



22 July 2021

Subject: PwC Response to the Feedback Statement on Trade & investment – addressing distortions caused by foreign subsidies

Introduction

PwC International Ltd (PwC), on behalf of the PwC network, welcomes the opportunity to provide feedback on the proposed regulation on foreign subsidies distorting the internal market (the “Regulation”)¹.

While we appreciate that the objective of this Regulation is to ensure a level playing field in the internal EU market, we would like to make a few, more general observations on a number of aspects of the Regulation for consideration by EU decision-makers.

Our comments focus on five key themes:

- Need for greater legal certainty and guidance;
- Retrospective nature of the Regulation;
- Achieving a balanced result;
- Impact of future multilateral solutions on the Regulation, and
- World Trade Organisation (WTO) considerations.

1. Need for greater legal certainty and guidance from the European Commission

We suggest the Commission provides additional guidance to clarify when a subsidy is received for the purpose of the Regulation, when that subsidy may cause a distortion in the Single Market, and when the entity is required to notify the Commission about said subsidy. We also ask for clarification as to whether well-established concepts such as *abnormally low tenders* and *proportionality* have applicability under the proposed Regulation (albeit with necessary modifications having been made) and how that will work in practice.

- *Which foreign subsidies fall within the scope of the Regulation?*

¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market COM/2021/223 final

The concept of “foreign subsidy” is defined broadly in Article 2 of the Regulation. It requires a financial contribution, originating directly or indirectly from the government of a non-EU country, that confers a benefit on an undertaking or industry (or several undertakings or industries) engaged in an economic activity in the internal market. The benefit can be conferred *de jure* or *de facto*. In addition, the presence of a foreign subsidy should distort competition.

The definition of “foreign subsidy” in the Regulation seems close to the definition of State aid under Article 107 TFEU which covers every economic aid that the beneficiary would not be able to obtain under normal market conditions.

Given the broad definition of the term “foreign subsidy”, it is not entirely clear how the requisite nexus between the subsidy and distortion within the internal market will be determined. We understand that the concept of a foreign subsidy can take different forms such as tax advantages, setting off of operating losses, unlimited State guarantees, tax exemptions or reductions in respect of foreign investments or dedicated State funding. The point of difficulty is to assess when a subsidy granted in a foreign jurisdiction affects the competition in the internal market. We would appreciate further guidance on this point.

- *How is the selectivity test to be interpreted?*

Under Article 107 of the Treaty on the Functioning of the European Union (TFEU), which together with Article 108 TFEU lay down a system of state aid control as regards EU Member States, a measure must satisfy a number of criteria, including the so-called “selectivity” criterion, i.e., whether the measure favours certain undertakings or the production of certain goods. The concept of “selectivity” has been addressed in EU jurisprudence² in the past and more recently.

In state aid selectivity especially when looking at fiscal measures can be an extremely complex criteria to judge. The definition of foreign subsidies appears to incorporate the concept of ‘selectivity’ when referring to measures that are limited in law or in fact to certain undertakings or groups of undertakings.

- *Difficulties in assessing the existence of a subsidy*

² Joined Cases C-78/08 to C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl* (C-78/08), *Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze* (C-79/08) and *Ministero delle Finanze v Michele Franchetto* (C-80/08), paras. 38 et seq.

The Regulation requires businesses to essentially self-assess as to whether they may have received a subsidy. Given the aforementioned complexities, it may be difficult for foreign companies to assess fully whether they benefit from aid schemes using only the current guidance available. It is possible that groups will not be aware that a scheme under which aid was received by them was a subsidy scheme. More guidance would be very much welcomed to mitigate the risk to businesses who perform this self-assessment task.

2. *Retrospective nature of the Regulation*

It is settled case law of the EU courts that the principle of legal certainty generally precludes the application of substantive EU law regulations with retroactive effect, except (i) “where the purpose to be achieved so demands”; and (ii) “where the legitimate expectations of those concerned are duly respected”³.

Consistent with the concept of *existing aid* in state aid proceedings, subsidies that are granted pursuant to a subsidy regime where no state aid risk was found to exist, but where the State Aid rules governing that regime subsequently changed, should not be adversely impacted.

With respect to EU state aid rules, the concept of lawful aid includes existing aid. That is aid that is granted pursuant to arrangements prior to a Member State’s accession to the EU. By analogy, we believe that similar concepts would need to apply to foreign subsidies so that subsidies granted pursuant to arrangements in place prior to the effective date of the Regulation should not be subject to counteractive measures.

We suggest the Commission take into consideration to ensure that existing aid and subsidies where no State Aid has heretofore been deemed to arise are not treated any less favourably following the introduction of this Regulation. Guidance may be sufficient to deal with this risk.

3. *Achieving a balanced result*

Paragraph 16 of the Regulation states that “The Commission should take into account the positive effects of the foreign subsidy on the development of the relevant subsidised economic activity. The Commission should weigh these positive effects against the

³ Case 98/78, *A. Racke v Hauptzollamt Mainz*, para. 20.

negative effects of a foreign subsidy in terms of distortion on the internal market in order to determine, if applicable, the appropriate redressive measure or accept commitments. The balancing may also lead to the conclusion that no redressive measures should be imposed". The balancing test was not included in the White Paper released in 2020, and the proposed Regulation does not provide guidance or insights on how the balancing test will be applied.

Guidance would be welcomed to help businesses understand the new rules.

4. The Regulation and future multilateral solutions

The Explanatory Memorandum states that "Considering the challenge to find a multilateral solution to subsidies within a reasonable timeframe, the Commission committed (as part of the new industrial strategy for Europe) to explore how best to strengthen the EU's anti-subsidy mechanisms and tools." The Regulation does not provide for a mechanism to revoke or to switch off the Regulation when bilateral or multilateral solutions are reached.

We suggest that the Commission anticipate possible future multilateral or bilateral solutions and, in doing so, consider adding a mechanism to waive the Regulation in case of international agreements, including criteria to assess the appropriateness of such multilateral or bilateral solutions.

5. World Trade Organisation (WTO) considerations

At a global level it appears that groups of WTO members, including the EU Member States, have made substantial progress in areas such as investment facilitation, e-commerce, and alignment of trade domestic regulations. In this respect, two important elements would need to be kept in mind while evaluating the expected outcomes of the Regulation on foreign subsidies potentially distorting the internal market:

- The far reaching impacts of the non-tariff measures and barriers to trade. The barriers have been raised during the COVID-crisis and the trade protectionism measures that have been taken by certain economies. The global trade environment has improved since the non-tariff measures were lifted and as efficient policies started to facilitate and accelerate the restart of EU supply chains.

Accordingly, we suggest the Commission take into account the impact of such barriers to trade and the slowly-recovering trade position that many businesses continue to face.



- Over the last couple of years the WTO dispute settlement mechanism and its Appellate Body have been under tremendous pressure.

We suggest the Commission continue to pursue the dialogue with international partners on WTO reforms, taking into account the impact of redressive measures under the Regulation in order to avoid triggering adverse effects on business due to trade retaliation measures that can only be mitigated via the WTO dispute settlement mechanism.

For any clarification on this response, please contact me or any of the contacts below. We look forward to discussing any questions you have on the points we raise above. We would welcome the opportunity to contribute to the discussion

Yours faithfully

A handwritten signature in black ink, appearing to read 'Stef' followed by a surname.

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