

Proposal for an EU regulation on foreign subsidies distorting the internal market

COMMENTS BY AFEP (FRENCH ASSOCIATION OF LARGE COMPANIES)

AFEP, the French Association of Large Companies, has been long strongly advocating for policy initiative(s) aimed at restoring a fair competition between EU and third countries' economic operators when it comes to subsidies for good and services supply, companies' mergers and acquisition and procurement for operations within the internal market.

Large French companies therefore welcome, after the publication by the European Commission of the White Paper on foreign subsidies, **the adoption of the proposal for an EU regulation on foreign subsidies distorting the internal market by the European Commission on 5 May 2021.**

AFEP would like to share the following comments with respect to the main features of the proposal:

- **General approach, scope of operations being reviewed and horizontal aspects of the proposed regulatory framework.**

As reflected in AFEP's previous positions on the white paper and the roadmap for the impact assessment, large French companies are **fully supportive of the three-module structure adopted for the proposed regulation** which is likely to capture distortions affecting concentrations between undertakings, public procurement tendering procedures and most of other economic operations within the internal market.

AFEP also welcomes the choice **to finally empower the European Commission with the competence to exert the control of distortive subsidies and to take redressive measures under all the three modules.** Such attribution of competence will guarantee a **uniform approach of distortive subsidies across the internal market** and **a unified EU position when dealing with subsidies provided by our main trading partners.**

Nonetheless, large French companies maintain the view that the regulation should also **cover foreign subsidies affecting all projects funded by EU financial instruments**, as envisaged in the white paper. Whereas foreign subsidies distorting tenders organised for the financing of projects subject to shared managed of EU funds are likely to be addressed at least partially under Module 3, the proposed regulation does **not include provisions relating to projects financed by EU funds subject to direct and indirect management** and **should therefore be complemented in this respect.**

When it comes to the articulation between the three modules, **the overall architecture should not create overlaps or introduce ex-post reviews where ex ante remedies are preferable for legal certainty, provided that administrative burden and negative impact on economic operations is minimised.** Therefore, AFEP continues to insist that **module 1 (horizontal ex post review) should not**

cover acquisition operations or public procurement, these operations being then exclusively reviewed under respectively under module 2 and module 3. Given that the proposed regulation already entrusts the European Commission with the possibility to review concentrations and public procedure under respectively module 2 and 3 below the thresholds set for mandatory notification, there is no specific justification for an ex-post review under module 1 for these operations.

■ **Notion of foreign subsidies, qualification of distortive subsidies and EU interest test**

Large French companies fully support the large scope of **foreign subsidising bodies** and of **different categories of financial contributions considered** by the proposal to identify foreign subsidies. Nevertheless, it would be also crucial to include, as envisaged in the white paper, two types of non-monetary supports granted by third countries' authorities: (1) the competitive advantage **provided by a domestic market closed or restricted to foreign competitors** and the competitive advantage **resulting from regulatory dumping practices such as environmental or social dumping**. Acknowledging the difficulty to determine minimal legal requirements being considered and quantify these supports, AFEP suggests **building a methodological approach** that could be also used to **measure up environmental and social dumping under the basic anti-dumping regulation**.

Large French companies also **welcome the flexible approach retained for qualifying distortive subsidies, providing the European Commission with an effective room for manoeuvre when dealing with various and/or innovative distortive practices by third countries**. Without prejudice to this much needed legal flexibility, AFEP suggests that the European Commission issues, after the adoption of the regulation, **complementary guidelines being more specific on how it will proceed to identify distortive practices** not being already flagged in the proposed regulation. This would help EU companies and their non-EU subsidiaries to adopt best practices when being recipient of foreign subsidies or participate in an operation involving foreign subsidies.

The **EU interest test** as outlined in the proposed regulation is obviously required to make a balance between negative and positive impacts of distortive foreign subsidies. That being said, an excessively large notion as "positive effects on the development of the relevant economic activity" (article 5) could result in regarding a number of distortive subsidies as **being immune from any commitments or redressive measures at the expense of the EU industries' competitiveness**. To achieve a better balance and a more precise assessment, AFEP suggests linking the appreciation of positive impacts to **the contribution of distortive subsidies to the fulfilment of the objectives of pre-existing EU policies**.

■ **Cross-cutting remedies**

Large French companies supports the choice by the European Commission to **propose an indicative list of possible commitments and/or redressive measures instead of a limitative list**. AFEP suggests complementing the list **to clarify the effective extent of remedies**, notably with **more insistence on behavioural remedies** in addition or in alternative to structural measures (for instance temporary sale ban on the internal market) and **a clarification on the level of repayment that could be imposed**. Moreover, the regulation should be more specific on whether the **review of subsidies in the context of concentrations or public procurement can give way to all the types of commitments envisaged under Article 6**.

- **Ex ante review of distortive subsidies in the context of mergers and acquisitions**

The proposed regulation intends to focus the ex-ante review on the largest merger and acquisition operations on the internal market as revealed by the threshold of 500 million euro to determine the scope of concentrations eligible for notification. Noting that the proposal would allow the European Commission to seek information and launch investigation below this threshold, AFEP is currently verifying with its membership whether it would be opportune to consider **lower notification thresholds** to capture foreign distortive subsidies deployed for **the acquisition of smaller companies in specific sectors such as emerging technologies**.

Conversely, large French companies stress the **administrative burden and legal uncertainty that might arise from imposing the obligation to notify a foreign subsidy to all the businesses participating to a merger or an acquisition operation with joint control**, including the companies which are not the recipient of a foreign subsidy in the first place. As it is the only business partner in a position to provide the full details of the subsidy in cause (subsidising entity, amount, and other modalities), **the obligation referred to in Article 19 (2) and (2) should be exclusively limited to the recipient company** in the merger or acquisition operation.

- **Ex ante review of distortive subsidies in the context of public procurement contracts**

Noting that the proposed regulation has brought an obvious improvement in the modalities for the ex-ante review of foreign subsidies likely to distort public procurement operations compared with the procedures envisaged in the white paper, AFEP would like to share several suggestions to **strengthen the reach of module 3 and optimise its interplay with tendering procedures**.

Proposed threshold for ex-ante notification is clearly **set at a very high level**, which could still be circumvented by the splitting of contracts into lots. Large French companies therefore advocate for either **lowering this threshold** or/and to **adopt solid provisions meant to avoid the artificial divisions of a procurement operations into lots** in addition to the rules already existing in EU public procurement directives.

By the same token, the list of recipient businesses bound to notify a foreign subsidy should **take into account possible circumventing strategies going beyond the use of subcontractors being the recipient of foreign subsidies**. Hence, AFEP suggests **expanding this list to parent companies of bidders** (mother and subsidiaries in particular) being granted a subsidy by third country's entities with a view to supporting bidding companies to prepare their tenders.

It is also worth providing for **an early notification** to accelerate the potential review by the European Commission and minimise its impact on the duration of the tendering procedures. While the proposed regulation limits the review of potentially distortive subsidies to the analysis of tenders submitted by bidding companies, **such screening should take place**, at least for restricted procurement procedures, concession contracts or framework contracts, **at the stage of the application to submit a bid**. This would **allow to detect foreign subsidies not incorporated in tenders but providing bidding companies or parent companies with a competitive asset** and **would make the next steps of concerned tendering procedures immune from a later review**. Conversely this **early screening would also help bidders adopting appropriate remedies at this stage and being then in a position to continue to participate in the following steps**.

Regarding the length of the period for review, **the maximum duration of 200 days for in-depth investigation provided in the proposed regulation is obviously too long not to severely extend the total duration of tendering procedures** at the expense of other bidders and contracting authorities/entities, even if the European Commission intends to target only complex contracts. Given its recommendation as far as the standard applicable threshold is concerned and its consequences for the scope of tendering procedures eligible for review, **AFEP suggests limiting the duration of in-depth investigation to a maximum of 100-150 days.**

Finally, large French companies are appreciative of efforts made to set clear rules for the designation of the next bidder to which award the contract in case the most successful bid should be disqualified for having been granted a distortive subsidy without any possible remedy. With a view to anticipating all possible situations arising in the review process, AFEP suggest **adding another “re-ordering” rule in case the most successful bid has benefited from an unnotified distortive subsidy or a subsidy subject to an inaccurate/false notification** and this lack of proper notification is found by the European Commission or the contracting authority/entity before the conclusion of the contract.

- **Recommendatory framework to ease the management of risks relating to foreign subsidies**

As mentioned above, French companies are eager to **anticipate possible review and remedies linked to the benefit of foreign subsidies** in such way that **they can adjust their “subsidisation” policy accordingly and stay in line with fair competition practices on the internal market.** In addition to guidelines on the qualification of distortive subsidies, AFEP therefore suggests developing aside the regulatory framework provided by the European Commission’s proposed regulation, **a set of non-binding recommendations on possible ex ante internal measures**, including potential remedies, **that could be taken by companies to reduce the risk of distortions inherent to foreign subsidies** before engaging in a business operation such as a merger and acquisition or a tendering procedure. Such indications on risk management measures are crucial for numerous companies when deciding on the making of a joint venture or a consortium to bid in a public procurement operation.

About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members’ vision to French public authorities, European institutions, and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP’s core priority. AFEP has around 113 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

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