



2021/0114(COD)

21.12.2021

DRAFT OPINION

of the Committee on the Internal Market and Consumer Protection

for the Committee on International Trade

on the proposal for a regulation of the European Parliament and of the Council
on foreign subsidies distorting the internal market
(COM(2021)0223 – C9-0167/2021 – 2021/0114(COD))

Rapporteur for opinion (*) : Christian Doleschal

(*) Associated committee – Rule 57 of the Rules of Procedure

PA_Legam

SHORT JUSTIFICATION

The European Union is closely interconnected with the global economy. With trade in goods and services worth EUR 5984 billion in 2019¹, it accounts for 16.4% of overall global trade. Goods, services and capital flows to and from the EU contribute to its growth by enhancing competitiveness, creating jobs, stimulating innovation and opening up new markets.² In 2017 the EU28 was the destination for a third of the world's investment stocks³. Foreign direct investment is a welcome source of employment, growth and competitiveness. The openness of our EU single market is our greatest asset. However, openness requires fairness.

In recent years, foreign subsidies appear in some cases to have had a distorting effect on the EU internal market and to have created an uneven playing field. While there is only limited reliable data on subsidies granted by third countries, there is an increasing number of cases where foreign subsidies appear to have facilitated the acquisition of EU companies, influenced investment decisions, given unfair advantages in the award of public contracts or otherwise influenced the behaviour of their recipients in the EU market to the detriment of fair competition.

At present, there are no specific EU rules to address the distortive effects that foreign subsidies may have on the internal market. While the EU has a system of State aid control enshrined in Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU), it applies only where an EU Member State grants financial support to an undertaking, giving rise to an advantage that distorts competition and affects trade between Member States.

On 5 May 2021, the European Commission proposed a legislative proposal for a new instrument to address distortive effects of foreign subsidies in the internal market. It aims to close the regulatory gap in the Single Market. The new instrument aims to effectively address foreign subsidies that create distortions and affect the level playing field in the internal market in any market situation. The proposed regulation is also key element for the implementation of the updated EU industrial strategy (adopted on 5 May 2021) by promoting a fair and competitive internal market and thus creating the right conditions for a successful European industry.

The Rapporteur supports the overall aim and design of the proposal for a Regulation on foreign subsidies distorting the single market and fully shares the sense of urgency when it comes to closing this legal loophole.

With this in mind, the Rapporteur would like to focus especially on:

- ensuring a level playing field in the single market while keeping administrative burden for undertakings, bidders and contracting authorities as low as possible, including by clarifying that where a third country has a subsidy control mechanism that is equivalent to the Union's, foreign subsidies provided by such countries may be

¹ DG Trade Statistical Guide, August 2020, excluding intra-EU trade; https://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151348.pdf

² Report from the Commission on the implementation of the trade policy strategy – Trade for all: delivering a progressive trade policy to harness globalisation (COM(2017) 491 final).

³ Eurostat, Foreign Affiliates Statistics (FATS), Foreign control of enterprises by economic activity and a selection of controlling countries (from 2008 onwards) [fats_g1a_08].

- considered as unlikely to be distortive;
- strengthening commitments and redressive measures to remedy the distortion on the internal market caused by a foreign subsidy;
- clarifying that advantageous tenders also include abnormally low tenders.
- reducing the deadlines for the in-depth investigation in order to strike a balance between the time needed to award public contracts at the expense of contracting authorities and other economic operators involved.
- introducing a review clause of the estimated value of public procurement and the thresholds proposed in the Regulation;
- improving the procedural rules applicable to the preliminary review and the in-depth investigation of notified financial contributions in public procurement procedures;
- improving transparency and predictability for undertakings taking part in public procurement;

Furthermore, the Rapporteur would like to clarify the cooperation with national public procurement authorities and foster the exchange of information and good practices. Member States shall ensure that its competent public procurement authorities cooperate effectively with the Commission for the purpose of the preliminary review and in-depth investigation in notified public procurement. Competent national authorities may also alert the Commission regarding foreign subsidies in public procurement below the threshold, if they consider that there is a risk of internal market distortion.

AMENDMENTS

The Committee on the Internal Market and Consumer Protection calls on the Committee on International Trade, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a regulation

Recital 14

Text proposed by the Commission

(14) When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a

Amendment

(14) When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, foreign subsidies covering a substantial part of the estimated value of a

contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. **Finally**, foreign subsidies not exceeding EUR 5 million should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this Regulation.

contract to be awarded in a public procurement procedure are likely to cause distortions. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built **or bought** are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. **Nevertheless, the evolution of the economic activity should also be taken into account to enable the Commission to take action when an undertaking's level of activity is small at the time of assessment, but is expected to grow strongly.** Foreign subsidies not exceeding EUR 5 million should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this Regulation. **Where the Commission has found that a third country has in place a system for the provision of subsidies which ensures in law and in practice a level of protection against undue state intervention into market forces and unfair competition which is at least equivalent to the level within the Union and which effectively protects not only the market of the third country but also the internal market of the EU, foreign subsidies by this third country should also be deemed, as a general rule, to be unlikely to distort the internal market within the meaning of**

this Regulation. When assessing whether there is an equivalent level of subsidy control in a third country the Commission should take into account the relevant legal provisions as well as their effective implementation in practice. These findings by the Commission should be valid for a limited period of time and be subject to a periodic review. The Commission should also consider whether the third country has concluded a bilateral agreement with the Union which includes substantive level playing field provisions, whether the third country complies with international subsidy obligations and is aligned with the Union on initiatives with regard to improving international rules on subsidies and competitive neutrality, notably within the WTO. The Commission should draft and publish, in close cooperation with the Member States, guidelines with further details for assessing the distortive nature of a subsidy in order to provide legal certainty for all market participants. The guidelines should also provide examples and typical cases of distortive and non-distortive subsidies.

Or. en

Amendment 2

Proposal for a regulation Recital 17

Text proposed by the Commission

(17) Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures should be proportionate and suitable to remedy the distortion at stake. They should include behavioural or structural remedies or the repayment of the foreign subsidy.

Amendment

(17) Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by a foreign subsidy in the internal market. Redressive measures should be proportionate and suitable to remedy the distortion at stake. They should include behavioural or structural remedies or the repayment of the foreign subsidy ***or the temporary exclusion if it finds that a company has***

repeatedly received foreign subsidies that distort competition.

Or. en

Amendment 3

Proposal for a regulation Recital 22

Text proposed by the Commission

(22) The Commission should be given **adequate** investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete, incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of the undertaking, or, subject to agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. The Commission should also have the power to take decisions on the basis of facts available if the undertaking in question does not cooperate.

Amendment

(22) The Commission should be given **appropriate** investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete, incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of the undertaking, or, subject to agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. The Commission should also have the power to take decisions on the basis of facts available if the undertaking in question does not cooperate.

Or. en

Amendment 4

Proposal for a regulation Recital 33

Text proposed by the Commission

(33) The need to address distortive foreign subsidies is especially salient in public procurement, given its economic

Amendment

(33) The need to address distortive foreign subsidies is especially salient in public procurement, given its economic

significance in the internal market and the fact that it is financed by taxpayer funds. The Commission should have the power, upon notification prior to the award of a public contract or concession, to examine information on foreign financial contributions to the participating undertakings in the context of a public procurement procedure. Prior notifications should be mandatory above a threshold set in this Regulation to capture economically significant cases while minimising the administrative burden and not hindering the participation of SMEs in public procurement. That obligation of prior notification above a threshold should also apply to groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU of the European Parliament and of the Council⁴⁰, Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council⁴¹ and Article 37(2) of Directive 2014/25/EU of the European Parliament and of the Council⁴². It should also apply to the main subcontractors and the main suppliers of undertaking.

⁴⁰ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

⁴¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

significance in the internal market and the fact that it is financed by taxpayer funds. ***In particular as public procurement plays a major role in the implementation of the EU Recovery Plan, the need to ensure a level playing field is essential. A level playing field in public procurement is even more important considering that the EU Recovery Plan boosts further public procurement and any distortions would counter the desired effects of the Recovery Plan.*** The Commission should have the power, upon notification prior to the award of a public contract or concession, to examine information on foreign financial contributions to the participating undertakings in the context of a public procurement procedure. Prior notifications should be mandatory above a threshold set in this Regulation to capture economically significant cases while minimising the administrative burden and not hindering the participation of SMEs in public procurement. ***The Commission should regularly review the thresholds set in this Regulation.*** That obligation of prior notification above a threshold should also apply to groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU of the European Parliament and of the Council⁴⁰, Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council⁴¹ and Article 37(2) of Directive 2014/25/EU of the European Parliament and of the Council⁴². It should also apply to the main subcontractors and the main suppliers of undertaking.

⁴⁰ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

⁴¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁴² Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁴² Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

Or. en

Amendment 5

Proposal for a regulation

Recital 36

Text proposed by the Commission

(36) Foreign subsidies that enable an undertaking to submit a tender which is unduly advantageous in relation to the works, supplies or services concerned should be deemed to actually or potentially create a distortion in a public procurement procedure. Those distortions should therefore be assessed on the basis of the non-exhaustive set of indicators described in recitals 13 and 14 as well as the notion of unduly advantageous tender. The indicators should allow to determine how the foreign subsidy distorts competition by improving the competitive position of an undertaking and enabling it to submit an unduly advantageous tender. The opportunity should be given to undertakings to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU. The prohibition of the award should only apply where the advantageous nature of the tender benefiting from foreign subsidies cannot be justified, the tender would be awarded the contract and the undertaking submitting the tender did not offer commitments considered appropriate and sufficient to fully and effectively remove the distortion.

Amendment

(36) Foreign subsidies that enable an undertaking to submit a tender which is unduly advantageous, **including abnormally low tenders as defined in Directives 2014/23/EU, Directives 2014/24/EU Directives 2014/25/EU**, in relation to the works, supplies or services concerned should be deemed to actually or potentially create a distortion in a public procurement procedure. Those distortions should therefore be assessed on the basis of the non-exhaustive set of indicators described in recitals 13 and 14 as well as the notion of unduly advantageous tender. The indicators should allow to determine how the foreign subsidy distorts competition by improving the competitive position of an undertaking and enabling it to submit an unduly advantageous tender. The opportunity should be given to undertakings to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU. The prohibition of the award should only apply where the advantageous nature of the tender benefiting from foreign subsidies cannot be justified, the tender would be awarded the contract and the undertaking submitting the tender did not offer commitments considered appropriate and sufficient to fully and effectively remove

the distortion.

Or. en

Amendment 6

Proposal for a regulation

Recital 36 a (new)

Text proposed by the Commission

Amendment

(36 a) Foreign subsidies should also be controlled as regards abnormally low tenders. Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.

Or. en

Amendment 7

Proposal for a regulation

Recital 48

Text proposed by the Commission

Amendment

(48) In order to ensure a level playing field on the internal market also in the long term, with a view to ensuring adequate coverage of cases investigated both through notifications as well as ex officio, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of amending the notification thresholds for concentrations and for public procurement

(48) In order to ensure a level playing field on the internal market also in the long term, with a view to ensuring adequate coverage of cases investigated both through notifications as well as ex officio, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of amending the notification thresholds for concentrations and for public procurement

procedures, exempting certain categories of undertakings from the notification obligations under this Regulation, as well as amending the time limits for the preliminary review and the in-depth investigations of notified concentrations or notified financial contributions in the context of a public procurement procedure. In relation to financial contributions in the context of a public procurement procedure, the power to adopt such acts should be exercised in a way that takes into account the interests of SMEs. It is of particular importance that the Commission carries out appropriate consultations during the preparations of those acts, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making⁴⁷. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

⁴⁷ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

procedures, exempting certain categories of undertakings from the notification obligations under this Regulation, as well as amending the time limits for the preliminary review and the in-depth investigations of notified concentrations or notified financial contributions in the context of a public procurement procedure. In relation to financial contributions in the context of a public procurement procedure, the power to adopt such acts should be exercised in a way that takes into account the interests of SMEs, *without unnecessary bureaucratic burden*. It is of particular importance that the Commission carries out appropriate consultations during the preparations of those acts, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making⁴⁷. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

⁴⁷ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

Or. en

Amendment 8

Proposal for a regulation Article 1 – paragraph 1

Text proposed by the Commission

(1) This Regulation lays down rules and procedures for investigating foreign

Amendment

(1) This Regulation lays down rules and procedures for investigating foreign

subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, and in particular in concentrations and public procurement procedures.

subsidies that distort the internal market and for redressing such distortions **and for ensuring a level playing field in the single market**. Such distortions may arise with respect to any economic activity, and in particular in concentrations and public procurement procedures.

Or. en

Amendment 9

Proposal for a regulation

Article 3 – paragraph 1 – introductory part

Text proposed by the Commission

(1) A distortion on the internal market shall be 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. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include the following:

Amendment

(1) A distortion on the internal market shall be 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 **and the level playing field** on the internal market. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include the following:

Or. en

Amendment 10

Proposal for a regulation

Article 3 – paragraph 2

Text proposed by the Commission

(2) 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.

Amendment

(2) A foreign subsidy is unlikely to distort the internal market if:

(a) its total amount is below EUR 5 million over any consecutive period of three fiscal years; **or**

(b) the Commission has ascertained that the third country granting the foreign subsidy has in place a system for the

review of subsidies that guarantees in law and in practice a level of protection against undue state intervention into market forces and unfair competition which is at least equivalent to the level within the EU and which effectively protects not only the market of the third country but also the internal market of the Union. A Commission decision ascertaining equivalence under point (b) of the first subparagraph shall be valid for three years and may be prolonged, if appropriate.

Or. en

Amendment 11

Proposal for a regulation Article 3 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

(2 a) The Commission shall publish guidelines concerning the application of this Article. Those guidelines shall be regularly updated, in close cooperation with the Member States, while keeping the European Parliament and the Council informed.

Or. en

Amendment 12

Proposal for a regulation Article 4 – paragraph 1 – point 4

Text proposed by the Commission

Amendment

(4) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking would be awarded the public contract.

(4) a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, ***including an abnormally low tender in relation to the works, supplies or services***, on the basis of which the undertaking would be awarded the public contract.

Or. en

Justification

The explicit inclusion of aberrant low tender here would increase legal certainty as this concept is enshrined in the Directive 2014/24/EU.

Amendment 13

Proposal for a regulation

Article 6 – paragraph 2

Text proposed by the Commission

(2) Commitments or redressive measures shall fully and effectively remedy the distortion caused by the foreign subsidy in the internal market.

Amendment

(2) Commitments or redressive measures shall fully and effectively remedy the distortion ***actually or potentially*** caused by the foreign subsidy in the internal market.

Or. en

Amendment 14

Proposal for a regulation

Article 6 – paragraph 3 – point c a (new)

Text proposed by the Commission

Amendment

(c a) excluding of the award of the contract for a limited period of time if the Commission finds that an undertaking has repeatedly received foreign subsidies of a distortive nature.

Or. en

Justification

While the prohibition of awarding a public contract is covered in the chapter on public procurement, the European Commission should consider the temporary exclusion from future procedures.

Amendment 15

Proposal for a regulation

Article 6 – paragraph 6

Text proposed by the Commission

(6) 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.

Amendment

(6) 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 ***and that the repayment will fully remedy the distortion caused by the foreign subsidy to the internal market.***

Or. en

Amendment 16

**Proposal for a regulation
Article 26 – paragraph 1**

Text proposed by the Commission

Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an undertaking to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. The assessment of whether there is a distortion on the internal market pursuant to Article 3 and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure at stake. Only foreign subsidies granted during the three years prior to the notification shall be taken into account in the assessment.

Amendment

Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an undertaking to submit a tender that is unduly advantageous, ***including abnormally low***, in relation to the works, supplies or services concerned. The assessment of whether there is a distortion on the internal market pursuant to Article 3 and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure at stake. Only foreign subsidies granted during the three years prior to the notification, ***or known future subsidies that have been decided and will become effective within one year following the submission of the tender or request to participate in the public procurement procedure***, shall be taken into account in the assessment.

Or. en

Justification

The explicit inclusion of “abnormally low” tenders in this definition would increase legal

certainty as this concept is embedded in Directive 2014/24/EU.

Amendment 17

Proposal for a regulation

Article 27 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

(3 a) The Commission shall review the estimated value of public procurement indicated in the paragraph 2 every three years. The Commission shall take into account the following criteria:

- the number of public procurement procedures notified;***
- the amount of public procurement procedures where distorting Foreign Subsidies were identified;***
- the average and median value of all public procurement procedures notified to identify size of procedures;***
- changes to the threshold amounts of EU Directives 2014/24/EU, 2014/23/EU and 2014/25/EU;***
- the market share attained by winning tenders by the appointment of those public procurement contracts.***

The decision amending the thresholds should be adopted via delegated acts in accordance with Article 44.

Or. en

Amendment 18

Proposal for a regulation

Article 28 – paragraph 1

Text proposed by the Commission

Amendment

(1) When submitting a tender or a request to participate in a public procurement procedure, undertakings shall ***either notify*** to the contracting authority or the contracting entity all foreign financial

(1) When submitting a tender or a request to participate in a public procurement procedure, undertakings shall ***submit a notification*** to the contracting authority or the contracting entity

contributions received in the three years preceding that notification or ***confirm in a declaration*** that they did not receive any foreign financial contributions in the last three years. Undertakings which do not submit such ***information or declaration*** shall not be awarded the contract.

indicating all foreign financial contributions received in the three years preceding that notification or ***indicating*** that they did not receive any foreign financial contributions in the last three years. Undertakings which do not submit such ***notification*** shall not be awarded the contract.

Or. en

Justification

There is lack of clarity about whether a declaration (of non-reception of foreign subsidies) is assessed in the same way as a “notification” (of reception of foreign subsidies). Both should be subject to preliminary review to minimise the risk of undetected fraud. In order to simplify, the provisions should refer to a notification which encapsulates both information on foreign subsidies received and indication that foreign subsidies have not been received.

Amendment 19

Proposal for a regulation Article 28 – paragraph 2

Text proposed by the Commission

(2) The obligation to notify foreign financial contributions under this paragraph shall extend to economic operators, groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU, Article 19(2) of Directive 2014/24/EU and Article 37(2) of Directive 2014/25/EU, main subcontractors and main suppliers. A subcontractor or supplier shall be deemed to be main where their participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds **30%** of the estimated value of the contract.

Amendment

(2) The obligation to notify foreign financial contributions under this paragraph shall extend to economic operators, groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU, Article 19(2) of Directive 2014/24/EU and Article 37(2) of Directive 2014/25/EU, main subcontractors and main suppliers. A subcontractor or supplier shall be deemed to be main where their participation ensures key elements of the contract performance and in any case where the economic share of their contribution exceeds **15 %** of the estimated value of the contract.

Or. en

Justification

It is important to trace all contractors under the Foreign Subsidies instrument. As subcontracting is a very common practice in particular in the construction sector, it is important to lower the economic share so as to ensure that all distortion is captured. The share of the contract each of these execute may be less than 30% but nevertheless crucial for

the execution of the contract and the final price of the bid. 30% as proposed by the Commission would have a very limited scope.

Amendment 20

Proposal for a regulation Article 28 – paragraph 6

Text proposed by the Commission

(6) Where the Commission suspects that an undertaking may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may request the notification of the foreign financial contributions received by that undertaking in any public procurement procedure which are not notifiable under Article 27(2) or fall within the scope of paragraph 5 of this Article, at any time before the award of the contract. Once the Commission has requested the notification of such a financial contribution, it is deemed to be a notifiable foreign financial contribution in a public procurement procedure.

Amendment

(6) Where the Commission suspects that an undertaking may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, ***or where there are reasonable grounds to suspect that an undertaking will benefit from foreign subsidies in the year following the submission of the tender or request to participate in the public procurement procedure***, it may request the notification of the foreign financial contributions received ***or foreign financial contributions to be received within one year following the submission of the tender or request to participate in the public procurement procedure*** by that undertaking in any public procurement procedure which are not notifiable under Article 27(2) or fall within the scope of paragraph 5 of this Article, at any time before the award of the contract. Once the Commission has requested the notification of such a financial contribution, it is deemed to be a notifiable foreign financial contribution in a public procurement procedure.

Or. en

Amendment 21

Proposal for a regulation Article 28 – paragraph 6 a (new)

Text proposed by the Commission

Amendment

(6 a) For contracts above the thresholds as defined in the Directive 2014/24/EU and below the threshold set out in Article 27 (2), where a contracting authority or contracting entity establishes that a tender is abnormally low it shall request the undertaking to notify the Commission without delay all foreign financial contributions received in the last three years.

Or. en

Justification

Corresponding to Article 69 (4) of Directive 2014/24/EU, an abnormally low tender, irrespective of the value of the contract, should give rise to an investigation into the existence of foreign subsidies

Amendment 22

Proposal for a regulation Article 29 – paragraph 2

Text proposed by the Commission

Amendment

(2) The Commission shall **carry out** a preliminary review no later than **60** days after it received the notification.

(2) The Commission shall **complete** a preliminary review no later than **30** days after it received the notification.

Or. en

Justification

The Commission shall complete its preliminary review no later than 30 days after having received the notification. The proposed duration for preliminary review is too long and may result in delaying the award of public contracts at the expense of contracting authorities and all economic operators .

Amendment 23

Proposal for a regulation Article 29 – paragraph 4

Text proposed by the Commission

Amendment

(4) The Commission **may** adopt a decision closing the in-depth investigation no later than **200** days after it received the notification. In exceptional circumstances, this time limit may be extended after consultation with the concerned contracting authority or contracting entity.

(4) The Commission **shall** adopt a decision closing the in-depth investigation no later than **150** days after it received the notification. In exceptional **duly justified** circumstances, this time limit may be extended **for 30 days** after consultation with the concerned contracting authority or contracting entity.

Or. en

Justification

The proposed duration for the in-depth investigation is too long. It may result in delaying the award of public contracts at the expense of contracting authorities and all economic operators involved. A regular maximum time span of 150 day seems appropriate especially also with a view to the fact that Art. 29 paragraph 4, second sentence, allows for an extension of the time limit in exceptional circumstances.

Amendment 24

Proposal for a regulation
Article 31 – paragraph 3

Text proposed by the Commission

Amendment

(3) ***The contract may be awarded to an undertaking submitting a declaration under Article 28 before the Commission takes any of the decisions referred to in Article 30 or before the time limit laid down in Article 29(4) elapses only if the tender evaluation has established that the undertaking in question has in any case submitted the most economically advantageous tender.***

deleted

Or. en

Justification

Declarations should also be investigated due to the risk of fraud. The most economically advantageous tender can be the result of advantages thanks to foreign subsidies. Introducing an exception on “economically advantageous tender” would put the effectiveness of the instrument at risk.

Amendment 25

Proposal for a regulation Article 32 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

(3 a) The Commission may exclude an undertaking from future public procurement procedures for a limited period of time if it finds that a company has repeatedly received foreign subsidies that distort competition.

Or. en

Amendment 26

Proposal for a regulation Article 32 a (new)

Text proposed by the Commission

Amendment

Article 32 a

Cooperation with national public procurement authorities

1. Member States shall ensure that their competent public procurement authorities, and, if applicable, designated bodies cooperate effectively with the Commission for the purpose of the preliminary review and the in-depth investigation in notified public procurement.

2. Competent public procurement authorities may also alert the Commission regarding the foreign subsidy in public procurement below the threshold, if they consider that there is a risk of the internal market distortion. The Commission shall inform the public authority of the follow-up taken.

3. Competent public procurement authorities shall collect and exchange data with the Commission on the third country bidders and contracts won by non-EU companies, foreign participation in the supply chain and as subcontractors.

Amendment 27**Proposal for a regulation
Article 46 – paragraph 1***Text proposed by the Commission*

Within **five** years after the entry into force of this Regulation at the latest, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation, accompanied, where the Commission considers it appropriate, by relevant legislative proposals.

Amendment

Within **three** years after the entry into force of this Regulation at the latest, the Commission shall present a report to the European Parliament and the Council on the application of this Regulation, accompanied, where the Commission considers it appropriate, by relevant legislative proposals. ***The Commission shall also review the economic effects of the Regulation on the internal market and the number of received and treated notification cases per year resulting from the thresholds set in this Regulation. The Commission shall, where possible and appropriate, consider suggesting an increase or decrease of the threshold amounts applicable set out in this Regulation.***