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EBIT's Comments on the European Commission's public consultation on distortive foreign subsidies – procedural rules for assessing them.

Submitted electronically via the EC's ['Have your say'](#) website

Brussels, 6 March 2023

Dear Mr. Guersent,

EBIT's Members¹ thank the European Commission for the opportunity to provide feedback on the proposed EU procedural rules for assessing distortive foreign subsidies (6 February 2023 – 6 March 2023). Outlined below are a number of questions, concerns and recommendations which EBIT's Members have with the proposed procedural rules, which are intended to help raise awareness and a better understanding of the potential business impact of the European Commission's initiative. As day-to-day tax practitioners, EBIT's Members are primarily focused on the tax-related aspects of the financial contributions.

We recognise the very broad scope of the threshold notification requirements in the EU Foreign Subsidies Regulation (Regulation (EU) 2022/2560) and we are hoping that the procedural rules on which we are commenting now would alleviate some concerns. They apply to potentially distortive subsidies granted by non-EU governmental bodies to undertakings engaging in an economic activity in the EU, whether based in the EU or elsewhere. However, the notification obligations apply to 'financial contributions', irrespective of whether they might ultimately be determined to be subsidies and distortive toward competition in the EU market. The non-exhaustive definition of 'financial contributions,' is so broad as to include any fiscal incentives and the foregoing of revenue that is otherwise due, terms which might encompass routine tax reliefs, exemptions and other tax arrangements. The thresholds provide only limited protection in relation to aggregate financial contributions, and there are no thresholds in relation to the European Commission's ex-officio power. The procedural rules do not go far enough to clarify this application of the definition, meaning that many businesses will be burdened with trying to ascertain a wide list of tax benefits receivable by them, by their fellow group companies and, in some instances, by other third parties (like main subcontractors and suppliers). We believe that it would help businesses operating in the EU a lot if the practises adopted by the European Commission in the context of this regulation could take into account some degree of transition, with higher thresholds in the earlier years, at least in the context of article 5.1 of Annex 1 of the Regulation.

EBIT's Members welcome the initiative of creating a level playing field, though the EU's State aid rules in relation to subsidies granted by EU governmental bodies operate in a very different way. We also welcome the possibility that upon written request, dispensation can be given for the obligation to provide any information in the notification, including documents, or with any other requirement on notification of concentrations where the European Commission considers that compliance with those obligations or requirements is not necessary for the examination of the notification (article 4(4) of the draft regulation). Likewise, we welcome a similar approach on the notifications and declarations in public procurement procedures

¹ EBIT's Members include Airbus Group, BP, Carlyle, Carrier, Caterpillar, Diageo, GSK, Huawei, International Paper, Johnson and Johnson, JTI, PepsiCo, Pfizer, P&G, Raytheon Technologies, RELX, Schroders, SHV Group and Vattenfall. For more information on EBIT see: www.ebit-businesstax.com

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(article 5(5) of the draft regulation). However, there is inherent uncertainty as to how the European Commission will apply such requests and examination criteria, and such process is undeniably going to require a very significant amount of time before companies are able to proceed with their acquisition or finalise their submission to a public tender. In addition, the extent of notifications that may be required by the European Commission under its ex-officio power would presumably be determined in a similar manner, possibly in establishing the scope of the initial requirement, but there is further uncertainty in that regard. Also, we believe that the proposed retrospective roll-back period adds to the uncertainty for business. We therefore recommend only a prospective application of the procedural rules. EBIT's Members would welcome further clarification and guidance by the European Commission to address the abovementioned important points of uncertainty for businesses.

EBIT's Members also wish to share some specific concerns that the regulation puts a disproportionate documentation and information burden on European undertakings:

- The documentation and information requested may not always be available at the level of the EU entity or undertaking. The foreign subsidies, in particular in relation to tax incentives, are governed by foreign states. Typically, the foreign tax incentives (labelled subsidies) may be managed by the local entity. The EU entity or undertaking may not even be aware a specific tax incentive or subsidy is or will be allocated, let alone a (potentially) distortive one in view of a future EU acquisition or procurement procedure. Secondly, and more generally, the retrospective roll-back period proposed by the European Commission will add hugely to the documentation and reporting burden for European businesses, who could collect the information going forward but have not done so for the past 3-5 years or so. Lastly, the quantity of information or documentation that should be foreseen, kept and provided for by businesses is ~~one~~ ~~again~~ increased, while some of this information might already be available to other (government) organisations, including Tax Administrations;
- The potentially negative effects of tax incentives are already addressed by other legislative initiatives such as, firstly, Pillar II under the OECD/Inclusive Framework project and the Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for MNE groups and large-scale domestic groups in the EU and, secondly, OECD BEPS Action 5 on harmful tax practices as well as the EU list of non-cooperative jurisdictions for tax purposes (Annex A and Annex B) and the links between them are unclear;
- Unlike State aid where the procedure is against a Member State in the first instance (including in tax matters), the investigation powers turn directly against the undertakings allegedly benefitting from a distortive subsidy, including tax credits and tax incentives allocated in a non-EU Member State;
- The current financial contributions thresholds in the regulation are not especially high given the breadth of recipients covered and there is no guarantee they will not be lowered in future and hence expand the scope (and the notification burden) quite extensively by a European Commission delegated act (art. 49 of (EU) Regulation 2022/2560);
- Some countries may consider a fine of up to 10% of the parties' worldwide group turnover in the preceding financial year excessively harsh for the breach of a notification requirement. There should at least be some guarantee that the size of the fine will be proportionate to the nature of the failure, perhaps with a graduated scale";
- The goal of the regulation for tax purposes could be better achieved through a central depository of tax incentive regimes that could, subject to rebuttal, constitute foreign distortive subsidies. It would seem to EBIT's Members that the European Commission

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and Member States may be better placed to judge the relevance of the financial contribution element than individual undertakings (see also article 37 of (EU) Regulation 2022/2560 on Third Country Dialogue).

EBIT's Members believe that the notification measures should be proportionate to the objective pursued: tackling foreign subsidies that distort Europe's internal market. With regard to tax incentives, other measures are already available to substantially diminish their use and safeguards are available in those other measures. We are concerned that the notification rules may introduce another layer of burden on European enterprises with regard to potential tax issues, that are disproportionate or already addressed elsewhere (e.g. harmful tax practices).

EBIT's Members trust this contribution is helpful to you.

Yours sincerely,

European Business Initiative on Taxation – March 2023

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