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COVER NOTE

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject: Impact assessment / Addressing distortions caused by foreign subsidies

Delegations will find attached document SEC(2021) 182 final.

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REGULATORY SCRUTINY BOARD OPINION

{COM(2021) 223}
{SWD(2021) 99} {SWD(2021) 100}



Brussels,
RSB

Opinion

Title: Impact assessment / Addressing distortions caused by foreign subsidies

Overall opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

Financial support by EU Member State authorities to undertakings is subject to EU State aid control. There is no comparable regime for third country subsidies that may distort the EU internal market. They may lead to unfair bidding in the acquisition of EU undertakings, provide an advantage in public procurement markets or help to build up market power. They could also distort investment decisions and trade in services. This could lead to growth reducing technology transfer and dependence on third country governments for infrastructure services. Resulting trade specialisation patterns could threaten future competitiveness.

This initiative follows a White paper on foreign subsidies that the Commission adopted in June 2020 to explore the issue and launch a public debate.

(B) Summary of findings

The Board notes the useful additional information provided in advance of the meeting and commitments to make changes to the report.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the lead DG to rectify the following aspects:

- (1) The report does not clearly establish when foreign subsidies are problematic and when they are not.**
- (2) The presentation of policy options is too complex and does not focus on the issues that matter most to the decision makers. The content of the options and their interaction with existing instruments is not sufficiently clear.**
- (3) The report does not clearly explain how an EU interest test would be applied.**
- (4) The report does not present the positive and negative impacts in a balanced way.**

This opinion concerns a draft impact assessment which may differ from the final version.

(C) What to improve

(1) The problem analysis should emphasise more the difficulties to collect information on the potential distortions caused by foreign subsidies (in the absence of a dedicated instrument) and the limitations of the case studies and the data. Moreover, the report should clarify the difference between potential distortions that may arise from subsidies granted by Member States and those resulting from foreign subsidies. It should also provide a more balanced explanation of the possible positive short-term effects (e.g. lower public procurement costs) and the negative long-term effects (e.g. development of dominant positions). The problem analysis should include the indirect consequences of subsidised acquisitions and subsidised imports from third countries. The report should detail the analysis of the problems in public procurement. It should be clearer on the risks of third country (co-) ownership in public natural monopolies, earned by subsidised bidding.

(2) The policy options should be redesigned to focus more clearly on the main choices for the policy makers. The report should present self-standing options for the design parameters of the policy instrument, i.e. competence level, investigative approach, EU interest test and institutional implementation. It should explain the retained policy options more in detail (e.g. investigative powers, redressive measures and their enforcement). The range of explored options for notification and *de minimis* thresholds should be justified in terms of adequacy. They should be sufficiently broad to reflect positions likely to emerge in the legislative process. A separate section on discarded options should give an overview of the initially considered options and justify why options that looked promising at first view (sometimes with stakeholder support) were then discarded from further analysis.

(3) The report should explain how the new instrument would work in conjunction with existing EU instruments in the public procurement, merger control and foreign direct investment screening areas. It should describe how procedural synergies (e.g. for notifications, timelines) would be ensured without causing unnecessary delays or legal uncertainty. It should clarify the envisaged redressive measures, including in situations where the foreign subsidy distortions would be detected only after the implementation of the procurement or transaction.

(4) Linked to the issues detailed in the problem analysis, the report should explain how the responsible authority would apply the EU interest test. It should clarify how it would judge when foreign subsidies may overall promote or conflict with EU policy objectives. and how this may influence the design of possible redressive measures.

(5) The impact analysis should present positive and negative effects of the policy intervention in a more balanced way. Particularly for the short term, it should assess more thoroughly the risks to economic activity and employment in case foreign direct investment declined. The analysis should also cover possible (short-term) adverse impacts on consumers and on public procurement costs.

(6) The monitoring and evaluations arrangements should reflect the novelty of this instrument and the potential need for timely review, including of key design parameters, such as notification and *de minimis* thresholds.

The Board notes the estimated costs and benefits of the preferred option in this initiative, as summarised in the attached quantification tables.

Some more technical comments have been sent directly to the author DG.

(D) Conclusion

The DG may proceed with the initiative.

The lead DG must revise the report in accordance with the Board's findings before launching the interservice consultation.

If there are any changes in the choice or design of the preferred option in the final version of the report, the lead DG may need to further adjust the attached quantification tables to reflect this.

Full title	Commission proposal(s) for Regulation(s) of the European Parliament and the Council to address distortions caused by foreign subsidies in the internal market generally and in the specific cases of acquisitions and public procurement
Reference number	PLAN/2020/8943
Submitted to RSB on	03 February 2021
Date of RSB meeting	03 March 2021

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

<i>I. Overview of Benefits (total for all provisions) – Preferred Option</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Direct benefits</i>		
Improved level playing field between companies	Could not be quantified	The preferred option would reduce the risk that non-subsidised companies are crowded out by companies that benefit from distortive foreign subsidies. The benefits include access to technology, scaling up through acquisitions, more competitive and fair procurement markets providing realistic quality price ratios to the taxpayer and more generally, growth
<i>Indirect benefits</i>		
Economic growth	Not possible to quantify	Improving competition by removing distortive foreign subsidies would lead to more efficient companies, innovation and more choice, and in the long-term lower prices for consumers
Third countries incentivised to resolve any issues in the ambit of various trade agreements	N/A	In order to avoid unilateral measures, third countries will be motivated to explore multilateral solutions

II. Overview of costs – Preferred option

		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
Notification of subsidised acquisitions (a)	Direct costs	none	none	negligible	Around 30 companies per year may be affected. Notification costs range between EUR 5,000 and EUR 500,000. If the Commission would find an infringement, the company may have to pay back the subsidy or if found not effective, other redressive measures can apply.	negligible	Around 40 full time equivalent (FTE) employees excluding costs for administrative tasks
	Indirect costs	Not possible to quantify	Not possible to quantify		If the Commission opens an in-depth investigation there may be indirect costs linked to the impact that the legal uncertainty over the outcome could have on the business. But in this regard, the same applies to any infringement instrument by a public authority	none	none
Notification procedure for public procurement procedures	Direct costs	none	none	Negligible	The costs per company should be similar to those in action 1. The number of cases expected to be between 13 and 36, depending on threshold. Further difficulty in calculation is the fact that number of cases does not	Negligible	Relying on resource assessments as explained in Chapter 6, the Commission would need between 15 and 45 full time employees, depending

					equal number of companies as many tenders are provided in consortia.		on the threshold.
	Indirect costs	none	Increased risk of higher prices in public procurement due to fewer cheap bids facilitated by foreign subsidies	none	none	none	none
Ex-officio tool for all other market situations and acquisitions and public procurement below the thresholds	Direct costs	Same as above	Same as above	Negligible	30-45 cases per year including other market situations, acquisitions and public procurement.	Negligible	Around 60 FTEs
	Indirect costs	Same as for 1	Same as for 1	Same as for 1	Not applicable	Not applicable	Not applicable