

EC COMMUNICATION

Communication from the European Commission of 1 February 2023 - A Green Deal Industrial Plan for the Net-Zero Age



Analysis

New measures are welcome in the new “geo-economic” environment in which we find ourselves, and while notions such as “simplification”, “one-stop-shop” and “predictable regulatory environment” are positive, we will have to wait for the practical implementation to see if they are true. More concern is raised by the new temporary aid framework and the possibility that excessive flexibility in the application of the TCTF could lead to further inequalities within the EU. It is essential to ensure a balance between pursuing policy objectives, such as the fight against climate change, and maintaining an undistorted market, at a time when temporary measures are becoming permanent.

The European Commission’s response to the US subsidy policy: a European industrial policy or more regulation?

On 1 February, the [Green Deal Industrial Plan Communication](#) was published, with the aim of developing a strategy to improve and protect the competitiveness of European industry, while accelerating the green transition and setting out measures to counteract the negative effects of the recent US Inflation Reduction Act.

The Communication announces **the following legislative proposals**: (i) a **Net-Zero Industry Act** to provide an appropriate regulatory environment and promote European strategic projects; (ii) a **Critical Raw Materials Act** to ensure access to materials that are critical to the manufacture of key technologies (due on 8 March) and (iii) a **reform of the EU electricity market**. It also sets out the following **key areas for action**: (i) a **predictable and simplified regulatory environment**; (ii) faster access to **sufficient funding**; (iii) ensuring that the **workforce has the right skills** for the green transition; and (iv) **open trade** for resilient supply chains.

In particular, the proposal to make state aid rules more flexible stands out, allowing Member States to grant aid in certain areas and always on a temporary basis (although there is already talk of a duration up to 2025), simplifying them, with easier calculations, simpler procedures and accelerated approvals.

To this end, a **new Temporary Crisis and Transition Framework (TCTF) will be created**, with the following priorities: simplifying aid for renewable energy deployments and for decarbonising industrial processes; targeted aid for major new production projects in strategic value chains; and increasing state aid notification thresholds in these areas.

In terms of **EU funding**, the Commission has issued new **Guidance on Recovery and Resilience Plans**, providing flexibility to adjust the plans to the current context and to prepare REPowerEU chapters. The Commission encourages Member States to include simple and effective measures in their revised recovery and resilience plans, to provide immediate support to businesses and boost their competitiveness, such as one-stop-shops for permitting renewable energy and net-zero projects; and tax breaks or investments to equip the workforce with the skills needed for the industrial transition.

MORE INFORMATION

- [🔗](#) The Green Deal Industrial Plan
- [🔗](#) Commission consultation of Member States on the new Temporary Crisis and Transition Framework
- [🔗](#) Guidance on REPowerEU chapters in the context of recovery and resilience plans

LEGISLATIVE PROPOSAL

Implementing
Regulation of
Regulation
2022/2560 on
foreign subsidies



Analysis

The draft does not clarify many questions on the practical application of the instrument, and in particular regarding the supporting documents that companies will have to submit with the forms. Interpretative guidance from the Commission will be essential in order to avoid lengthy procedures that would hamper public procurement procedures and lengthen authorisation periods for large transactions, which are essential for maintaining competitiveness within the EU.

Feedback period on the draft Implementing Regulation on detailed arrangements for the conduct of proceedings included in the foreign subsidies Regulation

On 6 February, the draft Implementing Regulation for the recently adopted Regulation 2022/2560 on foreign subsidies was published, which will not enter into force until 12 July 2023, and for notifications until 12 October 2023.

The Implementing Regulation, once adopted, will be an important step in shaping this new instrument which aims to **keep the internal market free from distortions caused by subsidies from third (non-EU) states**.

One of the most notable elements of the draft are the annexes, which identify the sections of the forms that companies will have to complete with detailed information in order to be able to submit notifications in relation to concentrations and public procurement.

In relation to concentrations, it is worth highlighting the possibility for the Commission to waive the obligation to provide certain information; or the way to proceed for the submission of commitments, among others. **The information to be submitted by companies, as currently drafted, is exhaustive.**

In relation to public procurement, a distinction is made in terms of information to be submitted by those who must issue a sworn declaration in procurement procedures where there are no notifiable financial contributions, and those who must submit a notification. It also includes the possibility of exempting notifiers from providing certain information, if the contracting authority agrees.

The draft Implementing Regulation with its annexes goes into detail in some respects, such as the description of the notifying parties in relation to concentrations and public procurement procedures, but lacks proper clarification in other areas, such as the calculation of the financial contributions to be taken into account.

Comments on the draft can be submitted until 6 March.

MORE INFORMATION

- [Foreign Subsidies - Draft Implementing Regulation](#)
- [Possibility of participating in the consultation](#)
- [Regulation 2022/2560 on foreign subsidies](#)
- [Pérez-Llorca's Legal Briefing on the Foreign Subsidies Regulation](#)

CJEU JUDGMENT

Judgment of the
Court of Justice of
the European Union
dated 16 February
2023, *Tráficos Manuel
Ferrer*, Case C-312/21.



Analysis

This is a major judgment for all “damages litigation” which is of particular significance in Spain. It makes it clear that the logic of “weaker party and stronger party” is not used, as the rights of the claimant of damages have been guaranteed by means of precise instruments such as the request for information, and the active conduct of the claimant must be assessed. It is also significant because it leaves no doubt as to the exceptional and subsidiary nature of the power of the courts to estimate harm.

Judgment on the exceptional nature of the power of courts to estimate the harm in proceedings for damages arising due to the “truck manufacturers’ cartel”

Request for a preliminary ruling from Commercial Court No. 3 of Valencia in the context of proceedings for damages arising from the “truck manufacturers’ cartel”. The court asked about legal costs and the power to estimate damages in the light of the Damages Directive (Directive 2014/104).

The Court of Justice clarified that **it is not possible to apply the case law on unfair terms by analogy**, since the logic of a claim for damages under the Directive is different. Its subject matter is a non-contractual liability claim, and it stressed that the “balance of power between the parties to the dispute” may end up being rebalanced depending on the use made of the tools made available to the claimant, such as the possibility of requesting that the national court order the defendant or a third party to disclose relevant evidence which lies in their control, in accordance with Article 5(1) of the Directive.

Furthermore, the Court made it clear that the right to full compensation for harm suffered as a result of anti-competitive conduct has no bearing on the rules on the allocation of costs in legal proceedings brought to enforce that right, since those rules are not intended to provide compensation for harm, but to determine, in each Member State, in accordance with its own law, the manner in which the costs incurred in the conduct of such proceedings are to be allocated. It concluded that, **in the event that a claim is upheld in part, it is not incompatible with EU law for each party to bear its own costs and half of the common costs, except in cases of wrongful conduct.**

Secondly, the Court of Justice established that **the power of judicial estimation of harm is limited to very exceptional situations**, and provided that two circumstances are present: (i) the existence of that harm to the claimant must be established; and (ii) it must be practically impossible or excessively difficult to quantify precisely, which implies taking into account all the parameters leading to such a finding, in particular the unsuccessful nature of steps such as the request to disclose evidence provided for in Article 5 of the Directive, or any inaction on the part of the claimant.

MORE INFORMATION

- Judgment of the Court of Justice of the European Union dated 16 February 2023, Case C-312/21, *Tráficos Manuel Ferrer*
- Request for a preliminary ruling from Commercial Court No. 3 of Valencia lodged on 19 May 2021 - *Tráficos Manuel Ferrer S.L. and Other v Daimler AG*



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CASE TO FOLLOW

Case T-5/23, *Illumina v Commission*



Analysis

Apart from the criticisms and discussions surrounding all the proceedings in this case, the importance of this “saga” lies in the fact that the General Court has validated a new, broader understanding of the Commission’s powers in the area of concentrations, which is viewed with a degree of mistrust by some, as it creates more uncertainty, in view of an excessive “margin of discretion” that could be harmful to the market.

New action for annulment in the “Illumina Grail saga”

An action for annulment has been submitted in relation to the Commission’s decision renewing the interim measures aimed at preventing the concentration between Illumina and Grail.

Illumina’s appeal against the Commission’s decision of **28 October to renew the interim measures adopted in the proceedings concerning the concentration between Illumina and Grail**, aimed at ensuring the separation of the two companies’ activities following Illumina’s ban from acquiring Grail (case M.10983), was published on 3 February. The action alleges, inter alia, infringement of the principle of proportionality, errors of fact and law, and a failure to justify certain aspects of the contested decision.

It is very important to distinguish this action for annulment from the appeal brought by Illumina last September against the judgment of the General Court ([Case T-227/21](#)) which dismissed the action for annulment of the decisions that allowed the **Commission to open its investigation of the (now prohibited) concentration, despite the fact that no notification threshold was met**. This case is currently under appeal before the Court of Justice ([Case C-611/22 P](#)).

The appeal concerning the interim measures is a new milestone in the “Illumina saga”, the significance of which lies, above all, in the General Court’s ruling on the application of the referral mechanism provided for in Article 22 of the Concentration Regulation, in relation to a concentration that did not meet the thresholds provided for in EU and Member State law.



MORE INFORMATION

- [Action for annulment T-227/21, *Illumina v Commission*](#)
- [Appeal C-611/22 P, *Illumina v Commission*](#)
- [Action for annulment T-5/23, *Illumina v Commission*](#)