European Commission proposal for a regulation to control foreign subsidies: Fortress Europe or political posturing?

May 25, 2021

On May 5, 2021, the European Commission published a proposal for an EU regulation to control foreign subsidies, launching an 8 week public consultation. The new rules would allow the Commission to investigate and remedy the potentially distortive effects of foreign subsidies in the EU internal market.

The proposal addresses distortions caused by foreign subsidies in the internal market generally, and in the specific areas of acquisitions and public procurement.

The Commission estimates that application of the regulation will require 145 new officials at a cost approaching €100 million from 2021 to 2027. Normally, EU member states would be expected to reject such an increase in the EU budget. However, the Commission believes it will be given sufficient resources because the proposal is made in response to the new industrial policy demanded by member states including France, Germany, Italy and Poland. Its updated industrial policy communication of the same date specifically identifies the proposed foreign subsidies regulation as a key action delivering on the trade policy objective of the EU's "open strategic autonomy".

The proposal also would support the recovery program for the European economy post the pandemic. In particular, it is intended to support the Green transition under the 2019 Green Deal, requiring net zero carbon emissions by 2050, and the digital transition driving EU ambitions to lead digital markets, including in terms of technological innovation and regulation.

The proposal also fits with another measure already in place, the EU Foreign Direct Investment (FDI) Screening Regulation, which establishes a framework for the screening of foreign direct investments into the EU. Its adoption was prompted by the concerns of various stakeholders, in particular Germany, France and Italy, that there was a regulatory gap in the EU merger control regime, which does not include public interest and security considerations. Many EU member states are paying increasing attention to potential risks for public security and safety or public order associated with foreign investments. The COVID-19 pandemic has accelerated the process of implementing FDI control regimes. Several governments have introduced new FDI control regimes, enhanced existing ones, or accelerated policymaking to fend off new potential threats (find out more here). The Commission has explicitly recommended the adoption of extensive national FDI screening legislation in its guidance on March 25, 2020.

While pointing the finger at non-EU countries such as China, Russia and the sovereign investment funds of the Middle East and Asia, the Commission makes no reference to the fundamental rules in EU law prohibiting discrimination between public and private businesses. In particular, it fails to mention that the Treaty on the Functioning of the European Union (The TFEU) does not have any impact on national systems of ownership.

A foreign subsidy will benefit from a "de minimis" type provision if its total amount is below €5 million over any consecutive period of three years, when it is considered unlikely to distort the internal market (Article 3 (2)). This is more favourable than, and in marked contrast to, the parallel EU state aid figure of €200,000.

Controversially, the proposal provides for retroactive application of the new foreign subsidies rules. Under Article 47(1), the proposed regulation will apply to foreign subsidies granted in the 10 years prior to the date of application of the regulation where such foreign subsidies distort the internal market after the start of application of the regulation. However, this transitional provision is subject to three qualifications.

First, the regulation will 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 (Article 47 (3)). Second, it will not apply to public procurement procedures initiated before the date of application of the regulation (Article 47 (4)). Third, where 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 the regulation, the regulation will apply only to foreign financial contributions granted in the three years prior to the date of its application (Article 47 (2)).

Although the Commission openly acknowledges that there is still a general lack of reliable data on subsidies granted by third countries, it says that there is a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU undertakings, influenced investment decisions, distorted trade in services or otherwise influenced the behavior of their beneficiaries in the EU market, to the detriment of fair competition. In support of this assertion, the Commission cites a recent report by the European Court of Auditors, where it finds that certain subsidies granted by the Chinese state would constitute state aid if granted by an EU member state, noting that this "difference in treatment can distort competition in the EU's internal market" (European Court of Auditors, "the EU's response to China's state-driven investment strategy", Review 03 (2020).

International trade aspects of the proposal

The Commission highlights the shortcomings of the current WTO rules on subsidies and EU trade defense instruments. These do not cover foreign subsidies relating to services, investment, acquisitions or public procurement bids but are limited to trade in goods and services. It makes it clear that the regulation is intended to be a stopgap and stepping stone to a multilateral solution for the control of foreign subsidies. It acknowledges the provisions in GATS mandating adoption of rules on subsidies in the services sector. It also refers to the tripartite meeting between the US, Japan and the EU that resulted in a joint statement of their foreign ministers on January 14, 2020, in Washington DC, on an agreement to seek a multilateral agreement on state intervention, including industrial subsidies, in the WTO.

However, given the length of time required to adopt agreements in the WTO and persisting disagreements between members, there is little prospect of an agreement on foreign subsidies in the near future.

To overcome the impasse in the WTO, some members, including the EU, have concluded free trade agreements incorporating provisions on foreign subsidies. These provisions, however, only require consultations in the case of disagreement. The only legally binding alternative is to deal with the matter under domestic law, as in the case of the proposal from the Commission. The Commission gives a clear signal of its support for a multilateral solution by basing the definition of subsidies in the proposal on the definition in the WTO Agreement on Subsidies and Countervailing Duties Measures (the WTO SCM Agreement).

Nevertheless, it is clear that the Commission has an eye to the likely areas of controversy that the new regulation will face in the context of international trade law. It is careful to adopt definitions of subsidies taken from the Annex to the WTO SCM Agreement.

It adapts the key concepts of financial contribution, benefit and selectivity in terms of undertaking or sector, as well as the competition assessment used in EU State Aid law, to the parallel situation of foreign subsidies. No doubt it believes that consistency between the rules to be applied to foreign subsidies and EU state aid will avoid accusations of a breach of the WTO principles of discrimination and MFN treatment.

One of the first comments after the proposal was published came from the Chinese Ambassador to the EU, who expressed his concerns and disappointment. The proposal can be seen as one of a series of measures that aim to counter the global expansion of Chinese-owned businesses.

The Commission's proposal for a regulation of May 5, 2021

The proposal targets the negative impact on the EU internal market in three areas where distortions are caused by foreign subsidies granted to an undertaking engaging in an economic activity in the internal market either generally, or in the specific areas of acquisitions and public procurement.

- **Policy objectives**

The Commission justifies the new rules on the grounds that EU State Aid Law does not apply to subsidies from non-EU states to their businesses established or operating in the EU.

On the assumption that current EU law on merger control, international trade subsidies, public procurement and free movement of capital, for example, remain unchanged, the proposal fills that gap.

- **Legal basis**

The proposed regulation takes as its legal basis Article 207 of the Treaty on the Functioning of the European Union, which deals with the common commercial policy, and Article 114, which deals with the internal market. Any proposal, therefore, would have to remain within the competence of these legal bases and follow the ordinary legislative procedure before the Council and European Parliament (EP).

- **Scope (Chapter 1, Articles 1 – 6)**

The proposal addresses distortions caused by foreign subsidies in the internal market generally, and in the specific areas of acquisitions and public procurement.

- **Definition of foreign subsidies**

A foreign subsidy is presumed to exist where a non-EU country "provides a *financial contribution* that confers a *benefit* to an undertaking engaging in an economic activity in the internal market, and which is limited in law or in fact to an individual undertaking or industry or to several undertakings of industries" (Article 2(1)).

A financial contribution caught by the regulation will include: capital injections, grants, loans, loan guarantees, fiscal incentives, setting off operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt-to-equity swaps or rescheduling; the foregoing of revenue otherwise due; or the provision of goods or services or the purchase of goods and services (Article 2(2)(a)).

The regulation will apply to foreign subsidies granted by central government and government authorities at all other levels, as well as foreign public and private entities whose actions can be attributed to a non-EU country (Article 2 (2)(b)).

- **Distortions on the internal market**

A distortion to the internal market is deemed to exist "where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market". The Commission will determine such a distortion on the basis of a non-exhaustive list of indicators, including the amount, nature, purpose of the subsidy and any conditions attached to it, as well as its use on the internal market; the situation of the undertaking and the markets concerned; and the level of economic activity of the undertaking concerned on the internal market (Article 3(1)).

The test in EU State Aid law for prohibiting financial contributions that are capable of distorting competition in the internal market refers simply to the beneficiary "improving its competitive position". This test, which the Commission also proposes to apply to foreign subsidies, in the interests of fairness, is not difficult to satisfy in the light of the practice of the European Court.

Article 4 contains a list of the categories of foreign subsidies most likely to distort the internal market.

- **Balancing test**

Before imposing any remedies or accepting commitments proposed by undertakings, the Commission must carry out a balancing test (what was perhaps revealingly called the EU interest test in its 2020 White Paper). This canallow foreign subsidization even if there is some distortion of the internal market.

The balancing test (Article 5) introduces the complexities of politics into what is supposed to be a legal regime to ensure a level playing field in the internal market. It opens the door to legal uncertainties with negative commercial implications for business decisions. The fact that it is borrowed from the EU interest test in EU trade defense instruments, such as the EU Anti-dumping Regulation, suggests that it may be manipulated to protect EU industries whether or not the economic realities justify that intervention.

- **Commitments and redressive measures**

Remedies or what the Commission calls "redressive" measures, including commitments offered by the undertaking concerned, can be behavioral or structural (Article 6).

The three different investigative tools aim at determining whether the foreign subsidy creates a distortion, and whether this distortion has negative consequences by improving the competitive position in relation to the undertaking concerned. If so, the undertaking may offer commitments that the Commission could accept if they are effective, or the Commission may also prohibit the transaction.

Commitments or redressive measures must fully and effectively remedy the distortion caused by the foreign subsidy in the internal market (Article 6(1)). They may consist of: offering access to infrastructure acquired or supported by the foreign distortive foreign subsidies; reducing capacity or market presence; refraining from certain investments; licensing assets acquired or developed with the help of foreign subsidies on FRAND terms; publication of research and development results; divestment of assets; dissolving the concentration; or repayment of the foreign subsidy with appropriate interest (Article 6(3)).

- ***One-stop shop: Commission has exclusive control***

A one-stop shop managed by the Commission, to the exclusion of the member states, has been chosen for the proposal. This is because both in the context of merger control and public procurement, the Commission is introducing a new notification procedure.

- **Tools**

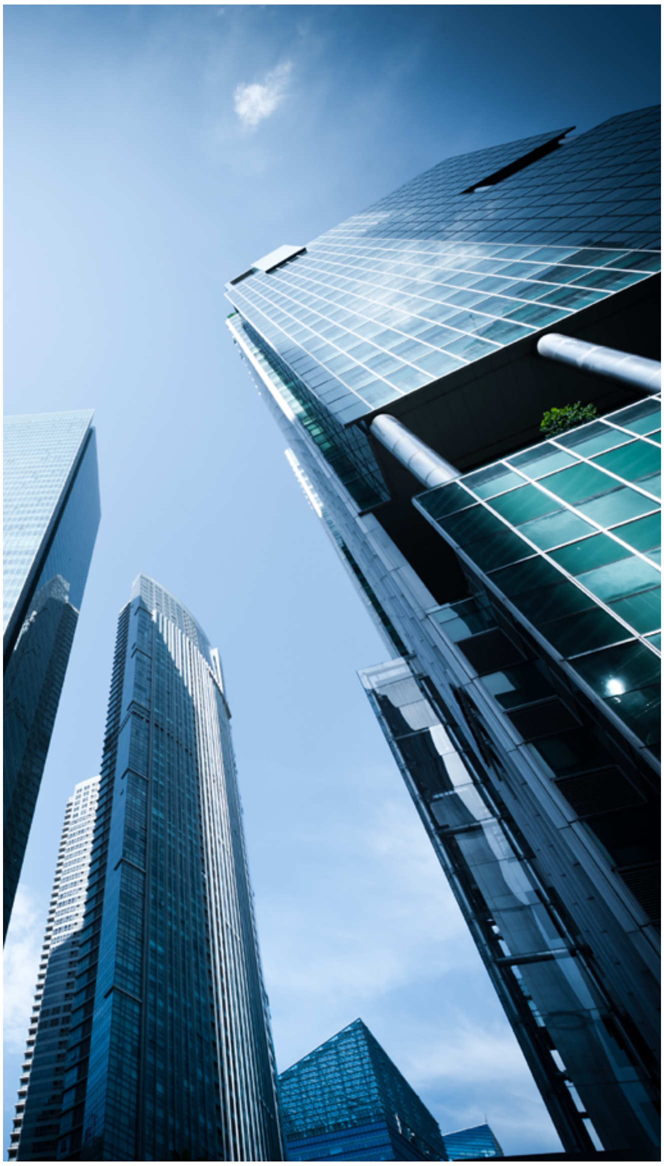
The Commission's power to investigate will be based on three tools matching these three areas. The first tool gives the Commission a far-reaching general power to investigate on its own initiative all kinds of market situations, including greenfield site investments and concentrations or public procurements below the notification thresholds, without any caps on the amount of subsidies, ex ante or ex post. This will require foreign investors to seek informal guidance from the Commission, in the absence of a formal notification procedure, creating serious legal uncertainty for their planned investments. The two specific tools for concentrations and public procurement require notification with strictly defined thresholds and timetables for approval prior to any implementation.

- **Ex officio reviews (Chapter 2, Articles 7 – 16)**

The Commission may launch an investigation of any foreign subsidies on its own initiative (ex officio) (Article 7). Unlike in the case of EU trade defense investigations, the initiation of an ex officio procedure does not require a formal complaint y the representatives of a sufficiently representative part of the EU industry concerned.

Under the ex officio procedure, the Commission has extensive powers to request information not only from the undertakings concerned within the EU, but also from other undertakings or associations of undertakings in the EU and third countries (Articles 8 and 11).This may impose an administrative burden on any business in the EU regardless of whether it has a commercial interest in the specific investigation. For example, the Commission enjoys a similar power under the EU Merger Regulation (EUMR). In addition, the Commission will have the power to conduct inspections in and outside the EU (Articles 8 and 13), as in the context of trade defense instruments, such as anti-dumping investigation verifications.

Also borrowing from the EU trade defense instruments procedure, the Commission may take decisions on the basis of the "facts available" if the undertaking concerned does not cooperate with information requests (Article 14). Hence, the Commission is entitled to rely on facts provided by other undertakings in the EU and third countries. As in the context of the other two tools, this is intended to enable the Commission to overcome the practical difficulties of finding data on foreign subsidies generally, and in particular when non-EU countries and undertakings do not cooperate with an investigation.



- **Acquisitions (Chapter 3, Articles 17-25)**

Chapter 3 on concentrations aims to ensure that foreign subsidies do not give an unfair advantage to their recipients when acquiring stakes in other undertakings in the EU internal market. The objective is to prevent the prices from third-country investors outbidding the prices of EU investors as a result of unfair subsidies.

The merger parties acquiring control must notify the Commission of all qualifying foreign subsidies. Notification is triggered where the aggregate turnover of the acquired undertaking, or of at least one of the merging parties, which is established in the EU, exceeds €500 million in the EU. Also, the aggregate value of the subsidies received during the three calendar years prior to the notification must exceed €50 million (Article 18). The Commission estimates that there should be in the region of 30 notifications a year, on the basis of past EU merger notification statistics.

The Commission also has the power to request the prior notification of any concentration, which is not a notifiable concentration under Article 18, at any time prior to its implementation when the Commission suspects that the undertakings concerned have benefitted from foreign subsidies in the three years prior to the concentration. That concentration is then deemed to be a notifiable concentration for the purposes of the proposed regulation (Article 19 (5)). This clearly creates a major risk of legal uncertainty for concentrations before they are implemented. It may well discourage foreign direct investment in, and acquisitions of, EU undertakings by non-EU undertakings, unless the Commission is prepared to provide a safe harbor procedure.

- ***Procedure***

The Commission will review ex ante the planned acquisitions involving possible foreign subsidies under a compulsory notification mechanism, in two stages. First, a preliminary review phase (25 working days) and, if justified by the preliminary results, a second in-depth investigation (90 working days, plus a potential extension of 15 working days). The timetable and procedure are intended to mirror that under the EU Merger Regulation (EUMR) to minimize delays and additional burdens for undertakings and the Commission.

The concentration may not be implemented before its notification, which must be made prior to implementation subject to the same conditions as under the EUMR, including when the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or have publicly announced a public bid (Article 18). Subject to satisfying exceptional grounds for derogation, as under the EUMR, the concentration is suspended for 25 working days after receipt of a complete notification (Article 23 (1) (a)). Where the Commission initiates an in-depth investigation, which it must do no later than the expiry of the preliminary review of 25 working days, the concentration may not be implemented for 90 working days. A further 15-day suspension will apply if the undertakings concerned offer commitments to remedy the distortion of the internal market (Article 23 (1) (b)).

To ensure effective implementation, the Commission would also have the power to carry out an ex officio review of an acquisition, which should have been notified but was not. The review ultimately could result in the prohibition of the acquisition or, if it is already implemented, in its unwinding.

- ***Remedies***

If the Commission finds that an acquisition is facilitated by foreign subsidies and distorts the internal market, it will have two possible remedies. It could accept commitments by the notifying party that effectively remedy the distortion, or ultimately it would have the power to prohibit the acquisition.

Where an undertaking concerned, intentionally or negligently, fails to notify a notifiable concentration, or implements a suspended or prohibited notified concentration, the Commission may impose fines of up to 10% of global aggregate turnover in the preceding business year, and up to 1% for supplying incorrect or misleading information (Article 25).

- **Public procurement**

The existing EU public procurement framework does not specifically address distortions to the EU procurement markets caused by foreign subsidies that enable a tenderer to submit otherwise unsustainable bids, unfairly undercutting EU competitors.

- ***Procedure***

Chapter 4 (Articles 26-32) of the proposed regulation will ensure foreign subsidies can be addressed in individual public procurement procedures. The proposal introduces 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.

The bidder in public procurements meeting the thresholds will have to notify ex-ante any financial contribution received from a non-EU government in the three years preceding that notification. This obligation to notify extends to economic operators, groups of economic operators, main subcontractors and main suppliers.

Pending the Commission's review, the public procurements in question cannot be completed and the investigated bidder cannot be awarded the contract. The procedure to investigate foreign subsidies will consist of a preliminary review and, if there are indications of the existence of a subsidy, an in-depth investigation. The regulation provides for 60 working days for a preliminary review and 200 working days for an in-depth investigation.

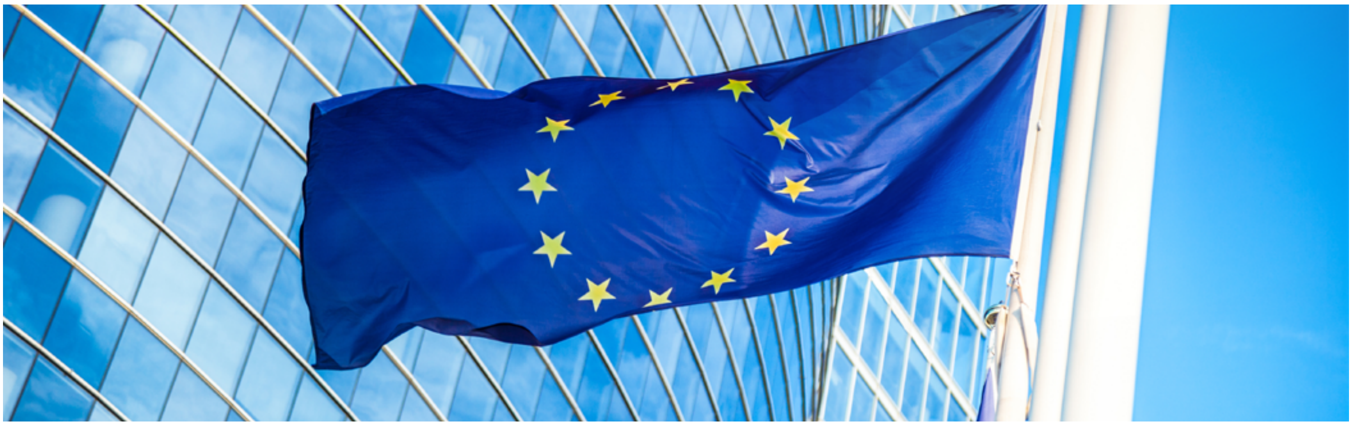
The Commission estimates that on average between 13 and 36 notifications will be required each year, based on public procurement contract award statistics.

- ***Remedies***

Where a company does not comply with the obligation to give notification of a financial contribution in procurements that meet the thresholds, the Commission may impose fines of up to 10% of global aggregate turnover in the preceding business year, and up to 1% for supplying incorrect or misleading information, and review the transaction as if it had been notified.

If the company does notify, and the Commission finds that the company benefits from a foreign subsidy that distorts the internal market:

- The company may offer commitments that fully and effectively remove the distortion on the internal market (e.g. the repayment of a foreign subsidy). The Commission may make these commitments legally binding on the company.
- The company may not offer commitments or the Commission may consider that the commitments are neither appropriate nor sufficient to fully and effectively remove the distortion. If no commitment is offered, or it is not accepted by the Commission, it must adopt a decision prohibiting the award of the contract to the company concerned.



Impact on exclusion and delays

The decision prohibiting the award of the contract must comply with the EU's international obligations under the WTO Government Procurement Agreement (the GPA) and the various bilateral agreements providing for access to the EU procurement market, including for example CETA and the EU-UK TCA.

Although there are already exclusion rules for abnormally low bids in the 2014 EU public procurement directives, these rules do not catch foreign subsidies but only EU state aid that enables an abnormally low bid. The proposal allows the Commission to prohibit a bid that benefits from a foreign subsidy which distorts the internal market, even if it is not an abnormally low bid.

In 2016, the European Commission proposed an International Procurement Instrument (IPI), which would effectively introduce rules of reciprocity for foreign undertakings to compete in the EU, and for EU undertakings to compete in those foreign domestic markets. The Council of Ministers has not advanced that proposal for the last five years, but has started to look at that proposal again now. The Commission considers that this is essential since access to non-EU public procurement markets is equally as important as reinforcing a level playing field for EU public procurement.

The investigation may cause significant delays in the completion of the tender procedure since the contracting authority to whom the Commission's prohibition or suspension decision is addressed, as well as the foreign subsidy beneficiary, would be barred from awarding the contract to the allegedly subsidized candidate and, consequently, would have to suspend adjudication until the investigation was complete.

- ***Common procedural provisions including market investigations***

Chapter 5 (Articles 33-39) of the proposal deals with procedural issues such as publication of decisions and rights of defense but most importantly the general process of market investigations. This is a novel provision with far reaching implications for EU business as well as non-EU undertakings. It can be used by the Commission if it invokes the third ex officio tool for combating foreign subsidies when the thresholds for mergers and public procurement scrutiny are not met, and generally for any other investments, including greenfield sites (Article 34).

- **The balancing test (Chapter 1, Article 5)**

Under Article 5 of the proposed regulation, the Commission must carry out a balancing test before taking any decision on the merits. More precisely, it must balance "the negative effects of a foreign subsidy in terms of distortion on the internal market with positive effects on the development of the relevant economic activity". The balancing test was previously referred to by the Commission in the white paper as an EU interest test. However, the Commission is understood to be open to considering economic benefits in the non-EU country in its assessment of positive effects, for example aid for regional development. But it will still prohibit a foreign subsidy if it nonetheless distorts competition in the EU internal market.

There are as yet no guidelines as to the elements that must be taken into account in this balancing test beyond "the positive effects on the development of the relevant economic activity". Invariably foreign investments will give rise to conflicting interests, and the Commission will have important discretionary powers in that regard. The test may encourage intense lobbying activities, especially by EU domestic industry since there is no procedure for formal complaints.

In the light of the previous impact assessment and the white paper, it is possible to deduce that the following elements might outweigh the negative impacts of a foreign subsidy. First, the test can be expected to assess the employment impact of a subsidy to determine whether subsidized and non-subsidized companies can remain in operation. Second, the Commission impact assessment says it will take into account positive effects on the environment and the global fight for climate change. Third, it also will be likely to consider impacts on customers, households, taxpayers and beneficiaries. More generally, it will seek to be in line with "EU public policy objectives" and reflect existing instruments in the fields of Competition Law (EU state aid and merger control) and trade defense rules.

EU state aid rules provide for exemptions in Articles 107(2) and (3) TFEU, including the development of particular geographical areas, the realizing of an EU project in the common interest, or the safeguarding of cultural heritage. As in the context of EU trade rules, all interests can be expected to be taken into account during investigations, including the interests of the domestic industry, users and customers. In some instances in the trade field, the Commission has considered the following elements: safeguarding employment, previous investments made, avoiding factory closures or delocalization, protecting the environment, keeping up with technological innovation, and avoiding a monopoly situation. The EU has recently adopted Regulation 2019/452 requiring the screening of foreign direct investment for security and public policy reasons, making it likely that its implications for the assessment of foreign subsidies will be considered in the balancing test.

Interestingly, the UK post-Brexit balancing test used for its new trade defense instruments includes two tests: an economic interest test (at the investigation stage when the trade authority makes a recommendation to the government) and a public interest test (at the political stage when the government makes its determination). This highlights both the technical and the political aspects of trade policy, which relate closely to the state of international relations with other countries, and their scope for retaliation in the WTO context. It follows that the European Commission will be politically lobbied by EU member states before imposing any restriction on foreign subsidies, especially by the larger member states with the most important trade policy interests.

Implications for business and public authorities

Due diligence will take on a new meaning when foreign subsidized businesses acquire EU targets or compete in public procurement tenders. All businesses will need to check with their advisors, whether their transactions are subject to the new notification processes or ex officio reviews.

- **Issues for M&A deals**

Firstly, because of the overlap with the EU merger regulation, not only will there be a potential two-stage merger control process with a competition law assessment, as well as the risk of investigations and far reaching remedies under the foreign direct investment screening rules, but there may also be foreign subsidies notification requirements and investigations. That multiplies by three the risk of delay to a transaction, and creates legal uncertainty as to the outcome because the Commission may choose to use its open-ended ex officio powers.

Secondly, unsurprisingly, there seem to be gaps in the proposal regarding how the Commission will handle occasional parallel merger control and foreign subsidies procedures: Will there be the same or distinct case teams, parallel timings, divergent outcomes?

Thirdly, there are a number of issues foreseeable in the context of M&A transactions that may arise as a result of the proposed foreign subsidies regulation. These include:

- The competitive disadvantage and loss of agility of non EU bidders in competitive tender processes. From a seller perspective, there also will be new difficulties for the selection process and pre-evaluating the risk of selecting non-EU bidders.
- There will be significant implications for drafting warranties and indemnities in sale & purchase agreements (SPAs) and conditions precedent (CPs) relating to which party bears the risk arising from the presence of foreign subsidies.
- The lack of legal certainty is aggravated by the possibility that Commission could investigate ex-post smaller transactions under the ex-officio procedure, provided that the level of subsidies is above €5 million. This may paralyse acquisitions and joint ventures involving non-EU undertakings.
- The proposed regime seems to require notification of JVs operating outside the EU when one parent enjoying foreign subsidies is active in the EU. This would then trigger numerous unnecessary notifications as under the EUMR itself, overburdening case teams.
- EU undertakings are clearly at risk of receiving requests for information even if they have nothing to do with the controversial transaction but happen to operate in the same market.

- **Public procurement risks**

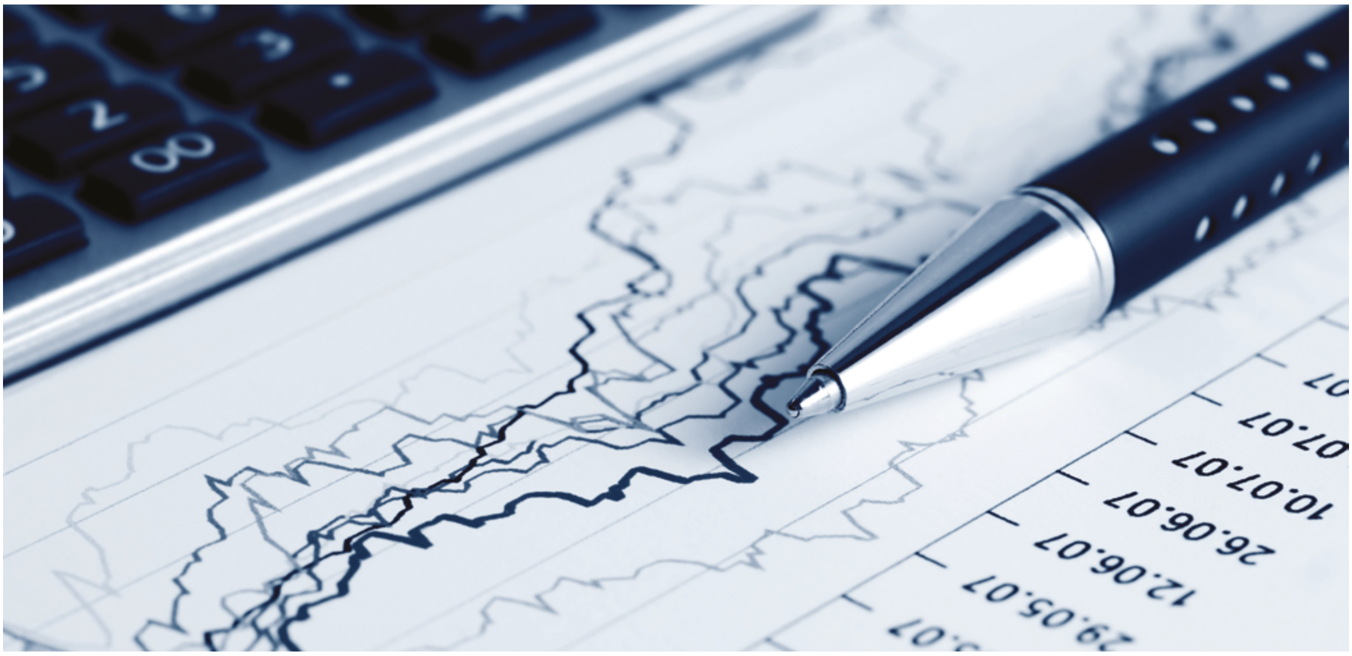
There are a large number of risks and uncertainties created by the proposed regulation in the context of public procurement competitions, including the following examples:

- It is not clear whether the Commission intends to apply the ex officio tool to foreign subsidies in the context of local authority contracts that may fall outside the WTO Government Procurement Agreement because of their low value or non-qualifying status.
- It is also not clear how the Commission will obtain relevant data on foreign subsidies when no notification is made. For example, will EU undertakings wishing to bid in a public procurement procedure be required to respond to formal requests for information with the risk of fines if their responses are incomplete?
- It is unclear how the Commission will assess the potential competitive advantage of foreign subsidies for a bidder, especially since the Public Procurement Directives' rules applicable to abnormally low bids do not apply under the proposed regulation. The risk of legal uncertainty and delays in public procurement procedures is high and may discourage many potential bidders from tendering, reducing competition to the disadvantage of contracting authorities.

- **The balancing test will require a local political reflex in the EU and third country concerned**

Before imposing any remedies or accepting commitments proposed by undertakings, the Commission must carry out a balancing test (what was perhaps revealingly called the EU interest test in its 2020 white paper). This will allow foreign subsidization even if there is some distortion of the internal market.

The balancing test introduces the complexities of



politics into what is supposed to be a legal regime to ensure a level playing field in the internal market. It opens the door to legal uncertainties with negative commercial implications for business decisions. The fact that it is borrowed from the EU interest test in EU trade defense instruments, such as the EU Anti-dumping Regulation, suggests that it may be manipulated to protect EU industries whether or not the economic realities justify that intervention.

- **Potential for international trade disputes and retaliation**

Ultimately, any new foreign subsidies regulation will have to be compatible with relevant WTO disciplines. This is likely to prompt disputes, within and beyond the WTO forum, and lead to threats of, or actual, retaliation. This will also certainly strengthen the debate as to whether foreign subsidies rules are required at the international level to avoid distortions of global trade in goods, services and capital investments. The question arises, therefore, whether the new proposal is no more than an invitation to other WTO members to negotiate a multilateral agreement on foreign subsidies.

- **Legal challenges and disputes**

It is almost inevitable that businesses and governments will need legal advice and representation before the Commission and national public procurement contracting authorities. Ultimately, they may have to bring their legal challenges before the EU Court of Justice or the WTO dispute body.

CSBrand-59534-Client alert long version — 25/05/2021