Comments on the Commission proposal for a regulation on foreign subsidies distorting the internal market

ABOUT AEGIS EUROPE

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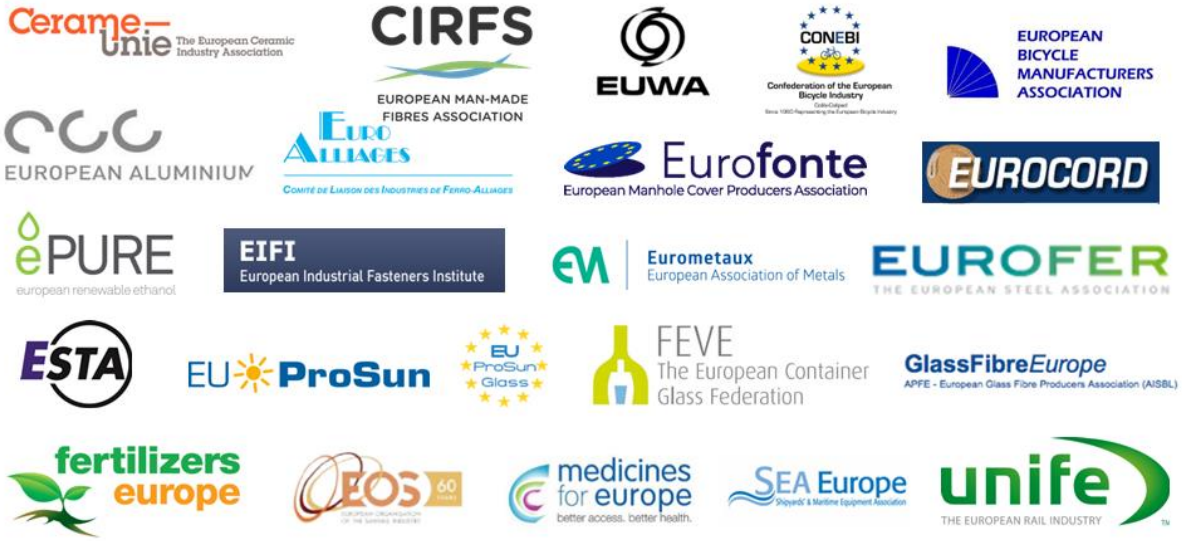

EXECUTIVE SUMMARY

The Commission's Proposal for a regulation regarding foreign subsidies is promising but requires substantial clarifications and revisions before it can become an effective tool for addressing the foreign subsidies distorting the EU internal market.

As a general matter, because effective countermeasures under the WTO Agreement on Subsidies and Countervailing Measures are being blocked by the failure of other countries to meet their WTO transparency obligations, the proposed Regulation needs modification in order not to rule out in advance any action against distorting foreign subsidies, regardless of the sector involved.

The scope of subsidies and distortions covered, and of possible redressive measures, needs clarification to ensure comprehensiveness, for example to recognise that foreign subsidies may cause major distortions of the EU market already at the time contracts are entered into, or even earlier.

To lessen evidentiary burdens in the face of the failure of other countries either to meet WTO transparency obligations or to provide full cooperation in subsidy proceedings, and/or the fact that they have economies significantly distorted by State intervention, the Proposal should include presumptions, farther-reaching consequences of non-cooperation, and an alternative threshold for an *ex officio* review which would, for example, be based on the magnitude of the (potential) distortive impact on the EU internal market.

The Proposal's provisions regarding interim measures, the balancing assessment, and redressive measures and commitments, need major strengthening in order to be capable of safeguarding a strong and strategic EU industrial base with sustainable and diversified supply chains, able to deliver on the EU's political priorities.

More generally, the Proposal needs to include provisions recognising the fundamental interest of EU industry most affected by the distortions in question to request initiation and to participate meaningfully in proceedings, and to have recourse against Commission decisions. Similarly, there need to be rights of private legal action with a view to allowing EU persons to obtain compensation for damages in relation to injury caused to them by distortive foreign subsidies established by the Commission.

Regarding the review of concentrations, the Proposal's procedural rules should be further aligned with the EU Merger Regulation ("EUMR"), by decreasing the notification threshold to EUR 250M (instead of EUR 500M). In parallel to this decrease, and to enhance legal certainty,

1) the Commission's ability to open an *ex officio* review of a concentration should be clearly limited to strategic M&A's conducted by SOE's (e.g., acquisition of notified bodies); and,

2) the Commission should not be able to request *ex ante* notification below the fixed threshold.

With regard to public procurement, AEGIS Europe supports the compulsory notification mechanism, the threshold of EUR 250M (with a number of pre-conditions) and the proposed Commission's decision, as well as the obligation to notify for "main subcontractors and main suppliers" where the economic share of their contribution exceeds 30% of the estimated value of the contract.

At the same time, a number of provisions need fine-tuning in order to minimise the risk of circumvention, in particular regarding the control of European economic operators by foreign entities or concerning the most economically advantageous tender.

Further, in addition to addressing procurement based on a specific individual procurement procedure, *ex officio* reviews should also examine more generally the behaviour of a given operator in a sector, with a potential remedy being the exclusion from EU procurement for a certain period of time. In this context, it is also important to address private procurement, to the extent there is a risk of circumvention.

Introduction

The provisions of the Commission's proposed regulation on foreign subsidies distorting the internal market (hereafter, "the Proposal") appears to take into account a number of AEGIS Europe's comments on the White Paper but leaves open a number of other critical points. This note examines the Proposal in the light of the earlier comments and considers the elements which are essential to ensure that the new tool provides an effective remedy for distortions caused by foreign subsidies on the EU market.

Horizontal elements

Relationship to other instruments (Article 40)

A most fundamental issue raised by the Proposal concerns the interplay between the provisions of the new regulation and existing EU legislation and international commitments. In this regard, Article 40(7) of the Proposal provides that no action is to be taken under the Proposal if that "would amount to a specific action against a subsidy within the meaning of Article 32.1 of the Agreement on Subsidies and Countervailing Measures".

Article 32.1 of the WTO ASCM provides in full that "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Because the ASCM – which relates to trade in goods – covers both countervailing duties imposed on subsidised imports causing material injury to a domestic industry, and WTO dispute settlement to address any prohibited subsidies or subsidies causing serious prejudice to the interests of another WTO Member, **it is not clear to what extent actions would be possible under the Proposal in relation to foreign subsidies granted by another WTO Member to operators in sectors producing goods**.

The proposed Regulation needs to provide an effective remedy against those distortive foreign subsidies which are not already addressed *de facto* by actual anti-subsidy measures in place with regard to imported products, especially in light of the fact that effective countermeasures under the ASCM are being blocked by the failure of other WTO Members to meet their WTO obligations, including their obligations to declare their goods-related subsidies at the WTO. Accordingly, Article 40(7) needs modification in order not to rule out in advance any action against distorting foreign subsidies, regardless of the sector involved. Having said that, the Proposal could assess the risk of a double remedy in individual cases and limit redressive measures to the extent necessary to avoid a *de facto* double remedy.

Scope of application (Article 1)

The Proposal addresses any distortion on the internal market which arises "with respect to any economic activity" as a result of foreign subsidies "granted to an undertaking engaging in an economic activity in the internal market" (Article 1). In other words, as opposed to the approach taken in the White Paper and in line with the comments of AEGIS Europe, there is no limitation as to the place of establishment of the undertaking to which the foreign subsidies are granted. However, the "economic activity" of the subsidy recipient needs to be broadened to cover any commercial interaction with a government or economic operator which causes (or potentially causes) a distortion on the EU internal market (i.e. regardless of the place where the commercial interaction happens).

Further, a distortion on the internal market is deemed to exist "where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market". This needs modification to cover different levels of the value chain, i.e., to cover foreign subsidies granted to third country operators both with regard to the improvement of their own competitive position on the EU internal market, and with regard to the improvement of the competitive positon of their customers who are active on the EU market (regardless of their place of establishment).

Existence of subsidies (Article 2)

Article 2 of the Proposal begins by setting out three cumulative criteria for the existence of a foreign subsidy : a third country provides a financial contribution, that contribution confers a benefit to an undertaking engaging in an economic activity in the EU internal market, and that contribution is granted to a limited group of undertakings or industries. That article then continues with lists of examples of financial contributions, one regarding types of financial contributions and the other regarding ways in which financial contributions are considered to be provided by the third country.

To begin with, it is unclear to what extent Article 2 of the Proposal seeks to apply the same concepts as those applied under the EU's Basic Anti-subsidy Regulation for trade in goods.[1] The attribution of actions of a private entity, the conferral of a benefit, and the specificity requirement are examples of concepts for which there is substantial experience and case law under the Basic Anti-subsidy Regulation. If it is intended that one or more of the concepts in Article 2 mirror those of the Basic Anti-subsidy Regulation, that should be expressed more clearly.

A second and specific point concerns the extent to which the lists in Article 2(2) (financial contributions and financial contributions provided by the third country) are non-exhaustive. The proposed Article 2(2) says "shall include", but that is ambiguous and it should be clarified that the lists are non-exhaustive. Further, the definition of a subsidy should expressly cover regulatory requirements which are lower than those in effect in the EU, as AEGIS Europe requested in its comments on the White Paper.

A third point is that the proposed Article 2 should but does not establish a presumption in the case of third countries whose economies are significantly distorted through government intervention, to consider as subsidies all benefits derived from financial contributions that are provided by bodies which are not clearly demonstrated to be acting independently of government policy.

Similarly, there should be a basic – rebuttable – presumption that all subsidies to producers of upstream inputs are passed through to the benefit of downstream operators, whether those operators are manufacturers or suppliers of services (or both).

Timing of subsidies and of resulting distortions (Articles 1, 3 and 8)

Because economic activity can be characterised by very long lead times between the signing of a contract and its execution, it is essential to recognise that foreign subsidies may cause major distortions of the EU market already at the time contracts are entered into, which may be long before the contract is executed, or even earlier.

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[1] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ 2016 L176/55, as amended.

Article 1(2) of the Proposal ("This Regulation addresses foreign subsidies granted to an undertaking…")[2] implies that a subsidy must have already been granted prior to consideration under the proposed Regulation. The question here is whether a subsidy can be considered "granted" at some point prior to actual receipt of the benefit at issue (e.g. based on a conditional promise of the benefit and/or a pattern of granting benefits which indicates an ongoing commitment to grant them, such as bailouts of SOEs in strategic sectors). In this regard, the AEGIS Europe comments on the White Paper had pointed out that it is essential that subsidies be recognised already from the moment they can cause distortions (which can occur from the moment an operator is entitled, even if only conditionally, to a benefit or even before).

At the same time, because of the extended period over which a given subsidy causes injury, as well as the challenges of identifying and quantifying foreign subsidies, the limitations period for taking action against a given subsidy should start only from the later of the actual moment of receipt of the subsidy or the moment at which a product is delivered. Indeed, while the impact of a subsidy may begin already at the time a contract is concluded (or even earlier), a product may only be delivered years later and the subsidy may also be paid only at an even later date (and may even have been conditional on the signing of the contract and additional conditions to be fulfilled in relation to the production and/or delivery of the product in question).

Accordingly, Article 8(3) should be clarified to say that the closure of a preliminary review without proceeding to an in-depth investigation shall take place on the grounds that there is no foreign subsidy only if the absence of a subsidy is not simply an issue of timing of receipt.

Also, it should be expressly provided that market investigations under Article 34 interrupt the limitations period.

With regard to the timing of the distortion, it is positive and essential that Article 3 of the Proposal does not require that a distortion has already materialised prior to the opening of an investigation : "where a foreign subsidy is **liable to improve** the competitive position of the undertaking concerned in the internal market and where, in doing so, **it actually or potentially negatively affects competition** on the internal market". As action is allowed even before there is an actual effect on competition, one can reasonably conclude that action is in any event permitted as early as the distortion in fact appears (e.g. at the moment contracts are lost), but this again highlights the need to clarify that action can be taken under the new Regulation as soon as a distortion on the EU internal market is likely and it is reasonable to conclude that it is or will be due to foreign subsidisation.

Amount of subsidies (Article 3, Article 14 and Article 34)

Article 3 of the Proposal provides that "A foreign subsidy is unlikely to distort the internal market if its total amount is below EUR 5 million over any consecutive period of three fiscal years." This is a substantial increase from the amount of EUR 200,000 suggested in the White Paper. Although this text is not worded as an absolute exclusion of consideration of subsidies less than EUR 5 million, the context may lead to that conclusion.

In this regard, the Proposal must be amended to address the difficulties of precise quantification of foreign subsidies which, with the relatively high threshold, could become an issue given the lack of transparency of third country governments with regard to the amount of subsidies granted. An

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[2] Specifically in the context of the *ex officio* review, Article 8(2) has a similar wording : "Where the Commission, based on the preliminary review, considers that there are sufficient indications that an undertaking has been granted a foreign subsidy…"

alternative threshold should be added which would, for example, be based on the magnitude of the (potential) distortive impact on the EU internal market.

Article 14(3) of the Proposal does provide that

Where an undertaking concerned, including a public undertaking which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such benefit.

However, this still leaves it to the Commission to establish with affirmative proof the amount of a financial contribution, as well as the fact that there is a limited group of beneficiaries. Accordingly, Article 14(3) should be revised to provide that in cases of less than full cooperation, subsidies shall also be deemed to have distortive effects (i.e. regardless of the relevant threshold)[3] and to concern a limited group of beneficiaries.

Further, in relation to a specific comment of AEGIS Europe on the White Paper, the Proposal should be adapted to provide that DG Trade findings of subsidies benefiting third country producers in a given sector made in relevant and recent TDI investigations, or subsidies documented in reports published by international intergovernmental organisations (e.g. OECD) are to be accepted as sufficient evidence of distortive subsidies to operators in the countries and sectors concerned (i.e., as having met the relevant threshold).

Article 34 of the Proposal allows the Commission to "conduct a market investigation" "where the information available substantiates a reasonable suspicion that foreign subsidies in a particular sector, for a particular type of economic activity or based on a particular subsidy instrument may distort the internal market". The Commission may then use the information obtained in the framework of, for example, an *ex officio* review. Such an investigation may thus help to overcome the difficulty of proving a certain value of subsidies to companies or to a sector, but to ensure that it does, Article 14 (regarding the consequences of non-cooperation) should also be expressly made to apply in the context of Article 34 investigations.

Subsidies most likely to distort the internal market (Article 4)

Article 4 of the Proposal sets out a list of categories of foreign subsidies "most likely to distort the internal market" but the list is too short and there is no clear legal consequence of that categorisation. In that regard, AEGIS Europe had asked in its comments on the White Paper that a number of foreign subsidies be considered to have distortive effects on a *per se* basis :

- all export financing subsidies granted by countries which are not signatories to the OECD arrangement on officially supported export credits, and
- all subsidies to beneficiaries active in sectors:
    * characterised by structural excess capacity;
    * featuring high-tech and/or dual-use products to a significant extent; or,
    * designated as strategic by the government providing the subsidies.

Also to be considered distortive *per se* should be foreign subsidies to operators which have privileged and/or protected access to a significant non-EU market, especially if the non-EU market is the operator's domestic market.

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[3] Article 14 applies not only in the context of an *ex officio* review, but also in the context of concentrations and public procurement (which have a lower threshold).

Balancing (Article 5)

Article 5 of the Proposal very simply provides that the Commission "shall, where warranted, balance the negative effects of a foreign subsidy in terms of distortion on the internal market with positive effects on the development of the relevant economic activity." Further, the Commission "shall take into account the balancing… when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments."

In this manner, the Proposal gives the Commission full discretion in the application of the balancing assessment, with no weighting of particular factors or presumption in favour of redressive measures to address the distortions.[4] In this regard, and to be more consistent with EU State aid rules, the AEGIS Europe comments on the White Paper had insisted that a balancing assessment must start from the presumption that there is a fundamental and strong EU interest in favour of removing the effects of distortive foreign subsidies, especially those endangering sustainable and diversified supply chains and the preservation of a strong industrial base in Europe.

This presumption in favour of redressive measures should be irrebuttable with regard to subsidy recipients that are operators in sectors which are

1) targeted by national strategic plans in third countries (such as Made in China 2025) or are otherwise considered strategic by the EU,

2) affected by structural excess capacities, or

3) dominated by the presence of State-owned enterprises in the country granting the subsidies.

In addition, because a balancing assessment must involve an adequately transparent and coherent analysis of both short- and medium-term impacts of the distortions in question, the Proposal should be amended to require the Commission to carry out a full and timely consultation of relevant EU industries and to give meaningful consideration of their input.

Redressive measures (Article 6 and Article 15)

Article 6 of the Proposal appears to set out a non-exhaustive list of redressive measures that the Commission **may impose**, and commitments that the Commission **may accept** in lieu of redressive measures.

On the one hand, it should be clarified that the list of redressive measures in Article 6(3) is in fact non-exhaustive.

On the other hand, it should be clarified that the repayment of the foreign subsidy is normally not to be considered an adequate redressive measure.

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[4] The decision-making procedure applied under the Proposal does not materially limit this full discretion of the Commission. Pursuant to Articles 41 and 43 of the Proposal, Commission decisions on redressive measures and commitments following an in-depth investigation are to be adopted in accordance with the advisory procedure referred to in Article 4 of Regulation 182/2011. In such cases, the Commission submits to an advisory committee the draft decision and the committee votes on it, but in any event the Commission "shall decide on the draft implementing act to be adopted", merely "taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered".

In other words, the decision-making procedure confirms the impression given by the Proposal itself, that the Commission has a nearly unfettered discretion to proceed with investigations, to impose redressive measures or not, to accept commitments or not, and to set the nature and level of redressive measures or commitments.

In this regard, Article 6(6) of the Proposal is entirely inadequate as it appears to limit the discretion of the Commission **not** to accept the repayment of the foreign subsidy as a full and effective remedy :

Where the undertaking concerned proposes to repay the foreign subsidy including an appropriate interest rate, the Commission shall accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention.

Rather than put a burden on the Commission to check only whether a particular repayment would be transparent and effective, which could easily be futile in the absence of a proper and effective State aid framework in the third country in question,[5] it would be more sensible

- to require the Commission to start from the basic principle that structural remedies or other remedies other than repayment would be the most appropriate base measure, at least when major subsidies, strategic and/or sensitive sectors, and/or State-owned or directed companies are involved; and,
- to have as a fundamental basic principle that payments to the third country or countries are never an appropriate redressive measure on their own, at least with regard to countries which are not subject to the jurisdiction of the European Court of Justice or the EFTA Court in State aid matters.

As a more general matter, there need to be limits on the commitments that the Commission may accept in lieu of redressive measures, especially in cases of less than full cooperation. In particular, the Commission should not be allowed to accept commitments in cases of significant or full non-cooperation.

Further, Article 15 should be amended so that there are no absolute limitations to the amount of fines and penalties applied in cases of insufficient cooperation or failure to comply with measures imposed. This is especially critical to allow the Commission to impose effective and dissuasive measures to address non-compliance where, for example, there is a failure to comply with the reporting and transparency obligations that accompany redressive measures in application of Article 6(4) of the Proposal.

The Proposal also needs modification to oblige the Commission to consult in a timely manner with the affected EU industry and to require meaningful and effective consideration of input from that industry, especially regarding the choice of redressive measures and the assessment of whether or not commitments (and which ones) should be accepted.

Finally, the Proposal needs amendment to allow rights of private legal action with a view to allowing EU persons to obtain compensation for damages in relation to injury caused to them by distortive foreign subsidies established by the Commission (regardless of the redressive measures the Commission finally imposes or the commitments it accepts).

Addressees of decisions (Article 37)

With regard to the possibility of challenging Commission decisions, Article 37 of the Proposal should be amended to expand the addressee(s) of decisions beyond the undertakings alleged or found to have received the foreign subsidies, in particular to cover EU parties affected by distortions caused by foreign subsidies.

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[5] The Proposal says that the Commission is to "[take] into account the risk of circumvention", but there is no elaboration on that and, for example, there is no clear consequence of non-cooperation in that regard.

Elements specific to ex officio reviews (Chapter 2)

Requests by interested parties & related rights of action (new articles)

Although Article 7 allows the Commission to "examine information from any source regarding alleged distortive foreign subsidies", there needs to be a provision in the Proposal for a procedure by which interested EU operators could request the opening of a review by the Commission and by which time the Commission must reach a decision whether to proceed. Similarly, the Proposal needs to provide a right of action for EU operators to have recourse against a Commission decision not to open a review or to close a preliminary review or an in-depth investigation without the imposition of adequate redressive measures.

Interim measures (Article 10)

Article 10 of the Proposal needs revision to allow the Commission to take interim measures already during the period of a preliminary review. Also, there should be a presumption of "a serious risk of substantial and irreparable damage to competition on the internal market" in the case of subsidies to operators in sectors which are

1) targeted by national strategic plans in third countries (such as Made in China 2025) or are otherwise considered strategic by the EU,

2) affected by structural excess capacities, or

3) dominated by the presence of State-owned enterprises in the country granting the subsidies.

Scope of action for concentrations

In order to guarantee legal certainty for European companies, the Commission's ability to open an *ex officio* review of a concentration should be clearly limited to strategic M&A's conducted by SOE's (e.g. acquisition of notified bodies).

Scope of action for public procurement

AEGIS Europe believes that *ex officio* reviews should address procurement not only with regard to specific tender procedures which are under the threshold in Chapter 4, but also more horizontally looking at the behaviour of a given operator or set of operators in a sector, with potential redressive measures including exclusion from EU procurement procedures for a certain period of time. In this context, it is also important for redressive measures to address private procurement, to the extent the latter represents a significant risk of circumvention of the Regulation (for instance if private rail operators or leasing companies acquire rolling stock cheaply and lease it to public operators subject to the Regulation).

Elements specific to concentrations (Chapter 3)

General comments

AEGIS Europe supports the fact that it captures the same type of transactions (i.e. concentrations involving an acquisition of control on a lasting basis) that are reportable under the EU Merger Regulation ("EUMR") and does not follow the initial suggestion in the White Paper to also encompass acquisitions of "material influence" short of control. AEGIS Europe appreciates that the procedural rules governing the Commission's review broadly mirror the EUMR.

Definition of concentrations and relevant notification thresholds (Article 18)

AEGIS Europe supports the definition of concentrations on "a lasting basis", and the fact that "the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity" is included in the scope.

The proposed threshold for notification related to the aggregate turnover of the acquired/one of the merging undertakings in the Union (i.e. at least EUR 500 million) is higher than the thresholds in the EUMR. AEGIS Europe calls for lowering that threshold to EUR 250 million to address the same concentrations as the EUMR. In parallel to this decrease, the Commission's ability to open an *ex officio* review of concentrations should be more clearly limited to strategic M&As conducted by SOE's.

AEGIS Europe supports the introduction of a specific SOE clause here and elsewhere in the Regulation (see first section), shifting the burden of proof, or at least removing the limitations period of 3 years and adding a reference to control by a third country with the financial contribution aspects.

Prior notification of concentrations (Article 19)

Article 19 of the Proposal provides a strong discretionary power to the European Commission, which might be necessary to examine and sanction certain strategic mergers that have already affected European industries in the past. However, this would also create legal uncertainty for investors.

AEGIS Europe does not support the possibility for the Commission to request the prior notification of any concentration which is not a notifiable concentration in so far as 1) AEGIS Europe proposes to lower the threshold for notification to EUR 250 million; 2) concentrations below the proposed threshold can still be addressed through an *ex officio* review under certain conditions.

Suspension of concentrations and time limits (Article 23)

AEGIS Europe appreciates that the proposed time limits for investigation correspond to those of the EUMR. By this, it is likely that Chapter 3 will not lead to additional delays of the closing of concentrations.

Procedural rules applicable (Article 24)

Under Article 24, the Commission could "require the undertakings concerned to dissolve the concentration" if the concentration has already been implemented and is found to distort the market.

In so far as it only addresses notified or notifiable concentrations that have been unduly implemented before clearance/time lapse, AEGIS Europe supports appropriate measures (including dissolution of the concentration) to handle these cases. This mirrors the approach taken in the EUMR.

Elements specific to public procurement (Chapter 4)

Distortions on the internal market by foreign subsidies in public procurement procedures (Article 26)

The notion of "unduly advantageous tender" is key and different from the notion of "abnormally low tenders" developed in EU public procurement directives and focused on contracting authorities. It is important that this "unduly advantageous" nature can concern both price and more qualitative aspects.

However, the article does not consider the fact that the timing of subsidies and the timing of distortions do not necessarily coincide. Here again, taking into account the nature of the entity (SOE) is crucial: Market behaviours of SOEs could lead to price distortions on the basis of a promise of subsidy (i.e. subsidy coming after the actual award of the contract).

Definition of and notification threshold in public procurement procedures (Article 27)

According to the European Commission's Impact Assessment, the proposed notification threshold of EUR 250 million of the estimated contract value would concern approximately 36 cases/year.

AEGIS Europe supports the proposed notification threshold and the focus on strategic/flagship projects (including those related to intergovernmental agreements), which is a way to mitigate the administrative burden for European companies. It should also be taken into account than in a single procedure, more than one undertakings may notify and be the object of an investigation. This support for the proposed threshold is based on two pre-conditions: 1) Distortions in procurement related to contracts of a lower value should be addressed through the *ex officio* review; 2) The redressive measures put forward by the Commission must address the links of a subsidiary/legal entity with its parent company in order to avoid potential circumvention of the instrument.

It is crucial to avoid circumvention by the splitting of the contract into lots – the "overall" contract will need to be the reference point for determining whether it is above or below the threshold. This needs to take into account not only the division of projects into lots, but also options in contracts.

Prior notification of foreign financial contributions in the context of public procurement procedures (Article 28)

AEGIS Europe calls for the notification from undertakings to be required as early as possible in the procedure, i.e. at the pre-qualification stage. This would allow time for the Commission to analyse feedback and minimise possible disruptions to the procurement procedure.

While paragraph (1) makes a distinction between the notification of foreign financial contributions and the declaration of non-receipt of foreign financial contributions, it should be clarified how the Commission would tackle misleading declarations.

Article 28 should also include a provision regarding notification in the case of EU entities controlled or acquired by foreign entities. The link with the parent company and the subsidies perceived by the parent company should be disclosed. The provisions on aggregation of financial contributions (Article 22) in the chapter on concentrations should be replicated for the procurement notification-based tool.

AEGIS Europe supports the obligation to notify for "main subcontractors and main suppliers" where their economic share of their contribution exceeds 30% of the estimated value of the contract. AEGIS Europe acknowledges that the Commission has thereby mitigated the administrative burden since

these obligations will only for subcontractors and suppliers that are essential – and most probably known at bidding stage – for the execution of the contract.

In paragraph (3), it is stated that the "lead economic operator" will be in charge of ensuring notification, i.e. of obtaining information from main subcontractors and suppliers. A lead operator can be expected to have a due diligence process in place for obtaining information from the main subcontractors or suppliers, but should not be liable in cases where a main subcontractor or supplier does not respond to the request to notify, or if the information provided by them is not fully accurate.

In paragraph (6), the Commission may request notification in any public procurement procedure below the threshold at any time before the award of the contract. AEGIS Europe supports this possibility but believes that this request should come at the earliest stage possible so that it does not disrupt the procurement procedure because of a potential investigation. This *ad hoc* notification procedure must not concern the entire procedure or all bidders.

The Article does not mention what happens if a contract is awarded in cases where the winning bidder should have notified foreign financial contributions and submitted on the contrary a declaration that it did not receive foreign financial contributions. Is the award cancelled and going to be awarded to the next best bidder, as per paragraph (4)?

Procedural rules applicable (Article 29)

AEGIS Europe calls for a shortening of the timing proposed for the Commission to close the in-depth investigation ("no later than 200 days after it received the notification"). AEGIS Europe believes that is too long and potentially disruptive, even if procurement procedures for projects of that size can sometimes last up to a year.

Commission decisions (Article 30)

AEGIS Europe supports a decision prohibiting the award of the contract to the undertaking concerned should the latter fail to offer sufficient commitments to remove the distortion. Although it is a decision concerning one procedure only, it could be expected to have a deterrent effect for the undertaking in the future since the Commission is the sole investigating authority (contrary to the White Paper).

Evaluations in public procurement procedures involving a notification and suspension of award (Article 31)

AEGIS Europe calls for a clearer formulation of paragraph (3), related to the most economically advantageous tender. AEGIS Europe understands that the contracting authority/entity will be able to award the contract to an undertaking proposing the best tender without having to wait for the result of an investigation, but only if that undertaking is not subject to an investigation and has therefore made a "declaration" that they did not receive foreign financial contributions (see Article 28)[6].

While paragraph (3) is important to ensure that public procurement procedures are not unduly disrupted, it also highlights the need for the European Commission to be able to act if an undertaking has submitted a "declaration" in cases where there are grounds to suspect that it has actually received foreign subsidies (see Article 28). Therefore, the Commission should be duly informed of the intention of the contracting authority/entity to award the contract to the best bidder, so that potential action can be taken preemptively.

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[6] The Impact Assessment reads: "The contracting authority will be able to award the contract to a non-subsidised bidder if it proposes the best tender, and would only have to wait for the outcome of the investigation if the subsidised bidder would be set to win the contract."

Other elements not covered above

Relation between procedures (Article 33)

It is important to ensure proper and effective coordination between *ex officio* reviews and the notification-based tools. For instance, *ex officio* reviews should address procurement not only based on a specific individual procurement procedure but also more horizontally looking at the behaviour of a given undertaking in a sector, with a potential remedy being the exclusion from EU public procurement for a certain period of time. In this context, it is also important to take into account other forms of distortions such as private procurement, especially where there is government funding or use, or a particular regulatory regime in place, in order to limit possibilities of circumvention of the Regulation (e.g. in the rail sector: if private rail operators or leasing companies acquire rolling stock cheaply and lease it to public operators subject to the Regulation).

AEGIS Europe also supports the possibility for the Commission to conduct *ex officio* reviews to address concentrations below the threshold set in the dedicated notification-based tool, in particular regarding acquisitions of key strategic companies (e.g. engineering) or testing, inspection and certification (TIC) companies. Indeed, these acquisitions are not captured in existing European tools such as the FDI screening mechanism, but are key to ensure Europe's strategic autonomy.

Review (Article 46)

AEGIS Europe calls for a review "Within three years after the entry into force of this Regulation at the latest" instead of five years as currently proposed, given the magnitude of the changes proposed by this Regulation in the competition landscape.