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WORKING PAPER

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INFORMATION

From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Proposal for the Regulation of the European Parliament and the Council on Foreign Subsidies Distorting the Internal Market – doc. 8576/21

Delegations will find attached Czech Written Comments on the Proposal for the Regulation of the European Parliament and the Council on Foreign Subsidies Distorting the Internal Market - doc. 8576/21.

Czech Written Comments on the Proposal for the Regulation of the European Parliament and the Council on Foreign Subsidies Distorting the Internal Market – doc. 8576/21

1. We are of the opinion that the administrative burden of the current Proposal, especially in Chapter 4, is not proportionate. The proposal itself introduces an administrative procedure that will run in parallel to the national procedures on review of the public procurement. In that regard, we believe that the possibilities according to Art. 69 of the Directive 2014/24 are sufficient. In particular, **the contracting authority/entity may exclude the tenderer when an abnormally low tender is identified and unduly granted state aid (foreign subsidy) is proven.** We consider it to be sufficient if the contracting authority/entity would be entitled to initiate the review proceedings of the Commission in cases when the foreign subsidy is difficult to identify or has clear and justifiable suspicion of this conduct. For this reason, we believe that Chapter 4 of the Proposal should not automatically cover all contracts over EUR 250 million. The review proceedings according to Art. 31 would be initiated either by the contracting authority or the Commission when there is suspicion or evidence of a possible undue foreign subsidy.
2. In this draft regulation, the national competence in the field of public procurement review is being transferred to the powers of the Commission creating parallel review procedure. As stated above, **we believe that the competence connected with public procurement procedures review should remain in the hands of the Member States** and the draft needs to be more balanced in order to preserve the national competence connected with public procurement.
3. **We have concerns about possible parallel judicial review that might occur in the context of the Regulation.** For example, one judicial review can occur in the form of the Commission adopting a decision based on this Regulation and its decision being subsequently challenged at the Tribunal. In parallel, the national judicial review of the same public tender can proceed as well following the national decision of the review authority or contracting authority. In case this scenario occurs, the situation will cause a high level of legal uncertainty for contracting authorities and bidders.

4. In view of direct effects of the Regulation on the public procurement process, it is necessary that the Proposal clearly sets out the obligations and responsibilities of both the contracting authority and the supplier.
5. The proposed scope of the Regulation needs to be amended or at least clarified:
 - a. **The scope of the Regulation as proposed is excessively wide** and covers the purchases beyond procurement directives. See Art. 27(1)(c) of the Proposal: The “Public Procurement Procedure” covered shall also cover the legal instrument creating international law obligations, such as an international agreement, that according to the PP directives, do not need to be awarded in the procurement procedures. In this extent, majority of the further procedural provisions is inapplicable, as the tender in the meaning of PP directives is not submitted. We suggest deletion of Art. 27 (1)(c).
 - b. The Proposal regulates the purchases of contracting authorities and contracting entities. It is not clear from the Proposal whether the Regulation shall be applied in case of subsidised contracts (Art. 13 of Directive 2014/24/EU).
6. We suggest that the Regulation shall not be applicable in cases of negotiated procedure without prior publication based on the lack of competition, especially Art. 32 (2) (b, c) of Directive 2014/24/EU.
7. According to Directive 2014/24/EU (Art. 56), contracts shall be awarded, on the basis of criteria laid down in accordance with the directives, to a supplier that was not excluded on the basis of an exhaustive list of exclusion grounds. The public buyer is bound by strict and formalized procedural rules with a significant limitation of its own discretion. The current wording of the Proposal does not indicate how the contracting authority/entity should proceed. The impact of the Regulation will be significant – it shall cover the contracts with the value exceeding EUR 250 million which are often concluded in order to implement relevant infrastructure projects. However, crucial issues are not dealt within the Proposal – e.g. the obligation/option to exclude the tenderer, conditions for suspension or cancellation of the procurement procedure, impact of commitments on the tender and the contracting authority.

8. Since the Proposal as submitted is not clear and does not necessarily convene with the public procurement regulation on national level, it needs to be significantly elaborated, e.g. in the following areas:
- a. If the estimated value of the contract exceeds EUR 250 million, the foreign subsidy shall be notified, see Art. 27 (2). There is no indication of what are the rules for contracts that are divided into lots or framework agreements – is it the value of the individual contract, or the value of the whole project that is decisive? These rules should be clearly stated within the Proposal.
 - b. Does the Proposal modify the mandate of the buyer to proceed according to Art. 69 of the Directive 2014/24 and exclude the tenderer in cases where the abnormally low tender is based on a foreign subsidy obtained?
 - c. Art. 28 (1) of the Proposal states that *Undertakings which do not submit a notification / declaration shall not be “awarded the contract.”* It is not clear how the contracting authority shall proceed. Can the respective undertaking be excluded from the procurement procedure? The procurement directives do not provide for such an exclusion ground – it should be therefore expressly stated within the Proposal. Or shall the initiation of the review by the Commission, according to Art. 28 (5), be the sole consequence?
 - d. The rules for recognition of subcontractors/main suppliers are vague and insufficient. It is not clear, from the Proposal, whether the contracting authority/entity shall require, in the procurement documents, that the tenderer indicates in its tender the share of the contract subcontracted to third parties and proposed subcontractors.
 - e. It needs to be safeguarded that initiation of any phase of investigation concerning the procurement procedure shall be announced to the contracting authority/entity as to allow the contracting authority/entity to set the following steps. The Proposal is thus inconsistent on this issue.
 - f. As for the ex officio review by the Commission (Art. 28 (6)), we suggest that the mandate of the Commission to request the notification shall be limited to public procurement exceeding a certain value.
 - g. The review proceedings by the Commission prevent the contracting authority/entity to award a contract. We suggest that the conditions to conclude the contract are precisely clarified in the Proposal. In particular, the possibility of the sooner completion of the review and its announcement to the buyer shall be previewed.

- h. Legal implications of the decision to prohibiting the award of the contract should be stated in the Proposal. The relation to PP directives should be dealt with concerning the obligation to award the contract to the most advantageous tender.
- i. The contracting authority / entity may be entitled to continue in the procurement procedure (not only evaluation of tenders, see Art. 31(1)) during the preliminary review and the in-depth investigation except from the contract awarded.
- j. The regulation of the beginning of the time limits differs from the general rules for calculating time limits (see Regulation (EEC, EURATOM) No 1182/71). Shall the end of the time period be regulated in line with the general rules?