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White Paper on levelling the playing field as regards foreign subsidies

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Contents

Introduction

On 17 June 2020, the European Commission (the "Commission") published its White Paper on levelling the playing field as regards foreign subsidies (the "White Paper"). The aim of the White Paper is to provide the Commission with new tools to address the potential distortive effects caused by foreign subsidies in the single market and to tackle foreign access to EU public procurement and EU funding. This has become particularly important for the Commission in current times, as EU companies may be weakened.

The White Paper is now open for public consultation until 23 September 2020 for all stakeholders to express their views on this matter. The input provided will be analysed by the Commission when preparing a proposal for a legal instrument, which should be approved in 2021.

White Paper on levelling the playing field as regards foreign subsidies

In its White Paper, the Commission explains that current instruments of EU law in the fields of state aid, trade, foreign investments and public procurement are deemed insufficient to address and remedy distortions in the EU internal market arising from subsidies granted by non-EU governments. These foreign subsidies that can take different forms (e.g. direct subsidies and cheaper financing) may be granted by non-EU countries to companies operating in the EU to promote their activities, enabling them to submit bids for public contracts at better prices or facilitate acquisitions of EU companies, among others. Therefore, the Commission considers that foreign subsidies may undermine the level playing field in the single market to the detriment of EU companies, which are subject to significant regulatory limitations with regard to the subsidies provided by EU Member States.

The formal implementation of any of the tools proposed by the Commission in the White Paper to address these issues could have a significant impact for foreign companies that wish to operate in the EU. In particular, state-backed firms of countries such as China that are increasingly growing in the EU could be significantly affected.

Proposed mechanisms

The White Paper proposes three different complementary tools to be at the disposal of the relevant authorities to address the mentioned concerns: (i) a general instrument to identify and deal with foreign subsidies; (ii) a specific merger control mechanism; and (iii) a specific public procurement mechanism. Finally, the White Paper proposes additional measures in relation to EU funding.

1. GENERAL INSTRUMENT

The first tool is intended as a general market scrutiny instrument to capture foreign subsidies above a threshold of EUR 200,000 provided over three consecutive years to a company active in the EU. It would allow the Commission and the relevant Member State authorities to act upon any information that a company in the EU benefitted from the foreign subsidy by imposing redressive measures (such as the repayment of the subsidy, the divestment of certain assets, the prohibition of certain investments or the publication of R&D results) if it causes a distortion in the internal market. The Commission indicates that certain categories of foreign subsidies including export financing, debt forgiveness absent a restructuring plan, unlimited state guarantees and tax reliefs would be more likely to cause a distortion in the market under certain circumstances. The relevant Member State authority would also analyse whether the subsidised activity or investment has a positive impact on the EU's public policy objectives, which could mitigate the distortion (for example, by creating jobs, achieving climate neutrality or digital transformation). This is referred to in the White Paper as the "EU Interest Test".

2. MERGER CONTROL INSTRUMENT

The second tool is intended to control acquisitions of EU companies by state-owned companies of non-EU countries or that are financed by a non-EU countries. It would consist of the implementation of a merger control mechanism under which any acquisition conferring control (or material influence) over an EU company, above a given threshold, made by an operator that has benefitted from the financial support of a non-EU government in the previous three years (or expects such contribution in the coming year), would need to be notified to the Commission. Unlike merger control rules that are only applicable to the acquisition of stakes conferring control, this notification would also be compulsory should the acquirer gain “material influence” in an EU company.

The White Paper proposes two thresholds:

- A quantitative threshold that would take into account the turnover of the target.
- A qualitative threshold that would also capture acquisitions of companies with a low turnover but with critical assets or high growth or technology development prospects.

As with current merger control rules, any transaction meeting the established thresholds could not be implemented until a decision on whether it distorts the single market is adopted. If the Commission considers that the transaction can distort the single market, it can subject the approval to commitments that would eliminate such distortion or, ultimately, prohibit the transaction.

3. PUBLIC PROCUREMENT CONTROL INSTRUMENT

The third tool is limited to public procurement. The White Paper proposes a mechanism whereby bidders of large contracts would have to notify the contracting authority of financial contributions exceeding a certain amount received from non-EU countries in the last three years (or expected to be received throughout the duration of the contract) either by them or by their partners in a consortium, their subcontractors or their suppliers.

The competent supervisory authority at Member State level would, in close cooperation with the Commission, determine whether the bidder effectively received a foreign subsidy. If the supervisory authority concludes that the bidder has received a foreign subsidy, the contracting authority would analyse whether it has distorted the public procurement procedure. If that is the case, the bidder would be excluded from the procurement procedure and could also be banned from participating in any other public procurement procedure for up to three years.

The White Paper proposes to adopt a similar mechanism for EU funding procedures, where funding is distributed through public tenders or grants.

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