



Proposed Regulation on foreign subsidies distorting the internal market

ESMIG position

European companies are increasingly facing unfair competition from third country producers in the EU market. In particular, and as recognised by the European Commission¹, subsidies granted by non-EU governments to companies competing in the Single Market can have an increasingly negative impact on competition. On this matter, ESMIG welcomes the proposal for a Regulation on foreign subsidies distorting the internal market.

ESMIG members are confronted with this situation in the specific context of public procurements for the national rollouts and solutions of smart meters in the European Union. This situation, which directly impacts the smart metering providers, also afflicts, as a consequence, many other EU companies in the sector, including suppliers, sub-contractors and co-developers (from SMEs to big companies).

As described in our position paper on Fair Competition in the Energy Sector², this causes a series of risks and negative consequences which should be prevented. Energy management is a very important critical infrastructure for every individual country and for the European Union as a whole. This digitalised infrastructure manages energy data which is extremely sensitive information. Considering the long-term duration of the contracts being implemented in smart energy solutions, (on average 20 years), mission critical infrastructure is being put at risk in the long run. Urgent measures are needed to solve this key issue for the European Union's political and strategic independence.

Among others, actions should be taken to strengthen contract award criteria, address non-compliance with EU rules and standards, tackle abnormally low tenders, and be stricter in terms of buyer accountability.

ESMIG supports the European Commission's proposal in Article 28 to introduce a mechanism of prior notification of foreign financial contributions in the context of public procurement procedures. The Commission would then assess whether there is a foreign subsidy and whether it made the procurement procedure unfair. In this case, the bidder would then be excluded from the procurement procedure. In this respect, we fully support the rapporteur's proposal to extend the notification to known future subsidies that have been decided and will become effective within one year following the submission of the tender or request to participate in the public procurement procedure. This would close a potential loophole which would have enabled a foreign competitor to submit abnormally low tenders.

¹ European Commission White Paper on Foreign subsidies, June 2020

² https://esmig.eu/sites/default/files/esmig_position_fair_competition_in_the_energy_sector.pdf

However, we would like to express our concerns on the decision to apply this procedure only where the estimated value of the procurement is €250 million or more. Most of the public procurements for the national rollouts and solutions of smart meters in the European Union are below this threshold. Indeed, our customers tend to divide the bids between multiple suppliers to mitigate their own risk, which leads to contracts far below this threshold.

We understand the European Commission's approach and the stake of setting such a threshold. This instrument should not lead to an excessive administrative burden for the European Commission, European and foreign companies. However, defining only one criterion excludes most of the European industries from this procedure, some of them being critical for the European Union. In the draft report, the possibility to lower sector-specific thresholds in emerging industries of strategic value is introduced. However, there is no mention of existing industries of strategic values which are not covered by the notification procedure.

ESMIG members participate in mission critical infrastructure and risks of unfair competition are closely connected with the safety of the electricity and gas grids, privacy and data security of Europe's citizens. At the same time, these technologies are essential for enabling the green and digital energy transition.

Therefore, we think that **multiple criteria should be defined, including "mission critical infrastructure" in addition to the threshold.** That way, the Regulation would not only protect the European economy, but also strategic independence of EU mission critical infrastructure.

The tender shall be automatically rejected by the contracting authority if a company fails to prove that it has not benefited from non-EU state aids.

ESMIG members are aware of the general market investigation tool proposed in the draft Regulation which offers the possibility to investigate smaller public procurement procedures below the threshold, which the Commission can start on its own initiative (ex-officio) and may request ad-hoc notifications. We appreciate the flexibility offered by this tool since there is no specific procedure to notify the European Commission; however clear guidelines are needed to understand what kind of information is required to be successful with the request. In addition, this procedure does not allow the European Commission to adopt a decision prohibiting the award of the contract to the undertaking concerned. Therefore, the ex-officio tool cannot be the only option for our sector to which the ex-ante notification procedure defined in article 28 must apply.

We urge the European Institutions to ensure that this Regulation is fit for purpose and guarantees a level playing field in the internal market for these primordial industries for the European Union. The safety of mission critical infrastructure must be maintained.

However, we agree that extending this obligation of prior notification to main subcontractors and main suppliers in the context of procurements below €250 million would represent an excessive administrative burden which should be avoided.

ESMIG also agrees with the proposal to consider the balancing between the negative and positive effects of a foreign subsidy. However, the potential positive impact(s) will be very difficult to evaluate. A long-term assessment, ensuring that the effect(s) of the foreign subsidies are aligned with all the other EU policy objectives, will be essential. In addition, specificities of sectors should be taken into consideration and in particular companies involved in critical infrastructure.

Compliance with the EU legislation and guidelines should be proved by the bidding candidate and take the form of an audit which could potentially lead to the prohibition for the company to participate in EU tenders for a given period.

Bidding candidates should have the possibility to notify the authority in case of suspicion of abnormally low prices or any other non-compliance with EU legislation and guidelines.

In this context, abnormally low tenders should be addressed. This term should be clearly defined and the obligations of contracting authorities to check the justifications for low price should be strengthened.

Awarded bids must be considered as potentially abnormally low if the winning price is more than 10 to 15% below the average given price.

The burden of proof would be on the bidding candidate whose offer is suspected to be abnormally low.

For a matter of transparency, the final price of winning tenders should be released.

In essence, ESMIG is proposing that competition rules ensure a fair, level playing field for EU and non-EU competitors.

In the context of growing protectionism in other world regions, Europe needs to review and adapt its trade policy, taking bold actions to tackle the negative implications resulting from foreign subsidies in the internal market.

About ESMIG

ESMIG is the European voice of the providers of smart energy solutions. Our members provide products, information technology and services for multi-commodity metering, display and management of energy consumption and production at consumer premises.

Our activities are focused around systems for Smart Metering, consumer energy management and safe and secure data transfer.

We work closely with EU policy makers and other EU associations to make Europe's energy and water systems cleaner, reliable, more efficient and the European consumer informed, empowered and engaged.