



Antitrust & State Aid Team

EU Foreign Subsidies Regulation

February 2023

EU Foreign Subsidies Regulation published in the Official Journal

On December 23, 2022, Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market (“**Regulation**”) was published in the Official Journal.

This is the first EU regulatory instrument designed to take action on distortions created by subsidies granted by non-EU countries to companies active in the internal market.

Until now, subsidies granted by non-EU states to companies active in the internal market were essentially exempt from any control mechanism (with the exception of a limited the possibility to initiate State-to-State dispute settlement against certain foreign subsidies granted by WTO members and limited to goods), unlike subsidies granted by EU member States (which are instead subject to state aid rules). The Regulation aims to overcome this unequal treatment and, thus, ensure a level playing field within the internal market.

The Regulation, precisely, grants the European Commission significant investigative powers over contributions paid by non-EU countries to companies involved in public merger or tender procedures. Moreover, the Commission may, among other things, impose remedial measures or make binding commitments submitted by the parties.



In most serious cases, the Commission may even order the undertakings concerned to dissolve the concentration and, with reference to public tenders, declare a bid irregular.

For the purposes of the Regulation, **foreign subsidy** means any financial contribution provided directly or indirectly by a non-EU country that confers a benefit to an undertaking and is limited to one or more undertakings or one or more sectors.

The notion of **financial contribution** is very broad (in line with state aid provisions) and includes, *inter alia*, (a) transfers (e.g. capital injections, grants, loans, guarantees, tax incentives, loss compensation, debt forgiveness, etc.); (b) revenue waivers (e.g., tax exemptions, granting of rights without adequate remuneration); and (c) provision or purchase of goods or services.

A foreign subsidy is considered **distortive** if it is “*liable to improve the competitive position of an undertaking in the internal market*”, based on a number of indicators, such as the amount of the foreign subsidy; the nature of the subsidy; the size of the enterprise and the markets involved; the level and development of the enterprise’s economic activity in the internal market; the purpose of the subsidy and the conditions attached to it; and its use in the internal market.



The Regulation contains several *safe-harbour provisions*: (a) a foreign subsidy is “*unlikely*” to be considered distortive if the amount is less than **EUR 4 million over three consecutive years**; (b) a subsidy “*shall not be considered to distort*” the internal market if it does not exceed the threshold of a *de minimis* aid (EUR 200,000 over three consecutive years); (c) a subsidy granted for the purpose of making good the damage caused by natural disasters or exceptional occurrences is “*considered*” not distortive.

Commission’s review of foreign subsidies can be based on:

1. Prior notification of concentrations
2. Prior notification of public procurement procedures
3. Ex officio review

1. Prior notification of concentrations

Prior notification of concentrations is required if:

- a) at least one of the merging companies, the acquired company or the joint venture is established in the EU and generates a **total turnover** in the EU of at least **€500 million**;



- b) investing companies have received combined total financial contributions of more than **50 million** euros from non-EU countries in the **previous three years**;

In any case, the **Commission may require prior notification of any concentration** where it suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration.

2. Prior notification and public procurement procedures

Undertakings participating in public tenders are required to notify the contracting authority of foreign financial contributions received if:

- a) the contract value is at least 250 million euros (or 125 million euros per individual lot); and
- b) the economic operator has been granted financial contributions of at least 4 million euros per non-EU country in the three years prior to notification.

Even where these conditions are not met, economic operators shall list all foreign financial contributions received in a declaration and confirm that the foreign financial contributions received are not subject to reporting requirements.

The notification requirement also covers economic operators, groupings of economic operators, main subcontractors and main suppliers.

Where a notification or declaration is missing, under certain circumstances, tenders may be declared irregular by the contracting authority.

If the notification or declaration is submitted, the contracting authority shall forward a copy to the European Commission, which shall examine it.

If the Commission considers the notification to be incomplete, it shall invite the operator concerned to supplement its contents. Failing this, the Commission will declare the relevant tender irregular.

In the case of **negotiated procedures**, instead of notification, the company concerned must directly inform the European Commission.

The Commission may, in any case, initiate an ***ex officio* investigation** or **request notification of foreign financial contributions** made by non-EU countries in the previous three years, regardless of the value of the contract or grants received.

If, at the end of an in-depth investigation, the Commission verifies that the economic operator has benefited from a foreign subsidy distorting the internal market, it may:

- 1) prohibit the award of the contract;
- 2) close the proceedings with commitments or redressive measures.

3. Ex officio review of foreign subsidies

The Commission may, on its own initiative, examine information from any source, including EU member States and any natural or legal person or association, regarding alleged foreign subsidies distorting the internal market.

Ex officio review in the field of public procurement, however, is limited to awarded contracts and, in any case, ***cannot result in the annulment of the decision awarding a contract.***



The Regulation grants the Commission significant investigative powers, including the ability to conduct inspections of enterprises and business associations, also abroad (provided the interested non-EU country raises no objection).

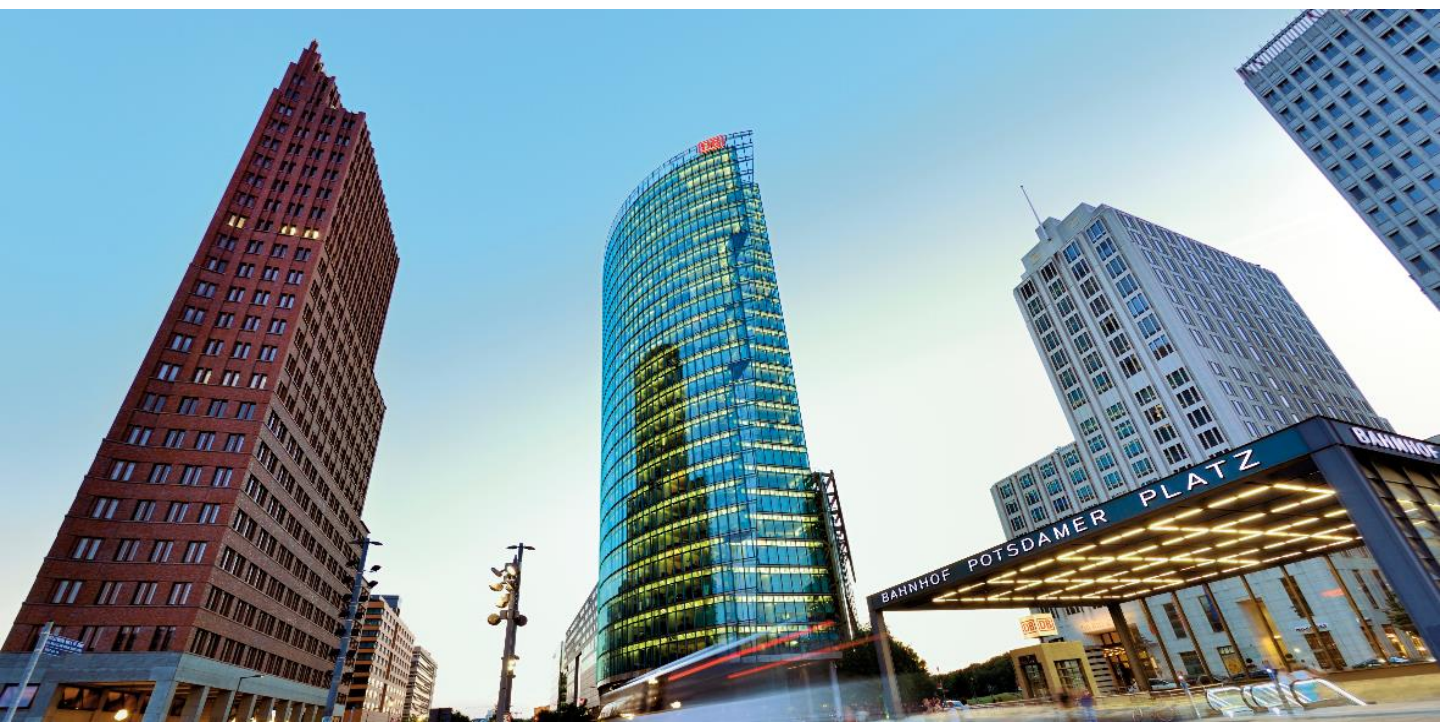
4. Fines

In case of violation of the notification and/or *standstill* obligation, fines not exceeding 10% of the total turnover achieved in the previous fiscal year by the enterprises involved may be imposed.

The Commission may also impose fines not exceeding 1% of the total turnover achieved during the previous fiscal year if companies intentionally or negligently provide inaccurate or misleading information.

5. Entry into force and date of application

The Regulation has already entered into force but the new measures will apply from **12 July 2023**, while the reporting requirements introduced by the new framework will take effect as of **12 October 2023**.



Experience the future of law, today

Deloitte Legal tackles your challenges with a multidisciplinary approach and a global perspective, linking specific business needs and using technology to experiment with innovative solutions.

Make an impact that matters. To make a significant mark you need an experienced advisor who is both pragmatic and pioneering.

Deloitte Legal integrates legal advice, strategy and technology to develop innovative solutions, create value for you and your business and transform the world of legal services.

The future of law is here, today.



Il nostro impegno concreto per
un'evoluzione sostenibile

Key contacts

Emilio Cucchiara

Of Counsel | Head of Antitrust

ecucchiara@deloitte.it

Francesco Munari

Partner | Head of Ports Shipping & Transport Team
& International EU Law

fmunari@deloitte.it

Andrea Blasi

Partner | Commercial Law

ablasi@deloitte.it

Deloitte.

Legal

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.