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## Foreign Subsidies Regulation on public procurement and M&A transactions

### Why it matters

The new Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market ("**Regulation 2022/2560**") will have a significant impact on the activities of entrepreneurs who receive non-EU subsidies. Special emphasis is placed on M&A transactions and public procurement of certain values. Its aim is to prevent undertakings benefiting from foreign subsidies from gaining an undue advantage on the EU market.

### Entry into force of foreign subsidies regulation

Regulation 2022/2560/EU will apply from 12 July 2023. It came into force on 12 January 2023 and is directly applicable in all Member State of the European Union and covers all companies operating in the EU internal market.

### Foreign subsidy – concept

Regulation 2022/2560 applies to all economic activities in the internal market that are undertaken by undertakings benefiting from foreign subsidies. Whether or not the subsidies are provided to undertakings based outside the EU or established in one of the Member States is irrelevant.

The concept of foreign subsidies is broadly defined as financial contributions made by a third (non-EU) country that may benefit a particular undertaking or industry while distorting competition in the internal market. It is indicated only by way of example that such contributions may be **capital injections, grants, loans, loan guarantees, debt forgiveness, tax exemptions, and the provision or purchase of goods and services.**

In Regulation 2022/2560, a **third country** is understood to mean **central government** and **public authorities** at all other levels, and **public and private entities whose actions can be attributed to a non-EU State.**

Regulation 2022/2560 places particular emphasis on concentration and public procurement procedures:

*The Commission should have the power to examine any foreign subsidy, to the extent it is in the scope of this Regulation, in any sector of the economy on its own initiative, relying thereby on information from all available sources. To ensure effective control, in the specific case of large concentrations (mergers and acquisitions) and public procurement procedures above certain thresholds, the Commission should have the power to review foreign subsidies based on a prior notification by the undertaking to the Commission.*

(preamble to Regulation 2022/2560)

## Foreign subsidies and M&A transactions

For the purposes of Regulation 2022/2560, a **concentration** is deemed to arise where a **change of control on a lasting basis** results from either of the following:

- 1) the **merger** of two or more previously independent undertakings or parts of **undertakings**;
- 2) the **acquisition**, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect **control** of the whole or parts of one or more other undertakings.

The obligation to notify the intention and to finalise the implementation of a concentration arises if:

- 1) at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least **EUR 500 million**; and
- 2) the acquirer and the acquired undertaking, the merging undertakings or the undertakings creating a joint venture and the joint venture were granted combined aggregate financial contributions of more than **EUR 50 million** from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

The implementation of the notified concentration of undertakings should be postponed until the EC has completed its examination of the case. However, Regulation 2022/2560 will not apply to concentrations for which the agreement was concluded, the public bid was announced, or a controlling interest was acquired before 12 July 2023.

## Foreign subsidies and public procurements

In the case of public procurement, an economic operator's obligation to notify a financial contribution will arise if:

- 1) the estimated value of that public procurement or framework agreement net of VAT or a specific procurement under the dynamic purchasing system is at least **EUR 250 million**; and
- 2) the economic operator was granted aggregate financial contributions in the three years prior to notification of at least **EUR 4 million** per third country.

Financial contributions should include those received by both the economic operator and its subsidiaries without commercial autonomy, holding companies, and *main* subcontractors and suppliers. Under the Regulation, a subcontractor or supplier is deemed to be *main* where they ensure key elements of the contract and in any case where the economic share of their contribution exceeds 20 % of the value of the submitted tender.

Regulation 2022/2560 will only apply to public procurement procedures initiated after 12 July 2023.

## Selected exclusions

According to the Regulation, activities of financing institutions or insurance undertakings involving transactions and dealing in securities and the acquisition of control of an undertaking by a person authorised by the public authorities or by financial holding companies will not be deemed to be concentrations.

In the context of public procurement, exemptions have also been introduced. Firstly, contracts awarded pursuant to Article 346 of the TFEU are excluded from the application of Regulation 2022/2560. Secondly, contracts in the field of defence and security awarded under Directive 2009/81/EC, the European Commission may only initiate a foreign subsidy review procedure *ex officio*. Thirdly, a foreign subsidy will not distort the internal market if it is aimed at making good the damage caused by natural disasters or exceptional occurrences.

## Powers of the European Commission

Regulation 2022/2560 provides that:

- in procurement, the obligation for economic operators to provide information on subsidies or the absence thereof, which the EC examines and issues a decision that may order the contracting authority to reject the tender of the economic operator concerned.
- in M&A transactions, the possibility for the EC to refuse clearance for a concentration.

The EC may also analyse any business activity taken up by an undertaking on the EU market where it suspects the use of foreign subsidies.

In this respect, the EC issues decisions imposing redressive measures or decisions imposing commitments. These may, e.g. order a reduction in capacity, an obligation to make certain infrastructure available, the granting of licences or the divestment of certain assets.

The EC also has the power to prohibit the conclusion of a public procurement contract or to order the dissolution of a concentration.

## Selected risks arising from Regulation 2022/2560

- 1) New rules that may significantly affect the course of the largest concentration and public procurement procedures in the EU (lack of experience in applying the new regulations)
- 2) Competence to assess whether the company or economic operator is the beneficiary of foreign subsidies distorting competition in the internal market has been delegated to an external body (the European Commission) – the companies, economic operators and contracting authorities have limited influence on the course of the procedures laid down in Regulation 2022/2560
- 3) The broad and imprecise scope of the term "foreign subsidies" may give rise to interpretative doubts as to the scope of application of the obligations under Regulation 2022/2560 – the risk falls primarily on companies and economic operators
- 4) The procedure to examine the impact of foreign subsidies on the internal market may be repeated several times for a given company or economic operator
- 5) Risk of a prohibition of a concentration or the award of a contract, financial penalties or other commitments
- 6) Risks potentially extending beyond a concentration and public procurement procedure

## Recommendation

We therefore recommend that entities intending to carry out a concentration or operating in the area of public procurement in the EU analyse any financial contributions received by the undertaking from third countries over the past three years. The undertaking should include in its analysis not only the subsidies it has received, but also the financial contributions received by subsidiaries, holding companies, and main subcontractors and suppliers. We also recommend that procedures be developed to allow concentrations to be carried out and participation in EU procurement procedures in line with the new rules, including procedures to select concentrating entities, consortium members, subcontractors and suppliers.

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## Who will my adviser be?



**Katarzyna Kuźma**

Partner | Infrastructure and Energy Practice

E: [katarzyna.kuzma@dzp.pl](mailto:katarzyna.kuzma@dzp.pl)

T: +48 22 557 94 25 | M: +48 660 440 310



**Dr Marek Świątkowski**

Partner | Corporate and M&A Practice

E: [marek.swiatkowski@dzp.pl](mailto:marek.swiatkowski@dzp.pl)

T: +48 22 557 76 65 | M: +48 606 757 100