentration cannot be completed and an investigated bidder in a public procurement procedure cannot be awarded the contract unless and until approved by the Commission.

**When would a foreign subsidy be regarded by the Commission as having distorted the internal market?**

A foreign subsidy would be regarded by the Commission as having distorted the internal market if it is liable to improve the competitive position of the company concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market.

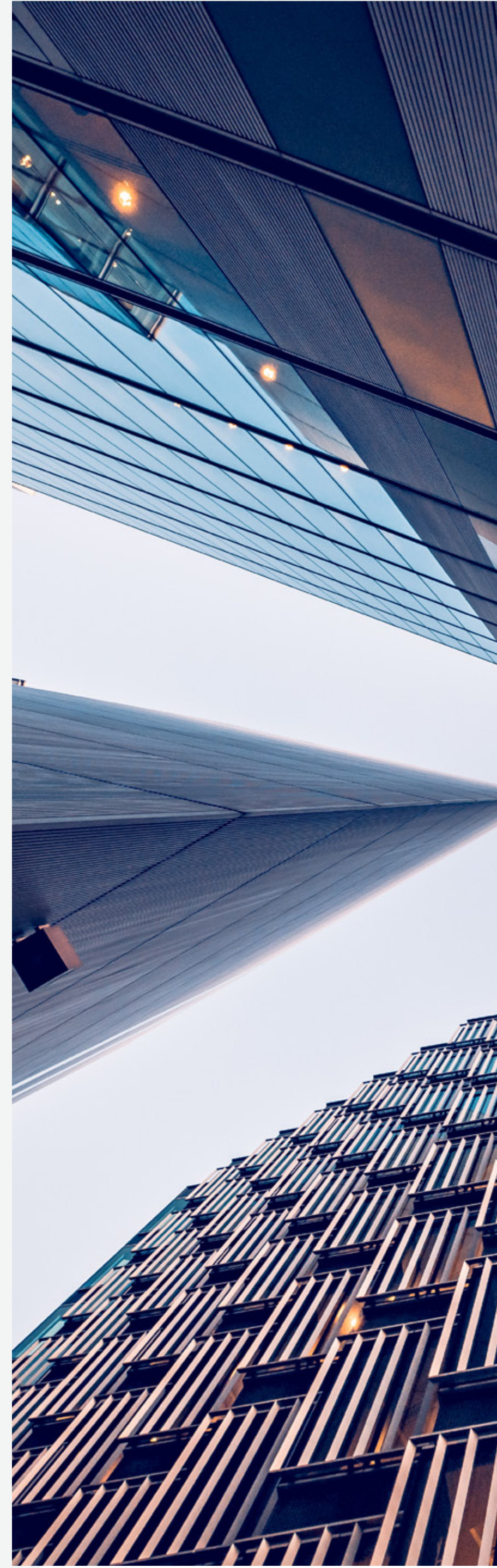
**If a foreign subsidy would distort competition, what steps can the Commission (or the parties) take?**

If the Commission finds that a foreign subsidy exists and that it would distort

competition, the Commission then carries-out a balancing test. This assesses the balance between the positive and negative effects of a foreign subsidy. If the negative effects of the foreign subsidy outweigh the positive effects, the Commission can impose “redressive” measures (including structural and behavioural measures) to remedy the distortion on the internal market. The company concerned may also offer commitments to the Commission to remedy the distortion.

The Regulation lists a number of possible measures. One measure includes the Commission requiring that access be granted under fair, reasonable and non-discriminatory conditions to an infrastructure that was acquired or supported by a distortive foreign subsidy. Another possible measure under the Regulation is the repayment of the foreign subsidy (including an appropriate interest rate).

The Commission can also carry-out inspections of companies involved (after having given them notice) regarding foreign subsidies. Member State competition authorities (e.g. the Competition and Consumer Protection Commission in Ireland) can assist the Commission in such inspections.



**Are there sanctions for breach of the notification obligations under the Regulation?**

Yes - the Commission can impose fines of up to 10% of aggregate turnover on companies that breach the obligation to notify a concentration under the Regulation (or complete the concentration prior to Commission approval). In addition, the Commission can impose fines of up to 10% of aggregate turnover on companies that breach the obligation to notify a subsidy in accordance with the public procurement procedure under the Regulation.

**Is there a de minimis threshold for foreign subsidies?**

Yes. A foreign subsidy to a company is “unlikely” to distort the internal market if its total amount does not exceed €4m over any consecutive period of 3 years. A foreign subsidy to a company “shall not be considered” to distort the internal market if its total amount is not more than the de minimis aid under Regulation 1407/2013 per non-EU country over any consecutive period of 3 financial years (i.e. €200k).

## 2. The Commission's general market investigation power

The Regulation also enables the Commission to review, on its own initiative (i.e. “ex officio”), situations where it suspects that a distortive foreign subsidy may be involved. In this regard, the Regulation grants the Commission powers to gather information necessary for its review including:

- sending information requests to companies,
- conducting fact-finding missions and inspections, and
- launching market investigations into specific sectors or types of subsidies.

Failure by a company involved to comply with an information-gathering requirement by the Commission can lead to fines of up to 1% of turnover.

The Commission can impose interim measures in relation to such subsidies. On conclusion of its review, the Commission can impose redressive measures, accept commitments or adopt a no-objection decision.

### How far back can the Commission look?

The Commission can investigate subsidies granted up to 5 years before the entry into force of the Regulation and distorting the internal market after its entry into force.

### Who will apply the Regulation?

The Commission will be exclusively competent to enforce the Regulation (though Member States will, for example, be kept informed and will be involved, through the advisory procedure, in decisions adopted under the Regulation). The Regulation is to be complemented by implementing rules.

### What are the next steps for the Regulation and when is it expected to come into force?

The Regulation will enter into force once it is formally adopted by the Council and the Parliament and published in the Official Journal. The Regulation will be directly applicable, across the EU, six months after its entry into force. The Commission has stated that it expects that the Regulation will apply by mid-2023.

## Comments

Once in force, the practical application of the Regulation will not be without its uncertainties and challenges (e.g. the identification of relevant concentrations (including the “call-in” feature for smaller concentrations) and tenders for review, information-gathering outside the EU, enforcement of the Regulation outside the EU and the application of the tests for determining when there is a distortive foreign subsidy).

Given the subsidy “look-back” provisions under the Regulation, subsidies granted by non-EU countries before the Regulation comes into force will become relevant. It’s tempting to think that the pre-existing State aid assessment system under the EU rules will largely be replicated in applying the Regulation but that discounts the probable difficulties in applying an EU law to subsidy systems outside the control of the EU.

For merger control, FDI and public procurement practitioners (inside and outside the EU), the Regulation constitutes an additional (and novel) regulatory consideration before completion of a transaction (or public procurement process) can safely take place (quite apart from the possible impact of a general market investigation by the Commission into a foreign financial contribution).

Third parties may also see opportunities, for example, to challenge acquisitions and public procurement processes which involve parties which they believe haven’t complied with the Regulation.

The Regulation is coming into force at a time when the EU and its Member States are carefully scrutinising FDI in the EU and are also looking more carefully at the impact of subsidies (e.g. in January 2020, senior trade representatives of the EU, US and Japan agreed on the need to strengthen World Trade Organisation rules on industrial subsidies).

For further information in relation to this topic, please get in touch with [Alan McCarthy](#) or any member of the [EU, Competition & Procurement Group](#).

## Key contact



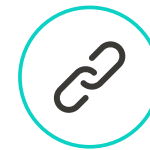
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## Sources



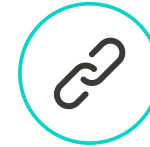
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