



# Regulation on foreign subsidies distorting the internal market

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# Executive summary

The Austrian Chamber of Labour welcomes in general the efforts of the Commission to submit subsidies from third countries to more stringent monitoring and checks in the scope of the proposed regulation.

However, the proposed regulation does not fulfil the expectations raised politically in key points and the risk is too great that the efforts to achieve greater fairness and justice will miss the mark.

## Key demands concerning the proposed regulation

### Thresholds for mandatory ex-ante notification and review should be lowered significantly

The proposed notification thresholds for acquisitions of undertakings subsidised by third countries (turnover of EUR 500 million, financial contributions of EUR 50 million) should be halved at least. The threshold for companies supported by third countries in public procurements of EUR 250 million should also be lowered considerably.

### Exclusive competence of the European Commission for execution of the regulation is not effective

**Acquisitions of undertakings:** To ensure efficient and economical enforcement, the two procedures – the review of foreign direct investments and the review of acquisitions of undertakings subsidised by third countries – should be closely linked, rather than performed in parallel.

**Public procurements:** Exclusive competence of the Commission in the case of public procurements may make sense under certain circumstances if a number of conditions are fulfilled.

- Significant lowering of the notification thresholds;
- Right of the Member States to require that the Commission conducts an investigation on a case-by-case basis.
- Obligatory involvement of Member States in review procedures;

- Regular exchange of information with the Member States;
- Involvement of the statutory interest groups.

Otherwise the introduction of a national notification and review requirement according to the “one-stop-shop principle” is essential.

### No special “de minimis rules” for foreign subsidies

A level playing field is only guaranteed in the case of equal treatment and alignment of the proposed legislation with the EU state aid system.

### Not only “financial contributions” should be considered as foreign subsidies (Article 2)

Practices supported by third countries of social dumping or the undermining of standards with respect to wage provisions, labour rights, social protection, environmental sustainability, and human rights are deemed to be “foreign subsidies” that distort competition.

### “Distortion of competition” should not be the only criterion for examining foreign subsidies

Security of employment and supply, technological independence, and industry policy goals should be recognised as criteria. A comprehensive investigation on the basis of transparent guidelines is therefore needed.

### Obligatory exclusion from public procurement procedures in the case of violations of the notification requirement

Deliberate violation of the notification requirement for foreign subsidies should result not only in fines, but also in obligatory exclusion from future procurement procedures for a period of three years throughout the EU.

# The AK's position

## Fundamental remarks

Subsidies from third countries to companies active in the EU are increasingly leading to serious distortion of competition on the EU single market. The aim of fair competition on the single market is therefore undermined by foreign subsidies to the benefiting companies, making the playing field unlevel. European companies and workers are suffering the effects.

It is therefore of particular importance for there to be equal conditions for all companies on the European single market. Foreign subsidies can particularly distort competition on the single market – and beyond that – in the field of public procurements. EU state aid law applies to Member States, but not to third countries. That means companies from third countries enjoy benefits and are therefore better positioned than EU companies subject to the EU state aid rules. A framework is needed that ensures equal treatment of both EU companies and non-EU companies and guarantees a level playing field. With respect to public procurements, that means the new instrument should be in line with EU state aid rules as far as possible.

A similar problem arises in connection with the subsidised acquisition of EU undertakings by companies from third countries. If, due to financial state support, companies from third countries can pay significantly higher prices than competitors in the case of purchases of undertakings, then distortion of competition is present that is not taken into account in the scope of the European merger control rules. Moreover, foreign subsidies in connection with acquisitions of undertakings are often targeted at strategic goals, if purchase prices over the market price are paid. Moreover, the question arises as to whether and to what extent the strategic goals of the third country jeopardise European interests and Europe as a business location.

We therefore deem it essential to close the existing gaps with respect to foreign subsidies that distort competition. Accordingly, the Austrian Chamber of Labour welcomes in general the efforts of the

Commission to submit subsidies from third countries to more stringent monitoring and checks in future.

In the scope of the White Paper preceding the regulation, the Austrian Chamber of Labour assessed the Commission's initiative, was extensively involved in the consultation, and conveyed important demands of the relevant stakeholders. The Austrian Chamber of Labour notes with regret that none of the proposals made during the consultation have been included in the present proposed regulation. They remain fully valid and are reinforced below.

## Remarks on the proposed regulation

As already proposed for discussion in the White Paper, three instruments are put forward in the proposed regulation for the scrutiny of foreign subsidies to companies active in the EU. Two instruments concern acquisitions of undertakings and public procurement procedures and are based on ex-ante notification and review, while a general market investigation instrument is intended to enable the Commission to launch investigations ex officio into foreign subsidies (e.g. in the case of mergers and procurement procedures where the thresholds are not reached or any other market situation).

The proposed regulation takes a very narrow approach both with respect to the definition of "foreign subsidies" and to the criteria for examining such subsidies. Only financial contributions of a third country are deemed subsidies and the sole criterion is whether the foreign subsidy is liable to improve the competitive position of the benefiting company and whether competition on the single market is negatively affected as a result.

Contrary to the proposals in the White Paper on levelling the playing field as regards foreign subsidies (COM (2020) 253 final), which provided for decentralised competences, the European Commission, as set out in the proposed regulation, now wishes to have exclusive competence for execution of the regulation. Partial division at least

of the powers of review between the European Commission and the Member States is no longer provided for. The Commission justifies its departure from the original proposals with the risk of inconsistent decisions and the possibility of the authorities of the individual Member States being overburdened.

To limit the review burden for the European Commission and for companies, very high thresholds are now proposed in the regulation for ex-ante notification requirements. Acquisitions of undertakings are now only to be subject to a notification requirement and review by the Commission if the turnover of the target EU company exceeds EUR 500 million and if the financial contributions from third countries exceed EUR 50 million in the three-year observation period.

In the field of public procurements, an ex-ante notification requirement is only to be introduced from a contract value of EUR 250 million. Below the thresholds and in other market situations, the possibility is to be provided for foreign subsidies to be investigated ex officio. According to the proposed regulation, foreign subsidies of less than EUR 5 million in the observation period are not deemed to distort competition.

The proposed regulation does not fulfil the expectations raised politically in key points, since the intention is only to investigate major cases by setting high threshold values. That concerns both acquisitions of EU undertakings subsidised by third countries and companies supported by third countries in public procurements.

In the Austrian Chamber of Labour's opinion, significant parts of the proposed regulation therefore need to be improved since otherwise the risk is too great that the efforts to achieve greater fairness and justice will miss the mark.

### **Demands and remarks concerning the proposed regulation**

#### **Thresholds should be lowered significantly both for acquisitions of EU undertakings subsidised by third countries and for companies supported by third countries in public procurements**

The aim of creating fair competition on the single market between EU companies and non-European companies subsidised by third countries cannot be achieved by the Commission submitting only a few large projects ex ante to preliminary review. Moreover,

the high thresholds in the field of acquisitions of undertakings subsidised by third countries and public procurements by no means take into account the different economic circumstances in the Member States. Secondary ex-post reviews are hardly suited to creating a level playing field between EU companies and companies subsidised by third countries. It should also be noted here that obtaining information in the scope of ex-ante market investigations is likely to pose difficulties in the case of foreign subsidies targeted at strategic goals.

Especially in the field of public procurements, we do not share the Commission's view that this instrument should only apply to large public contracts. It has become clear in the last two years in particular that subsidised companies from third countries are increasingly vying for smaller public contracts. The Austrian Chamber of Labour therefore calls for the threshold of EUR 250 million to be lowered significantly.

The proposed thresholds for ex-ante notification and preliminary review are likewise far too high in the case of acquisitions of undertakings subsidised by third countries. In the White Paper a quantitative threshold of aggregate turnover in the EU of EUR 100 million for the target undertaking was proposed. In the Austrian Chamber of Labour's opinion, the proposed notification thresholds should be halved at least. Accordingly, acquisitions of undertakings should be subject to a notification requirement and review if the turnover of the target EU company exceeds EUR 250 million. The EC Merger Regulation also sets out the same threshold for aggregate turnover in the EU. With respect to financial contributions, even a lowering of 50% to EUR 25 million still seems very high. The question arises here in particular of which financial contributions are intended to be considered in that regard and, above all, on what basis they are to be calculated.

### **Exclusive competence of the Commission for execution of the regulation is unhelpful**

The Commission wishes to have exclusive competence for acquisitions of undertakings, public procurement procedures, and general market investigations. The Austrian Chamber of Labour considers that unhelpful for several reasons.

As mentioned earlier, acquisitions of undertakings subsidised by third countries are often also in pursuit of strategic goals of the third country. Foreign subsidies are also increasingly relevant in connection with the investigation of foreign direct

investments. The Austrian Chamber of Labour wishes to refer here to the FDI Screening Regulation. Numerous possibilities for action were set out in that regulation and the Commission also called on the Member States, in view of the COVID-19 crisis, to make ambitious use of the FDI Screening Regulation and to perform investment reviews in the case of strategically important acquisitions of undertakings by third countries.

It is surprising that the European Commission, in the proposed regulation, excludes the possibilities set out in the FDI Screening Regulation for the review of acquisitions of undertakings subsidised by third countries in such a manner, since in the Austrian Chamber of Labour's view it is necessary for the two procedures – namely the review of foreign direct investments and the review of acquisitions of undertakings subsidised by third countries – to be closely linked, rather than performed in parallel. The exclusive competence of the Commission regarding the subsidised acquisitions of undertakings is therefore not advisable. On the contrary, it should be reviewed whether it would make sense for the two procedures to be merged in the interest of efficient and economical execution.

Foreign subsidies that distort competition in the case of public procurements are increasingly a problem for European companies. In the Austrian Chamber of Labour's opinion, effective monitoring and checks are essential in order to ensure fair competition in this important field. Exclusive competence of the Commission may make sense under certain circumstances if several conditions are fulfilled.

These include:

- Significant lowering of the notification thresholds;
- Right of the Member States to require that the Commission conducts an investigation on a case-by-case basis.
- Obligatory involvement of Member States in review procedures;
- Regular exchange of information with the Member States;
- Involvement of the statutory interest groups: they should have the possibility to inform the public client or authority that notification has not been given or that there is reasonable suspicion of a subsidy from a third country.

Otherwise the introduction of a national notification and review requirement according to the "one-stop-shop principle" is essential. The merger control rules, which provide for a clear delimitation of the competences of national competition authorities and the EU Competition Commission, could serve as a model here.

In the case of shared competence, Member States, competitors, and interest groups should have the possibility to notify the Commission if the national authority fails to act despite plausible indications of foreign subsidies. Furthermore, in the case of decentralised division of enforcement of the regulation, the Commission should be authorised to instruct the national supervisory authority to launch an investigative procedure.

### No special "de minimis" rules for foreign subsidies

The Commission's observation that foreign subsidies of less than EUR 5 million in the three-year observation period are not deemed to distort competition is incomprehensible and in need of explanation. The "de minimis" state aid that is exempt from the scrutiny of state aid is set at EUR 200,000 per company over a period of three years. The Commission's proposal is incompatible with the goal of a level playing field and does not create equal starting positions for competitors. The Austrian Chamber of Labour advocates equal treatment and therefore recommends that the proposed legislation be aligned with the EU state aid system.

### Reviews launched ex officio require effective powers of investigation and enforcement

The reasons given by the Commission for the high proposed thresholds with respect to the notification requirement for acquisitions of undertakings subsidised by third countries and public procurements include the fact that the Commission can also (ex officio) perform reviews on its own initiative of possible distortions of competition. In addition, it proposes a general market investigation instrument if there is reasonable suspicion that foreign subsidies might distort competition in a given sector.

The Austrian Chamber of Labour welcomes in general the further possibilities for the Commission to investigate foreign subsidies that are proposed in the regulation. The procedures launched ex officio are ex-post reviews and obtaining information about the level, type, and purpose of foreign subsidies could pose considerable difficulties. The Austrian Chamber

of Labour therefore recommends extensive powers of investigation and enforcement to ensure the effectiveness of those instruments.

The Austrian Chamber of Labour also wishes to reiterate that an ex-post review does not replace an ex-ante review and only makes a limited contribution to the aim of the present initiative, namely to create a level playing field for EU companies and non-EU companies.

### **Not only "financial contributions" should be considered foreign subsidies (Article 2)**

The review of foreign subsidies is solely focused on financial contributions to the benefiting companies (e.g. capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses or foregone revenue). That approach is too narrow. A "foreign subsidy" may also be identified if third countries fail to take action against violations of international minimum labour standards and environmental standards, thereby giving such companies a competitive advantage over their competitors. In the case of public procurements in particular, it is of critical importance that practices supported by third countries of social dumping or the undermining of standards with respect to wage provisions, labour rights, social protection, environmental sustainability, and human rights are deemed to be "foreign subsidies" that distort competition and are included in the scope of the review under Article 3 ("Distortions on the internal market").

### **"Distortion of competition" should not be the sole criterion for examining foreign subsidies**

According to Article 3 of the proposed regulation, the European Commission solely examines foreign subsidies with respect to whether and to what extent the subsidy is able to improve the competitive position of the undertaking concerned on the single market and thereby actually or potentially resulting in a negative effect on competition.

The acquisition of EU undertakings by companies subsidised by third countries is not only a matter of distorted competition. Instead, it should also be questioned whether the subsidised acquisition of the undertaking serves to capture technology and know-how and ultimately also threatens jobs due to relocations. The competitive aspect should therefore not be the sole criterion. Instead, it is necessary for security of employment and supply, technological

independence, and industry policy goals to be recognised as criteria as well. However, acquisitions of undertakings subsidised by third countries can also have positive effects, which should be weighed up against any distortion of competition and other potential for damage. Comprehensive investigation of all the aforementioned aspects is therefore needed.

The Commission has considerable leeway with respect to the "balancing test" (Article 5) as to whether and to what extent distortion of competition is justified. However, to ensure that the approach is as consistent as possible, there is a need both for transparent guidelines and for transparency requirements to ensure that decisions of the Commission on a case-by-case basis can be understood by all market players.

### **Interim measures in the case of substantial damage to competition should be defined more precisely**

Under Article 10, the Commission can take interim measures if there are indications that a financial subsidy by a third country distorts competition and there is serious risk of substantial damage to competition on the single market. However, those measures are not designated in the proposed regulation. In the Austrian Chamber of Labour's opinion, it should be clarified in the text of the regulation what interim measures the Commission can take at short notice to restore competition on the single market without delay.

### **Redressive measures must be efficient and effective**

The Commission can take redressive measures to balance out distortion caused by foreign subsidies on the single market (e.g. behavioural or structural requirements). Repayment of subsidies to the third country should certainly be excluded as a redressive measure to prevent possible circumventions of the rules.

### **Obligatory exclusion from public procurement procedures in the case of violations of the notification requirement**

In the Austrian Chamber of Labour's opinion, sanctions are required if it is established during a review that a company received a subsidy from a third country but did not duly report it. Article 32 provides for fines to be imposed on the companies concerned at the level of 1% to 10% of the total turnover

generated in the preceding business year. Deliberate violation of the notification requirement for foreign subsidies should also result in obligatory exclusion from future procurement procedures for a period of three years throughout the EU.





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## About us

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The Austrian Federal Chamber of Labour (AK) is by law representing the interests of about 3.8 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore, the Austrian Federal Chamber of Labour is a part of the Austrian social partnership. The Austrian Federal Chamber of Labour is registered at the EU Transparency Register under the number 23869471911-54.

The main objectives of the 1991 established AK EUROPA Office in Brussels are the representation of AK vis-à-vis the European Institutions and interest groups, the monitoring of EU policies and to transfer relevant information from Brussels to Austria, as well as to lobby the in Austria developed expertise and positions of the Austrian Federal Chamber of Labour in Brussels.