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Task Force on the Instrument on Foreign Subsidies

8 July 2020

White Paper on Foreign Subsidies

- On 17 June, the Commission published its white paper on the distortive effects of foreign subsidies in the Single Market

- The related public consultation will be open until 23 September

- The aim is to help the Commission prepare the appropriate legislative proposals that should be presented next year

BusinessEurope Press Release

- BusinessEurope issued a press release with the main priorities for business:

- For BusinessEurope, the instrument should
  - be comprehensive
  - fill existing legal gaps and
  - effectively address market distortions created by foreign subsidies.
  - level the playing field while ensuring legal certainty and keeping Europe open to trade and investment

- With regards to level playing field issues and market distortions, the paper addresses many of the problems BusinessEurope raised in its China paper published in January 2020

White Paper on Foreign Subsidies

The White Paper identifies a legal gap that makes the EU unable to address the distortions created by foreign subsidies.

Therefore, it proposes a new framework that would allow the EU and Member States to remedy the distortions caused by foreign subsidies

I. in the EU's internal market and

II. in access to EU funding.

I. Foreign subsidies distorting the EU internal market

Foreign Subsidies distorting the internal market

The white paper sets out proposals for three new legal instruments to address the legal gap in addressing foreign subsidies in relation to

1. The general market operation of economic operators active in the EU (Module 1)

2. Acquisitions of companies in the EU (Module 2)

3. Public procurement (Module 3)

These three modules can be applied either on a stand-alone basis or in combination.

Module 1 – General Instrument to capture foreign subsidies

Scope:

- Distortive foreign subsidies in all market situations
- All undertakings active/established in the EU that are involved in production/provision of goods/services or investment in the EU that have received a subsidy above EUR 200.000 over a period of three consecutive years;

Supervisory authorities:

- One single national supervisory authority; or
- Several national supervisory authorities in parallel; or
- European Commission

Redressive measures:

- Redressive payments to country providing the subsidy where suitable or feasible
- Otherwise, measures ranging from fines, to structural and behavioural remedies

Module 2 – Foreign subsidies facilitating the acquisition of EU targets

Scope:

- Foreign subsidy directly or indirectly facilitating acquisition of a significant share in an EU company with a turnover of more than e.g. EUR 100 million
- Received [three] years prior to or one year following the acquisition
- Additional and alternative national thresholds possible

Supervisory authorities:

- European Commission exclusively

Redressive measures:

- Binding commitments offered by acquirer; or
- Structural remedies; or
- Full prohibition of acquisition

Module 3 – Foreign subsidies in public procurement

Scope:

- Foreign subsidy above a certain threshold, directly or indirectly facilitating the participation in public procurement procedures in the EU
- Received [three] years prior to the application or one year following the expected completion of the contract

Supervisory authorities:

- Relevant national supervisory authority in cooperation with the European Commission

Redressive measures:

- Exclusion of subsidised operator from ongoing procurement procedure and possibly from future procurement procedures for a period of time (e.g. three years)

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II. Foreign subsidies in the context of access to EU funding

Foreign subsidies in the context of access to EU funding

- Economic operators should compete for EU financial support on equal footing across the EU's different internal and external instruments and implementation modes.
- EU funding should not contribute to favour companies that have received distorting foreign subsidies vis-à-vis other companies.

The White Paper identifies two main areas where foreign subsidies could cause distortions in the context of access to EU funding:

(a) Procurement; and

(b) grant award procedures.

Foreign subsidies in EU procurement

The exclusion grounds for EU procurement need to be adapted within a revised legal framework:

- Tenderers having received distortive foreign subsidies (e.g. above a certain threshold or in specific sectors) within the three years preceding the procedure or during the execution of the contract should be excluded
- Obligation for tenderers to notify whether they, including consortia members or subcontractors, have received/expect to receive eligible foreign subsidies
- Possibility for authorities to conduct preliminary market consultations to collect information on the markets and its key players in certain cases (e.g. substantial expenditure)
- Aligned with Module 3, which applies e.g. in case of shared management with Member States

Foreign subsidies in grant award procedures

Overall:

- Exclusion of applicants for grants who have received foreign subsidies distorting the award procedure
- Procedures and thresholds as in the case of procurement

In case of indirect management:

Increasingly, the EU entrusts the budget implementation to implementing partners (e.g. international organisations, international financing institutions, international public law bodies)

- ➢ Strong interest that these implementing partners mirror the approach to foreign subsidies outlined in the White Paper
- ➢ Some entrusted entities are subject to certain governance constraints and may be unable to fully implement these measures
- ➢ Stakeholders invited to make further suggestions

III. Initial Assessment

Broad definition of ‘foreign subsidy’

- Broad understanding as to the **provider of the subsidy**, including:
  - a government or any public body of a non-EU state
  - any private body entrusted with functions normally vested in the government or directed by a non-EU government.
- Non-exhaustive **definition of what constitutes a subsidy** including:
  - export finance beyond the scope of OECD guidelines,
  - (preferential) loans with conditions to procure from the third country,
  - support to ‘ailing undertakings’ that cannot obtain long-term financing or investment from independent commercial sources,
  - unlimited debt guarantees,
  - operating subsidies such as tax reliefs,
  - subsidies that facilitate acquisitions,
  - as well as any other types of subsidies that might be found to have a distortive impact
- **Low threshold**: any foreign financial contribution of EUR 200.000 over a period of three years.

Sweeping powers to authorities

- The Commission proposes ex officio powers for the competent supervisory authority to launch investigations even if there is no direct complaint from stakeholders.

- Investigative procedures would consist of a two-step system consisting of
  - A review
  - Possibly followed by an in-depth investigation

- In case of a lack of information or false information, authorities would be able to take a decision on the basis of the available information.

Remedies not automatic

- Any foreign subsidy must be found to have a distortive effect in order for remedies to be applied

- Distortive foreign subsidies are subject to an **EU interest test** where distortions are weighed up against a positive impact on EU public policy objectives (e.g. creating jobs, climate neutrality, environment protection, etc.)

→ It is currently unclear what exactly would be considered ‘distortive’ and what would be considered a ‘positive impact’

Burden of proof lies on economic operator

- Economic operator needs to comply with transparency obligations regarding foreign subsidies
- A lack of transparency or false information would be met by redressive measures

Module 1, 2 and 3:

The competent supervisory authority (Commission and/or Member States) is able to request information needed in case of an investigation.

Module 2 and 3:

Economic operators would be obliged to indicate at the time of any acquisition or tender application whether they have received/expect to receive foreign subsidies.

In line with BusinessEurope's China Paper

The White Paper addresses many of the level playing field issues highlighted in BusinessEurope's China Paper:

- **The approach is country-neutral, but Chinese companies could find themselves easy targets in investigations** due to the degree of state intervention in the Chinese market.
- While applicable to all types of enterprises, **it would particularly tackle hitherto poorly addressed SOE distortions.**
- **De facto reversal of the burden of proof:** This would address the lack of transparency, which has hitherto been one of the most problematic obstacles to tackling foreign subsidies.

Problematic issues

a) concepts are broad and may lead to different interpretations and implementation;

b) need to clarify potential overlapping with other existing procedures e.g. FDI screening, trade defence, state aid;

c) should not add additional administrative burden for companies or impact the time for the different decision-making processes by public authorities;

d) important not to give the impression that Europe is closing its market specially now that we need increased investments including Foreign Investments.

Questions to members

BusinessEurope will develop a response to the public consultation based on members' input.

- What are members' initial views on the White Paper?
- Are there any problems regarding the White Paper that members would like us to highlight?