



Foreign Subsidies Regulation: key EU trade and investment partners raise concerns

Brussels, 1 June 2022 – Our organisations are closely following the legislative work related to an EU Proposal for a Regulation on foreign subsidies distorting the internal market (‘the Regulation’). International businesses are significant trade and investment partners in the EU, and private investment will play an increasingly important role in supporting Europe’s economic recovery following the COVID-19 pandemic.

The international business community fully supports the objectives of the European Commission (‘the Commission’) in combatting distortions of competition in the EU caused by foreign subsidies. However, **we have concerns about important elements of the Regulation**. It poses a significant administrative burden on EU and non-EU businesses alike by introducing wide-ranging notification requirements and lengthy investigation periods. **A number of concepts being introduced may even pose practical impossibilities for those businesses seeking to act in accordance with the Regulation, and non-compliance could lead to the imposition of substantial sanctions**. It is also likely to generate an unnecessarily heavy burden for the Commission. We call upon co-legislators to ensure the final text of the Regulation will be focused and proportionate, and that the new administrative procedures ensure good governance and efficacy.

We set out below a number of suggestions that address points which we believe remain highly uncertain. We respectfully encourage co-legislators to consider these concrete recommendations to ensure the workability of the Regulation.

1. Scope: definition of foreign subsidy and financial contribution (Article 2)

We suggest that **to provide businesses with workable conditions, the definitions of financial contributions and subsidies be as clear and practical as possible**. Tightening and defining ‘safe harbours’ that do not give rise to a ‘financial contribution’ within the meaning of the Regulation will allow for an effective, efficient and consistent tool.

To this end, we support the Parliament’s additional text proposed in Article 2(2)(a)(iii) which suggests that the provision or purchase of goods or services following a competitive, transparent, non-discriminatory and unconditional tender procedure is not considered to constitute a ‘financial contribution’.

The Council provided an exclusion of the same activity from the definition of foreign subsidies as it did not consider such activity to confer a benefit. However, we prefer the **Parliament’s proposal as it goes further to reduce compliance burdens with respect to financial contribution disclosures in both concentration and**

public procurement cases. This would also relieve companies in such tender scenarios from having to assess their customers and vendors for potential affiliation with public authorities under Article 2(2)(b).

We **urge the co-legislators to adopt the Parliament's amendment in Article 2(2)(a)(iii) and provide a clear and focused definition of a financial contribution.** We also urge co-legislators to consider additional reasonable ways to limit the still very wide concept of 'financial contribution'. For example, **any contribution granted for specific purposes completely unrelated to economic activities in the EU internal market, and which has already been utilised for those specific purposes, could be excluded from the 'financial contribution' definition.** This would considerably ease the administrative burden on both businesses and the Commission.

We further urge the co-legislators to **incorporate a *de minimis* threshold into the definition of financial contribution,** as the text does for foreign subsidies. The current text requires companies to count every financial contribution from the first euro, including such ordinary activities as paying public authorities for water, electricity or employee health insurance. **Companies receive thousands of such 'contributions' every year. It would be unreasonable to require companies to identify and report each and every such instance to the Commission, or for the Commission to review them all to determine whether any such 'contribution' amounts to a foreign subsidy.** This would be avoided if the Regulation provides that **contributions below a *de minimis* threshold would not be considered 'financial contributions'** within the meaning of the Regulation, on the basis that they would not distort the internal market even if they were deemed to be subsidies.

2. Balancing test (Article 5)

There **is a need to enhance the legal certainty around the balancing test.** The new formulation proposed by both Parliament and the Council only considers the positive and negative effects of a foreign subsidy on the internal market. This ignores its positive effects on the subsidising country. **The 'effects' in the EU cannot be the benchmark, as no subsidies - not even EU state aid - are granted with the aim of benefitting a third country.** So, the benchmark becomes almost impossible to meet. Limitation of the balancing test to consideration of positive effects in **the EU further risks violating the EU's World Trade Organization obligations.**

Consideration should be given to whether the foreign subsidy pursues a goal in the foreign country which the EU would consider worthy of support if being pursued in the internal market (e.g. job growth, innovation, research & development, climate change, sustainable development, resilient supply chain, etc.). In such a case, the balancing exercise should, at the very minimum, take into account any indirect benefits and positive externalities that the foreign subsidy may have for the EU.

We urge the co-legislators to ensure equitable treatment of EU and foreign subsidies in the application of the balancing test. We respectfully submit that the EU's World Trade Organization obligations and International Comity require the Commission to take into account of positive effects in the granting foreign country, not only in the EU. The arguments for taking into account any direct and indirect positive benefits engendered by the foreign subsidy on both the internal market and the non-EU country making the financial contribution are even more compelling where the goals pursued by the subsidy in the granting countries are in line with goals recognised in the EU's own law and policy.

3. Procurement

- **Investigation timelines in public procurement (Article 29).**
 - We welcome the Council's suggestion to shorten in-depth investigations in the context of public procurement tenders from 200 days to 110 working days. A 110-day investigation, although still lengthy, would constitute an improvement for EU contracting authorities which pursue significant purchases of goods and services and engage in key infrastructure investments. **Substantial delays to contract awards could cause harm to the EU economy and businesses alike.**
 - **We encourage the Council and Parliament to adopt the Council's proposed shorter, 110-day review period. An efficient review period will also enable equitable treatment of all bidders, as public procurement procedures should await the outcome of reviews prior to a contract being awarded (see below).**
- **Avoid discrimination in suspension of public procurement awards (Article 31).**
 - We welcome the Council's clarifications to determine what constitutes 'the most economically advantageous tender'. However, **we encourage co-legislators to keep in place, at the very least, the safeguards established in the Commission's original proposal to ensure that investigative procedures do not disadvantage companies which, in good faith, disclose their subsidies**, even if they are ultimately deemed non-distortive. **To prevent discrimination against a company that is under investigation**, we propose going beyond the Commission's proposal. We believe that **contracts should not be awarded to any undertaking during both a preliminary review and an in-depth investigation.**
- **In light of the above, we respectfully regret the Council amendment to Article 31(1).**
 - If this amendment, read in conjunction with Article 31(2) and (3), were to be accepted, the contract could be awarded at any time to any undertaking which has made a declaration under Article 28(1), provided the contracting authority/entity has established that such undertaking did not receive any notifiable foreign financial contributions and provided that it has submitted the most economically advantageous tender. Under these two provisos, the award could take place even during the preliminary review period. However, an undertaking which has submitted a notification and is under an in-depth investigation cannot be awarded the contract until the period of the in-depth investigation lapses or until the Commission decides that the undertaking did not receive a distortive foreign subsidy.
- **We encourage co-legislators to adopt the Council's concept of the most economically advantageous tender, taking into account that bids should be evaluated under a number of parameters including quality, and not just price. We also strongly urge co-legislators to, at least, maintain the Commission's safeguard under Article 31(1), which provides that 'the contract shall not be awarded before the expiry of the time limit set in Article 29(2)'.**

4. Concentrations: concentration notification thresholds (Article 18)

We encourage the Council and Parliament to **maintain the higher turnover threshold**, as proposed by the Council, of **EUR 600 million**, to ensure that only significant transactions become subject to an *ex ante* filing requirement. We also strongly commend both the Council and Parliament for excluding from the notification requirement joint ventures which have no nexus to the EU. This will avoid a number of ‘non-issues’ transactions being notified. However, we continue to urge the Council and Parliament to revise the Regulation so that **the only financial contributions to be taken into consideration are those on the *acquiring* side**. The current wording requires the calculation of *acquirer and target* financial contributions. This not only appears at odds with the stated purpose of the Regulation (i.e. to scrutinise subsidised acquirers) but would also put the acquirer in the difficult position of having to seek and rely on data regarding all financial contributions received by the target’s group in the last three calendar years.

We urge co-legislators to revise the Regulation so that the financial contributions taken into account for the notification of an acquisition are only those received by the acquirer’s group.

5. Consultations

The ability for businesses to consult and seek guidance from the Commission, in particular when faced with such a novel piece of legislation, is paramount. In this respect, **we very much commend the Council for introducing a provision allowing companies to provide information to the Commission** to show that financial contributions obtained are not distortive.

6. Period of grace

The Regulation will constitute a completely novel piece of legislation in the EU. It will require companies to monitor all financial contributions received in the last three calendar years prior to a notification. The concept of ‘financial contribution’ is yet to be provided with an exact scope – this will be ultimately determined by the co-legislators. **Companies have not been able to monitor in advance the ‘financial contributions’** their groups receive and, thus, they will not be ready to comply with the Regulation once it becomes applicable. To avoid this problem, **we urge co-legislators to introduce a period of grace** (e.g as from the date when the regulation becomes applicable) where companies only have to take into account the financial contributions received in the one calendar year prior to notification, rather than in the three calendar years.

We remain at your disposal to discuss or clarify any aspect of the above. Our organisations support the important objective of ensuring a level playing field for all companies but seek to provide focus, proportionality and certainty to the legislation.

Signatories:

- American Chamber of Commerce to the EU
- Europe India Chamber of Commerce
- European Australian Business Council
- Japan Business Council in Europe
- Korea Business Association Europe
- Swiss-American Chamber of Commerce