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EUROPEAN COMMISSION OUTLINES REGULATIONS FOR FOREIGN SUBSIDIES

European Law Competition, Retail and Consumer Law Public Law and Public Procurement Law | 20/07/23 | Vincent Brenot

On December 14, 2022, the European Parliament and the Council adopted the Regulation concerning foreign subsidies distorting the internal market ("**RSE**»)[1]. This text, which came into effect on January 12, 2023, addresses a legal void: situations in which a non-member state of the European Union ("**EU**") grants subsidies to a private or public company, subsidies that could potentially harm competition in the internal market.

The implementation details of the Regulation had not yet been determined. This has now been addressed. On July 10, 2023, the European Commission ("**the Commission**") adopted the Implementation Regulation 2023/1441 concerning the detailed modalities of the procedures implemented by the Commission under the RSE ("**the Implementation Regulation**")[2].

New Regulations on Foreign Subsidies Leading to Market Distortions

The RSE aims to address distortions caused by subsidies granted by non-EU member countries, whether during merger reviews, in public procurement procedures, or in any other market situations.

It includes three tools, the use of which will be overseen by the Commission:

- An obligation for companies to notify the Commission of mergers involving a financial contribution from public authorities of a non-EU member state when i) the acquired company, one of the merging parties, or the joint venture generates a turnover in the EU of at least 500 million euros and ii) the foreign financial contribution exceeds 50 million euros[3];
- An obligation for companies to notify the Commission when participating in public procurement procedures when i) the estimated value of the market is at least 250 million euros and ii) the concerned foreign financial contribution is at least 4 million euros per non-EU member state; under these two procedures, the Commission can prohibit the awarding of contracts to companies benefiting from distortion-generating subsidies[4];
- For all other market situations, the Commission can initiate investigations on its own (*ex-officio*) if it suspects the presence of distortion-generating foreign subsidies. This includes the possibility of requesting ad hoc notifications for smaller-scale procurement procedures and mergers[5].

Commission's Authority and Investigation Procedures

A notified merger cannot be completed, and a bidder under investigation cannot be awarded the public contract while the Commission's investigation is ongoing. In the event of a breach of this obligation, the Commission can impose fines on the company that can amount to up to 10% of its total annual turnover. The Commission can also prohibit the completion of a subsidized merger or the awarding of a public contract to a subsidized bidder.

The RSE grants the Commission a broad range of investigative powers to gather necessary information, including i) sending information requests to companies; ii) conducting investigative missions within and outside the EU (including through inspections with on-site or document checks, requests for explanations, sealing of premises, etc.[6]); iii) initiating sector inquiries into specific sectors or types of subsidies. The Commission can also rely on market information provided by companies, Member States, or any individual or legal entity or association[7].

Companies that refuse to undergo inspections or do not effectively cooperate with the Commission can face periodic penalty payments or fines[8].

The Commission can also take **interim measures** if it believes there are sufficient elements demonstrating the existence of a foreign subsidy that could distort the internal market and a risk of significant and irreparable harm to competition[9].

If the Commission finds that a foreign subsidy exists and it distorts the single market, it can weigh the subsidy's negative distortion effects against its positive impacts on the development of the subsidized economic activity. If the negative effects outweigh the positive ones, the Commission can impose structural or non-structural remedies on companies, or accept them as commitments, to address the distortion (for example, divestment of certain assets or prohibition of certain market behavior).

As a general rule, subsidies below 4 million euros over three years are considered as "unlikely" to cause distortions, while subsidies below the EU's de minimis thresholds applicable to state aid are deemed not likely to cause distortions.

Within the context of mergers and public procurement procedures subject to notification obligations, the Commission can examine foreign subsidies granted up to three years before the transaction. However, the RSE does not apply to mergers concluded and public procurement procedures launched before July 12, 2023.

In all other situations, the Commission can examine subsidies granted over the previous ten years. However, the RSE only applies to subsidies granted within the five years preceding July 12, 2023, when these subsidies distort the internal market after its application.

The Implementation Regulation outlines the procedural elements for enacting the RSE

The Implementation Regulation provides detailed rules concerning:

- The notification procedure to the Commission for mergers and participation in public procurement related to foreign financial contributions, including the notification forms for each procedure (similar to, for example, the forms provided by the Regulation on merger control), the person authorized to submit a notification, and the effective date of the notification.

Regarding merger operations, companies must, for foreign financial contributions considered by the RSE as the most likely to distort the internal market (such as those granted to distressed companies or directly facilitating a merger, or unlimited guarantees, also known as "financial contributions under Article 5"), provide detailed information on all financial contributions of an individual amount of at least one million euros, granted to the parties involved in the transaction over the past three years. For all other foreign financial contributions, companies must provide an overview of the financial contributions granted to the notifying party or parties over the last three years, of an individual amount of at least one million euros, solely concerning the countries that have granted the parties involved in the transaction at least 45 million euros over the three years preceding the merger, subject to a number of exceptions.

Regarding foreign financial contributions in the context of public procurement procedures, companies must, for foreign financial contributions, provide detailed information on all financial contributions that fall under Article 5 of an individual amount of at least one million euros, granted to the notifying party or parties over the three years preceding the notification. For all other foreign financial contributions, companies must provide an overview of the financial contributions granted to the notifying party or parties of an individual amount of at least one million euros, solely concerning the countries that have granted each of the notifying parties at least 4 million euros per country over the three years preceding the notification.

- the Commission's investigation process, including the procedures for companies to present commitments to address potential concerns of the Commission
- the procedural rights of the parties regarding the protection of confidential information, access to files, and the presentation of observations
- the calculation and suspension of deadlines for the communication of information and the submission of commitments
- the transmission and signing of documents by the notifying parties to the Commission using digital means, where applicable

The system for monitoring foreign subsidies is now complete. Starting from October 12, 2023, companies will have to, depending on the applicable thresholds, notify mergers and participation in public procurement procedures that involve foreign financial contributions.

This new *ex ante* control is cumulative with the potential review of a transaction under competition rules by the Commission's services if the thresholds of the merger regulation are met, as well as, where applicable, those related to foreign direct investments[10].

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[1] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

[2] Implementing Regulation (EU) 2023/1441 of the Commission of 10 July 2023 on detailed arrangements for the procedures implemented by the Commission under Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market.

[3] Article 20 of the RSE.

[4] Article 28 of the RSE.

[5] Article 9 of the RSE.

[6] Articles 14 and 15 of the RSE.

[7] Article 13 of the RSE.

[8] Article 17 of the RSE.

[9] Article 12 of the RSE.

[10] Article 44 of the RSE specifies that the Regulation applies without prejudice to the application of Regulation 139/2004 on the control of concentrations between undertakings and Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the European Union.