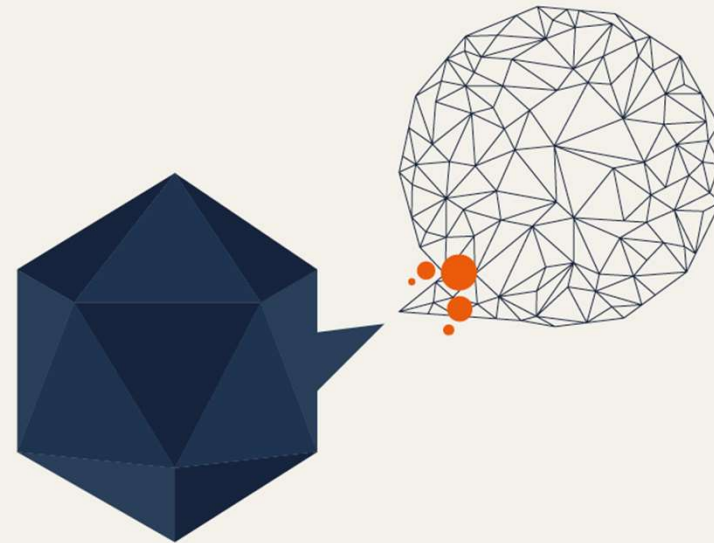


/ Substantive and procedural parallels and overlaps between Art. 107, 108 TFEU and the (Draft) Regulation

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Introduction

“Europe is a trade and investment superpower. In 2019 the stock of foreign direct investments was worth more than 7 trillion euros. Openness of the Single Market is our biggest asset. But openness requires fairness. For more than 60 years, we've had a system of State Aid control to prevent subsidy races between our Member States. And today we are adopting a proposal to also tackle distortive subsidies granted by non-EU countries. It is all the more important to ensure a level playing field in these challenging times, to support the recovery of the EU economy.”

Margrethe Vestager, Commissioner for Competition, Executive Vice-President
2021


/ Overview

A.	Aim of the Draft Regulation
B.	Terminology of the Draft Regulation
C.	Substantive parallels with the definition of State Aid in Article 107(1) TFEU
D.	Balancing test
E.	Procedural parallels with State Aid law and Article 108 TFEU
F.	Discussion

/ A. Aim of the Draft Regulation

/ A. Aim of the Draft Regulation:

→ Closing the **'regulatory gap'** by addressing foreign subsidies that cause distortions and harm the **level playing field** in the Single Market



State Aid rules?	... Only support by EU Member States is covered
Antitrust & merger control?	... Foreign subsidies are not a relevant aspect in the Commission's assessment
Procurement framework?	... Distortions of the Single Market by foreign subsidies are not addressed
EU & WTO trade defence instruments?	... Only the import of subsidised goods is addressed
FDI screening?	... FDI screening tackles threats by foreign takeovers to Member States' security and public order, but not the level playing field in the Single Market

/ B. Terminology of the Draft Regulation

/ B. Terminology of the Draft Regulation

Subject matter

“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.”

(Article 1(1) Draft Regulation)

Scope

“This Regulation addresses foreign subsidies granted to an undertaking engaging in an **economic activity in the internal market**. An undertaking **acquiring control or merging** with an undertaking established in the Union or an undertaking **participating in a public procurement procedure** is considered to be engaging in an economic activity in the internal market.”

(Article 1(2) Draft Regulation)

/ B. Terminology of the Draft Regulation

Foreign subsidy

“A foreign subsidy shall be deemed to exist where a **third country** provides a **financial contribution which confers a benefit** to an **undertaking engaging in an economic activity** in the internal market and which is **limited, in law or in fact**, to an individual undertaking or industry or to several undertakings or industries.”

(Article 2(1) Draft Regulation)

Distortion

“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.”

(Article 3(1) Draft Regulation)

/ C. Substantive parallels with the definition of State Aid in Article 107(1) TFEU

/ C. Overview

Foreign subsidy	State Aid
I. Undertaking engaging in an economic activity in the internal market	Undertaking/economic activity
II. Financial contribution which confers a benefit	Advantage
III. Provided, directly or indirectly, by the public authorities of a third country	State origin
IV. Limited to an individual undertaking or industry or several undertakings or industries	Selectivity
V. Distortion on the internal market	Effect on trade and competition

/ C. „Economic Activity” (I.)

Foreign subsidy

Undertaking engaging in an economic activity in the internal market

- **Undertaking** is not defined in the Draft Regulation but can only be understood as relating to economic activity
 - ▷ Non-economic activity is outside of scope of the Draft Regulation
- **Economic activity** (Article 1(2) Draft Regulation): all types of “market operation”
- In addition, “**acquiring control or merging**” is explicitly defined as economic activity

State Aid

Undertaking/economic activity

- Classification as **undertaking** relates to a specific economic activity
- **Economic activity**: Any activity consisting of offering goods and services on a market

/ C. “Advantage” (II.)

Foreign subsidy

Financial contribution which confers a benefit

- **Benefit:** Should be determined on the basis of comparative benchmarks (as further detailed in Recital 10 Draft Regulation)
- **Financial contribution** includes in particular:
 - ▷ Transfer of funds or liabilities
 - ▷ Foregoing of revenue that is otherwise due
 - ▷ Provision of goods or services or the purchase of goods and services

State Aid

Advantage

- **Advantage:** Determined through market economy operator test
- **Form of aid measure:**
 - ▷ Form of the measure irrelevant, as long as there is an advantage
 - ▷ Not only the granting of positive economic advantages, but also relief from economic burdens

/ C. “State origin” (III.)

Foreign subsidy

Provided directly or indirectly by the public authorities of a third country

- **Source of financial contribution:**
 - ▷ Central government/government authorities at all other levels
 - ▷ Foreign public entities whose actions can be attributed to the third country
 - ▷ Any private entity whose actions can be attributed to the third country

State Aid

State origin

- **State resources:** Only advantages granted directly or indirectly through State resources
- **Imputability** (public authority, public or private body or public undertakings)

/ C. “Selectivity” (IV.)

Foreign subsidy

Individual undertaking or industry or several undertakings or industries

- Limitation in **law or fact** to an individual undertaking, an individual industry or several undertakings or industries (Article 2(1) Draft Regulation)

State Aid

Selectivity

- Advantage granted in a **selective way**

/ C. “Effect on trade and competition” (V.)

Foreign subsidy

Distortion on the internal market

- Unlike State Aid, foreign subsidies are **not generally prohibited**, but only where distortion of the internal markets outweighs positive effects of foreign subsidy (Article 5 Draft Regulation)
- **Distortion on the internal market** shall be assumed where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market (Article 3(1) Draft Regulation)

State Aid

Effect on trade and competition

- State Aid requires a distortion of competition and effect on trade between Member States
- **Distortion of competition:** When aid is liable to improve the competitive position of the recipient compared to other undertakings with which it competes
- **Effect on trade:** Where aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Union trade

/ D. Balancing test

/ D. Balancing test

Foreign subsidy

Balancing test

- Commission shall **balance** the **negative** effects of a foreign subsidy in terms of distortion with **positive effects** on the development of the relevant economic activity (Article 5(1) Draft Regulation)
- There is no further explanation in the Draft Regulation or other guidelines on the application of the test

State Aid

Compatibility test

- **Article 107(2) TFEU** names categories of aid that are deemed compatible with the internal market **by law**
- **Article 107(3) TFEU** names categories of aid that are deemed compatible with the internal market at the **discretion** of the Commission

/ E. Procedural parallels wit State Aid law and Article 108 TFEU

/ E. Instruments for assessing foreign subsidies – Overview

Instruments provided for by the Draft Regulation for assessing foreign subsidies	
Subject	Assessment approach
(I) Concentrations (mergers and acquisitions of control)	Notification-based instrument to investigate concentrations involving a financial contribution by non-EU government institutions
(II) Ex-officio initiatives by the Commission	Instrument which the Commission can use on its own initiative (ex-officio)

Instrument for assessing State Aid	
Subject	Assessment approach
Granting of state subsidies	Notification-based instrument to assess measures fulfilling requirements of State Aid pursuant to Art 107 (1) TFEU (Exemptions, e.g. de-minimis)

/ E. Concentrations (I) and foreign subsidies

Notification obligations

Foreign subsidy

Who is obliged?	Undertakings
When?	Prior to their implementation and following conclusion of the agreement, announcement of the acquisition of a controlling interest (Article 19(1) Draft Regulation)
Competent authority?	European Commission
Thresholds?	(1) One undertaking involved has a branch in the EU and a total turnover > EUR 500m (2) Undertakings involved have received more than EUR 50 m of foreign subsidies in the previous three years before the notification

State Aid

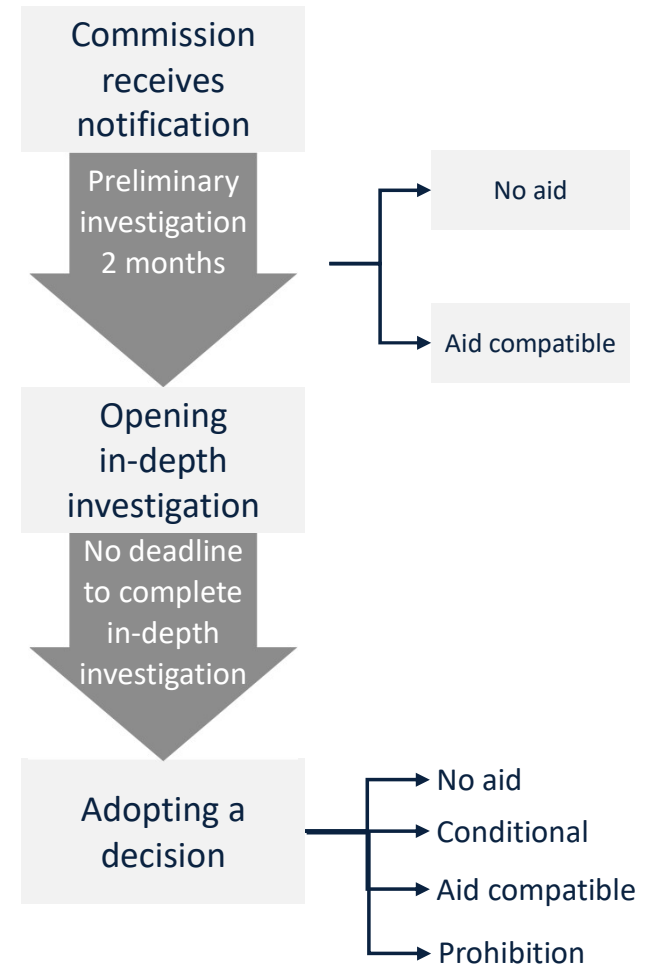
Member State
In sufficient time before the aid is granted (Article 108(3) TFEU)
European Commission
<ul style="list-style-type: none">◦ De-minimis aid (EUR 200,000)◦ General Block Exemption Regulation◦ Existing (and notified) national aid schemes

/ E. Concentrations (I) and foreign subsidies

Review of notified concentrations under the Draft Regulation



Review of notified State Aid



/ E. Ex-officio initiatives (II) and foreign subsidies

Foreign subsidy

When will an ex-officio investigation be initiated? Whenever the European Commission receives information regarding allegedly distortive foreign subsidies.

Interim measures? Yes, if there are

- 1) indications that there is a foreign subsidy distorting the internal market
- 2) serious risk of substantial and irreparable damage to competition in the internal market

Competent authority? European Commission

State Aid

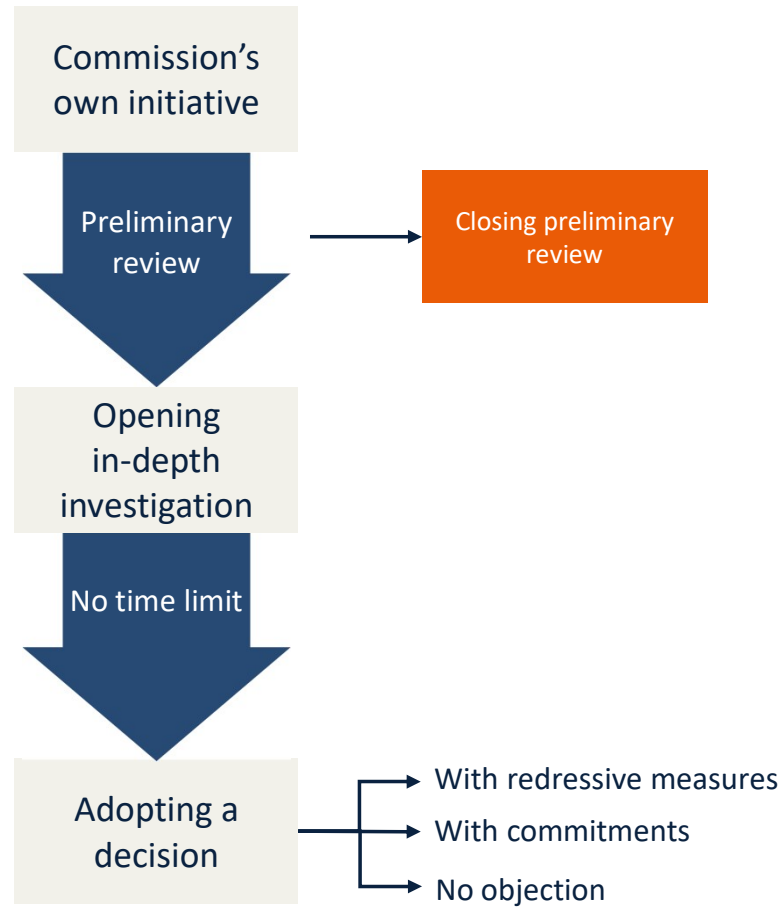
Whenever the European Commission receives information (or an official complaint) regarding any alleged unlawful aid or any alleged misuse of aid.

Yes, injunctions, e.g. “suspension injunction” may be adopted until the Commission has taken a decision on the compatibility of the aid with the internal market.

European Commission

/ E. Ex-officio initiatives (2) and foreign subsidies

Ex-officio proceedings under the Draft Regulation



/ E. Non-compliance

Foreign subsidy

Concentration

Commission may review a notifiable concentration by requesting the notification of that concentration.

Non-compliance with requests of Commission:

Fines (up to 1 % of the aggregate turnover in the preceding business year) and **periodic payments** (up to 5 % of the average daily aggregate turnover for each working day of delay)

Fail to notify a notifiable concentration: Fines (up to up to 10 % of the aggregate turnover in the preceding business year)

Ex-officio

Non-compliance with requests of Commission:

Fines (up to 1 % of the aggregate turnover in the preceding business year) and **periodic payments** (up to 5 % of the average daily aggregate turnover for each working day of delay)

State Aid

If there is unlawful aid, procedure as for cases of notified aid.

Commission may adopt a injunction to obtain information from Member States, suspend the further granting of aid or impose provisional recovery obligations on the Member State.

Fines up to 1% of total turnover in the preceding business year.

/ F. Discussion

Thank you for your attention!

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Sarah Blazek advises clients on all aspects of European and German antitrust and competition law, including the coordination of merger control filings involving multiple jurisdictions. She represents clients in competition authorities' fine proceedings before the European Commission and the German Federal Cartel Office. In addition, she advises on compliance issues and supports clients in developing and implementing compliance programmes. Sarah also advises on current digital antitrust issues and helps clients to design their digitalisation projects, such as internet platforms and cooperation between competitors, in compliance with antitrust law. Another of Sarah's core focuses is on European State Aid law supporting clients in complex and time-critical proceedings before the European Commission and the European courts. Her practice covers general issues of State Aid law as well as particular problems arising in the context of rescue and restructuring aid (including within the finance sector), funding for large infrastructure projects and most recently for crisis State Aid in the course of the coronavirus pandemic.

Expertise

- German and European antitrust and competition law
- German and European merger control
- European State Aid law
- Dawn Raid Team
- Digital Business Practice Group