

New obstacles for foreign investments in the EU? – The Commission’s White Paper on foreign subsidies –

The European Commission published its White Paper on ensuring fair conditions of competition with regard to subsidies from foreign countries ([COM\(2020\) 253 final](#)) on 17 June 2020. All stakeholders have been invited in the public consultation to submit their opinions by 23 September 2020. This process is being hastened by the current COVID-19 crisis. On the one hand, the EU and its Member States are granting significant amounts of State aid to support individual companies in order to stabilize the economy and accelerate research on the coronavirus in the current crisis. On the other hand, there is a fear of distortion of competition by third country subsidies. This is where the Commission is now taking action. It summarizes the existing problem areas in its White Paper as follows:

- Foreign subsidies distorting the internal market regarding
 - the general market operation of undertakings active in the EU;
 - acquisitions of EU undertakings and
 - public procurement procedures; as well as
- foreign subsidies in the context of access to EU funding

Building on the central pillars of ensuring fair competition conditions in the internal market, i.e. the instruments of foreign trade, State aid, public procurement and competition law, the White Paper intends to provide a solution to the above-mentioned alleged regulatory gaps by introducing new assessment instruments. The first three options (so-called "Modules") focus on the alleged distortive effects caused by foreign subsidies

- in the Single market generally (Module 1),
- in acquisitions of EU companies (Module 2); and
- during EU public procurement procedures (Module 3).

These Modules are not to be seen as alternatives, but complement each other. The White Paper also sets out a general approach to foreign country subsidies in the context of EU funding.

The substantive test is whether a particular business acquisition or practice is facilitated by subsidies and whether it will distort the internal market. The respective test is not based on per se infringements, but on a comprehensive weighing of the facts to be carried out for each individual case. It is assumed that certain types of subsidies are very likely to cause distortions of the internal market. Apart from that, the assessment is to be made on the basis of certain indicators (e.g. size of the subsidy, company size, existence of structural excess capacity, etc.) and the respective market situation.

Once it is established that a foreign subsidy is capable of distorting the internal market, the established distortion would be balanced against the positive impact that the investment might have within the EU or on public policy interests recognized by the EU (so called "EU interest test"). In this assessment, the EU's public policy objectives, such as creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience, would be taken into account.

Specifically, the Modules should regulate the following:

1. Module 1 (ex officio investigation of market behaviour)

Module 1 proposes the introduction of a general market monitoring instrument, which should, in principle, cover all forms of distortion of competition in the EU internal market due to foreign subsidies.

Both the Commission and the respective supervisory authorities of the Member States would be responsible for the assessment. The cooperation could be similar to the existing cooperation in competition law (especially Regulation (EC) No. 1/2003). In any case, all authorities should work closely together through the best possible coordination.

Unlike the following instruments, Module 1 is not limited in its scope. In the event of a foreign subsidy, which is likely to have distorting effects in the internal market, the White Paper considers various remedies, such as redressive payments to the foreign country or to the EU or Member States. Behavioral or structural remedies should also be possible. Procedures can also be terminated by binding commitments on the companies concerned.

2. Module 2 (ex ante notification for acquisitions)

Module 2 is a modified merger control review, which is, however, intended to stand alone alongside the existing merger control. The purpose of this instrument is to ensure that foreign subsidies do not give their beneficiaries an unfair advantage in acquiring companies in the EU. In order to efficiently cover potentially problematic cases of subsidized acquisitions, the scope of application is to be limited by thresholds yet to be determined. Both qualitative thresholds (e.g. referring to all assets likely to generate a significant EU turnover in the future) and quantitative thresholds (e.g. value of the transaction or turnover-related (for example EUR 100 million)) will be considered. A corresponding notification requirement is to be introduced for the acquisition of EU target companies.

Due to the time pressure in the prior review of acquisitions, the Commission, as a "one-stop shop", should have the exclusive right of review here, unlike with Module 1.

If a foreign subsidy facilitates the acquisition of EU target companies and thereby causes distortions in the internal market, the White Paper considers the same redressive measures as under Module 1 (e.g. redressive payments and transparency obligations). However, as the White Paper emphasizes, the focus will be— due to a more practical application – on structural remedies, such as prohibition or commitments, similar to the competition law merger control regime.

3. Module 3 (notification obligation in public procurement procedure)

Module 3 creates a new ground for exclusion in the field of public procurement law. If a tenderer is favored by foreign subsidies and this leads to a distortion of competition in the tender procedure or in the execution of the contract, the tenderer would be excluded from the award procedure. Similar to Module 1, it is proposed that both the Commission and the national authorities should be given appropriate powers and that the system should include coordination for the sake of coherence.

Summary and Outlook

The more intensive and structured scrutiny of foreign subsidies as set out in the White Paper is the right approach to ensuring that companies have fair access to public contracts. However, it does not yet contain detailed measures. The exact content is still to be determined. In this respect, the statements and ideas of the stakeholders are awaited. Nonetheless, there are potential problems listed with the remedies and procedures it outlines.

With regard to mergers and acquisitions, the European legislator should establish a formal procedure with fixed review periods. For compelling reasons of legal certainty and the respective tight timeframe of the financing, M&A transactions should therefore be subject exclusively to the (modified) merger control review (Module 2). In accordance with EU competition law, the procedure should be limited to a preventive merger control. A parallel application of the "catch-all" Module 1 should be avoided as it is too indeterminate for the purpose of M&A transactions and therefore not practicable.

It will be a challenge to ensure that the procedures and restrictions envisaged are designed in such a way as to interfere as little as possible with the freedom of economic activity of individual undertakings.

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