AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Balance and proportion key to tackling foreign subsidies distorting the internal market

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive summary

The proposed Regulation is a positive step towards the European Commission's objective to resolve gaps in its current legal powers in relation to distortive foreign government subsidisation of companies.[1] As American businesses invested in Europe, we share our perspectives on the Proposal and aim to ensure that future Regulation on non-EU subsidies is balanced and proportionate. To that end, we have set out the main areas for refinement that we have identified in the Proposal. In summary, the main issues include:

1. **Clarity of key concepts and safe harbours**: Businesses need clearer definitions of what transactions and legal and tax regimes will be considered to give rise to a 'subsidy' as well as on how the Commission will determine whether these distort competition in the internal market. Defining safe harbours that do not give rise to a financial contribution will reduce the cost for businesses and ensure that Commission resources are not wasted by unnecessary notifications. We would welcome if guidance and case law applicable to 'state aids' regarding the 'selectivity criterion' would also apply to 'foreign subsidies.'
2. **General operating mechanisms:** The Regulation should balance effective protection of the internal market and the need to limit the administrative burden on businesses. It is therefore important for the Commission to provide: (i) clearer guidance on the procedures it will follow and how it will seek to safeguard the rights of the companies involved; (ii) further clarity on the Proposal's balancing test, including clear examples and review procedures; and (iii) further clarity on how the Commission will decide what corrective measures to apply. These steps will help reduce the risk of third countries replicating this Regulation in a potentially uncoordinated, inconsistent manner.
3. **Ex-officio review:** Provide for a clear and consistent framework on the factors triggering such a review; the scope of the review; and the timeline to completion. This will help ensure that the tool is focused and reduces concerns of over-broad and open-ended investigations.
4. **Concentrations:** The jurisdictional criteria should be refined to avoid companies notifying transactions with no EU nexus. Where a concentration triggers a notification obligation under the Regulation and the EU Merger Regulation, the procedures should be aligned to avoid duplication and waste of resources for businesses as well as for the Commission.
5. **Public procurement:** The Proposal imposes on businesses the burdensome responsibility of identifying and validating foreign subsidies received by its main subcontractors and suppliers as a prerequisite to participate in public procurement activities. Procurement processes are already slow and complex in many EU countries with investigations can take up to 200 working days. These long investigative timelines could further burden companies and Member States participating in procurement. We therefore encourage the Commission to shorten timelines to 25 days maximum for the preliminary review and 90 days for in depth investigations, similar to merger and acquisition (M&A) investigations.
6. **Judicial review and appeals process:** Despite stakeholder feedback on the White Paper on the potentially severe implications for business, the Proposal provides little clarity on how a company can address a decision against it.

[1] European Commission, 'Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market' COM (2021) 223 final, hereinafter referred to as 'Proposal'.

Introduction

The American Chamber of Commerce to the EU (AmCham EU) strives to facilitate business relations between the US and the EU. We represent American companies committed to and invested in Europe, advocating for their fair treatment across the EU single market. We therefore have an important stake-holding in the matter at hand. With this paper, we aim to ensure that future rules on non-EU subsidies, acquisitions of EU assets by companies in receipt of non-EU government funding and public procurement bids from third country entities are rules-based, balanced, and proportionate.

We agree with the objectives the Commission is seeking to achieve, namely to resolve gaps in its current legal powers in relation to distortive foreign government subsidisation of companies. We support the Commission in its efforts to create a level playing field in which companies from around the globe can compete on a fair basis within the European single market; bringing innovative and competitively priced products and services to European businesses and consumers.

There are, however, a number of areas in which AmCham EU believes the Proposal needs to be further refined. This paper addresses the Proposal's definition of foreign subsidies and distortion before moving onto operating mechanisms that apply generally within the Proposal. Further remarks are then provided on each of the three Tools (ex-officio, concentrations and public procurement).

Clarify foreign subsidies

Clear definitions of foreign subsidies is particularly important for business, which must identify and quantify them. Two factors are considered in identifying a foreign subsidy: the existence of a financial contribution and whether it was provided by a third country. Both factors require additional refinement to enable businesses to understand the Proposal's scope and to assist them in compliance. Indeed, given the broad comparisons to the existing State Aid framework, guidance should be provided drawing on existing case law on unlawful State Aid in order to assist with the practical implementation and interpretation of this Proposal.

More specifically, the list of financial contributions in the Proposal is vague and overly broad. For example, identifying any 'provision of goods or services or the purchase of goods and services' as a financial contribution would capture any business relationship with any government entity or public or private body whose actions can be attributed to a third country as a financial contribution, regardless of whether the relationship in question involves an element of subsidy. At minimum, commercial relationships with such entities that are subject to competitive bidding should be excluded.

Identifying and quantifying these contributions will impose significant burdens on multinationals operating in dozens of countries around the world and lead to mandatory notification in many situations raising no actual risk of distortion. Further clarification will help avoid unnecessary notifications of concentrations and tenders and ensure consistent application.

The Commission should consider how a business can reasonably determine whether a government financial contribution is limited 'in fact.' Given the general lack of transparency around such contributions globally,

businesses may find it impossible to determine whether the contributions they receive are available to others and available under similar conditions.

The Commission should also consider the practicality of requiring businesses to determine which foreign public entities and private entities' actions 'can be attributed to the third country' for purposes of identifying financial contributions they may receive for purposes of the Regulation. Take a Chinese company, for example. If the company's website asserts that it is independent and not owned, controlled or affiliated with the government, non-Chinese companies would be in no position to determine whether the company's actions should be attributed to China.

Distortion defined

We agree that certain forms of subsidies are more likely to distort competition than others. Examples of types of foreign subsidy that can be presumed not to distort the internal market would be welcomed - for instance post-Covid recovery funds.

The forms of subsidies that are likely to distort competition should be clearly defined in the Regulation to provide business certainty. Any further revision of the definition of 'foreign subsidies' should enable the EU to address distortions caused by state support that would otherwise fall outside of the limited remit of the World Trade Organization (WTO) rules (eg state subsidies for litigation against foreign companies). Such further revisions should remain aligned with the concept of state aid under EU law to ensure that companies receiving a foreign subsidy are not subject to a higher standard than companies receiving a subsidy from an EU Member State.

The Proposal's inclusion of indicators of distortion is welcome, but further refinement is required to ensure equitable treatment of all businesses and markets and to provide clarity to businesses seeking to avoid their businesses' in third countries being considered to benefit from distortive foreign subsidies. In particular, we recommend deleting a business' level of activity in the internal market and situation of the business or market as indicators of distortion. Only indicators relating to subsidies themselves should be included to avoid disproportionate treatment of certain businesses and markets and discouraging beneficial foreign investment in the EU. Indeed, under the Proposal, AmCham EU members who have invested heavily in the EU would be more at risk of being considered to benefit from distortive subsidies simply because of their commitment to Europe. Businesses would also benefit from additional guidelines on how each indicator of distortion will be applied (eg the types and purposes of subsidies that are more likely to cause distortion and those that are less likely). This additional clarity will allow businesses to better self-assess whether a potential foreign financial contribution would result in a distortion within the European internal market and to pursue subsidies without fear of retribution from the EU.

General operating mechanisms

We agree with the Commission that it is necessary to balance effective protection of the internal market and the need to limit the administrative burden on businesses. Unlike EU State Aid rules, where the notification obligation falls on Member States (who have access to the most complete information), the Proposal places the burden of identifying financial contributions and notifying relevant concentrations and tenders on businesses. This makes it particularly important to limit that burden and minimise the disparate treatment of foreign

subsidies and their beneficiaries. A lack of balance could dampen investment, reduce fair competition, and ultimately drive third countries to implement retaliatory measures – impairing innovation and trade in general.

Balancing: A well-designed balancing test is instrumental to a successful Regulation of foreign subsidies. The Proposal does not offer many details on how its balancing test will operate, but we expect much refinement will be necessary to align it with the balancing test offered under EU State Aid Rules. Non-distortive subsidies generally generate positive effects in the jurisdiction of the subsidising government, such as investment in local infrastructure, development of the local workforce, etc. This enables a successful EU State Aid balancing test, which compares distortion caused to the EU with positives effects caused by the subsidy issued by an EU Member State. We are keen to understand how a comparable test will be crafted for a Regulation with a primary purpose of reducing distortion to the EU internal market caused by foreign subsidies.

Review: We agree with the two-stage process, which allows the Commission to focus attention on significant cases. We reiterate the need for relatively swift processes with clearly identified timelines, transparent procedures and procedural checks and balances. The procedure should provide safeguards against in-depth investigations being continually extended without an appeal mechanism. Currently both the preliminary review and in-depth investigation allow for the Commission to seek 'all necessary information.' There should be procedures in place to further distinguish between the two stages and to protect non-distortive businesses from unreasonably burdensome demands.

Corrective Measures: We are pleased that the Commission is seeking powers to enforce the proposed Regulation and correct distortions found. The Proposal gives the Commission several mechanisms to do this: commitments/redressive measures if distortion is found; interim measures when indicators of serious risk of substantial and irreparable damage exists; and fines and penalties if a business purposefully or negligently impedes the Commission's ability to assess distortion. Each is necessary, but additional refinement is required for each to be an effective tool.

A non-exhaustive list of commitments and redressive measures is provided by in the Proposal. However, as currently drafted, commitments cannot be distinguished from redressive measures. This distinction is important, because some items on the list - such as fair, reasonable, and non-discriminatory terms (FRAND) licensing of assets - may be acceptable if a business willingly commits to such licensing, but unacceptable if imposed by the Commission. In general, the Commission should not seek to impose redressive measures that go beyond the distortion caused by foreign subsidies.

For example, subsidies may help fund research and development (R&D), but a business's proprietary knowledge drives the results of the research and development. As such, requiring a business to publish the results of all R&D benefiting from a foreign subsidy would go too far. We also request an exhaustive list of redressive measures to give businesses legal certainty of how the Regulation may be enforced. In a similar vein, such a list for interim measures and additional guidance on what may constitute serious risk subject to interim measures would provide more legal clarity on the application of the article.

Regarding fines and penalties, we are keen to understand whether the Commission has considered baselines for the applicable rate other than turnover (eg amount of EU investment, subsidies received, EU turnover, etc). The ambiguity of what may be considered a financial contribution and when a financial contribution is considered to be provided by a third country raises concerns that a business may provide incorrect, incomplete or misleading information in spite of its best effort to comply; subjecting it to staggering fines and penalties based on its global turnover. Tackling the aforementioned ambiguity will alleviate this concern, but businesses primarily based outside the EU may still find the financial risk to their global portfolio too great to justify investing in the EU. Alternatively, businesses may choose to mitigate such risk by over-reporting, increasing the administrative burden on both the companies concerned and on the Commission with unnecessary notifications.

Ex-officio review of foreign subsidies ('Tool 1')

Tool 1 gives the Commission a broad margin of action. This necessitates a solid, clear and consistent legal framework. Unlike tools addressing subsidised concentrations and public procurement, there are no indicators of what triggers a review; the thresholds that would generally apply; or a timeframe for the review. Indeed, the current wording of Tool 1 effectively neutralises the thresholds in Tools 2 and 3. The current lack of a framework for Tool 1 seemingly gives the Commission freedom to audit a business' complete financial records and business transactions for the last ten years to identify financial contributions that may be considered a potentially distortive subsidy. A broad fact-finding mission without reasonable cause is concerning.

We suggest the Commission initiate a review under Tool 1 only when a distortion is identified and that distortion can be linked to specific activity. This would ensure a tool that is focused and reduce concerns that investigations could be overly broad and burdensome. Setting timelines for review will also help in this regard. Providing a threshold for application similar to other tools of the Proposal will give more certainty of application.

Furthermore, a ten-year retroactive application period is unreasonable considering the wide breadth of scope and uncertainty of market conditions that makes defining financial contributions and distortion more ambiguous (ie whether contributions would considered limited at the time received or if public entities were acting on behalf of a third country at the time of contribution). Instead, a one-year retroactive application period seems more reasonable.

Concentrations ('Tool 2')

AmCham EU supports the creation of a European-wide, harmonised tool to prevent or remedy distortions from strategic acquisitions by companies benefitting from unfair foreign state aid. We are, however, concerned that the current proposal for Tool 2 could unintentionally lead to an overly broad notification requirement and create disproportionate compliance burdens on companies who are already potentially subject to EU Merger review rules and foreign direct investment screening.

For example, Article 18(3) of the Proposal deems a notifiable concentration to arise when the acquiring undertaking or at least one of the merging undertakings is established in the Union, meaning the Commission must be notified even if the target is not established in the EU in any way. Such a requirement would not align with the Regulation's intent of tackling distortions in the EU market caused by foreign subsidies and may entail pernicious and unwanted consequences. Further, a threshold based solely on the acquirer without regard to the

target's activities would catch transactions with no effect on the internal market at all. Even where concentrations need not be notified, the requirement to identify and quantify all financial contributions to determine whether transactions are notifiable would impose an unnecessary compliance burden on both businesses. We urge the Commission to consider clarifying the jurisdictional criteria and, at minimum, eliminating the notification requirement of extra-territorial transactions as previously proposed under the EU Merger Regulation.

We welcome the fact that the proposed notification requirement follows the EU Merger Regulation in many respects but note that many transactions that are notified under the Proposal would likely also trigger notification under the EU Merger Regulation. In such cases, the two procedures should be combined - or at least aligned - to avoid duplication of effort and waste of resources both for businesses and for the Commission.

Public procurement ('Tool 3')

The proposed design of Tool 3 carries significant risk of deterring participation in public procurement procedures by actors who diligently adhere to market-economy terms while failing to deter those who flout the system. This issue is largely due to the broad scope of the self-declaration requirement, which also includes information on main subcontractors and suppliers.

Gathering and validating such information from main subcontractors and suppliers will be a herculean task, as experienced in multiple countries and WTO who have sought to increase transparency on subsidies. This raises concerns about businesses' ability to provide such information; let alone in a timely manner to ensure a smooth bidding process. Both European as well as non-European companies would likely be impacted by this administrative challenge.

In parallel, there is a high risk of non-compliance from entities intended to fall in scope, as they either would not file a self-declaration or, more likely, file one stating that they did not receive any financial contributions from a foreign government. Whilst the proposal seeks to address this high risk of non-compliance with the publication of notifications and the right for competitors to inform contracting authorities in case of non-compliance, it is questionable whether transparency will be an effective tool in practice. To ensure success, competitors would - at minimum - require strong assurances of confidentiality. If these provisions are not enforced effectively, they risk burdening compliant companies while giving a de facto competitive advantage to non-compliant companies who pretend to have done their supply chain due diligence. As such, Tool 3 as proposed could lead to the perverse outcome that heavily subsidised foreign companies do not comply, whilst good corporate citizens feel compelled to self-declare for main subcontractors and suppliers without having a sound basis for making these assessments.'

An ambiguity in Article 31 regarding the effect of a review and investigation on the award of contracts in public procurement procedures may also result in unintended consequences. Articles 31(1) and (2) provide that when a notification is made under Article 28, the contract may not be awarded during the Commission's investigation unless the statutory time limits have expired. Article 31(3), however, provides that a contract may in fact be awarded before the end of that period, 'if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender.' This suggests that Member State

authorities can in fact award contracts to the lowest bidder even if that bidder benefitted from significant foreign subsidies and the Commission has not yet finished its assessment. The phrase 'in any case' may be intended to mean that Member State authorities wishing to award a contract before the Commission completes its assessment must demonstrate that the bidder would have won the tender regardless of any foreign subsidy. This point requires clarification and criteria for Member State authorities to make such assessments must be set out in the Regulation or implementing rules.

The specific exemption for defence-related equipment and services is welcome, but is notably restricted to Chapter 4 rather than the Proposal overall.[2] Given the overlapping nature of the Proposal's tools, it would be pragmatic to provide a clear exclusion to provide legal certainty.

Conclusion

Subject to the comments expressed above, AmCham EU supports the Commission's intent as they seek to resolve gaps in its current legal powers in relation to inappropriate foreign government subsidisation of companies and we remain a committed partner in this regard. We stress the need for further clarity on how any newly proposed framework would interact with existing European requirements, such as competition rules, national and EU FDI screening, etc. Particular attention should also be paid to alignment with EU state aid rules.

[2] Those governed by EU Directive 2009/81/EC