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Foreign Subsidies Regulation: cross-industry perspectives

Brussels, 15 February 2022 – Our organisations – representing significant trade and investment partners in Europe as well as a wide range of sectors – support the objective of the European Commission’s proposed Regulation on Foreign Subsidies, which seeks to combat distortions of competition in the EU caused by foreign subsidies. However, we are concerned that the Proposal will have unintended consequences for multinationals, including EU-headquartered companies, who are most likely to engage in mergers and acquisitions (M&A’s) and public procurement activities liable to trigger notification requirements under the Proposal. The future Regulation should be balanced and proportionate as it could otherwise impair fair competition.

More specifically, the lack of clarity of core concepts and operating mechanisms creates legal uncertainty and, in some cases, it may prove unreasonable to comply with such rules for both large and small companies that rely on various types of support measures that pose no risk of distorting competition. Importantly, the legal uncertainty inherent in the Proposal could limit investment in the EU. Companies may fear that the wide range of support measures received in third countries globally could not be accounted for in full compliance, and this could expose them to high fines. The new merger review and public procurement processes set out in the Proposal would also cause delays in M&A transactions and tender awards.

We have set out the main areas for refinement while urging co-legislators to continue a multilateral approach via the WTO and managing the most problematic subsidisers via bilateral agreements. In summary, the main Proposal refinements include:

1. **Clarity of key concepts:** Businesses need clearer and workable definitions of what transactions and regimes will be considered to give rise to a ‘financial contribution’ or ‘subsidy,’ as well as on how the Commission will determine whether these distort EU competition. Tightening these concepts and defining safe harbours that do not give rise to a financial contribution will enable an effective, efficient, and consistent tool. For example, the Proposal should exclude from the definition of ‘financial contribution’ locally targeted government programmes, e.g. those that help under-developed regions. Moreover, contracts with governments that are party to the WTO Government Procurement Agreement should also be excluded. In fact, any contribution used for purposes other than engaging in economic activity in the EU should be excluded from the definition of ‘financial contribution’.
2. **General operating mechanisms:** The Proposal should be workable for companies. The final Proposal should balance effective protection of competition in the EU and the need to limit the administrative burden on businesses. For instance, companies cannot be expected to report on information they do not have the authority to collect or distribute, i.e. subsidies received by main suppliers and subcontractors. To ensure consistency, requirements for companies to make judgement calls should be excluded. Co-legislators may also wish to clarify the conditions and criteria with which a company can make a judgement on distortion.

3. **Ex-officio review:** The Proposal should provide for a clear and consistent framework on the factors triggering such a review, the scope of the review, and the timeline to completion. This will help ensure that the tool is focused and reduces concerns of over-broad and open-ended investigations. The ten-year retroactive application period should be reduced as well.

4. **Concentrations:** The thresholds as proposed are not fit for their intended purpose, i.e. triggering review of subsidised bids for European businesses. This is because they will also catch acquisitions of European targets that themselves meet the financial contribution threshold, as well as full-function joint ventures with no connection with the EU whatsoever. Financial contributions of the target ought to be excluded from considerations as such contributions do not subsidise the acquisition, nor do they impact acquirers inequitably. Where a concentration triggers at the same time both the Proposal's notification obligation and merger notification obligations in the EU, whether before the Commission or at the EU national level, the various resulting proceedings should be aligned to avoid duplication and waste of resources for businesses as well as for the competition authorities involved. In this respect, we recommend that the co-legislators explore ways to streamline procedures, for instance by combining to the extent possible the reviews under the EU Merger Regulation (EUMR) and the future Regulation, where both are required, and/or by allowing parties to seek referral of EU Member State merger reviews to the Commission where the latter is looking into the concentration on the basis of the future Regulation, as the EUMR already has a referral system in place which could be adapted for these purposes. Finally, the intended purpose of the concentration tool implies important differences for the Commission's assessment and process that should be clarified in the final Regulation and not only in later guidance. For example, if there is only one bidder in an auction process, or competing bidders received comparable levels of foreign subsidies, distortion in the acquisition process can be excluded.

5. **Public procurement:** The Commission's review can delay award of the relevant contracts by up to 260 days. EU procurement processes are already slow and complex, and these long investigative timelines present a disadvantage to companies subject to investigation, even if their subsidies are not distortive, and could discourage their participation in procurement. We, therefore, encourage co-legislators to shorten timelines for the investigations and clarify its criteria for determining the most economically advantageous tender capable of being awarded a contract even while investigations are pending under Article 31(3). In addition, the proposed framework seems very broad as it currently stands and it imposes significant responsibility on the bidder, who may not know whether suppliers or sub-contractors received subsidies that lead to a notification requirement. This could pose the risk of a potential three-year ban on future public procurement procedures and increased compliance burdens for companies as every incentive received should be tracked or monitored.

6. **Judicial review and appeals process:** The Proposal provides little clarity on how a company can address a decision against it.

We stand ready to work with co-legislators and the business community, to develop a Regulation that provides a level playing field for all companies and at the same time is proportionate and ensure legal certainty for companies willing to invest in Europe.

Signatories:

- American Chamber of Commerce to the EU
- Australian Business in Europe
- Computer and Communications Industry Association
- Europe India Chamber of Commerce
- European Australian Business Council
- Japan Business Council in Europe
- Korea Business Association Europe