European Commission's White Paper on Levelling the Playing Field as regards Foreign Subsidies

Key Takeaway: The EU (and Member States) may be given new, far-reaching powers to tackle the perceived harmful effects of third-country subsidies benefitting businesses operating in the EU. Remedies could be imposed limiting participation in all sectors of the internal market, including prohibiting businesses from making subsidised acquisitions and participating in public procurement in the EU.

On 17 June 2020, the European Commission (the "Commission") published a White Paper on how to respond to third countries giving subsidies to companies active in the EU ("foreign subsidies"). In an effort to level the playing field, the Commission proposes new tools to address what it perceives as unfair competition from foreign players in the EU's internal market. The Commission considers that existing tools, in the areas of notably trade defence, competition law and public procurement, are insufficient to avoid distortions resulting from foreign subsidies. The proposed new tool box fits within the EU's new policy of "open strategic autonomy". It signals a more pro-active approach on the part of the EU in responding to unfair and abusive practices distorting the EU internal market and undermining the level playing field.

The envisaged new investigatory and enforcement powers of the Commission and authorities at Member State level could impact all third countries directly or indirectly giving financial support to economic operators in the EU, and affect all beneficiaries of such support in the EU across all economic sectors.

The White Paper defines a "foreign subsidy" as a financial contribution by a government or any public body of a non-EU country (including a private body entrusted or directed by a non-EU country's government) which confers a benefit on a recipient and which – reflecting a requirement of selectivity – is limited to an industry, individual company or group of companies. Under the White Paper's proposal, a foreign subsidy would cover: (i) foreign subsidies granted directly to companies established in the EU; (ii) foreign subsidies granted to a company established in a third country where those subsidies are used by a related party established in the EU; and (iii) foreign subsidies granted to a company established in a third country where those subsidies are used to facilitate an acquisition of an EU undertaking or participate in public procurement procedures. In essence, any undertaking directly or indirectly benefitting from subsidies of non-EU origin and seeking to access or otherwise operate in the EU market is likely to be affected by the proposed new "toolbox". Its implications for many clients are therefore potentially far-reaching.

The new "toolbox" is organised around three so-called "modules" addressing: (i) distortive effects caused by foreign subsidies in general; (ii) distortions caused by foreign subsidies facilitating the acquisition of EU companies; and (iii) harmful effects of foreign subsidies on access to EU public procurement and EU funding. Each of these modules envisages that the Commission and possibly authorities at Member State level would be given far-reaching powers in investigating and making a determination of the impact of foreign subsidies on the right to operate in the internal market.

Module 1 (*General review instrument*). This module concerns actual or potential distortive effects caused by foreign subsidies in general. It contemplates that the Commission or an authority of an EU Member State could investigate any type of foreign subsidy received by companies established or (in certain cases) active in the EU (subject to a *de minimis* exception for amounts up to a cumulative maximum of EUR 200,000 over a three-year period). Examples of foreign subsidies considered likely to create distortive effects would

include certain subsidies in the form of export-buyer financing, debt forgiveness or guarantees, tax relief, and subsidies directly facilitating acquisitions, while other types of subsidies may be shown to have such distortive effects based on an individual assessment. An investigation would focus on three main questions: (i) is the foreign subsidy capable of distorting the internal market; (ii) if so, does the foreign subsidy nonetheless have a positive impact within the EU or on a public policy interest recognised by the EU (a so-called "EU interest test", which the Commission alone could apply); and (iii) if the distortion outweighs any positive impact for the EU, what is the appropriate remedy?

Possible remedies under this module include prohibition of market conduct, divestment of assets, access or licensing obligations, prohibition of investments or subsidised acquisitions and even redressive payments to the EU or to the Member States. Under EU State aid rules, subsidies deemed to be distortive have to be paid back to the country which granted them. Given that the EU cannot order or enforce such a rule in respect of subsidies paid by a third country, Module 1 envisages a variety of alternative remedies available to the Commission and possibly authorities at Member State level.

To ensure the effectiveness of this instrument, authorities would have strong investigatory and enforcement powers, including the power to impose fines on companies for failing to provide relevant information or respect remedies, and to carry out inspections in the EU and even, subject to third-country agreement, in third countries. In the absence of cooperation, the authority could make its determination on the basis of the facts available.

Module 2 **(*Prior review of subsidised acquisitions*).** This second module focuses specifically on distortions that may be caused by foreign subsidies facilitating the acquisition of any undertaking established in the EU where the acquisition meets certain quantitative and qualitative thresholds. These thresholds could be based on turnover, the value of the transaction and/or the amount of the relevant support received from the non-EU government. In contrast to the standard applicable under the EU Merger Regulation, a transaction could be caught by these rules where "material influence" is acquired over another undertaking even where the degree of this influence falls short of control.

A company would need to notify a proposed acquisition meeting the above thresholds to the Commission, or possibly to an authority at Member State level, whenever it has benefitted from a financial contribution provided by any non-EU government within the three-year period preceding a planned acquisition (or will receive it in the following year). This notification obligation would arise whether or not the contribution amounted to a "subsidy" and whether or not it was specifically granted to finance the acquisition. The authority would conduct a potentially two phase investigation during which the implementation of the transaction would have to be suspended. At the conclusion of the investigation, the relevant authority could: (i) clear the acquisition unconditionally; (ii) adopt a conditional clearance decision based on commitments offered by the acquirer (in particular structural remedies); or (iii) prohibit the transaction. The authorities would have strong investigatory and enforcement powers, including the power to impose fines.

Similar to the approach under Module 1, the investigation would focus, first, on whether the acquisition would be facilitated by a foreign subsidy (requiring the causal link to be established between the support and the financing of the acquisition) and, second, on whether it would result in a distortion in the internal market. Subsidies that directly finance an acquisition would be considered to be particularly harmful and would therefore normally be considered to distort the internal market, whereas subsidies that *de facto* facilitate an acquisition by increasing the financial strength of the acquirer could be considered to have

distortive effects in certain circumstances. As the third step in the assessment, the EU interest test would also apply.

This notification and investigation would need to take place regardless of the requirements in respect of EU or national merger control or FDI screening. Given the suspension requirement referred to above, a prior ruling would be required before the transaction could be implemented.

Module 3 (*Prior review of subsidised participation in public procurement*). This third module addresses the perceived harmful effects caused by foreign subsidies on EU public procurement and, like Module 2, would introduce a mandatory prior notification system. Economic operators participating in public procurement procedures would need to notify, to the contracting authority conducting the procurement, financial contributions which they have received from non-EU governments within the last three years or which they are expected to receive during the execution of the contract. Certain thresholds in relation to the value of the contributions received and the value of the procurement could apply to determine when the notification obligation would be triggered.

As under Module 2, the notification would result – in this case after an initial review made by the contracting authority – in a possible two phase investigation primarily at Member State level but in cooperation with the Commission. During the investigation, the procurement contract could not be awarded to the notifying party.

If the investigation would show that there is a foreign subsidy distorting the public procurement procedure, an economic operator would be excluded from the ongoing procurement procedure and possibly also future procurement procedures during a period of three years (a remedy that does not currently exist where operators have received aid from EU Member States incompatible with the EU State aid rules). An excluded economic operator seeking to participate in future procedures would bear the burden of showing that it no longer benefits from a distortive foreign subsidy.

Module 3 could also be used to address the impact of foreign subsidies on access to various types of EU funding.

Next steps. The Commission has now initiated a public consultation procedure, inviting stakeholders to complete a questionnaire and share their views on the proposals in the White Paper. Stakeholders have until 23 September 2020 to submit comments to the Commission. Further information about the consultation procedure is available here.

Given the importance of the topic for different practice areas of the firm, Van Bael & Bellis intends to analyse the proposals in the White Paper and their implications in further depth in a subsequent client alert.

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