HERBERT SMITH FREEHILLS

THE LOOMING NEW EU FOREIGN SUBSIDIES REGIME - A STRICTER FRAMEWORK?

03 May 2022 | Europe
Legal Briefings

Amendments to the EU's proposed new foreign subsidy rules have big implications for international firms in the region

In 2021, the European Commission issued proposals for a far-reaching new Regulation on foreign subsidies distorting the EU market. The proposed Regulation has now passed a key procedural milestone. On 25 April, the EU Parliament's Committee on International Trade (INTA Committee) unanimously voted in favour of the proposed Regulation, subject to amendments further broadening its scope and altering other important aspects of the envisaged regime. These amendments are outlined below. The adoption of the proposed Regulation, likely this year, could have a transformative impact on foreign companies operating or investing in the EU.

BACKGROUND

While the granting of support to companies by EU Member State authorities is subject to rigorous EU State aid control, comparable regulatory controls do not in general exist for subsidies granted by non-EU countries. The proposed Regulation is intended to prevent beneficiaries of such foreign subsidies from securing unfair advantage when operating in the EU.

As such, the outlined reforms would confer substantial new powers on the Commission and also increase the regulatory risks and burdens faced by foreign companies in the EU. In particular, the Commission would have the ability to investigate mergers and acquisitions or bids for public procurement contracts where relevant companies are beneficiaries of foreign subsidies such as grants, interest-free loans or unlimited guarantees, as well as any other alleged distortive state support. The Commission will have a number of measures of redress at its disposal or may, in certain circumstances, accept commitments to remedy any competitive distortion.

PROPOSED AMENDMENTS

The INTA Committee was assigned responsibility by the EU Parliament for review of the proposed Regulation. It has now adopted its report on the outlined reforms, which puts forward significant amendments to the proposed Regulation as issued by the Commission. Amendments of likely concern to business are summarised below:

- **Lower notification thresholds**. The INTA Committee proposes lowering thresholds above which companies are obliged to notify the Commission of potentially subsidised acquisitions and public procurement bids. This would extend the scope of the new regime. More specifically, the turnover threshold triggering the mandatory notification of potentially subsidised acquisitions involving EU companies would be lowered from €500 million to €400 million. For potentially subsidised public procurement bids, the notification threshold is lowered from €250 million to €200 million, based on the value of the public contract. Finally, the effective "safe harbour" for foreign subsidies – ie, the ceiling for subsidies, which should not be subject to so-called *ex officio* investigation by the Commission (where the body uses its discretion to launch an investigation) – would be reduced from €5 million to €4 million.

- **A broader definition of subsidy.** The INTA Committee has suggested widening the notion of a "subsidy" to include situations where a foreign company enjoys privileged access to its own domestic market in the form of exclusive or special rights. The misuse of transfer pricing in the context of multinationals' tax-planning arrangements is also highlighted, which has been a controversial area of focus for EU State aid enforcement in recent years.

- **Shorter review periods.** It is proposed that the basic review periods for the Commission to investigate potentially subsidised public procurement bids should be cut. The period for preliminary review would be reduced from 60 days to 40 days and the period for in-depth investigations would be cut from a general maximum of 200 days to 120 from notification.

- **Guidance to be issued.** To enhance legal certainty for stakeholders, the Commission has been pressed produce guidance on the criteria for opening investigations of alleged distortive foreign subsidies. The Commission should also produce guidance on how it will approach its substantive assessment of distortions and how it will weigh up potential benefits of a subsidy against its distortive effects. The INTA Committee specified the guidance must be provided within two years of the date the new rules enter into force.

- **Mechanism for Member States and businesses to provide information.** The INTA Committee recommends the Commission establishes a mechanism where Member States and interested parties, such as companies and trade associations, can contact the Commission and confidentially provide information on actual or potential cases of distortive foreign subsidies for the purposes of the Commission exercising its investigative powers. While this falls short of the kind of formal complaint mechanism existing under the EU State aid regime, it would provide a means for stakeholders to raise concerns, while affording the Commission greater flexibility to focus on the most distortive foreign subsidies.

- **Pre-notification procedure and greater clarity on notification obligations.** It is recommended the Commission introduce a pre-notification procedure for companies to consult with the Commission informally whether potentially subsidised acquisitions need to be notified. At the same time, it is recommended that foreign financial contributions in the form of the provision or purchase of goods or services do not need to be notified where an open, competitive tender has taken place. This should help reduce burdens for companies under the proposed regime.

- **Recognition of domestic subsidy control regimes in non-EU countries.** As part of the distortion assessment, it is recommended the Commission considers whether the non-EU country granting the subsidy has a domestic subsidy control regime equivalent to its state aid regime, and whether the subsidy has received local clearance. The suggestion is when a subsidy has already been through a credible subsidy control assessment that takes into account its effects on the internal market, it should be less likely to be problematic.

Recommendations to cut red tape and increase legal certainty through provision of guidance and pre-notification contacts are welcome. But an extension of the regime to include lower value acquisitions, procurement contracts and subsidies appears to us a retrograde step. The suggestion of some form of equivalence mechanism is controversial, but it may provide further impetus to the broader development of subsidy control disciplines outside the EU, the lack of which, informs the proposed Regulation. From a practical perspective, it could significantly reduce the risks in particular in relation to subsidies granted by the UK, which has just adopted its Subsidy Control Act, providing for a domestic subsidy control regime closely aligned with the EU State aid rules.

NEXT STEPS

The report adopted by the INTA Committee is subject to a vote on Thursday (5 May 2022) by the EU Parliament plenary. The adopted consolidated report will then serve as the EU Parliament's mandate for negotiations with the EU Council, one of three primary legislative bodies for the EU.

A parallel process is ongoing within the EU Council, where preparatory work on the proposed Regulation is being carried out by the Working Party on Competition. Once the Parliament and the Council have adopted their respective mandates, they will engage in inter-institutional negotiations to agree on the final version of the new Regulation. It is envisaged the new regime will be adopted this year and enter into force in 2023.

We will continue to monitor matters and provide updates on key developments. It seems the basic configuration of the proposed Regulation is now clear, as is the determination of EU institutions to take decisive action against distortive subsidies to ensure a level playing field for EU and foreign companies.

This article first appeared on our Competition Notes blog. Click here for analysis of the initial proposals.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

DANIEL VOWDEN
PARTNER, BRUSSELS

+32 2 518 1851
Daniel.Vowden@hsf.com

MORRIS SCHONBERG
SENIOR ASSOCIATE, BRUSSELS
+32 477 882 741
Morris.Schonberg@hsf.com

SOUZANNA OMRAN
ASSOCIATE, BRUSSELS
+32 2 518 1853
souzanna.omran@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.