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New rules to protect the internal market from foreign subsidies effective in 2023

1. Introduction

Late in the night of 29 June 2022, EU legislators emerged from long discussions with an agreement on the final text of a new law to vet foreign subsidies distorting the internal market.¹ The agreement comes 14 months after the Commission tabled the proposal: a record time by EU standards. The effects of the new legislation will start in 2023. Below is a summary of the main points for deal-makers and companies taking part in public tenders.

2. Key features of the new rules

The new rules aim at tackling distortive foreign subsidies in two scenarios: M&A and public tenders. The definition of “subsidy” is very broad, even broader than the concept of “aid” under EU law. To mitigate -partly - the potential overreach, the new rules consider subsidies below EUR 4 million to be unlikely to distort the internal market, while for those below EUR 200,000 there is an outright exclusion.

For M&A, the new rules apply when the EU target’s turnover is above EUR 500 million and the foreign financial contributions exceeds EUR 50 million. In case of joint-ventures, the duty to notify arises when they are fully based in the EU. For public tenders, the threshold is EUR 250 million.² If tenders are divided into lots, there is a notification obligation when an undertaking applies for a total value of more than EUR 125 million. Subcontractors and suppliers are also subject to the notification obligation.

The new rules imply a duty to notify to the Commission about foreign subsidies. For M&A transactions, the Commission has 25 working days from notification to begin the in-depth investigation and a further 90 days to conclude the procedure. For public tenders, the preliminary phase must be completed within 20 working days, with a possible extension of 10 working days in justified cases, while for in-depth investigations, the time limit is 110 working days (with a possible extension of 20 working days).

The in-depth investigation allows the Commission to carry out a balancing between the distortive and the positive effects. Prior to the new rules taking effect, the Commission will issue clarifications on how it plans to run the balancing. In particular, the Commission will clarify how it plans to take into account broader positive effects, such as environmental and social standards and the promotion of research and development.

¹ “Agreement on foreign subsidies: ensuring equal competition in the EU”, Press release, 30 June 2022, available at the following [link](#).

² “Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament”, Press release, 30 June 2022, available at the following [link](#).

3. Conclusion

Executive Vice-President Margrethe Vestager stated that the new rules put on a level playing field EU and non-EU companies, given that *“we have had since 60 years strict rules on aid that Member States are allowed to grant. But until now, we had no similar rules for subsidies granted by non-EU countries meaning that companies were able to use financial support from abroad to get an unfair advantage in the EU”*.³ To carry the parallel with State aid further, the real challenge is to separate “good” aid from “bad” aid – a task which continues to beset the Commission in spite 60 years of experience. The task will be at least as difficult with foreign subsidies. In addition, the duty to notify will have direct effect in the national legal order as it is the case with State aid. As a consequence, failure to notify could be invoked before national judges, in particular in the context of actions challenging the award of tenders.

³ *“Press remarks by Executive Vice-President Vestager for the political agreement on the Foreign Subsidies Regulation”*, 30 June 2022, available at the following [link](#).

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