**Public Consultation on EU Proposal for a Foreign Subsidies Regulation**

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**Background**

The European Commission published a formal proposal for a ***Regulation on Foreign Subsidies Distorting the Internal Market*** (the Regulation) on 5th May 2021. This followed a White Paper on the matter published on 17th June 2020, and a public consultation held in Autumn 2020.

In this Regulation, the European Commission is proposing to add powers to its toolbox to ensure a level playing field between European and foreign-backed companies active on the EU market. On top of merger control and Foreign Direct Investment screening obligations, companies will also need to account for future rules allowing scrutiny of subsidies granted by non-EU governments if those subsidies might distort the EU Single Market.

While the EU remains open to trade and foreign investment, the proposal requires that openness to go hand in hand with fairness and predictable rules. It proposes rules countering subsidies, granted by non-EU governments to companies operating in the EU, that distort the EU Single Market. Existing EU State Aid rules dealing with public support granted by EU Member States do not apply to public support given by non-EU governments; the proposed rules aim to fill this perceived regulatory gap.

Under the proposed Regulation, the Commission will have the power to investigate financial contributions granted by public authorities of a non-EU country which benefit companies engaging in an economic activity in the EU. The Commission will also have the power to take action to redress any distortive effects. This is intended to mirror the impact of existing EU State Aid rules on contributions to companies from EU countries, by removing the negative impacts of those subsidies from non-EU governments to companies. This will create a level playing field for all companies operating or trading in the EU internal market.

The Department of Enterprise, Trade and Employment recommends readers to visit the European Commission website which provides further information on the proposal. See: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982>

**Objectives of the Regulation**

The general objective of this initiative is to restore the level playing field on the internal market so that it is not distorted by foreign subsidies, with 2 specific objectives:

1. Identify the most distortive subsidies: This specific objective addresses the issue that there is a general lack of information about subsidies at international level and that there are no criteria and procedures to assess the potential distortion of the EU internal market caused by foreign subsidies.

2. Remedy the distortions caused by foreign subsidies: This objective addresses the issue that there are no tools to remedy distortions caused by foreign subsidies once identified.

Under the proposed Regulation, the Commission will have the power to investigate financial contributions granted by public authorities of a non-EU country which benefit companies engaging in an economic activity in the EU and redress their distortive effects, as relevant.

In this context, the Regulation proposes the introduction of three tools, two notification-based and a general market investigation tool. More specifically:

* A notification-based tool to investigate concentrations involving a financial contribution by a non-EU government, where the EU turnover of the company to be acquired (or of at least one of the merging parties) is €500 million or more and the foreign financial contribution is at least €50 million;
* A notification-based tool to investigate bids in public procurements involving a financial contribution by a non-EU government, where the estimated value of the procurement is €250 million or more; and
* A tool to investigate all other market situations and smaller concentrations and public procurement procedures, which the Commission can start on its own initiative (ex-officio) and may request ad-hoc.

Based on the feedback received on the White Paper, the enforcement of the Regulation will lie exclusively with the Commission to ensure its uniform application across the EU. However, it is likely that it will still have resource implications for Member States in assisting the Commission with investigations as required and participating in an advisory committee.

**Breakdown of the Proposed Regulation**

This regulation contains seven chapters and forty-eight articles.

**Chapter i – General Provisions**

This Chapter sets out the scope and the main terms used in the proposed Regulation. It sets out what is defined as a foreign subsidy, the factors that the Commission will consider when making a decision and what types of foreign subsidies the Commission considers will have the most distortive effect on the internal market. The Chapter also asserts that the Commission can utilise redressive measures or commitments from undertakings as remedies.

**Question 1:** What are your views on the scope of the proposed Regulation? Please give your views on any potential positive and negative aspects of the proposal.

**Question 2:** What are your views on the definitions included in the proposed Regulation, including how a foreign subsidy is defined? Does it need to be more or less specific?

**Question 3:** What are your views on how the distortive effect on the internal market is calculated? What other options for this calculation could be considered?

**Chapter ii - EX OFFICIO REVIEW OF FOREIGN SUBSIDIes**

This Chapter sets out that the Commission will seek all information necessary in order to conduct a preliminary review to decide (i) if an undertaking or association of undertakings has received a foreign subsidy and (ii) whether the subsidy is having a distortive effect on the internal market.

This Chapters outlines the steps that will be taken by the Commission if it considers that there are sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, such as taking redressive action or, where an undertaking makes commitments that the Commission believes will sufficiently remedy the distortion, making those commitments binding upon the undertaking.

If after the review there is insufficient evidence that the undertaking has received a foreign subsidy, or that the foreign subsidy has distorted the internal market, no further action will be taken. Likewise, if it is found that the positive effects of the distortion outweigh the negative effects then no further action will be taken.

If the Commission believes that there is a serious risk of substantial and irreparable damage to competition on the internal market, interim measures may be taken to prevent this distortion.

This chapter also outlines how information requests, investigations within the EU, and investigations outside the EU will work, along with procedures for non-compliance. Penalties for non-compliance include fines and periodic penalty payments.

**Question 4:** In your opinion, what are the pros and cons of the EU Commission using this ex officio tool?

**Question 5:** Do you support the idea of the EU Commission being the body empowered to gather information to ascertain if undertakings are in receipt of foreign subsidies (Yes/No)? Please give reasons for your answer.

**Question 6**: What are your views on the redressive measures the EU Commission can take to ameliorate distortive effects, including the penalties that may be imposed? Are they proportionate to the measures in place for other State Aid or competition distortive effects?

**CHAPTER iii: CONCENTRATIONS**

This chapter deals with distortion of the internal market by foreign subsidies in concentrations. It defines the terms concentration and control, and outlines proposed notification thresholds. It defines how turnover is calculated for the purpose of determining whether an undertaking meets a notification threshold. It sets out the procedural rules applicable to the preliminary review and the in-depth investigation of notified concentrations.

Article 25 sets out that the Commission may impose fines and periodic penalty payments to concentrations on similar grounds to those set out in Chapter II of this Regulation.

**Question 7**: Do you consider that the terms are correctly defined in this Chapter (Yes/No)? Please give reasons for your answer, including how these definitions sit with other similar instruments you may be familiar with and/or any suggestions you may have on how the definitions could be clarified.

**Question 8:** What are your views on how the preliminary review and investigation will be conducted?

**Question 9**: Do you support the penalties that may be imposed under this Regulation (Yes/No)? Please give reasons for your answer. Do they compare fairly to other penalties in related areas?

**CHAPTER IV: PUBLIC PROCUREMENT PROCEDURES**

This Chapter aims to ameliorate distortions in the internal market caused by foreign subsidies in public procurement procedures. It sets out the thresholds for notification. It outlines that undertakings must disclose all foreign subsidies received in the three years prior to notification, or sign a declaration that they did not receive any foreign subsidies in the three years prior to notification. Failure to disclose foreign subsidies received, or to provide a declaration that no foreign subsidies were received, will result in the contract not being awarded to the undertaking in question. This Chapter also sets out that when a group of undertakings are tendering together the need to notify will extend to all main subcontractors or suppliers. It will be the duty of the lead economic operator to ensure that the relevant notifications are made.

Where the undertaking, economic operators or groups of economic operators fail to notify a foreign financial contribution, or where such a notification is not transferred to the Commission, the Commission may initiate a review. Where the Commission suspects that an undertaking may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may request the notification of the foreign financial contributions received by that undertaking in other public procurement procedures.

If the Commission makes a finding that an undertaking was in receipt of foreign subsidies that has had a distortive effect on competition, the undertaking can engage in commitments that would adequately remedy the effects. The Commission may also impose fines and periodic penalty payments as set out in Article 15.

**Question 10:** Do you think the timeframes for disclosing foreign subsidies outlined in this Chapter are adequate (Yes/No)? Please give reasons for your answer.

**Question 11**: Do you support the penalties that the EU Commission may impose on undertakings involved in the public procurement process (Yes/No)? Please give reasons for your answer.

**CHAPTER V: COMMON PROCEDURAL PROVISIONS**

This Chapter states that financial contributions notified in the context of a concentration, or in the context of a public procurement procedure, may be relevant and assessed again in relation to another economic activity. The Chapter also sets out that the Commission, if a reasonable suspicion exists that foreign subsidies in a particular sector is distorting the internal market, may conduct a market investigation into the sector. The Commission may request the undertakings or associations of undertakings concerned to supply the necessary information and may also request the Member State or third country concerned to supply information. The Commission are also empowered to carry out necessary inspections.

The Chapter also sets out limitation periods for the powers of the Commission. Its investigative powers shall be subject to a limitation period of ten years, starting on the day on which a foreign subsidy is granted to the undertaking concerned. The powers of the Commission to impose fines and periodic penalty payments shall be subject to a limitation period of three years, starting on the day on which the infringement took place. In the case of continuing or repeated infringements, the limitation period shall start on the day on which the infringement ceases. The powers of the Commission to enforce decisions imposing fines and periodic penalty payments shall be subject to a limitation period of five years.

The Chapter also states that undertakings will have a right of defence and an opportunity to respond to the grounds the Commission will use to make a decision.

**Question 12**: Do you believe the limitation periods set out in this Chapter are sufficient (Yes/No)? Please give reasons for your answer.

**CHAPTER VI: RELATIONSHIP TO OTHER INSTRUMENTS**

This Chapter sets out how the proposed regulation will sit and interact with existing Council regulations.

**Question 13**: Do you have any views on how the proposed Regulation will interact with existing instruments? Please provide specific examples and suggestions where possible.

**CHAPTER VII: TRANSITIONAL AND FINAL PROVISIONS**

This Chapter empowers the Commission to adopt delegated acts for the purposes of:

(a) amending the thresholds for notifications,

(b) exempting certain categories of undertakings concerned from the obligation to notify; and

(c) amending the timelines for review and in-depth investigations.

It also sets out the timeframes in which a foreign subsidy has been received to be subject to the Regulation:

(1) The Regulation shall apply to foreign subsidies granted in the ten years prior to the date of application of this Regulation where such foreign subsidies distort the internal market after the start of application of this Regulation.

(2) The Regulation shall apply to foreign financial contributions granted in the three years prior to the date of application of this Regulation where such foreign financial contributions were granted to an undertaking notifying a concentration or notifying financial contributions in the context of a public procurement procedure pursuant to this Regulation.

(3) The Regulation shall not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before the date of application of the Regulation.

(4) The Regulation shall not apply to public procurement procedures initiated before the date of application of the Regulation.

**Question 14**: Do you support the timeframes set out above in relation to when foreign subsidies will be subject to the regulation (Yes/No)? Please give reasons for your answer.

**Question 15:** Do you support the EU Commission having the power under delegated acts to amend the provisions of this instrument (Yes/No)? Please give reasons for your answer.

If you have any further comments on the proposal not covered in the questions above, including specific suggestions or amendments, please set them out below:

**Deadline for Submissions**

The deadline for responses is **Thursday 2nd December 2021.**

Submissions should be sent to: conspol@enterprise.gov.ie

When making your submission please provide the name of the individual, firm or organisation making the submission; contact details and briefly describe your interest in the subject matter.

**FREEDOM OF INFORMATION ACT 2014 AND PUBLICATION OF SUBMISSIONS**

The Department will make public on its website all submissions received under this consultation. Your attention is also drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Act 2014. Therefore, should you consider that any information you provide is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with you regarding information identified by you as sensitive before publishing or otherwise disclosing it.

**GENERAL DATA PROTECTION REGULATION**

Respondents should note that the General Data Protection Regulation entered into force in Ireland on 25th May 2018 and it is intended to give individuals more control over their personal data. The key principles under the Regulation are as follows:

• Lawfulness, fairness and transparency;

• Purpose Limitation;

• Data minimisation;

• Accuracy;

• Storage Limitation;

 • Integrity and confidentiality, and

• Accountability.

The Department of Enterprise, Trade and Employment is subject to the provisions of the Regulation in relation to personal data collected by it from 25 May 2018. Any personal information which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 to 2018.

**Appendix – Reply Forms**

1. **What are your views on the scope of the proposed Regulation? Please give your views on any potential positive and negative aspects of the proposal.**
2. **What are your views on the definitions included in the proposed Regulation, including how a foreign subsidy is defined? Does it need to be more or less specific?**

**3. What are your views on how the distortive effect on the internal market is calculated? What other options for this calculation could be considered?**

**4. In your opinion, what are the pros and cons of the EU Commission using this *ex officio* tool?**

**5. Do you support the idea of the EU Commission being the body empowered to gather information to ascertain if undertakings are in receipt of foreign subsidies (Yes/No)? Please give reasons for your answer.**

**6. What are your views on the redressive measures the EU Commission can take to ameliorate distortive effects, including the penalties that may be imposed? Are they proportionate to the measures in place for other State Aid or competition distortive effects?**

**7. Do you consider that the terms are correctly defined in this Chapter (Concentrations) (Yes/No)? Please give reasons for your answer, including how these definitions sit with other similar instruments you may be familiar with and/or any suggestions you may have on how the definitions could be clarified.**

**8. What are your views on how the preliminary review and investigation will be conducted?**

**9. Do you support the penalties that may be imposed under this Regulation (Yes/No)? Please give reasons for your answer. Do they compare fairly to other penalties in related areas?**

**10. Do you think the timeframes for disclosing foreign subsidies outlined in this Chapter are adequate (Yes/No)? Please give reasons for your answer.**

**11. Do you support the penalties that the EU Commission may impose on undertakings involved in the public procurement process (Yes/No)? Please give reasons for your answer.**

**12. Do you believe the limitation periods set out in this Chapter (Common Procedural Provisions) are sufficient (Yes/No)? Please give reasons for your answer.**

**13. Do you have any views on how the proposed Regulation will interact with existing instruments? Please provide specific examples and suggestions where possible.**

**14. Do you support the timeframes set out above in relation to when foreign subsidies will be subject to the regulation (Yes/No)? Please give reasons for your answer.**

**15. Do you support the EU Commission having the power under delegated acts to amend the provisions of this instrument (Yes/No)? Please give reasons for your answer.**

**If you have any further comments on the proposal not covered in the questions above, including any specific suggestions or amendments, please set them out below:**