



BusinessEurope key messages on the foreign subsidies instrument

KEY MESSAGES

- 1 BusinessEurope welcomes the proposal** for a regulation to address distortions caused by foreign subsidies in the Single Market published in May 2021. The Regulation has been given a more proportionate scope, with focus on the potentially more distorting subsidies. Yet, the notification thresholds for concentrations and public procurement procedures may need to be lowered to capture relevant distortive subsidies. At the same time, the administrative burden on companies and public authorities needs to be kept as low as possible. Moreover, the Commission needs to allocate an adequate amount of resources to the operation of this instrument in order that lower thresholds for procurement and concentrations do not negatively impact its ability to use the ex officio tool.
- 2** The Regulation should include **specific provisions to deal with foreign state-owned enterprises (SOEs)**. For example, the Commission could reverse the burden of proof for foreign SOEs, particularly where it has well-founded evidence of the existence of significant distortions in a third country or a sector in a third country. The WTO compliance of this measure needs to be ensured.
- 3** The Commission will need to provide **detailed guidance on different aspects of the final regulation** to companies to give them more legal certainty. This should include guidance e.g. on the application of the ex-officio tool, the definition of foreign subsidies, the calculation of fines and penalty payments, interim measures the Commission can take, commitments companies can offer or inquiries that will be prioritised in case of an excessive number of notifications.
- 4** The Commission should issue practical guidance with concrete examples to companies on **how to calculate the financial contributions that need to be notified** under the foreign subsidies instrument. In this regard, the broad and unspecific scope of the notification obligations related to financial contributions in the context of public procurement tenders or concentrations should be refined to bring clarity for economic operators as to what reporting is expected.



- 5 The definitions and procedures under the instrument should be **aligned as much as possible with relevant EU legislation**, e.g. on state aid, trade defence, foreign investment screening, public procurement and antitrust. Duplication of reporting requirements and overlaps in terms of scope should be avoided.
- 6 BusinessEurope does not favour a **retroactive application** of the instrument to public procurement procedures and concentrations that were completed or initiated before the regulation enters into force.
- 7 The Commission should open an **electronic communication channel** presenting strict confidentiality guarantees to receive comments from interested parties, including business organisations and Member States. The Commission should hear all interested parties having made themselves known 30 days after the notification of the Commission on the electronic communication channel, provided that they have made an electronic request:
 - (i) showing that they are an interested party likely to be affected by the result of the proceedings and reasons why they should be heard; or
 - (ii) supporting the existence of a foreign subsidy or any other advantages; or
 - (iii) justifying that they have particular reasons to be heard (e.g., specific expertise on a given sector affected).Opportunities should, on request, be provided to interested parties so that opposing views may be presented and rebuttal arguments offered.
- 8 The Commission should present a **report in 2023 that assesses the effectiveness of existing EU trade defence instruments** tackling imported goods that benefitted from distortive foreign subsidies. If the report finds that the EU's existing tools in this area are not sufficient, it should be accompanied by a legislative proposal filling any of the gaps identified.
- 9 Article 40.7 has created some confusion as to the extent to which the manufacturing industry will be covered by the instrument. It should thus be **clarified whether the actions under the instrument will apply to the manufacturing industry** – including in the specific cases of public procurement and concentrations. It should further be specified how hybrid cases (supplies of both goods and services within one public procurement contract) will be treated under the instrument. A situation where the manufacturing industry is subject to notification requirements without having recourse to the actions under the Regulation should be avoided.



- 10** As foreign subsidies from **third countries with EU-equivalent measures in terms of subsidy control and state aid** may be less likely to be distortive, the European Commission should carry out an assessment of those equivalent legal frameworks. On the basis of the main findings, if deemed appropriate, the Commission may consider whether it is possible to grant an equivalency decision to such countries. To avoid politization, an equivalence decision should be limited in time and the European Commission should develop clear and transparent criteria for such a decision to be granted. In any event, operators from countries granted equivalence should not be exempted from notification requirements as they may still have received distortive foreign subsidies from another third country.

The full position paper on the European Commission legislative proposal on foreign subsidies distorting the internal market is available on the website of BusinessEurope [at this link](#).