

Berliner Gesprächskreis zum Europäischen Beihilfenrecht

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Where does this all fit?

EC wants to close a perceived "regulatory gap"

EU State Aid law

Strict controls on subsidisation of undertakings by EU Member States

Foreign Subsidies R.

Instruments to investigate any economic activity on the internal market subsidised by Non-EU Member States (e.g. production of goods in EU, cross border services, M&A / tenders)

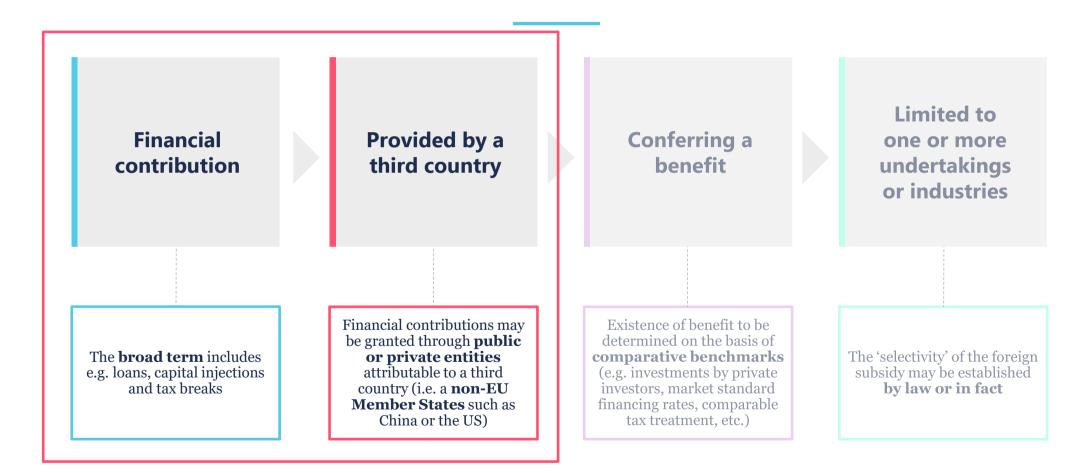
Anti-subsidy control

Part of a broader set of trade defence instruments targeting subsidised goods imported into the EU customs territory

Concept of a Foreign Subsidy

Limited to **Financial** Provided by a **Conferring a** one or more contribution benefit third country undertakings or industries Financial contributions may Existence of benefit to be be granted through **public** determined on the basis of The **broad term** includes or private entities comparative benchmarks The 'selectivity' of the foreign e.g. loans, capital injections attributable to a third subsidy may be established (e.g. investments by private and tax breaks country (i.e. a non-EU investors, market standard by law or in fact Member States such as financing rates, comparable China or the US) tax treatment, etc.)

Financial Contribution Threshold



Review Procedure for all Tools



Preliminary review

In-depth investigation

Where the EC has **sufficient indications** that a foreign subsidy
distorts the internal market

1st assessment: existence of a foreign subsidy

2nd assessment: distortion in the internal market

- I.e. where a foreign subsidy is liable to: (i) improve an undertaking's competitive position and (ii) negatively affect competition on the internal market
- Categories of foreign subsidies most likely (e.g. unlimited guarantees, facilitation of concentrations) / unlikely (e.g. total amount not more than €4m) to distort the internal market

3rd assessment: balancing

• EC <u>may</u> balance the distortion with **positive effects** on the development of the relevant subsidised economic activity (including relevant policy objectives, in particular those of the EU)

EC decisions

- No objection decision
- Decision with redressive measures/commitments (mixed bag of possible remedies: e.g. repayment, prohibition of a concentration/award of the contract, other structural and/or behavioural remedies)

Ex Officio Investigation Tool

Extensive EC powers

- The EC may on its **own initiative** examine information from **any source** regarding alleged distortive foreign subsidies in **all market situations**
- Additionally, "safety net" tool for the EC to investigate **smaller concentrations** not subject to mandatory filing
- **Risk of parallel antitrust and foreign subsidies investigations:** investigations under Article 101 and 102 TFEU as well as under the FSR could result in diverging outcomes

Extensive retrospective scope: applies to foreign subsidies granted in the <u>5 years</u> before the Regulation is applied

Information gathering

- Information requests from undertakings and third countries
- Dawn raids in the EU and in third countries (in theory)

Non-cooperation penalties

- Fines up to 1% of the aggregate turnover and periodic penalty payments up to 5% of the average daily aggregate turnover for each working day of delay
- Assumption that benefit of a financial contribution was received
- Decision based on facts available

Interim measures

 EC may impose interim measures if there is a serious risk of substantial and irreparable damage to competition in the internal market

Transaction Review Tool

Thresholds

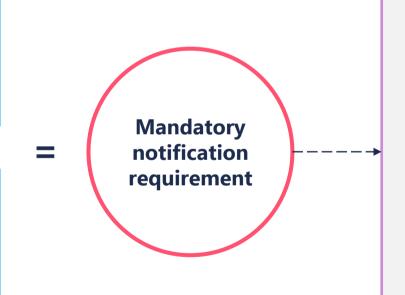
1. Turnover threshold:

Target/merging party/JV is **established in the EU** <u>and</u> generates an **aggregate turnover** of at least **€500m** in the EU

+

2. Financial contribution threshold:

Undertakings concerned have received **combined financial contributions exceeding €50m** from third countries in three previous financial years



EC review

- Preliminary review:
- 25 working days
- **In-depth investigation**: 90 working days
- Standstill obligation(Gun Jumping)

Public Procurement Review Tool



Trigger

1. EU tenders with an estimated value ≥ €250m; and

+

2. aggregate financial contributions of > €4m received per third country in three previous financial years

Entities relevant for the financial contribution threshold: economic operator's groups, main subcontractors and suppliers



Before submitting bid

(i) Notification

Disclose all financial contributions received in the last three years to contracting authority

or

(ii) Declaration

List all financial contributions and confirm that they are not notifiable

Failure to do so:

- Exclusion from tender/no award
 - Legal challenges by bidders
 - Review by EC and fines



Procedure

EC review

- Preliminary review: 20 + 10 w. days
- In-depth investigation: 110 + 20 w. days

Impact on tender

- May proceed
- No award to subsidized bidder until EC decision or subsidized bid is in any way the best bid

Thank you!

This material is for general information only and is not intended to provide legal advice.