



Proposal for an EU Regulation on foreign subsidies

Implications for investors

June 2022

What is the issue?

The EU is concerned about subsidies granted by non-EU countries that could distort competition in EU markets. In May 2021 it published a proposal for a regulation (the **Foreign Subsidies Regulation**) that would introduce, amongst other instruments, a new notification regime for mergers and acquisitions where either the acquirer or one of the merging undertakings has received subsidies from a third country. This is a new requirement that is independent of merger control or foreign direct investment (FDI) filing requirements, and would run in parallel to them.

We are sending this note because: (a) it is our view that it is highly likely that this new regime will be adopted either late 2022 or early 2023; and (b) we think it is highly likely to pass in its current form, compliance with which will require significant preparation for financial sponsor investors and create a new mandatory and suspensory filing regime in the EU.

What will change?

Under the proposed regulation, concentrations between undertakings must be notified to the EU Commission if:

- the acquired undertaking or at least one of the merging undertakings is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; **and**
- the undertakings concerned received from third countries an aggregate financial contribution in three calendar years prior to notification of more than EUR 50 million.

The terms “**concentration**” and “**undertaking**” have the same meaning as under EU merger control – ie looking at all of the investments under the given investing fund. The term “**financial contribution**” is deliberately wide and includes essentially any transfer of funds or liabilities, the foregoing of revenue that is due (eg non-ordinary course tax benefits), or the purchase of goods and/or services by public authorities of a third country.

During the first phase of the notification procedure (25 working days) the EU Commission will assess

whether the financial contribution distorts the internal market. If that is likely to be the case, the EU Commission can open an in-depth procedure (90 working days). If the concerns remain, the EU Commission may prohibit the concentration. The parties to the transaction can also submit commitments to remedy the concerns.

A concentration that is notifiable may not be implemented before approval of the EU Commission has been obtained. As with EUMR filings, a failure to notify can result in fines of up to 10% of aggregate turnover of the acquiring or merging parties concerned.

In addition, the Foreign Subsidies Regulation will introduce a notification requirement for participants in public procurement procedures in the EU having an estimated value of EUR 250 million or more, if they have received foreign financial contributions (regardless of the amount) in the three preceding years. Further, there will be a catch all ex officio investigation power for the EU Commission, enabling it to investigate any distortive foreign subsidies that are not caught by the notification requirements.

What are the implications?

Once adopted, the Foreign Subsidies Regulation will subject many transactions to an additional notification requirement, which we expect will run concurrently with EUMR filings (which will always be triggered if the thresholds for the new foreign subsidies filing is met). To ensure compliance with this requirement, financial sponsors will need to monitor financial contributions that they or any of their portfolio companies have received in the three years prior to notification and track this for each fund. Unlike EUMR, the current proposal under the Foreign Subsidies Regulation does not allow calculations to be based on the last financial year, meaning that financial sponsors will either need to have systems in place within their portfolio companies which require reporting on a constant basis, or there will need to be an information gathering exercise which is more event driven (which may be a competitive disadvantage in a competitive process given delays in obtaining information).

Undertakings that have received financial contributions from a third country that could distort the internal market, may experience prohibitions of certain concentrations or face remedy requirements. Jurisdictions which have subsidy regimes which are considered equivalent to the EU rules (such as the UK) are expected to be viewed more leniently than those which do not. The exact details of this regime are evolving but we consider it highly likely that they will pass substantially in their current form given the general consensus over two readings between various EU institutions over the need to have a mechanism in place to protect the EU against what are perceived to be unfair advantages given to certain acquirers. We would welcome the opportunity to discuss the detail with you further.

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