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From: General Secretariat of the Council
To: Working Party on Competition

Subject: Proposal for a Regulation on Foreign Subsidies distorting the Internal Market -
Articles 26-32

Delegations will find in annex a presentation given by the European Commission during the informal videoconference of the Working Party meeting on Competition on 27 October, agenda item 2.



Chapter 4: Public procurement

Articles 26-32

Proposal for a Regulation on foreign subsidies distorting the internal market

*Competition Council Working Party
Brussels, 27 October 2021*

Overview

- Introduction to Chapter 4: Public procurement
- Distortions in public procurement (Article 26)
- Definition and threshold (Article 27)
- Conditions for notification (Article 28)
- Procedure and decisions (Articles 29-31)
- Fines & periodic penalty payments (Article 32)

Introduction to Chapter 4 on public procurement

- **Threshold** for notification is EUR **250 million** (estimated value of procurement).
- **Indicators** of distortion **plus** notion of „**unduly advantageous tender**”.
- **Needs of SMEs** reflected in relevant provisions.
- Aim is **not to impact** the **evaluation process**, only award.
- The **contracting authority is not involved** in the investigation except for forwarding information to the Commission, but is kept in the loop.
- Non-notifiable subsidies in public procurement may be investigated under Chapter 2.

Article 26 | Distortions in public procurement

- The Regulation is focused on foreign subsidies enabling the submission of a tender that is **unduly advantageous** in relation to the works, supplies or services concerned. A situation where such an unduly advantageous tender wins the contract would most likely distort the internal market.
- The opportunity is given to undertakings to **justify** that the tender is **not unduly advantageous**.
- Article 3 **indicators** are applied in conjunction with the notion of „**unduly advantageous tender**”. This approach confirms that a foreign subsidy per se may not cause distorting effects in the internal market.
- Only foreign subsidies granted in the **three** calendar years **preceding** the notification.

Article 27 | Definition and threshold

- **All** public procurement **procedures** under Directives 2014/23/EU (concessions), 2014/24/EU (public procurement) and 2014/25/EU (utilities).
- Procurements pursuant to **Intergovernmental** agreements (Articles 10(4)(a), of Directive 2014/23/EU, 9(1)(a) of Directive 2014/24/EU 20(1)(a) of Directive 2014/25/EU)
- Procurements under Directive 2009/81/EU (Defence and security procurement) are only covered by chapter 2.
- The threshold of 250 million aims, on the basis of internal data, at striking the **right balance** between covering those large procurements which risk causing substantial distortions, while limiting the administrative burden.

Article 28 Conditions for prior notification in PP

- Obligation to submit in the tender or request to participate either:
 - a **notification** of all financial contributions in the last three years or
 - a **declaration** that no financial contributions were received.
- Obligation covers **economic operators and groups** thereof, as well as main **subcontractors** and main **suppliers**.
 - „**main**” = key elements of contract performance or over 30% of the value.
- Lead economic operator gathers information and sends to contracting authority/entity.
- If failure to notify or contracting authority does not transfer to COM – review.
- Possibility for the Commission to request **ad hoc** notifications.

Articles 29-31 | Procedure and decisions 1/2

- Procedural **rules essentially the same as** ex officio/concentrations; more detail in implementing acts
- (Exception: no interim measures due to deadlines)
- Suspensive effect:
 - **No award of contract at all** during preliminary review (**60 days**)
 - **No award of contract to investigated** in case of **in-depth investigation (200 days max** including preliminary review)
- **After 60 days** award to **non-investigated possible** if best tender
- Award to investigated possible if a) **no objection decision**, b) **decision with commitments** or if c) **no decision** after 200 days

Articles 29-31 | Procedure and decisions 2/2

- **If** investigated undertaking offers **no commitments** or these are **not appropriate or sufficient** to remove distortion: decision **prohibiting** award
- **If** undertaking to whom the award is prohibited is ranked first: **award to second** best and so on down the line
- Contracting authority may also cancel
- Rules on **balancing** apply
- **Principles** of public procurement in evaluation **are recalled** in the Regulation to **avoid** investigation **influencing evaluation**

Article 32 | Fines & periodic penalty payments

- Same as *ex officio* (Article 15(1)) regarding inspections and RFIs; also for incorrect/misleading information in the notification
 - Fines up to 1% of turnover in preceding business year
 - Periodic penalty payments up to 5% of average daily turnover in preceding business year
- Same as *ex officio* (Article 15(5)) regarding breach of decisions with commitments; also for failure to notify and breach of suspensive effect
 - Fines up to 10% of turnover in preceding business year
 - Periodic penalty payments up to 5% of average daily turnover in preceding business year

Thank you



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