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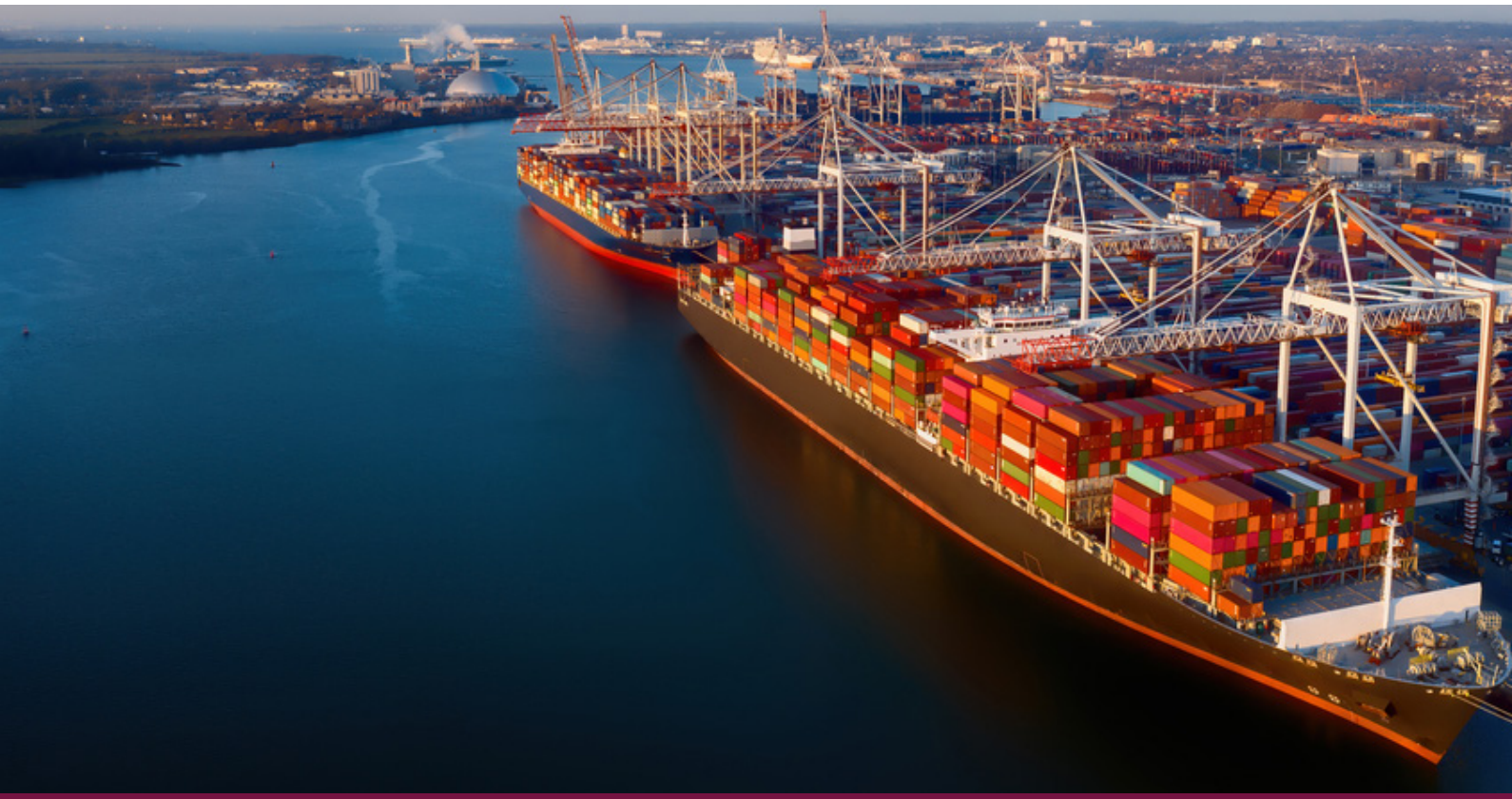

Upcoming EU legislation affecting trade with the Union: *Takeaways for foreign exporters*

8 July 2022

In the past months, the European Commission ('***Commission***') has adopted several legislative proposals affecting, directly or indirectly, international trade with the EU. The objective of this document is to briefly illustrate the main aspects of these proposals, with focus on the expected implications for businesses established outside the EU.

1. CORPORATE SUSTAINABILITY DUE DILIGENCE

On 23 February 2022, the Commission published a long-awaited proposal for a Directive on Corporate Sustainability Due Diligence ('***CSDD***').[1] The CSDD proposal has been adopted in the context of the so-called EU Green Deal and follows other initiatives setting out sector-specific due diligence obligations (e.g., Conflict Minerals Regulation,[2] proposal for a Regulation on deforestation-free supply chains,[3] proposal for a new Batteries Regulation,[4] etc.). The CSDD proposal is currently being discussed by the relevant committees of the European Parliament ('***Parliament***') and by the Council. The timeline for the final adoption is still unclear.

1.1 Scope of the proposal

The CSDD proposal is meant to apply to EU companies that in the previous financial year had:

i) more than 500 employees and EUR 150 million of net worldwide turnover ('***EU high-cap***'), or

ii) more than 250 employees and EUR 40 million of net worldwide turnover ('***EU mid-cap***'), if at least 50% of such turnover was generated in one of the following high-risk sectors:

(a) manufacturing of textile, leather and related products or the wholesale of textile, clothing and footwear;

(b) agriculture, forestry, fisheries (including aquaculture), manufacturing of food products or wholesale of agricultural raw materials, live animals, wood, food and beverages; or

(c) extraction of mineral resources including hydrocarbons, metal and mineral ores or the wholesale of mineral resources and intermediate products including metals, construction materials, fuels, and chemicals.

1 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

2 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, p. 1–20.

3 Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, COM/2021/706 final.

4 Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, COM/2020/798 final.

The CSDD proposal is also meant to apply to non-EU companies that in the financial year preceding the last financial year had:

i) a net turnover of more than EUR 150 million in the EU (‘***foreign high-cap***’);

ii) a net turnover of more than EUR 40 million in the EU, provided that at least 50% of that turnover was generated in one or more of the sectors listed above (‘***foreign mid-cap***’).

Foreign companies without subsidiaries in the EU, which meet the thresholds described above, will have to designate a legal or natural person – established or domiciled in one of the Member States where the company operates – as their authorised representative.

By limiting the application of the CSDD to (EU and foreign) high- and mid-caps (‘***covered companies***’), the Commission intends to exempt SMEs from the due diligence requirements. The proposal envisages a period of two years for EU Member States to implement the obligations for EU and foreign high-caps, in contrast to a period of four years for rules applicable to EU and foreign mid-caps.

1.2 Main obligations

The aim of the CSDD proposal is to foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies’ operations and corporate governance. To this end, covered companies will be required to:

i) **integrate** due diligence into their corporate policy. The policy must describe the company’s approach to due diligence, establish a code of conduct applicable to its employees and subsidiaries, and set out procedures to implement due diligence obligations;

ii) **identify** actual and potential adverse human rights and environmental impacts arising from their own operations and those of their subsidiaries. A lower standard applies to EU and foreign mid-caps;

iii) **prevent** potential adverse impacts. Covered companies must, *inter alia,* adopt a prevention plan and seek contractual guarantees that direct business partners will comply with their code of conduct and verify compliance;

iv) **stop/mitigate** adverse impacts by taking remedial action, such as paying damages to affected persons and/or implementing corrective action plans. Covered companies must also suspend/end relationships with business partners responsible for adverse impacts;

v) **consider** and follow-up on legitimate concerns voiced by affected persons, trade unions and civil society organisations regarding actual or potential adverse impacts with respect to their own, their subsidiaries’, and their supply chain’s operations. To this end, covered companies must establish a complaint procedure;

vi) **monitor** for adverse impacts, by conducting yearly assessments of their operations and those of their subsidiaries, as well as business partners with which they have long-standing relationships.

The CSDD proposal also envisages that EU and foreign high-caps must adopt a plan to ensure that their business model and strategy is compatible with the limiting of global warming to 1.5°C, in line with the Paris Agreement. If climate risks pose a ‘principal risk’, the company must include emission reduction objectives. However, for the moment the CSDD proposal offers no guidance on what qualifies as a ‘principal risk’.

1.3 Enforcement

The CSDD proposal envisages a **public enforcement** system. To this end, supervisory authorities will be established in Member States and empowered to impose remedies and/or fines on infringing companies. Sanctions will be determined by each Member State and they will have to be effective, proportionate and dissuasive. Pecuniary sanctions shall be based on the company's turnover. Investigations may be initiated *ex officio* or upon complaint filed by natural or legal persons demonstrating 'substantiated' concerns.

The CSDD proposal also contains provisions on **private enforcement**. The proposal requires Member States to lay down rules governing the civil liability for damages arising from covered companies' failure to comply with their obligation to prevent, mitigate or cease adverse impacts if – as a result of this failure – an adverse impact occurred and led to damage. Foreign victims of human rights and environmental harms will also be entitled to bring an action for damages in the EU when the applicable law is the law of a third country under international private law rules. With a view of limiting excessive litigation, covered companies will not be held liable for failing to prevent or cease adverse impacts caused by business partners with which they do not have an established relationship, provided appropriate due diligence measures were taken.

Finally, it should be noted that the CSDD proposal is without prejudice to national rules on civil liability. Therefore, certain aspects of the civil liability regime may vary depending on the Member State concerned.

1.4 Main implications for non-EU companies

If the CSDD proposal is adopted, foreign high- or mid-caps established or doing business in the EU will be made subject to a broad set of rules aimed at identifying and mitigating adverse impacts on human rights and the environment in their supply chains. In particular, the new instrument will entail:

- adopting and effectively implementing internal due diligence policies at group level;
- organising regular audits to ensure compliance with the new due diligence obligations;
- reviewing all contractual relationships with established business partners to ensure full compliance with the new due diligence obligations;
- liaising with the competent supervisory authorities to ensure full compliance with the new rules;
- define strategies to limit possible liabilities linked to private enforcement.

Finally, it is worth noting that the CSDD proposal, if adopted, may have a broader impact insofar as it may incentivise foreign governments to promoting higher human rights and environmental standards in their territories.

2. TRADE MEASURES AGAINST FORCED LABOUR

The EU institutions have become increasingly concerned by the fact that in certain third countries precarious labour conditions affect the manufacturing of goods which are then exported to the EU. On 12 July 2021, the Commission published a Guidance on due diligence to help EU companies to address the risk of forced labour in their operations and supply chains, in line with international standards. On 23 February 2022, the Commission released a Communication[5] advocating for a comprehensive approach to promote decent work worldwide. Besides setting out all the relevant EU instruments already in force, the Communication announced a legislative initiative to ban all forced labour products from the EU market, supported by a robust enforcement framework. On 9 June 2022, the Parliament adopted a Resolution[6] supporting the Commission's Communication and endorsing a new WTO-compatible trade instrument to ban all imports and exports of products made or transported by forced labour within the EU. The Commission is currently preparing a legislative proposal to be submitted to the Parliament and the Council.

2.1 Scope of the proposal

The exact content of the proposal is still unknown. Based on the available information, Commission is currently evaluating different types of measures used in other jurisdictions, including the United States.

2.2 Main obligations

Based on the limited information available, it is understood that the Commission's proposal will include, on the one hand, mandatory due-diligence practices to identify, prevent, mitigate and account for the risk of human-rights violations in the companies' value chains and, on the other hand, market-prohibition rules.[7] The Commission has followed a similar approach in a recent proposal on global deforestation,[8] where due-diligence obligations are accompanied by rules on market prohibition for companies which fail to ensure that their value chains are safe.

2.3 Enforcement

It is understood that public authorities will be empowered to launch investigations into the status of products on their own initiative or in response to complaints from stakeholders, NGOs or affected workers. More specifically, a determination that a product is produced with forced labour will have to be based on the International Labour Organization forced labour indicators.[9] Should these indicators reveal that the item was produced with forced labour, the proposed instrument will allow a ban on the products from a particular site of production, a particular importer or company, those from a particular region (in the case of state-sponsored forced labour) or from a particular transport vessel or fleet. Any sanctioned entity would be published on a public list that would be regularly maintained.

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5 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery, COM(2022) 66 Final.

6 European Parliament resolution of 9 June 2022 on a new trade instrument to ban products made by forced labour (2022/2611(RSP)).

7 In an effort to reduce potential burden on SMEs, the Parliament has requested the Commission to provide additional support to smaller industries to assist them with the transition to compliance.

8 See footnote 3 above.

9 These indicators are the following: abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions and excessive overtime; whereas sometimes the presence of more than one of the listed indicators is needed to determine the presence of forced labour.

2.4 Main implications for non-EU companies

If adopted, the proposal on forced labour will significantly affect foreign exporters, which will have to comply with the requirements of the new measure. This will entail, *inter alia*:

- adopting and effectively implementing internal due diligence policies at group level;
- organising regular audits to ensure compliance with the new obligations;
- liaising with the competent supervisory authorities to ensure full compliance with the new rules.

Finally, it should be noted that the proposal, if adopted, may have a broader impact insofar as it may provide an incentive to foreign governments to also promote higher labour standards in their territories.

3. CARBON BORDER ADJUSTMENT MECHANISM

On 14 July 2021 the Commission proposed a Regulation establishing a carbon border adjustment mechanism (‘***CBAM***’)[10], with the purpose of reducing the EU contribution to carbon emissions. In particular, the proposal advocates for a carbon price on a selection of the carbon emission-heavy imports so that the Union’s current efforts to reduce carbon emissions does not push carbon-intensive production to countries with lower environmental standards (so-called ‘carbon leakage’).

Following the approval of the Council’s general approach on 15 March 2022[11], on 22 June 2022 the European Parliament adopted its negotiating position on the CBAM proposal, endorsing a more ambitious version of the mechanism.[12] Interinstitutional negotiations between the Council, the Parliament and the Commission (the so-called ‘trilogue’) will start in July, with the aim of adopting the final text in late 2022, in order for the Regulation to enter into force at the beginning of 2023. In any case, the Regulation will have to be supplemented by implementing and delegated acts adopted by the Commission.

3.1 Scope of the proposal

The Commission’s CBAM proposal was intended to cover only the ‘direct emissions’[13] linked to the manufacturing of certain goods that are considered at high risk of carbon leakage, i.e. iron and steel, cement, fertilizer, aluminium and electricity. On 22 June 2022, the Parliament voted in favor of a wider scope of the CBAM, as to include also aluminous cement, organic chemicals, plastics, hydrogen and ammonia. Moreover, the Parliament asked the CBAM to cover also the ‘indirect emissions’ linked to the manufacturing of these goods.

10 Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM/2021/564 final.
11 The Council’s General Approach on the CBAM is available here.
12 The amended version of the CBAM proposal agreed by the European Parliament is available here.
13 Direct emissions, in contrast to indirect emissions, are emissions from the production processes of goods over which the producer has direct control.

3.2 Main obligations

Under the Parliament's draft, the CBAM proposal envisages an initial, transitional period commencing on 1 January 2023 and ending on 31 December 2026 (the Commission's original proposal set the end of the transitional period on 31 December 2025). The purpose of the transitional period is to facilitate a smooth rollout of the mechanism and reduce risks of a disruptive impact on trade. During this period, EU importers will have an obligation to report on the total quantity of each type of CBAM goods imported and the total emissions embedded therein, detailing also any carbon price paid abroad. During the transitional period, importers will not yet be required to buy any CBAM certificates.
At the end of the transitional period (i.e., as from 2027 according to the Parliament's draft) importers will be subject to a carbon pricing system comparable to that already envisaged for domestic goods under the EU European Trading Scheme (***'ETS'***). In particular, they will be required every year to submit a CBAM declaration and purchase – and surrender to the competent authorities – a number of CBAM certificates that correspond to the total amount of the emissions embedded in the imported goods.

The embedded emissions will be established through alternative means. First, importers will have the option to declare the actual emissions embedded in the imported goods, on the condition that the calculation is verified by an accredited verifier. If the actual emissions cannot be adequately determined, the embedded emissions calculation will be based on default values established by the EU authorities. These default values may be country-specific values. If no reliable data is available for an exporting country, the default value will be based on the EU's worst-performing installations.

Should EU importers opt to rely on actual emissions to determine the number of CBAM certificates to be surrendered, the burden will fall on third-country producers to provide the emissions information. However, the CBAM proposal envisages a mechanism allowing a fast-track verification, thus limiting administrative burdens. More specifically, operators and installations in non-EU countries will be entitled to register in a centralized database, thus benefiting from an *ex ante* verification of the embedded emissions by an accredited verifier. The pre-verified information may be used by authorized declarants as the basis for their own declaration, with no further *ex post* verifications.

Importers will have the opportunity to claim a reduction of the number of CBAM certificates to be surrendered only with respect to explicit carbon price paid in the country of origin (a 100% reduction will only be possible when the explicit carbon price paid abroad is equivalent to or higher than the EU carbon price). The prices of the CBAM certificates will be based on the weekly prices of ETS allowances. The free allowances assigned to certain industries under the ETS will be phased out between 2027 and 2032, in parallel with the phase-in of the CBAM. The CBAM factor by which the number of CBAM certificates is to be reduced corresponds to the phase-out schedule.

The proposal includes also anti-circumvention provisions. Under the Parliament's draft, the non-exhaustive list of circumvention practices includes (i) foreign subsidies that absorb part or all costs linked to the carbon price paid in the country of origin, (ii) carbon price in the country of origin placed only on goods exported to the EU, (iii) replacing the imported goods with slightly modified products which are not covered by the CBAM obligations, (iv) transhipment, and (v) dual production and/or sale practices.

Finally, the Parliament's draft also introduces export rebates available for exports of goods covered by the CBAM towards foreign countries with no carbon pricing mechanism similar to the ETS (EU installations will be eligible to receive free ETS allowances corresponding to their exports of the covered goods).

3.3 Enforcement

Under the Parliament's draft, a centralised EU CBAM authority is due to be established (while the original's Commission proposal envisaged a shared competence among national authorities). This authority will be responsible for the implementation of the CBAM legislation. It will be in charge of, *inter alia*, (i) establishing a CBAM central register, (ii) granting the status of authorised declarant and (iii) monitoring the implementation of the CBAM.

The proposal envisages specific penalties for non-compliance with the CBAM obligations – e.g., when an authorised declarant fails to surrender a number of CBAM certificates corresponding to the emissions embedded in imported goods or when any person other than an authorised declarant introduces goods into the customs territory of the Union without surrendering CBAM certificates and complying with its obligations. In addition to these penalties, Member States may apply administrative or criminal sanctions for failure to comply with the CBAM legislation. Such national sanctions shall be effective, proportionate and dissuasive.

Finally, the proposal empowers the Commission to investigate about potential cases of circumvention, by starting investigations *ex officio* or following notification from an interested party. At the conclusion of the investigation, the Commission may adopt delegated acts to supplement the scope of the CBAM, as to include the goods which were the object of the circumvention practices.

3.4 Main implications for non-EU companies

Since CBAM authorisations will be granted to entities established in an EU Member State, most of the new CBAM obligations will be falling upon importers (including EU importers related to foreign producers). EU importers will face new obligations, such as:

- registering to the central CBAM registry, reporting and submitting CBAM declarations, purchasing CBAM certificates and managing the CBAM certificate account;
- ensuring that the total embedded emissions declared in the submitted CBAM declaration are verified by an accredited verifier; for goods produced in a third country, the authorised declarant may use pre-verified information for registered manufacturers and installations;
- liaising with the competent authorities and handling potential cases of public enforcement.

Nevertheless, the CBAM proposal will also affect foreign companies which manufacture and export to the EU goods which are in the scope of the CBAM proposal. In particular:

- foreign companies with their own importing operations should be aware of the need to **appoint** an EU-based customs agent or establish a local office for CBAM purposes; [14]
- foreign exporting producers will have to cooperate by **providing information** to their EU customers, related EU companies or representatives in the EU, as to allow them to comply with the CBAM-related obligations. Cooperation on part of foreign exporting producers will be required, in particular, during the verification of the actual embedded emissions. In this regard, it should be noted that the default CBAM values will likely be disadvantageous for foreign producers, particularly if they are based on the EU's worst performers or if such foreign producers have lower emissions than the average in their home country;

14 According to the CBAM proposal, the authorized declarants may also be customs agents acting on behalf of foreign producers.

- bearing the above in mind, foreign exporting producers may have a strong incentive to **register in the centralized database** in order to reduce administrative burdens and speed up the emissions' verification process (see Section 3.2 above). In fact, it is expected that registered foreign manufacturers and installations will benefit from a competitive advantage vis-à-vis non-registered manufacturers, since it is likely that EU customers will consider buying from them more attractive;

- finally, foreign importers may be required to **participate to the Commission's investigations** initiated in case of alleged circumvention of the CBAM obligations. Similarly to anti-circumvention investigations carried out pursuant to the Basic Anti-Dumping Regulation, these investigation may result in an extension of the scope of the CBAM as to include goods initially not covered.

4. FOREIGN SUBSIDY REGULATION

On 5 May 2021, the Commission proposed a Regulation on foreign subsidies distorting the internal market.[15] The purpose of this initiative is to ensure a level playing field in the EU internal market, so as to avoid distortions by non-EU countries granting subsidies to companies operating therein. The proposal is a consequence of the fact that the EU is one of the very few jurisdictions with an extensive control over public aid granted to undertakings. On 30 June 2022, a provisional political agreement on the text of the proposal was reached by the Parliament and the Council. This agreement will pave the way for a swift adoption of the Regulation by the EU legislature in the coming months.

4.1 Scope of the proposal

This is a generally applicable instrument in that it could apply to any company within any sector, so long as the company is receiving a foreign subsidy which in turn is affecting the internal market. As a result, both EU and foreign companies are directly affected by the proposal. Examples of foreign subsidies considered likely to create distortive effects would include certain subsidies in the form of export-buyer financing, debt forgiveness or guarantees, tax relief, and subsidies directly facilitating acquisitions, while other types of subsidies may be shown to have such distortive effects based on an individual assessment.

4.2 Main obligations

Under the proposal, three new tools will be introduced:

i) **Concentration instrument**, an *ex-ante* tool (similar to the existing merger control regime) to investigate concentrations where one of the parties benefits from financial contribution by a non-EU government, subject to jurisdictional thresholds[16]. At the conclusion of the investigation, the Commission may: (i) clear the acquisition; (ii) adopt a conditional clearance decision based on commitments offered by the acquirer; or (iii) prohibit the transaction. The Commission will have strong investigatory and enforcement

15 Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final.

16 The parties must notify the Commission prior to the implementation of a concentration where (a) the acquired undertaking or at least one of the merging undertakings is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; and (b) the undertakings concerned received from third countries an aggregate financial contribution of more than EUR 50 million in the three calendar years prior to notification. In addition, in case of creation of a joint venture, a notification is required where (a) the joint venture or one of its parent undertakings is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; and (b) the joint venture or one of its parent undertakings received from third countries an aggregate financial contribution of more than EUR 50 million in the three calendar years prior to notification.

powers, including the power to impose fines and to adopt decisions accepting companies' commitments[17], when the companies involved offer them, or decisions prohibiting the concentration.

ii) **Public procurement instrument**, an *ex-ante* tool to investigate bids in public procurement procedure in case the offering company received a financial contribution by a non-EU government, subject to jurisdictional thresholds.[18] Under this tool, economic operators participating in public procurement procedures would need to notify the contracting authority of all financial contributions which they have received from non-EU governments within the last three years. The notification may result – after an initial review made by the contracting authority – in an investigation carried out by the Commission. If, after an in-depth investigation, the Commission finds that an undertaking benefits from a foreign subsidy which distorts the internal market, it may adopt a decision accepting commitments.[19] Where the company does not offer commitments or where the Commission considers them not appropriate or sufficient, the Commission may adopt a decision prohibiting the award of the contract to the company concerned.

iii) ***Ex officio* instrument**, a generic tool to investigate any alleged distortive foreign subsidies, including concentrations or public procurement procedures not satisfying the notification thresholds. Where, after an in-depth investigation, the Commission finds that a foreign subsidy distorts the internal market, it may adopt decisions accepting commitments, when the companies involved offer them. Otherwise, the Commission may adopt a decision imposing redressive measures.[20]

Any investigation would focus on three main questions: (i) is the foreign subsidy capable of distorting the internal market; (ii) if so, does the foreign subsidy nonetheless have a positive impact within the EU or on a public policy interest recognised by the EU (a so-called "EU interest test"); and (iii) if the distortion outweighs any positive impact for the EU, what is the appropriate remedy? Companies involved in investigations will be required to co-operate with the Commission, to provide all necessary information, and allow inspections at their premises.

4.3 Enforcement

The proposal confers extensive powers to the Commission to investigate and impose a wide spectrum of remedies on companies receiving subsidies from non-EU governments. The Commission may also impose fines and periodic payments when the companies concerned fail to comply with the notification obligations, or when they intentionally or negligently supply incorrect, incomplete or misleading information, or otherwise fail to cooperate. Moreover, in case of non- or insufficient cooperation, the Commission may take a decision on the basis of 'facts available' (similar to what happens in trade remedies investigations). In this case, the result of the procedure is likely to be less favourable to the undertaking concerned than if it had fully cooperated.

17 Commitments and redressive measures may consist of the following: (a) offering access under fair and non-discriminatory conditions to an infrastructure that was acquired or supported by the distortive foreign subsidies unless such fair and non-discriminatory access is already provided for by legislation in force in the Union; (b) reducing capacity or market presence; (c) refraining from certain investments; (d) licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies; (e) publication of results of research and development; (f) divestment of certain assets; (g) requiring the undertakings concerned to dissolve the concentration; (h) repayment of the foreign subsidy, including an appropriate interest rate.

18 The notification obligation is triggered if the value of the procurement should exceed EUR 250 million.

19 Please see footnote 17 above.

20 Please see footnote 17 above.

4.4 Implications for non-EU companies

If adopted, this proposal will affect foreign companies engaging in an economic activity in the internal market (thus, directly or through subsidiaries)[21] insofar as they are more likely to receive subsidies from third countries.[22] Consequently, these companies will be subject to notification obligations and, in addition, will be exposed to *ex officio* investigations. As a result, foreign companies will have to:

- conduct audits and risk assessment analysis to identify all possible subsidies before operating in the EU, especially when carrying out M&A transactions or participating in public tenders;
- notify the Commission in case the relevant thresholds are met, when carrying out M&A transactions or participating in public tenders;
- fully cooperate with the Commission when investigations are initiated, by providing all necessary information and allowing on-site inspections.

It should be noted that notifications have a suspensive effect on the transaction or public procurement procedure, and therefore, they are likely to have a significant impact on the conduct of business.

5. ANTI-COERCION INSTRUMENT

On 8 December 2021, the Commission proposed a Regulation for the protection of EU Member States from economic coercion by third countries (the so-called '***anti-coercion instrument***').[23] The aim is to provide the EU with a flexible instrument that could be used to respond to measures implemented by certain third countries to influence EU and Member States' trade and investment policy decisions (so-called 'economic coercion'), with the ultimate purpose of protecting the sovereign rights and interests of the EU and its Member States. The anti-coercion instrument would consist in a last resort measure that may be used also in the absence of any international agreement in force between the EU and the third country concerned.

The proposal is still under discussion. According to publicly available information, on 10 October 2022 the parliamentary Committee on International Trade will vote on the proposal. It is not clear yet whether the proposal enjoys a sufficiently wide consensus in the Council and Parliament. Therefore, it cannot be excluded that, if ever adopted, the final text will vary greatly from the current proposal.

5.1 Scope of the proposal

The anti-coercion instrument will apply where a third country interferes in the legitimate sovereign choices of the EU or a Member State, by seeking to prevent or obtain the cessation, modification or adoption of a particular act, or by applying or threatening to apply measures affecting trade or investment.

21 Under Article 1, the 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.

22 The proposal also affects EU companies as long as they receive aid from third countries. This is particularly relevant for undertakings part of international group, where the aid received by a company could be passed on to other members of the group and, thus, cause a distortion of competition in the internal market.

23 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, COM(2021) 775 final.

5.2 Possible measures

Under the proposal, once the presence of economic coercion has been determined on a case-by case basis, the Commission will be empowered to respond in two ways. First, the Commission will seek a negotiated solution with the third country concerned. Second, if the negotiations do not bring satisfactory results, the Commission will be allowed to use, as a last resort, any of the response measures listed in Annex I to the Regulation, targeting both the coercing third country and natural or legal persons 'connected or linked' to the government of that country. Annex I lists a broad range of measures targeting goods, services and investments originating in the coercing country, including the imposition of retaliatory tariffs and quotas, restricting access to EU public procurement and EU funded research programs, tighter controls on exports of dual-use items, restricting foreign direct investment as well as the provision of financial services within the EU. The response measures must be proportionate and likely to be effective in stopping the coercive activity. The list of responses will be updated via delegated acts with the involvement of the Parliament and Council.

5.3 Enforcement

Under the current proposal, the Commission would be tasked to enforce the new rules. More specifically, it will be the Commission which assesses whether a measure of a third country consists of economic coercion and then engages with it in negotiations. Similarly, it will be the Commission which determines and adopts the appropriate response measures. In this context, the Commission may also provide that UE natural or legal persons affected by the third country's measures of economic coercion shall be entitled to recover any damage caused to them by the measures of economic coercion. The damage should be recovered from the persons which are designated as connected or linked to the third country concerned and that have caused or been involved in the economic coercion, and up to the extent of the designated persons' contribution to such measures of economic coercion.

5.4 Implications for non-EU companies

Should the proposal be adopted, companies established in countries which make use of economic coercion may be heavily affected by the response measures adopted under the new instrument. In particular:

- response measures may directly target foreign companies when they are connected or linked to the government of the third country concerned, especially if they are involved with the coercive action;
- response measures in the form of trade or investment restrictions and/or import duties may indirectly affect foreign companies, even when they are not connected or linked with the third country's government;
- foreign companies linked or connected to third countries may have to face private enforcement actions when they have caused or have been involved in the economic coercion.

Needless to say, the consequences arising from the adoption of response measure will depend on the circumstances of each case.

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