An Eye on China – Brussels Gets Serious on Foreign Subsidies

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On 5 May 2021, the European Commission (***Commission***) has published its proposal for a Regulation on foreign subsidies distorting the internal market (***Proposal***) – eagerly and anxiously awaited both across Europe and internationally.

The Proposal aims at closing a perceived regulatory gap in the Single Market, which, according to the Commission, leads to an imbalance between the assessment of non-EU- and EU-subsidies: subsidies granted by non-EU governments currently go largely unchecked, while subsidies granted by Member States are subject to close scrutiny under the State aid rules. The new tool is designed to effectively tackle foreign subsidies that cause distortions and harm the level playing field in the Single Market in any market situation. The Proposal includes *two notification-based tools*: they cover concentrations as well as bids in public procurement procedures involving a financial contribution by a non-EU government. *The general market investigation tool* covers all other market situations, including greenfield investments or concentrations and public procurements below the thresholds, and would allow the Commission to start investigations on its own initiative and/or request ad hoc notifications.

The Proposal follows the Commission's White Paper from last June (see BLOMSTEIN briefing) which was subject to extensive consultations with stakeholders such as European industry associations, consumer organisations but also the American and Chinese chambers of commerce – the now proposed far reaching powers suggest that international stakeholders were not as successful in bringing their points forward as their European counterparts.

The explanatory memorandum accompanying the Proposal notes that the proposed regulation could have a negative economic impact on European consumers in the short run since it may lead to an increase in prices, although the Commission does not expect this to be very significant. In the explanatory memorandum the Commission also acknowledges that retaliation measures by third countries which perceive the new rules as hampering their companies could be expected.

Below is an overview of the three tools:

A parallel merger control regime for subsidised non-EU companies

The proposed new control regime for concentrations involving non-EU companies which have been granted subsidies by a third country is supposed to parallel the existing merger control regime under the European Merger Regulation (***EUMR***). Transactions that meet the filing thresholds would then face two parallel European merger control procedures when acquiring EU-based companies. The Proposal envisages a mandatory notification requirement for transactions that meet the following cumulative thresholds:

1. The turnover of the EU target exceeds EUR 500 million; *and*
2. The foreign financial contribution exceeded EUR 50 million in the three years preceding the deal.

As in the current merger control regime, notifiable concentrations must not be implemented before clearance. The procedural aspects shall also parallel the procedures under the EUMR. After the Commission receives a "complete notification", the Commission has 25 working days to review the transaction (phase I). If it has concerns that are not remedied in phase I, the Commission can open an in-depth 90 working day investigation. In its assessment, the Commission will examine foreign subsidies that directly facilitate a transaction assessing their distortive impact on the basis of the amount and nature of the subsidy, the economic activity and the situation of the markets concerned, according to the document. If the Commission establishes that a foreign subsidy exists and that it is distortive, it can balance the distortion with the possible positive effects of the subsidy to determine appropriate redressive measures or to accept commitments.

The parties concerned may offer commitments with a view to remedy concerns identified by the Commission. The Proposal includes a range of structural or behavioural remedies. Potential remedies include *inter alia* offering access to infrastructure or licensing assets under fair and non-discriminatory terms to an acquired infrastructure; reducing capacity or refraining from certain investments; and divestments of assets. The Commission can also require the purchaser to repay the foreign subsidy to the third country that granted it, including an appropriate interest rate. If no solution can be found, ultimately, the Commission will also have the power to prohibit the subsidised transaction.

Scrutiny of subsidised third-country-bidders in public procurement procedures

According to the Proposal, public procurement procedures involving subsidised non-EU bidders will also be subject to review: it includes the Commission's authority to investigate bids in public procurement procedures involving a financial contribution by a non-EU government, where the estimated value of the contract is equal or higher than EUR 250 million. When submitting a bid or a request to participate in a public procurement procedure, bidders shall notify the contracting authority of all foreign financial contributions received in the three years preceding the tender or confirm in a declaration that they did not receive any foreign financial contributions in these last three years. The contracting authority shall forward this information to the Commission, which will then have up to 60 days to carry out a preliminary review. Where the Commission has concerns, it can open an in-depth-investigation which shall take no longer than 200 days. If the concerns are not remedied (see above), the Commission will have the power to prohibit the award of the public contract to the subsidised bidder.

The (almost) "catch-all-element": General market screening

Thirdly, the Proposal envisages a general market investigation tool which would enable the Commission to start investigations on its own initiative (*ex-officio*) or request ad-hoc notifications. This would cover other types of market situations, such as greenfield investments or concentrations and public procurements below the thresholds. The new regime foresees the possibility of *ex officio* reviews of foreign subsidies, by first conducting a "preliminary review" on whether the financial contribution under examination constitutes a foreign subsidy and whether it is distortive.

The Commission would then, should it choose to continue the review, have the power to launch an in-depth investigation to gather additional relevant information to assess the foreign subsidy, and to allow the interested parties to exercise their rights of defence.

Next steps

The European Parliament and the Council will now discuss the Commission's proposal in an ordinary legislative procedure with a view to adopting a final text of the Regulation. Once adopted, the Regulation will be directly applicable across the EU.

While further changes to the Proposal can be expect in the legislative process, Brussels is clearly committed to getting this through, and foreign companies and European targets should factor in the proposed rules in their deal planning.

BLOMSTEIN is monitoring further developments and will keep you informed. If you have any questions about the potential impact of the Proposal on your company or your industry in relation to pending or future transactions, Max Klasse and Rita Zuppke will be happy to answer them at any time. Furthermore, should any questions regarding the Proposal's possible impact on public procurement procedures arise, please contact Pascal Friton and Laura Louca.