

27 April 2022

## EU Parliament Committee approves new rules to protect the internal market from foreign subsidies

### 1. Introduction

On 25 April 2022,<sup>1</sup> the Committee of the EU Parliament on International Trade voted a resolution proposing certain amendments to the Commission's proposal for a new regulation addressing foreign subsidies distorting the internal market.<sup>2</sup> In early May the plenary of EU Parliament is expected to vote on the resolution.

Later, the EU Parliament and Member States will enter into negotiations to arrive at a final text. Having prioritized the adoption of these new rules as part of the overall drive towards more strategic autonomy, France, currently holding the rotating presidency of the EU Council, is likely to push for a swift agreement. Thus, the new rules may well enter into force from next year.

Below we review the main impact of the new rules on foreign investors, focusing on the changes proposed after the recent vote.

### 2. Notification obligations – new thresholds

The draft regulation introduces new notification obligations for M&A transactions and participation in public tenders above certain thresholds. The EU Parliament Committee has voted for lower thresholds relative to the Commission's proposal. In particular, after the vote, the thresholds are as follows:

- For M&A deals, the relevant – cumulative – thresholds are (i) turnover of the EU target exceeding EUR 400 million and (ii) foreign financial contributions exceeding EUR 50 million.
- For public tenders, the estimated value of the public procurement needs to be equal or greater than EUR 200 million for a notification obligation to arise.
- There is also a *de minimis* threshold - EUR 4 million during three consecutive fiscal years, below which the subsidy is presumed to fall outside the new rules.

The lowering of the thresholds will lead to the new rules catching significantly more transaction/tenders. More specifically, with the original threshold the Commission estimated to receive 36 notifications for subsidised bids for public procurement, 30 notifications for concentrations, and between 30 and 45 ex-officio cases per year.<sup>3</sup> With the lower thresholds, these figures are bound to increase significantly, potentially posing an issue in terms of resources to manage the workload.

The lowering of the *de minimis* threshold is especially significant. The original threshold – EUR 5 million – was already considered “*fairly low in absolute terms*” by many stakeholders and the European Economic and Social

<sup>1</sup>The press release with the outcome of the vote is available at the following [link](#).

<sup>2</sup> Proposal for a regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, 5 May 2021, COM(2021) 223 final, available at the following [link](#).

<sup>3</sup> Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021, SWD(2021) 99 final.

Committee.<sup>4</sup> The new – lower - threshold expands further the Commission’s powers, in turn increasing the compliance burden on foreign investors that will have to keep track – and provide justifications – for relatively low amounts of subsidies.

### 3. Limited exemptions – the equivalence mechanism

The EU Parliament Committee also proposes new provisions to the effect that subsidies granted by a third country having a system for vetting subsidies equivalent to that of the EU should fall outside the new rules.

The Commission had already voiced criticism about the equivalence mechanism, fearing its misuse by certain countries.<sup>5</sup> In addition, it is unclear which countries could effectively invoke such exemption because the main trading partners do not have a system for vetting State aid that is similar to the EU’s.<sup>6</sup>

Ultimately, the only country which could aspire to benefit from this exemption is the UK, with its subsidy control bill currently advancing towards adoption.

### 4. Broad definitions – guidance

The Commission’s original proposal for defining a subsidy was already broader than the – already broad – notion of “aid” under EU law because it also included subsidies of a general nature (which would not be “selective” under EU law, hence outside notion of “aid”). The EU Parliament Committee has confirmed this approach. In fact, in the draft report there was even a reference to abuse of a dominant position/monopoly allowing a company to generate excess profits as a form of distortive subsidy.<sup>7</sup>

To balance the broad scope of these definitions, the EU Parliament Committee proposes that the Commission should publish guidelines, hopefully shedding light on the contour of these concepts.

### 5. Timeline of investigations – quickening the pace

With regard to public procurement, the EU Parliament Committee has significantly reduced the timeframe for the Commission’s investigations from 60 days to 40 days for the preliminary review, and from 200 days to 120 days for a final decision.

For M&A transactions the timeframe for investigations remains unchanged. Therefore, the Commission has 25 days from notification to begin the in depth investigation and a further 90 days to conclude the procedure from the opening of the in depth investigation.

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<sup>4</sup> European Economic and Social Committee Opinion on foreign subsidies distorting the internal market, 20 October 2021, INT/954-EESC-2021, available at the following [link](#).

<sup>5</sup> Mlex, Thresholds and exemption rules in EU foreign subsidies proposal divide bloc’s lawmakers, 26 January 2021, available at the following [link](#).

<sup>6</sup> Commission White paper on levelling the playing field as regards foreign subsidies, 17 June 2020, (COM(2020) 253 final), available at the following [link](#).

<sup>7</sup> Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies distorting the internal market 2021/0114(COD), 17 December 2021. This approach echoed the EU Parliament’s views in the 2020 report on competition policy, where it called on the Commission to “investigate the option to add a pillar to EU competition law that gives the Commission appropriate investigative tools in cases where a company is deemed to have engaged in distortionary behaviour due to government subsidies or to have made excessive profits based on a dominant market position in its home country” (see European Parliament, Report on competition policy, annual report 2019, available at the following [link](#)).

## 6. Concluding remarks

It is true that companies established in the EU must submit to a system for vetting the grant of State aid while no comparable regime is in place for support granted by non-EU countries. However, especially after the pandemic, Member States are meting out state subsidies at an unprecedented scale, all of which have been approved by the Commission. Moreover, new rules for facilitating even more the granting of aid for strategic projects are forthcoming – e.g. the Chips Act.<sup>8</sup>

Against this background, the urge to protect the EU internal market from subsidies granted by third countries should perhaps focus on the most harmful subsidies. Otherwise, there is a risk that our trading partners could equip themselves with similar vetting mechanisms with undesirable consequences. For instance, EU subsidies for the digital and green transition, which are at the heart of the resilience and recovery program, could trigger foreign probes in a scenario in which a EU operator eyes a target in a third country for scaling up, or decides to participate in a public tender. In sum, the co-legislators' next efforts could revolve around the right balance between protection and openness.

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<sup>8</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's Semiconductor Ecosystem (Chips Act), 8 February 2022, COM(2022) 46 final, available at the following [link](#).

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