



# Position paper on the EU regulation on foreign subsidies proposal

## 1. Introduction

CCIA Europe<sup>1</sup> shares the European Commission's objective of combating distortive foreign subsidies to enable fair competition.

This paper offers considerations for specific improvements to help make the final [EU Regulation on foreign subsidies](#) legally sound, enforceable, and protective of legitimate investment flows needed to support Europe's post-pandemic recovery.

## 2. Broad scope

The Commission's original Proposal includes a very wide variety of issues. We fear that this broad scope will generate legal uncertainty and workability concerns for companies and enforcers. The Proposal introduces broad and unclear definitions that go far beyond existing regimes on state aid and uniquely places the burden of proof on businesses. By shifting the burden of proof, the Proposal is fundamentally different from EU State Aid Rules and the WTO Subsidies and Countervailing Measures Agreement, which primarily interacts with the entity distributing the subsidy. This difference produces disproportionate treatment of recipients of foreign, i.e. non-EU, subsidies compared to recipients of EU subsidies. As such, we urge co-legislators to minimize the disparity in the burdens they may impose where possible.

### A) Overbroad definition of "foreign subsidy"

The Proposal defines financial contributions as a subsidy as long as the subsidy is limited and provided by a non-EU government or provided by a non-EU government indirectly through private and public entities. This definition goes beyond that prescribed by the WTO Subsidies and Countervailing Measures Agreement by including within scope the sale or purchase of services. The Proposal also goes beyond the EU's state aid framework by requiring businesses to identify public and private entities whose actions can be attributed to a non-EU country and thus, capable of providing financial contributions that are considered a subsidy (**Article 2(b)(ii)-(iii)**). The analysis required for businesses to identify such entities could prove unworkable since companies may lack visibility on whether such actions can be attributed to a non-EU country. The cumbersome, broad and unclear framework that the Proposal is putting forward will lead to inconsistent application, overreporting, and increased risk of non-compliance subject to large fines and penalties. This may limit companies' willingness to invest in Europe, as companies may fear that their financial contributions from third

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<sup>1</sup> The Computer & Communication Industry Association (CCIA Europe) is a not-for-profit membership organization that represents the world's leading providers of technology products and services.

countries could be deemed as distortive and thus engender high redressive measures.<sup>2</sup> The fear of investigation will be increased by the fact that even unsubsidized firms will bear the responsibility for notifying contributions in their supply chains when participating in public procurement processes (tool 3).

## B) Overbroad definition of “distortion”

The Proposal broadly deems ‘distortion’ to exist where a subsidy is liable to improve a business’ competitive position in the EU market and actually or potentially negatively affects competition. It is concerning that, even after burdensome disclosures and lengthy investigations, ‘distortion’ may still be determined to exist, and redressive measures applied, even in situations where there is no actual negative effect on the EU market. The Proposal also provides that ‘distortion’ shall be determined on the basis of five indicators. However, it is unclear how these indicators will be applied thereby limiting a business’ ability to avoid ‘distortive’ foreign subsidies and creating legal uncertainty.

## C) Uncertain Assessment of Article 5 on balancing test

CCIA Europe supports the introduction of a balancing test in **Article 5** as it will be fundamental to a properly functioning tool. However, the proposed Article 5 provides no details or explanation of the factors that the Commission is obliged to assess in this balancing exercise. It is important to highlight that the Proposal’s balancing test will likely be required to operate in a fundamentally different manner than the balancing test applied under EU state aid rules. The Proposal fails to introduce compatibility requirements between it and the EU state aid rules which may cause legal uncertainty. Given the extra-territorial effects of the Proposal, it is also unclear which positive effects of a foreign subsidy will be taken into consideration, or whether a global positive impact will be sufficient.

## D) Recommendation: Narrow definitions of ‘subsidy’ and ‘distortion’ and specify balancing test

We suggest that co-legislators narrow **the term ‘subsidy’ by removing sales of goods and services** to those countries that are party to the World Trade Organization (WTO) Agreement on Government Procurement (GPA) from the definition of “financial contribution” in the Proposal. This limitation would be justified by the fact that the GPA establishes rules that ensure open, fair, and transparent conditions in government procurement. Co-legislators may also consider publishing a **list of private and public entities** whose actions are deemed to be attributed to a non-EU country that businesses may reference, or otherwise remove the requirement to disclose indirect subsidies under Article 2(b)(ii)-(iii) altogether.

The Proposal also ought to deem distortion only in situations where EU competition is directly impacted. **There should be a direct causal link between the distortion identified and the subsidies received.** In this respect, any contribution which has been for purposes other than engaging in an economic activity in the EU should be excluded from the definition of “financial contribution”. Additional clarity should be provided for the indicators of distortion to ensure proportionate and fair application of the law.

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<sup>2</sup> “Assessing the European Commission’s proposal to address distortions caused by foreign subsidies”, RBB Economics study, October 2021: <http://www.rbbecon.com/downloads/2021/10/RBB-A-review-of-the-EC-Proposal-on-Foreign-Subsidies1.pdf>

We recommend that the balancing test be specified by providing a framework and examples. The Proposal's balancing test should be aligned with the EU state aid balancing test (i.e. considering the positive impact the foreign subsidies bring to non-EU countries).

### 3. Ex Officio ('Tool 1')

The Ex-officio tool ('tool 1'), is extensive in nature and gives the Commission discretion to investigate, seemingly in perpetuity, all parts of a business and their financial records during its Preliminary and In-Depth reviews without a clear indicator as to what could trigger a review. **Article 8** essentially gives the Commission the ability to audit a business' complete and total financial contributions without supplying *prima facie* evidence for how a subsidy may be considered potentially distortive. The Commission's new powers go as far as allowing on-premise visits of a company and questioning members of staff (**Art. 12 (2)**).

The Proposal also gives the Commission the ability to look back on a 10-year period of time (**Art 47. (1)**). This look-back period may also prove physically impossible to comply with if applied retroactively to companies that operate in countries where such obligations to keep records for 10 years are non-existent.

#### A) Recommendation: Provide clarity on investigation triggers and reduce look-back period:

We recommend that co-legislators **pre-define indicators or factors that would initiate a review under tool 1**. This would offer additional legal clarity for businesses, promote equal application, further clarify the tool and reduce concerns about unwarranted investigations and reviews. This may resemble a framework with conditions for investigations including thresholds and set timelines seen in tools 2 (**Articles 23.1 and 29**).

Moreover, we recommend that co-legislators lower the unreasonably high burden of a **ten-year retroactive period**. We believe a one-year period to be more practical.

### 4. Amendments needed in Concentrations ('tool 2')

The current thresholds for notification of concentrations lack refinement and may cause companies to notify concentrations with no EU nexus. In case of an acquisition, the Proposal suggests that "financial contributions" received by the Target's group need to be taken into account to determine whether the acquisition is notifiable or not. This may result in situations where the acquirer could be obliged to notify an acquisition simply because the Target has received financial contributions, when the acquirer itself has received none (**Art. 18. (3)**). **The Target's contributions would clearly have no impact on the acquisition and therefore should not constitute a 'subsidized acquisition'**.

The Proposal also fails to supply clarity for situations where a concentration may require notification under the Proposal and at the same time under the EU Merger Regulation or under EU Member States' national merger control, foreign direct investment, or national security regimes. Duplication of efforts, waste of resources and, most importantly, inconsistent results should be avoided.

**A) Recommendation: Refine notification thresholds to avoid in cases with no EU nexus as well as taking into account target’s contributions.**

The thresholds for notification of concentrations should be refined to clarify that the acquired undertaking must be established in the EU and generate aggregate EU turnover of at least EUR 500M on its own. Further, financial contributions received by a target’s group should not count towards the financial contribution threshold. Counting them would be wholly inappropriate, given that such contributions do not facilitate the acquirer to complete the acquisition to the detriment of other potential acquirers.

## **5. Burdensome requirements should be avoided in Procurement (‘tool 3’)**

The Proposal’s articles on procurement discourages businesses, European or not, that wish to participate in public procurement in Europe, which will reduce choices for European governments. The ex-ante requirement to self-declare all the subsidies that are received in the past three years by the bidder including those received by its main subcontractors and suppliers (receiving 30% of the contract value) is unworkable as businesses do not have the authority to collect this information nor the ability to validate the accuracy of any information received (**Article 28. (2)**). Governments have long experienced difficulty in collecting subsidy data despite their enforcement powers. It is impractical to impose this burden on businesses, and place stringent redressive measures, fines, and penalties on those that are unable to obtain such data accurately or in a timely manner.

In addition to the burdensome information requirements, the proposal also imposes stand-still obligations on public procurement procedures where investigations are pending (Art. 31). Where the Commission opens an investigation, the proposal would impose a stand-still obligation on any public procurement procedures involving the company. Due to this stand-still obligation, companies that are merely under investigation and have not received distortive subsidies may nevertheless be excluded.

There is only a narrow exception to these stand-still obligations, which is when a bid is deemed to be the most economically advantageous (**Art. 31(3)**). However, it is unclear what criteria will be used to determine when a bid is deemed most economically advantageous. The lack of clarity on the application of this exception would give an unfair competitive advantage to those companies that do not receive “financial contributions, which also includes the mere provision of goods and services to a foreign government.

**A) Recommendation: Remove obligation for companies to disclose their main subcontractors/suppliers’ subsidies and clarify conditions under which a bid is ‘the most economically advantageous’:**

We suggest that main sub-contractors and main suppliers should each have the obligation to notify foreign financial contributions separately as opposed to the main bidder. This should not be an obligation for the main bidder.

We suggest clarifying the criteria for which a bid may be awarded during investigations and ensure that timings are not the sole conditionality for governments to consider. Using a business’ ability to start and finish a project quickly as criterion for determining what is “the most economically advantageous tender” would lead to a disproportionately negative treatment of foreign subsidized businesses compared to others. We would

recommend the Commission may wish to adopt a decision closing the in-depth investigation no later than 90 working days after it received the notification, instead of 200 days.

## 6. Legal uncertainty is likely to deter investment in Europe

The broad and unclear scope of the Proposal may reduce companies' willingness to seek investment opportunities in Europe because they will fear potential sanctions. This chilling-effect would be to the detriment of Europe's economic recovery. The high stakes of these potential economic consequences warrants further revision of the Proposal's scope.<sup>3</sup>

## 7. Ensure judicial review and due process

The Proposal provides little clarity on how a company can address a decision against it. It is important that any such decisions, which carry quasi-criminal repercussions and impact on the freedom to conduct a business, are granted full rights of judicial review and due process. The co-legislators should provide further legal clarity in this respect.

## 8. Conclusion

CCIA Europe shares the objective of combating distortive foreign subsidies to enable fair competition. We stand ready to support co-legislators in further improving the Commission's Proposal for addressing distortions caused by foreign subsidies in the Internal Market to help ensure that the final text is able to deliver on the ambitious goals while still ensuring that Europe's investment ecosystem remains prosperous. We remain committed to help make this Regulation workable for both European and international businesses.

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<sup>3</sup> "Assessing the European Commission's proposal to address distortions caused by foreign subsidies", RBB Economics study, October 2021: <http://www.rbbecon.com/downloads/2021/10/RBB-A-review-of-the-EC-Proposal-on-Foreign-Subsidies1.pdf>