Lock, Stock and Two Smoking Notifications: The Proposed European Regulation on Foreign Subsidies

June 25, 2021

As explained in our previous client alert, on June 17, 2020, the European Commission (EC) issued a White Paper proposing three new regulatory tools to tackle distortive effects that may be caused by foreign subsidies in the EU Single Market (the White Paper).[1] After the completion of the consultation stage, on May 5, 2021, the EC has put forward a proposed Regulation on Foreign Subsidies (the Regulation) accompanied by an Impact Assessment Paper. The proposed new Regulation would be the latest in a series of moves by the EU to give itself additional tools to deal with growing geo-economic competition and the perceived risks created by the role of foreign governments in global investment and trade.

The EC is requesting feedback by July 8, 2021. Interested parties and stakeholders should consider actively contributing to the debate. After that, the proposal will be discussed under the ordinary legislative procedure based on Article 207 and Article 114 of the Treaty on the Functioning of the European Union, which do not require a unanimous decision of the Council of the EU. Given the general consensus that has been emerging within the EU on the need for these kinds of measures, it is likely that at least some aspects of the proposal will ultimately come into force.

I. Background

Foreign direct investment (FDI) within the EU amounted to more than €7 trillion in 2019, approximately 25% of global FDI. The same year, there were 3,254 foreign acquisitions of at least 30% of the equity of European companies.[2]

[1] European Commission, White Paper of June 17, 2020, on leveling the playing field as regards foreign subsidies, COM(2020) 253 final.

[2] While the pandemic has adversely affected FDI inflows, it has increased public awareness about the vulnerability of EU companies to foreign investors ready to come in and buy those undervalued assets.

While the EU has long expressed an interest in attracting foreign capital, there has been a growing concern that foreign companies may find it easier to buy EU assets because they are not subject back home to the stringent regime applying to State support of companies within the EU. This is because the strict European system of subsidy control (State aid) goes well beyond the World Trade Organization (WTO) subsidies regime in how it regulates the intra-EU impact of State subsidies, and in that sense is unique in the world.[3]

Indeed, different levels of anti-subsidy discipline can create an uneven playing field between foreign and EU companies when competing in the European internal market. While the EU is particularly concerned about outbound investments from China,[4] its worries go beyond that. The bloc's Single Market Commissioner Thierry Breton also specifically mentioned inbound investment into the EU by investors from the Middle Eastern oil-producing countries.[5] In addition, Commissioner Breton noted concerns about subsidized foreign investment, "*especially when a major partner has decided to leave us*" in a clear reference to the United Kingdom.[6]

The current EU legal landscape–i.e., antitrust, merger control, public procurement and foreign direct investment rules–is not well-suited to address this issue. For example, WTO subsidy rules and EU trade defense instruments apply to the import of subsidized goods, but they do not apply when foreign subsidies support investments, acquisitions or bids in procurement procedures, or where services are concerned (see our previous client alert for further details).[7] Similarly, the EU's merger control rules do not envisage a review of the impact of foreign government support on the acquisition.

In response to concerns about subsidized FDI, the EC proposes three different legal tools: (1) an *ex ante* notification obligation for concentrations, (2) an *ex ante* notification obligation in relation to

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[3] WTO, Agreement on Subsidies and Countervailing Measures (SCM). The WTO General Agreement on Trade in Services (GATS) has a built-in mandate to develop rules for subsidies in the area of trade in services, but no such rules have been developed to date. In that regard, in January 2020, senior trade representatives of the EU, US and Japan agreed on the need to strengthen WTO rules on industrial subsidies (Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (Washington DC, January 14, 2020)).

[4] The Impact Assessment Paper notes that the Chinese industrial strategy "Made in China 2025" aims to make the country an industrial leader by providing favorable conditions for growth to a number of industrial and high-tech sectors such as robotics, electric vehicles, medical equipment, aerospace, maritime and railways. Studies indicate that Chinese direct and indirect subsidies to State-owned enterprises have amounted to 1.3–1.6% of annual gross domestic product in recent years, with the total subsidy figure in fact likely being higher as private firms receive about a third of total direct subsidies (see p. 5).

[5] State support from Middle Eastern countries was also the driver behind the EU's new rules on unfair competition in the airline industry; *see* Regulation (EU) 2019/712 on safeguarding competition in air transport.

[6] Florian Eder, Politico Brussels Playbook: Centeno's valedictory interview—High praise for Parliament—Polish "solidarity" (June 18, 2020); Jorge Valero, EU seeks to beef up its defences against foreign subsidies, Euractiv (June 17, 2020).

[7] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union.

public procurement bids and (3) a broader *ex post* and *ad hoc* EC power to investigate.[8] The EC also proposes strong fact-finding mechanisms and intends to strengthen compliance with these new rules through the threat of enormous fines that are equivalent to those for violations of competition law.

Importantly, while the EU is concerned mainly about FDI from only a handful of countries and has only mentioned those when it advocated its proposal, the proposed new rules and mechanisms are couched in general terms and would apply to all of the EU's trading partners.[9] In fact, the rules would also apply to EU multinationals whose foreign subsidiaries have been granted subsidies outside of the EU, such as, for example, an EU multinational which receives government support in the UK or in the US.

The EC's proposal, which is currently open to public feedback, must be approved by the European Parliament and the Council of the EU (where the Member States' government representatives sit) before it is enacted into law. As such, it is still subject to changes. However, even if only parts of the proposal survive the legislative process, the Regulation will have profound consequences for foreign companies trading into the EU.

II. Substantive Assessment of Subsidies under the Proposal

A. Overarching Principles

1. Foreign Subsidy

The definition of a foreign subsidy is very broad and captures all types of direct and indirect financial contributions[10] by third-country governments as well as public and private entities attributable to third countries which confer a benefit to an undertaking, regardless of its legal status.[11] The proposal only applies to subsidies that are specific to one or more undertakings. They will therefore not apply to general State measures such as tax breaks applying broadly across all industries.[12]

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[8] The EC will be the designated authority to watch over foreign subsidies and may be equipped with up to 145 new posts.

[9] The only exception is close partners of the EU that have adopted the EU's State aid control regime, such as the European Economic Area countries, Norway, Iceland and Liechtenstein.

[10] The definition of financial contribution is broad and does not only include the transfer of funds, but equally the forgoing of revenue otherwise due and the provision or purchase of goods and services. Thus, for example, it also covers tax benefits or the government procurement of a company's products.

[11] In that regard, a financial contribution that benefits an entity engaging in non-economic activities does not constitute a foreign subsidy.

[12] The Impact Assessment Paper, at page 22, confirms that selective corporate tax measures, e.g., tax rulings, are considered potential subsidies.

For EU State aid practitioners, the proposed definition of subsidies sounds familiar because it very closely mirrors that of EU State aid rules. Thus, when applying this definition, the EC, foreign governments and investors as well as EU target companies can rely on the wealth of jurisprudence and practice under the existing EU rules. WTO subsidy and market access rules are, of course, also applicable, and the interaction between the two sets of rules may create frictions.

Importantly, in line with general jurisdictional requirements under public international law, the proposal is limited to subsidies for undertakings engaging in an economic activity in the EU. Thus, the new rules will not apply to government support for companies that operate exclusively outside the EU. However, any foreign company that acquires control of, or merges with, a company in the EU or that participates in public procurement in the EU is deemed to engage in economic activity in the EU.

2. Distortion in the EU Internal Market

Under the proposal, the EC can only take action against foreign subsidies where those subsidies result or threaten to result in a market distortion in the EU. Such a distortion exists if the subsidy is liable to improve the competitive position of the recipient in the EU and if, as a consequence, there are actual or potential negative effects on competition within the EU.

The EC acknowledges that, in practice, the lack of transparency surrounding many foreign subsidies and the complexity of the underlying facts may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine whether there is a distortion, the EC proposes to use a non-exhaustive set of indicators: the amount and nature of the subsidy, the situation of the beneficiary undertaking[13] and the market, the level of economic activity of the beneficiary undertaking on the internal market; and the purpose and conditions attached to the foreign subsidy, as well as its use.[14]

A blacklist of foreign subsidies which are "*most likely*" to distort the internal market is provided;[15] for instance, a foreign subsidy covering a substantial part of the purchase price of an EU acquisition target, unlimited guarantees for debts or liabilities, or subsidies enabling to submit an unduly advantageous tender.[16]

The EC also proposes certain safe harbor rules. Specifically, the EC clarifies that financing provided in line with the OECD Arrangement on officially supported export credits does not create a

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[13] The concept of an undertaking refers to a group of companies under common control and is used in EU competition law to enable piercing of corporate veils.

[14] Article 3(1).

[15] Article 4.

[16] Subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are only "*likely*" to cause distortions (Recital 14). Furthermore, if a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs, reflecting the known EU State aid bias against operating aid.

market distortion in the EU.[17] Moreover, subsidies below €5 million over any consecutive period of three fiscal years are presumed to be de minimis.[18]

3. Balancing Test

The EC must consider the positive effects of the foreign subsidy on the development of the subsidized economic activity concerned.[19] These must be balanced against the negative distortive effects of the foreign subsidy. The EC therefore effectively accepts in economic theory that foreign government support may result in benefits for consumers in the EU, while pursuing industrial policy goals to protect domestic industries from unfair competition. The proposal is, however, silent on how the EC will carry out this balancing.

B. Proposed Measures to Address Potential Distortions Caused by Foreign Subsidies

The proposal contains specific provisions to assess and address the impact of foreign subsidies on concentrations involving at least one entity established within the EU and on public procurement within the EU. In addition, as a general remedy for market distortions resulting from foreign government subsidies, the EC may impose corrective measures and/or the undertaking may offer commitments that the EC can make binding.[20] We will discuss these measures in more detail below.

1. Prior Notification of Concentrations

The proposal provides for a new system of prior notification of concentrations, which comes on top of existing EU and Member State merger control filing obligations, but is based on very similar rules and procedures. In essence, companies must file for approval of a transaction if they or their affiliates received substantial foreign government financing in the three calendar years preceding the notification (which are also the only subsidies taken into account in the substantive assessment).

Most importantly, under the proposal, a concentration falling under its rules must not be implemented before an initial review period of 25 working days has lapsed or, if the EC initiates an in-depth investigation, before it has been approved by the EC, including on the basis of commitments offered by the parties. Similar to the EU's merger control rules, the transaction is invalid if the parties jump the gun and implement the transaction before the review has been terminated.[21] Failure to comply with the obligation to notify a transaction prior to implementation as well as implementation prior to clearance or in violation of a prohibition can trigger enormous fines

[17] Recital 12.

[18] Article 3(2). In the White Paper, there was a much lower threshold of €200,000.

[19] Article 5.

[20] Article 6.

[21] Article 23.

(see also below). In addition, the EC can require the parties to dissolve a transaction that has been implemented in violation of the prior notification requirement, if it distorts the EU internal market.

Any merger or acquisition of sole or joint control of another undertaking or parts thereof must be notified prior to implementation where:

a) the target or at least one of the merging undertakings is established in the EU and generates an aggregate turnover, i.e., including the turnover of all group companies, in the EU of at least €500 million; and
b) the undertakings concerned received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than €50 million.[22]

The same applies to the creation of a joint venture where the joint venture itself or at least one of its parent companies is established in the EU if the aggregate turnover of the joint venture itself or of the relevant parent company in the EU is €500 million or more. Thus, if one of the parent companies is established within the EU, the creation of a joint venture must be notified even if its activities are entirely outside the EU (unless the financial contribution thresholds are not met).[23]

The financial contribution threshold may not be a very effective filter. There will likely be many cases in which the financial contribution threshold will be met although there was little or no benefit and thus no subsidy involved, e.g., where companies are involved in significant foreign government procurement. In addition, assessing whether the financial contribution threshold has been met will create enormous practical and legal difficulties. While the threshold does not require an evaluation of the benefit from a financial contribution, assessing the value of a financial contribution can be very complex as well, given the wide variety of financial contributions caught by the proposal.[24] Moreover, the proposal requires an assessment not only for the specific companies involved in the transaction, but also for the entire groups of companies to which these companies belong. This means, of course, that even a company established in the EU must determine the full value of financial contributions that its parents, subsidiaries and other affiliates may have received from third countries. Finally, as the proposal requires an aggregate assessment of the financial contributions received by all the companies involved, the parties must create transparency among them (or, at least, among their outside counsel) to determine whether the combined threshold is met.

Finally, even if these thresholds are not met, the EC can request a prior notification under its proposed rules at any point before implementation if it suspects that any of the parties may have benefited from foreign subsidies in the three years prior to the concentration. When the EC makes

[22] Article 18(3).

[23] Article 18(4).

[24] For example, establishing the value of a financial contribution that takes the form of a government investment, a tax benefit, or the provision of goods or services can require a complex economic and legal analysis.

such a request, the transaction is considered notifiable and all the proposed rules apply, including the prohibition to implement the transaction.[25]

The review process and the timeline suggested in the proposal are similar to those under merger control rules, with an initial (first) phase and a second phase and very similar deadlines.[26] The EC enters the second phase and opens an in-depth investigation if it considers that there are sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market.[27] The timeline can be extended upon request from the parties or if the parties offer commitments to remedy any concerns the EC may have.

In addition to the formal review process, it is likely that the EC will establish an informal pre-notification process similar to that which it uses in merger control proceedings, because the parties to a transaction will want to ensure that their assessment of the notification obligation is correct and their notification is complete, keeping in mind that the clock starts ticking only when the EC deems that it possesses the necessary information to review the transaction.[28] Pre-notification may also be required in order to avoid a subsequent request to notify a transaction even if it does not meet the thresholds.

These notification obligations will have huge practical implications and will require a careful review of notification obligations and discussions with the EC in many cases. The EC estimates that its proposed rules may require a formal notification in 30 to 40 transactions per year. Informal contacts will likely be needed in many more cases. Since the financial thresholds differ from those that apply under the EU Merger Regulation, some deals may require no notification in the EU, or only a notification in certain EU Member States under applicable national merger control rules, but still require an EC notification for the subsidy aspect, adding considerable complexity.

2. Prior Notification in Public Procurement

The proposal also envisages the prior notification of all foreign financial contributions received by a bidder or its main subcontractors and suppliers in the last three years when submitting a tender or a request to participate in a public procurement procedure where the estimated value of that public procurement is equal to or greater than €250 million and where the EU's rules on public procurement apply.[29] In addition, the EC can request the notification of any foreign financial contributions also in cases in which the value threshold is not met if it suspects that the bidder or its

[25] Article 19(5).

[26] Article 23.

[27] Article 8(2).

[28] Article 23(1)(a).

[29] Article 27(2).

main subcontractors and suppliers have benefited from foreign subsidies in the last three years. Failure to notify a subsidy can trigger enormous fines.[30]

The contracting authority must transfer the notification to the EC. The EC has 60 days after it receives the notification to conduct a preliminary review. If it decides to undertake an in-depth investigation, it shall conclude that investigation no later than 200 days after receiving the notification (unless it extends this deadline after consulting with the contracting authority or entity). The EC is proposing that the public procurement process should continue during the investigation, but that the contract shall not be awarded while it investigates. If the EC finds a distortion of competition, it can prohibit the award of the contract to the recipient of foreign subsidies. Alternatively, it can accept commitments that effectively remove the distortion, unless such commitments result in a modification of the initial tender.[31]

Foreign subsidies are considered to distort, or threaten to distort, competition in a public procurement procedure if they enable an undertaking to submit a tender which is unduly advantageous in relation to the works, supplies or services concerned.[32] However, the proposal also clarifies that the principles governing public procurement, notably proportionality, non-discrimination, equal treatment, and transparency, continue to apply.[33] The recipient of foreign subsidies shall therefore not be treated in a way that is contrary to these principles. It is unclear how the EC will implement these rules, including in situations where other bidders may have received State aid from EU governments. The obligation to notify any foreign financial contribution received by the bidder as well as its main subcontractors and suppliers will not only significantly increase the burden on both the contracting authorities and on bidders, subcontractors and suppliers, it will likely also stifle competition in public procurement. Bidders may not want to advance that information to contracting authorities and may be deterred from participating in light of the significant risk of fines, but perhaps even more importantly, their subcontractors and suppliers may not want to provide the relevant information to them. In addition, the requirement to halt a public procurement procedure while the EC investigates the situation for seven months or more is, of course, a proposal that is bound to be controversial for many Member States that may fear disruptions due to this delay.

3. Catch-all Mechanism for All Economic Activities Affected by Foreign Subsidies

Where there is no notification obligation, the EC can examine on its own initiative any allegedly distortive foreign subsidy granted to any undertaking engaging in an economic activity in the EU. For instance, this catch-all mechanism applies to public procurement procedures or corporate

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[30] The proposed text refers, in contrast to the proposed regime for merger control, to failure to notify a subsidy, rather than any financial contribution. It remains to be seen whether the difference in vocabulary is deliberate.

[31] Article 30.

[32] Article 26.

[33] Article 31(7) and Recital 35.

transactions that are below the thresholds for formal prior notification, such as greenfield investments. However, it also applies to any other economic activity within the EU (except for the import of goods, which will continue to be covered under the existing trade defense rules). Similar to the prior notification of concentrations and public procurement, the proposal sets out a two-stage investigation and review process for *ex officio* investigations.[34]

If the EC finds that a foreign subsidy distorts the EU market, it can impose redressive measures or accept commitments that remedy the concern.[35] Redressive measures and commitments may include, for example, repayment of the foreign subsidy[36]; offering access under fair, reasonable and non-discriminatory conditions to an infrastructure or to assets acquired, developed or supported with the help of foreign subsidies; reducing capacity or market presence; refraining from certain investments; or even, in case of an intervention against an acquisition, the possibility for the EC to break up the company and dissolve the concentration.[37] Where needed, the EC can adopt interim measures.[38]

III. Procedural Aspects of the Proposal

The draft Regulation sets forth some common procedural provisions, applicable both to the notification procedures and to the catch-all mechanism. While the proposal only contains very limited provisions securing the rights of defense of the undertakings concerned by an investigation, it provides the EC with very far-reaching investigative powers and suggests enormous fines in case of infringements.[39]

A. Information Requests, Inspections and Facts Available

Under the proposal, the EC can request all necessary information from an undertaking concerned, any other undertaking or trade association, Member States, and third countries.[40] Undertakings and trade associations are obliged to provide complete and accurate information required on time. Failure to do so can trigger substantial fines and periodic penalty payments.[41]

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[34] Articles 8 and 9.

[35] Article 9(2) and (3).

[36] Under Article 6(6), where the undertaking concerned proposes to repay the foreign subsidy including an appropriate interest rate, the EC shall accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention.

[37] Article 6(3).

[38] Article 10.

[39] Article 38.

[40] Article 11.

[41] Article 15(1)–(4).

In addition, the EC can conduct unannounced inspections of undertakings within the EU during which the undertaking inspected must cooperate with the EC and support its fact-finding.[42] Failure to cooperate can trigger substantial fines and periodic penalty payments.[43] The EC can also inspect premises outside the EU. In this case, the undertaking concerned must give its consent and the third country must be officially notified and agree to the inspection—similar to anti-dumping procedures.[44] During these inspections, the EC may *inter alia* enter any premises and land of the undertaking concerned, examine books and other business records, and take copies.[45]

In case of failure to comply with an information request or if the undertaking concerned or the third country refuses to submit to an inspection, the EC may take a decision based on the facts available.[46] This possibility, which is already provided for in the current trade measures framework (e.g., in anti-dumping investigations),[47] is meant to ensure that the investigation will not stall in these cases and, at the same time, to provide a strong incentive to cooperate.[48]

B. Fines

1. *General Rules for All Investigations*

The EC may impose fines and periodic penalty payments if the target fails to comply with the investigation (e.g., submits incorrect or incomplete information or breaks seals).[49] These fines can reach 1% of the aggregate worldwide turnover of the undertaking or association concerned. As for the periodic penalty payments, they can reach 5% of the undertaking's or association's average daily aggregate turnover.[50] The aggregate turnover of an undertaking is likely determined by including turnover of parents, subsidiaries and other affiliates.[51]

2. *Specific Additional Rules for Mergers*

In case of failure to notify or early implementation, fines of up to 10% of the aggregate worldwide turnover of the undertakings concerned can be imposed. In addition, the EC can impose a fine of

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[42] Article 12.

[43] Article 12.

[44] Article 13.

[45] Article 12.

[46] Article 14.

[47] See, for example, Article 18 of Regulation (EU) 2016/1036.

[48] It is explicitly provided that "*when applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated*" (Article 14(4)).

[49] Article 15(1).

[50] Article 15(2)(3).

[51] See Article 21(4), which likely also applies to the calculation of aggregate turnover for the purpose of determining fines.

up to 1% of the undertakings' aggregate turnover for supplying incorrect or misleading information in its notification of the transaction or any supplement thereto.[52]

3. Specific Additional Rules for Public Procurement

Any incorrect or misleading information provided to the EC in the notification, or any supplement thereto, may result in a fine of up to 1% of the undertakings' aggregate worldwide turnover.[53] Failure to a subsidy during the public procurement procedure may result in a fine of up to 10% of the undertakings' aggregate worldwide turnover.[54]

C. Market Investigations

If the EC has reasonable suspicion that foreign subsidies for a particular sector or based on a particular subsidy instrument may distort the internal market, it may open a market investigation into such subsidies.[55] Similar to how an *ex officio* investigation is conducted, the EC may request information from companies, conduct dawn raids and impose fines on companies for failure to supply requested information.

D. Limitation Periods

In relation to the catch-all mechanism described above, the EC may initiate an in-depth investigation into a foreign subsidy subject to a 10-year limitation period starting on the day on which a foreign subsidy is granted.[56] Surprisingly, it also has the possibility to scrutinize subsidies granted 10 years prior to the date of application of the Regulation.[57]

According to the proposal, the notification obligations shall apply to foreign financial contributions granted in the three years prior to the Regulation's date of application, where such contributions were granted to an undertaking notifying a concentration or notifying contributions in the context of a public procurement procedure.[58] However, as a limited concession to legal certainty, the notification obligation shall not apply to concentrations for which the agreement was concluded, the public bid was announced or a controlling interest was acquired before the date of application of the Regulation, or to public procurement procedures initiated before that date.[59]

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[52] Article 25.

[53] Article 32(2).

[54] Article 32(3).

[55] Article 34.

[56] Article 35.

[57] Article 47(1).

[58] Article 47(2).

[59] Article 47(3)(4).

Furthermore, the EC may impose fines and periodic penalty payments subject to a limitation period of three years, starting on the day of infringement. In the case of continuing or repeated infringements, the limitation period starts when the infringement ceases.[60]

E. Reassessment of Notified Financial Contributions

The proposed Regulation prohibits the EC from reassessing, on its own initiative, a financial contribution notified in the context of a concentration or a public procurement procedure. However, the EC may assess the same financial contribution again in relation to another economic activity.[61] This rule suggests that the notified financial contributions are approved only in the context of the economic activity they were notified for. The Regulation is open to interpretation on how to define an economic activity (i.e., a given merger or bid in a tender procedure, or a given industrial sector). However, until further guidance is provided, it may be safer to notify a financial contribution approved in the context of a concentration again in the context of a public procurement proceeding.

IV. Conclusion

While the proposal is still subject to debate and change, some key takeaways can be outlined at this stage:

- From a practical standpoint, the proposed rules could change the way transactions are negotiated, as the parties to a transaction must consider the impact of the new regulatory regime when they allocate risks. Potential targets of the EC's information requests under the new rules will have to comply with extensive data requests, which could involve information considered sensitive or secret in their national jurisdictions. Timing considerations will also be critical, as the risk of lengthy regulatory reviews—even more so in case of an in-depth investigation—could discourage buyers and sellers in M&A transactions, disadvantage foreign bidders in case of close bids in a bidding war, and effectively exclude foreign entities from participating in public procurement tenders where timing is of the essence. In fact, there may be instances in which the harm to competition from the proposed rules is greater than the benefit from creating a level playing field.
- Particularly in M&A transactions involving EU targets and non-EU companies, pre-closing pitfalls may include (i) a new mandatory filing under the proposed Regulation, (ii) an existing merger control filing at the EU or Member State national level, and (iii) a foreign investment filing at the Member State level, where these exist. In addition to the red tape, due to the standstill obligation, this may further increase costs depending on how the deal is financed.

[60] Article 35(2). The EC has five years to enforce its decision.

[61] Article 33 and Recital 37.

- Non-compliance has reputational risks and can be costly, with potentially cumulative procedural fines ranging from 1% for minor infringements to up to 10% of the undertakings' aggregate turnover. This is without accounting for potential divestments, mandatory access to assets or, at least in theory, the dissolution of the transaction.
- Potentially, the entire EU State aid substantive law could be used as a guide to determine when a foreign subsidy may be considered to distort the internal market, but considerable uncertainty will remain until the first cases are adopted and the EU Courts have an opportunity to opine. Unfortunately, in an M&A context, any court judgment, even if adopted under the EU Courts' expedited procedures, would likely come too late to save a deal, which can act as a powerful disincentive to challenges of the EC's future new powers.
- It is to be expected that the EC will seek to issue guidelines to clarify matters. While the EC often waits a few years to build up expertise before issuing guidelines, it is probable that in this case it will seek to provide at least some guidance to foreign companies at the same time as the adopted Regulation enters into force.
- The compliance with WTO rules of this instrument providing unilateral remedies against foreign subsidies is very much in question. For example, unilateral action against foreign services subsidies may lead to violations of the most-favored-nation and national treatment principles under the WTO General Agreement on Trade in Services (GATS).[62] They may be, however, justified under the general exceptions provided in both the GATS and General Agreement on Tariffs and Trade (GATT).[63] It is therefore not unlikely that litigation may follow at the WTO level over the interpretation of those exceptions.

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The proposal will be discussed under the ordinary legislative procedure based on Article 207 and Article 114 of the Treaty on the Functioning of the European Union, which do not require a unanimous decision of the Council of the EU. Given the overall shared political stance on the topic, it is likely that at least some aspects of this proposal will come to fruition.

In that regard, the EC is seeking feedback until July 8, 2021. Interested parties and stakeholders should consider actively contributing to the debate. WilmerHale would be pleased to represent stakeholders in the legislative process and the potential subsequent implementation. If you have queries, please contact any of the lawyers listed below.

[62] Article II:1 of the GATS and Article XVII of the GATS.

[63] Article XIV(c) of the GATS and XX(d) of the GATT.

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