



Paris, 8 December 2021

POLITICAL OPINION

on the proposal for a European Parliament and Council regulation on foreign subsidies distorting the internal market, COM(2021) 223 final

The Senate European Affairs Committee,

Having regard to Articles 114 and 207 of the Treaty on the Functioning of the European Union (TFEU),

Having regard to Articles 101, 102, 106, 107 and 108 of the TFEU,

Having regard to Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty,

Having regard to Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings,

Having regard to Commission Regulation (EU) no. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid,

Having regard to Regulation (EU) no. 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union,

Having regard to the Commission Communication of 18 February 2021, entitled "Trade Policy Review - An Open, Sustainable and Assertive Trade Policy," COM(2021) 66 final,

Having regard to the Commission White Paper of 17 June 2020 on levelling the playing field as regards foreign subsidies, COM(2020) 253,

Having regard to the Commission Communication of 18 February 2021, entitled "Trade Policy Review - An Open, Sustainable and Assertive Trade Policy," COM(2021) 66 final,

Having regard to the Commission Communication of 5 May 2021 "Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe's Recovery," COM(2021) 350 final, updating the communication of 10 March 2020, "A New Industrial Strategy for Europe," COM(2020) 102 final,

Having regard to Senate European Resolution no. 131 (2016-2017) of 8 September 2017 for a reform of the conditions for using the protective measures provided for in Regulation (EC) no. 1/2003 of the Council on the implementation of the rules on competition,

On a mechanism for identifying and evaluating the effects of foreign subsidies

Whereas foreign subsidies distort competition on the internal market to the detriment of non-subsidised companies, in particular when they facilitate the acquisition of European companies or the award of public procurement contracts;

Whereas the prohibition of State aid set forth under Article 107§1 of the TFEU is not applicable to subsidies granted by third States;

Whereas the existing trade defence tools apply only to trade in goods, and thus as they stand do not correct the distortions resulting from foreign subsidies;

Whereas the proposal for a regulation falls within the framework both of the new industrial strategy for Europe, which is

in particular intended to strengthen the strategic autonomy of the Union, and of the current re-evaluation of the Union's trade policy;

Approves the establishment of European mechanisms for identifying and monitoring distortions in competition on the internal market that may result from foreign subsidies, in order to fill a legal vacuum that is harmful to European companies and to competition on the internal market, notwithstanding compliance with international agreements to which the Union is party;

Draws attention to the need for a rapid implementation of these mechanisms in view of the strong growth in subsidies granted by third countries to companies operating on the European market, including in the context of recovery plans and the provision of support for the economy in response to the economic consequences of the health crisis, especially since control of these subsidies cannot be retroactive where an agreement has been made between parties to a concentration operation, or if a takeover bid has been announced, or in case of a public procurement procedure that started before the entry into force of the regulation;

Regrets the fact that the system cannot also take account of the competitive advantages created by non-compliance with International Labour Organisation (ILO) conventions and environmental standards;

Considers it essential for the European Union to go before the World Trade Organisation (WTO) to advocate the enactment of procedures effectively ensuring the transparency of State aid mechanisms;

On the competence of the Commission to implement mechanisms for the control of foreign subsidies

Whereas the text stipulates that, as in the case of the control of State aid, the Commission alone has competence to control subsidies provided by a third country to a company operating on the internal market;

Whereas, unlike in the case of State aid, subsidies granted by third States are not subject to a notification obligation, even if they involve large sums, except in case of concentration operations or public procurement procedures;

Whereas the Commission is empowered to act on the basis of information from any source, including a Member State, a national

competition authority, or complaints from competitors of the company thus subsidised;

Observes that the competence in principle granted to the Commission in matters of control of foreign subsidies is consistent with that conferred on it in matters of the control of State aid, and that it will permit uniform application of the control of the distortive effects of these subsidies on the internal market;

Suggests, however, that the Commission could nevertheless give national authorities a broader mandate than that provided for in the text to provide support for the implementation of the system, not only in terms of information gathering and investigation, but also in terms of the monitoring of remedies and commitments, or the identification of subsidies paid after the performance of controls by the Commission;

On the assessment of the distortive nature of foreign subsidies

Whereas Article 3 sets out the indicators allowing the measurement of distortions of competition that are habitually used by the Commission under Article 107 of the TFEU for the control of aid granted by Member States of the Union - or by means of State resources - which distort or threaten to distort competition by favouring certain undertakings or certain productions;

Whereas the Commission has a well-established investigative practice in the field of State aid, in line with the objectives of the Treaty;

Whereas Article 4 describes the categories of foreign subsidies most likely to distort the internal market, thus providing visibility to the undertakings concerned and to third countries;

Whereas the balancing of the negative impacts on the internal market and the positive effects of foreign subsidies on the development of the economic activity concerned, as provided under Article 5, may be accompanied by the imposition by the Commission of redressive measures to remedy the negative effects, or the acceptance by the Commission of commitments made by the undertaking concerned;

Observes that, even if the concepts are not equivalent, the legal standards are the same as for State aid, which should allow the Commission to make a concrete assessment, following a well-controlled economic approach, of the effects of foreign

subsidies on the internal market and correct its negative impacts, if necessary, without the need to define these effects *ex ante*;

Considers, with regard to the positive effects, that the Commission should assess them in light of the objectives of European policies, such as climate and environmental objectives, or those of the digital transition;

Points out that a quantification of the impacts of subsidies makes it possible to prepare an objective assessment without creating discrimination, in line with the rules of the World Trade Organisation (WTO);

On commitments and redressive measures

Whereas Article 6 provides the Commission with an indicative list of possible redressive measures that it may impose on an undertaking to remedy an actual or potential distortion generated by a foreign subsidy or to accept commitments proposed by a given undertaking and make them binding;

Considers that the focus should be on behavioural remedies that may be added to structural remedies or serve as alternatives to structural remedies;

Draws attention to the need for the Commission to carefully monitor the effective implementation of redressive measures and behavioural commitments;

Observes that among the measures cited is the reimbursement of the foreign subsidy, plus appropriate interest;

Expresses concern that in such cases, the risk of circumvention would be high, and for this reason recommends allowing the possibility of imposing a significant financial penalty or denying the undertaking access to the European market for a given period;

- ***Examination of foreign subsidies presumed to generate distortions of competition on the internal market (module 1)***

On the identification of distortive foreign subsidies

Whereas the first module provides that the Commission may, on its own initiative, conduct a control of subsidies granted by third countries to undertakings operating on the internal market in order to determine whether they are likely to distort this market;

Whereas when available information provides reasonable grounds to believe that third countries are granting distortive subsidies in certain sectors or in certain forms, Article 34 stipulates that the Commission may conduct a market investigation into a particular sector, among the undertakings or associations of undertakings concerned, inviting them to submit observations, and draw conclusions;

Whereas foreign subsidies are presumed to have no distortive effect on the internal market as long as they do not exceed 5 million Euros over the preceding three years;

Observes that this is a very high threshold, considering that Regulation 1407/2013 sets the *de minimis* threshold for notifying the Commission of aid granted by a Member State to European companies at 200,000 Euros, demonstrating that grants of an amount much lower than 5 million Euros have been perceived as likely to generate distortive effects;

Aware, nonetheless, that Commission services, as they stand, lack sufficient resources to identify foreign grants of small value that are not subject to notification;

Requests that at the very least it be expressly stipulated that the suitability of the threshold above which foreign subsidies must be presumed to generate distortions of competition should be the subject of an assessment by the Commission, as part of the regulation application review report required under Article 46, which should then be submitted to the European Parliament and Council within five years of the regulation's entry into force, and that the threshold should thus be revised if it appears too high;

On the obligation to demonstrate that damage is irreparable in order to pronounce interim measures

Whereas Article 10 allows the Commission to implement interim measures if there is evidence indicating the existence of a foreign subsidy distorting the internal market that represents a serious risk of substantial and irreparable damage to competition on the internal market;

Finds that the obligation imposed on the Commission to demonstrate the irreparability of the impact on competition on the internal market due to damages caused by a foreign subsidy makes it very difficult to use this tool;

Requests, therefore, that the excessively demanding criterion of demonstration of irreparable damage to competition should be replaced by a criterion of immediate damage;

On the preliminary review and investigation carried out by the Commission

Whereas, if following a preliminary review the Commission decides to open an in-depth investigation, Article 9 requires it to publish a notice in the Official Journal of the European Union inviting interested parties, Member States and the third country to make comments;

Whereas, as the control of anticompetitive practices, Article 12 authorises the Commission to appoint officials to carry out inspections of companies established in the Union, access accounting documents, and request explanations from employees about facts and documents related to the investigation;

Whereas the Member State concerned must be informed in advance of the opening of an in-depth investigation on its territory conducted by officials appointed by the Commission;

Whereas it is provided that the Commission shall also be entitled to ask Member States to conduct an inspection or other investigative measure within their territory in application of their national law;

Considers that when the Commission appoints officials to conduct an investigation in the territory of a Member State, the competent national authority should be able to appoint one of its officials to accompany them;

- ***Control of foreign subsidies received over the past three years in the event of a proposed concentration or takeover (module 2)***

On the thresholds for prior notification of foreign subsidies

Whereas Article 19 requires notification of the existence of foreign subsidies in advance of any concentration or takeover operation in which the companies concerned have received more than 50 million Euros in cumulative subsidies from third countries during the last three calendar years, provided that the total in-Union turnover of the target company or one of the parties exceeds 500 million Euros;

Notes that these thresholds, which differ from those provided under Regulation 2004/139 for the notification of concentration operations, are very high;

Understands that the Commission intends to concentrate its resources, at least initially, on the significant subsidies received by the largest operations;

Notes that the Commission nevertheless reserves the right to request a prior notification below these thresholds if it suspects that the undertakings concerned have received foreign subsidies over the prior three years;

Recommends that the Commission should intervene more particularly when the takeover target of an undertaking receiving foreign subsidies is an innovative SME, for example in the emerging technologies field;

Requests that it be expressly stipulated that the suitability of these thresholds should be the subject of an assessment by the Commission, as part of the regulation application review report required under Article 46;

On the consequences for a failure to notify or the provision of inaccurate information

Whereas it is provided that in the event of a concentration or the acquisition of a majority stake, the Commission may conduct an *ex post* examination of operations already carried out and that may not have complied with the foreign subsidy notification obligation;

Whereas in such a case, it may order the dissolution of the concentration or require the companies concerned to take measures intended to restore the prior situation;

Whereas it is also entitled to impose fines of up to 10% of the total turnover achieved in the previous financial year on companies that intentionally or negligently fail to notify a concentration when they were required to do so;

Whereas it may also impose fines of up to 1% of turnover on companies that intentionally or negligently provide it with inaccurate information;

Considers, subject to a five-year evaluation, that the Commission is entitled, in such case, to restore the competitive situation and sanction the non-compliances observed;

- ***Control of foreign subsidies in public procurement procedures (module 3)***

On the thresholds for prior notification of foreign subsidies

Whereas foreign subsidies are likely to allow a company to submit tenders that are unfairly more attractive;

Whereas Article 28 requires any economic operator bidding in a public procurement procedure to notify the contracting authority or entity of any foreign subsidies that it or its main subcontractors and suppliers have received over the three previous years, when they exceed 250 million Euros;

Finds that the very high level of this notification threshold is likely to result in only major works contracts being subject to the prior notification obligation, and would de facto exclude consideration of the distortive effects of foreign subsidies in supply contracts, or in the event of allotments intended to open up access to public contracts by SMEs;

Requests that these thresholds should be reduced, or at least that they be assessed within five years by the Commission as part of the regulation application review report required under Article 46;

Whereas it is specified in Article 31 that the investigation of foreign subsidies must not undermine the principles of proportionality, non-discrimination, equal treatment and transparency;

Emphasises that European public procurement contracts are generally open to competition, whereas many third countries very severely limit the access of European companies to their public contracts and therefore do not respect these principles;

On the duration of the examination deadlines by the Commission

Whereas the contracting authority or entity must transmit any foreign subsidy notification it receives to the Commission immediately, and whereas the Commission is empowered to perform a preliminary review and, where appropriate, an in-depth investigation into these subsidies, which may include taking comments from the contracting authority or entity;

Whereas in the event of a preliminary review, the award of the contract will be suspended for 60 days counted from receipt of the notification, which period will be extended to 200 days in case of an in-depth investigation;

Expresses concern as to the impact of these time periods on the timelines for the award of public procurement contracts, in particular when such contracts are necessary to ensure the continuity of public services or to meet urgent needs, even though it is provided that in such cases the award procedures may be expedited;

Considers that the duration of these deadlines should be reduced and that it should be possible to provide exceptions to them, in particular in case of an emergency duly demonstrated by the contracting authority or entity;

On sanctions for non-notification of foreign subsidies or provision of incomplete information

Whereas fines of up to 1% of the total turnover achieved by the successful undertaking or association of undertakings may be imposed for failure to notify subsidies received or the provision of incomplete information;

Whereas foreign subsidies may be granted after contracts have been awarded, and in such case, the only option available is to impose fines, which are limited to those same amounts;

Points out that subsidies received by subcontractors or *a fortiori* by suppliers designated after a given contract has been awarded will likely be difficult to identify and their distortive effects difficult to control;

Holds that in such cases the Commission should at the very least be able to impose fines exceeding the amount of the damages caused.