

The Regulation on Foreign Subsidies Distorting the Internal Market – Outline of the Provisional Agreement

Simone Ritzek-Seidl*

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Abstract

Towards the end of June 2022 the negotiators of the European Parliament and of the Council reached a provisional agreement on the Regulation on foreign subsidies distorting the internal market. This article describes the main points of the provisional agreement, pertaining to the key concepts of the Regulation, guidelines on certain provisions, thresholds for notifying concentrations and public procurement tenders, adapting those thresholds by delegated acts, the relationship with third countries as regards subsidies, certain procedural aspects and the retrospective application of the Regulation.

Keywords: Foreign Subsidies Regulation, Interinstitutional Negotiations, Provisional Agreement, Council, European Parliament, Commission

* Dr. Simone Ritzek Seidl, international relations officer, DG Competition, European Commission. The views expressed in this article are strictly personal and do not necessarily represent the position of the European Commission. Email: simone.ritzek-seidl@ec.europa.eu.

A. Introduction

On 30 June 2022, the negotiators of the European Parliament and of the Council reached a provisional agreement on the Regulation on foreign subsidies distorting the internal market.¹ This Regulation, which was proposed by the Commission on 5 May 2021,² closes a regulatory gap within the internal market. While subsidies granted by EU Member States are subject to State aid control, subsidies granted by non-EU countries are largely unmonitored.

B. The Commission proposal in a nutshell

The Commission proposal aimed at closing this gap by setting out three different procedures that allow the Commission to investigate foreign subsidies that distort the internal market, and to redress such distortions: A notification procedure for concentrations,³ a notification procedure for tenders in public procurement procedures,⁴ and more generally an *ex officio* procedure, which can be used in all market situations.⁵

If the investigation under one of these three procedures reveals that there is a foreign subsidy that distorts the internal market, and if this distortion is not outweighed by positive effects, the Commission may impose redressive measures on the undertakings concerned or accept their commitments to redress the distortion.

The Commission proposal is based on two legal bases, namely the Common Commercial Policy pursuant to Article 207 of the Treaty on the Functioning of the European Union (TFEU) and the approximation of laws in the internal market pursuant to Article 114 TFEU. To ensure a uniform application of the rules on foreign subsidies, the Commission is the sole authority competent to enforce the Regulation.

C. Provisional agreement reached during interinstitutional negotiations

The interinstitutional negotiations, i.e. the trilogues between the European Parliament, the Council and the European Commission, left the scope and the overall architecture of the Commission proposal largely untouched. The main points subject

1 <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/> (21/7/2022); <https://www.europarl.europa.eu/news/de/press-room/20220627IPR33918/agreement-on-foreign-subsidies-ensuring-equal-competition-in-the-eu> (21/7/2022).

2 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 2021/0114 (COD), (Commission proposal).

3 Chapter 3 of the Commission proposal.

4 Chapter 4 of the Commission proposal; for more details on the public procurement chapter, see *Ebrecht*, ZEuS 2022/3, p. 487.

5 Chapter 2 of the Commission proposal.

to negotiation, and the respective outcome of the negotiations as set out in the provisional agreement,⁶ concern the following aspects:

I. Key concepts

Both the European Parliament and the Council set out a number of ideas in their respective negotiating positions concerning key concepts of the Regulation, such as foreign subsidy, distortion, balancing and redressive measure.⁷ The provisional agreement further clarifies these key concepts, mainly using EU State aid rules as benchmark.

As regards the definition of foreign subsidy, it is amongst others clarified that tax exemptions or the granting of special or exclusive rights without adequate remuneration can constitute financial contributions.⁸ The undertaking may use the benefits derived from such tax exemptions or special or exclusive rights in the third country to distort the internal market.

On the assessment of a distortion, the negotiators agreed to add export financing to the categories of foreign subsidies most likely to distort the internal market.⁹ The provisional agreement acknowledges that foreign subsidies that aim at making good the damage caused by natural disasters or exceptional occurrences do not necessarily distort the internal market.¹⁰ The ‘soft’ minimum threshold, i.e. the level below which foreign subsidies are considered unlikely to distort the internal market, is set at EUR 4 million per undertaking over three financial years.¹¹ In addition to that ‘soft’ minimum threshold, the provisional agreement introduces a ‘hard’ *de minimis* threshold of EUR 200,000 over three financial years per undertaking and per third country. Below this level, which is aligned with the State aid *de minimis* Regulation,¹² a foreign subsidy shall not be considered to distort the internal market.

The provisional agreement modifies the balancing, to focus on the positive effects of the subsidy on the development of the relevant subsidised economic activity on

6 The text of the provisional agreement was published by the European Parliament, available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf (21/7/2022), and by the Council, available at: <https://data.consilium.europa.eu/doc/document/ST-11234-2022-INIT/en/pdf> (21/7/2022), (provisional agreement).

7 Council mandate for negotiation with the European Parliament as approved by the Permanent Representative Committee on 4 May 2022, doc. 8713/22, see for example, Art. 2, 3, 5 and 6; amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, P9_TA(2022)0143, see for example amendments 26–37.

8 Art. 2(2)(a)(ii) provisional agreement.

9 Art. 4(1)(ba) provisional agreement.

10 Art. 3(2aa) provisional agreement.

11 Art. 3(2) provisional agreement.

12 Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352 of 18/12/2013, p. 1.

the internal market, while clarifying that other positive effects can also be taken into account in the assessment, including those related to the relevant policy objectives.¹³

The negotiators agreed to add another redressive measure in the non-exhaustive list set out in Art. 6 of the provisional agreement, namely the possibility to oblige undertakings to adapt their governance structure. Furthermore, the provisional agreement empowers the Commission to oblige undertakings to inform the Commission of their future participation in concentrations or public procurements below the notification thresholds.¹⁴

II. Guidelines

Both the European Parliament and the Council highlighted in their respective negotiating positions that the Commission should provide further clarification on certain provisions.¹⁵ During the interinstitutional negotiations, it was agreed that the Commission would publish, at the latest three years after entry into force of the Regulation, guidelines on (i) the application of the criteria for determining the existence of a distortion, (ii) the application of balancing, (iii) the application of the Commission's power to request prior notifications of concentrations and public tenders not meeting the thresholds for mandatory notifications and (iv) the assessment of a distortion in a public procurement procedure. These guidelines will build on the practice of the application of the Regulation, and will be consulted with stakeholders and Member States.¹⁶ The Commission further committed to clarifying the application of certain provisions at the latest 12 months after the date of the application of the Regulation.¹⁷

III. Notification thresholds and definition of concentrations

According to the Commission proposal, the notification procedures will only be triggered for transactions above certain thresholds. These thresholds were, following an impact assessment,¹⁸ set at a level which should allow to capture the largest transactions and the potentially most distortive foreign subsidies. While the Euro-

13 Art. 5(1) provisional agreement.

14 Art. 6a provisional agreement.

15 Council mandate for negotiation with the European Parliament as approved by the Permanent Representative Committee on 4 May 2022, doc. 8713/22, recital 48a, Art. 3(2aa), 5(3), 19(5), 26(2), 28(6); amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, P9_TA(2022)0143, see amendments 9, 10, 12, 36, 40, 52.

16 See Art. 40b provisional agreement.

17 See Commission declaration in annex to the provisional agreement.

18 Impact assessment report of 5/5/2021, Commission staff working document accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, SWD(2021) 99 final.

pean Parliament had initially suggested to lower the notification thresholds,¹⁹ the Council wanted to increase them.²⁰ As a compromise, the provisional agreement maintains the notification thresholds initially proposed by the Commission.

As regards concentrations, only those meeting combined thresholds concerning the size of foreign financial contributions and EU turnover need to be notified. These thresholds are set at EUR 50 million of aggregate financial contributions received by the undertakings involved in the concentration over the last three years prior to the notification,²¹ and EUR 500 million EU turnover of at least one of the merging undertakings or the acquired undertaking or, in the case of acquisitions of joint control, the joint venture.²²

As regards the latter, the Commission proposal set out that a joint venture has to be notified if either the joint venture itself or one of its parent undertakings has an EU turnover of EUR 500 million. This proposal could however have led to an unduly high number of notifications, including of joint ventures outside the Union. The co-legislators therefore provisionally agreed to narrow down the notification requirement for joint ventures to target only transactions with an EU nexus. Only joint ventures exceeding the EU turnover threshold of EUR 500 million have to be notified.

As regards the notification thresholds for public procurement, the provisional agreement maintains the initially proposed threshold of EUR 250 million of the estimated value of the procurement and adds a threshold for lots.²³

Furthermore, the provisional agreement further aligns the chapter on concentrations with the EU Merger Regulation,²⁴ notably by exempting certain transactions involving financial institutions and insurance companies from the notification obligation under specific circumstances where control is not acquired on a lasting basis.²⁵ It also makes clear that undertakings can reach out to the Commission prior to the notification to get guidance on whether the notification thresholds are met.²⁶

IV. Delegated acts

The provisional agreement allows the Commission to adapt the notification thresholds with a delegated act pursuant to Art. 290 TFEU. This will allow the Commission to react quickly if it turns out that the notification thresholds were set at an

19 Amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, P9_TA(2022)0143, see amendments 63, 65, 69.

20 Council mandate for negotiation with the European Parliament as approved by the Permanent Representative Committee on 4 May 2022, doc. 8713/22, Articles 18, 27.

21 Art. 18(3)(b) provisional agreement.

22 Art. 18(3)(a) provisional agreement.

23 See *Ebrecht*, ZEuS 2022/3, p. 487.

24 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24 of 29/1/2004, p. 1.

25 Art. 18(3a) provisional agreement.

26 Recital 32a provisional agreement.

unsuitable level, and would for example create disproportionate burden on the Commission and the undertakings concerned, hamper beneficial foreign investment, or, on the contrary, would not cover problematic transactions.

In more detail, the Commission can increase or decrease by 20% the thresholds for notifications in concentrations and public procurement procedures after having assessed the threshold in light of its practice of the application of the Regulation, and after having established the necessity of amending the threshold.²⁷ To establish such a necessity, the provisional agreement sets out strict conditions. For example, for increasing the threshold for concentrations, the Commission will have to conduct an assessment that shows that either a large part of decisions prohibiting a concentration or setting out commitments concerned concentrations where the turnover of the company was substantially higher than EUR 500 million, or a large number of notifications ended without prohibition or commitments. In addition, the power to adopt such a delegated act can only be used once in a period of five years starting two years after the entry into force of the Regulation.²⁸

Furthermore, the provisional agreement delegates to the Commission the power to shorten the time limits for the investigation where practice shows that the duration of the Commission's assessment could justify such a change.²⁹

V. Relation with third countries

The European Parliament highlighted in its negotiating position that the Regulation should further emphasise the importance of multilateral solutions to improve foreign subsidy rules and cooperation with third country partners.³⁰ During the interinstitutional negotiations, it was provisionally agreed to allow the Commission to enter into a dialogue with a third country in case of repeated distortive foreign subsidies granted by that country.³¹ In such a dialogue, the Commission would explore options with the third country to eliminate the distortive effects of such repeated distortive foreign subsidies on the internal market. In addition, the three institutions emphasised that the Union remains committed to modernise WTO rules to address distortions to trade and competition, and provisionally agreed to issue a joint declaration on this topic, combined with a unilateral Commission declaration.³² Finally, the provisional agreement clarifies that the Regulation may be abrogated if multilateral rules on subsidies become advanced enough to make the Regulation redundant.³³

27 Art. 44(1) and (1ab) provisional agreement.

28 Art. 45(1a) provisional agreement.

29 Art. 44(2) provisional agreement.

30 Amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, P9_TA(2022)0143, see amendments 20, 21, 24, 83, 93.

31 Art. 34a provisional agreement.

32 See annex to the provisional agreement.

33 See Art. 46(1a)(e) provisional agreement.

VI. Public procurement procedures

The provisional agreement sets out some changes to chapter 4 on public procurement procedures,³⁴ notably shortening time limits for reviews of foreign subsidies in public procurement procedures,³⁵ clarifying that *ex officio* reviews can only cover contracts that were already awarded, and that the outcome of such investigations cannot result in a termination of a public contract or concession.³⁶ It also excludes certain public contracts in the field of defence and security from the scope of the Regulation.³⁷

VII. Procedural aspects

Furthermore, the provisional agreement includes new provisions on the interaction between the Commission, EU Member States and stakeholders.³⁸ It makes clearer in which cases EU Member States are consulted on draft decision in an advisory procedure under the Comitology Regulation³⁹ and provides clarifications on access to file.⁴⁰ It sets an approximate 18-month time limit for the *ex officio* investigations, during which the Commission would endeavour to adopt a final decision,⁴¹ similarly as set out in the State aid procedural regulation.⁴² Finally, it adds an anti-circumvention clause.⁴³

VIII. Retrospectivity

The provisional agreement reduces the retrospectivity period from the 10 years, as initially proposed by the Commission, to five years. The Regulation will therefore allow investigating foreign subsidies granted in the five years before the start of the application of the Regulation to the extent such subsidies still cause distortions after the start of the application of the Regulation.⁴⁴ The provisional agreement maintains the Commission proposal to carve out concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired be-

34 See *Ebrecht*, ZEuS 2022/3, p. 487.

35 Art. 29 provisional agreement.

36 Art. 7(2) provisional agreement.

37 Art. 1(2a) provisional agreement.

38 Art. 33a provisional agreement.

39 Recital 47 provisional agreement, Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ L 55 of 28/2/2011, p. 13.

40 Art. 38 provisional agreement.

41 Art. 9(5) provisional agreement.

42 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union – OJ L 248 of 24/9/2015, p. 9.

43 Art. 35a provisional agreement.

44 Art. 47(1) provisional agreement.

fore the date of application of the Regulation.⁴⁵ By the same token, public procurement contracts that have been awarded or procedures initiated before the date of the application of the Regulation are carved out.⁴⁶

D. Outlook

The provisional agreement reached on 30 June 2022 is still subject to formal approval by the European Parliament and by the Council.⁴⁷ The formal adoption procedure, which will start after the revision of the provisional agreement by the lawyer linguists of both institutions, is expected to be finalised in autumn 2022. The Regulation will enter into force 20 days after its publication in the Official Journal of the European Union, and will start to apply 6 months after the entry into force, i.e. most likely as of mid-2023. After the start of application, there will be an additional 3-month period before the notification obligation starts to apply. This should provide companies and public authorities with sufficient time to familiarize themselves with the obligations set out in the Regulation. By the start of application, the Commission will need to complement this important and timely addition to the Union's toolbox with implementing acts on procedural aspects, and will need to be equipped to effectively enforce the Regulation on foreign subsidies distorting the internal market.

Bibliography

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45 Art. 47(3) provisional agreement.

46 Art. 47(4) provisional agreement.

47 On the European Parliament's side, the formal approval process started with a vote in favour in the Committee on International Trade on 14 July 2022, and on the Council's side, the provisional agreement has been endorsed by the Permanent Representatives Committee (Coreper) on 13 July 2022.