

Kluwer Competition Law Blog

‘The EU should not be a naïve open economy’ – Conference debriefing: Webinar White Paper on Foreign Subsidies after the public consultation

Lena Hornkohl (Deputy Editor) (University of Vienna, Austria) · Monday, October 12th, 2020

The public consultation for the European Commission’s [White Paper on Foreign Subsidies](#) closed on September 23 this year. Perfect timing to discuss the stakeholders’ feedback. Wolters Kluwer therefore organized a webinar on October 8, 2020, involving leading experts from the Commission, WTO, OECD, and private practice:

- Eddy De Smijter, Head of the International Relations Unit in DG Competition, leading the White Paper project
- Elisabetta Righini, Partner at Latham & Watkins in Brussels, and former Member of Cabinet of European Commission Vice-president Joaquín Almunia
- Roberta Piermartini, Chief of Trade Cost Analysis at WTO
- Thomas Wilson, Partner at Kirkland & Ellis, London
- Andrzej Kmiecik, Partner at Van Bael & Bellis, Brussels
- Chair: Paulo Burnier da Silveira, Senior competition expert at the OECD

The webinar focused on the question of whether there is a general regulatory gap regarding foreign subsidies. Also, the participants discussed the three Modules envisaged by the White Paper. For background to the White Paper and its Modules, see our recent [blogpost](#).

Is there a general regulatory gap that the EU needs to address?

Eddy De Smitjer started with a spirited talk on how Europe must remain an open economy and how important FDI is for Europe’s growth and employment. However, he then quickly paddled back by stating that the EU cannot be a “naïve open economy”. Meaning: if you are active on the EU’s internal market, you should play by our rules and compete on the merits. While the EU can already intervene through merger and antitrust rules, this is not the case with foreign subsidies *per se*, he stressed. EU state aid rules only apply to Member States’ public funding, not third country subsidies. Trade defence, FDI regulation (fun fact: the FDI Regulation applies as from [yesterday](#)), and public procurement rules are also insufficient. Today, companies can use foreign subsidies to undermine the level-playing field of the EU internal market.

Andrzej Kmiecik pointed out that since [Siemens/Alstom](#), the EU Commission is (again) under a lot

of pressure from the Member States to put forward an EU industrial policy. While the White Paper does not automatically create European champions, it addresses some criticism of the Member States. (Agreed: It clearly addresses the foreign influence issue. However, it is not an instrument of industrial policy)

Elisabetta Righini took us through the last years, which some may describe as the [failure of multilateralism](#) – a point *Andrzej Kmiecik* shared. After the Doha Round, multilateral discussions on subsidizations got stuck. Therefore, the EU turned to bilateral and regional agreements (also for [competition and state aid policy](#)). The [Singapore Agreement](#) or [CETA](#) contain rules on subsidies, which are very close to EU state aid rules. (That being said, in the European Neighbourhood Policy, we can see even further exports of the EU acquis on state aid, such as in the [Ukraine Association Agreement](#)).

Roberta Piermartini called for an update on the subsidies provisions in multilateral trade agreements, in particular for services. She provided a simple economic theory for this: the negative cross-border spillovers created through subsidies that are not sufficiently covered by existing agreements. Subsidies attract so much attention now because they are used heavily to tackle crises. Subsidies increased after the 2008/2009 financial crisis and also increase today during the COVID pandemic. Furthermore, with the spread of global value chains, it is harder to control where subsidies will have their effect. In addition, digital technologies lead to negative profit shifting and cross border effects. *Roberta Piermartini* stressed that the WTO needs to play an active role in all of this, at least as a forum for discussion.

So, where do we stand with the suggested modules of the White Paper?

Module 1: General instrument to capture foreign subsidies – the favourite

The majority of the panel clearly favoured Module 1 of the White Paper, the general instrument to capture foreign subsidies. *Eddy De Smitjer* explained that, in the end, it is all about exporting the EU state aid regime. At the moment, companies who receive state aid from a Member State are at a disadvantage compared to companies that receive foreign subsidies. The EU normally has rigorous state aid rules. (He is right about that, well, unless we are in one of the many crises and large exemptions are being granted through temporary or not so temporary frameworks potentially [harmful to equality in the internal market](#)). Those rules do not apply to foreign subsidies – if you receive foreign subsidies, you are better off.

Nevertheless, discussants raised some concerns. *Andrzej Kmiecik* stressed that the EU and the Member States need to be careful about their already existing commitments under international agreements (such as FTAs, BITs, [GATT/GATS](#), [Agreement on countervailing measures](#)). Those commitments contain rules on anti-discrimination and expropriation as well as most-favoured-nation clauses. If certain countries have the feeling that they are *de jure* or *de facto* discriminated by the EU under this Module 1 *ex-post* control, repercussions under the existing agreements are likely. *Elisabetta Righini* also raised the point that the EU's defensive standpoint towards subsidies could backfire – is it beneficial for the EU economy if third countries would act the same towards our companies? *Eddy De Smitjer* intervened and assured that he absolutely intends to “respect the WTO”.

Elisabetta Righini criticized the possibility that, next to the European Commission, also the

Member States are expected to examine foreign subsidies under this Module 1. State aid, on the other hand, is an exclusive EU competence. Why mix competences here? Such an approach could lead to a different assessment of potentially the same measure. Further, it will be very difficult to obtain information from the undertakings concerned. In merger control, companies are more or less happy to collaborate with competition authorities to get the merger cleared. For state aid, and Module 1, it will be very difficult to obtain robust evidence. Meaning: we need a whole new system of procedural instruments, rights, presumptions comparable to the state aid regime. She raised the question if this is not too much and if we would not be better off by finding common ground with our international partners. (Multilateralism, not dead after all?)

Module 2: Foreign subsidies facilitating the acquisition of EU targets – a chilling effect on M&A in the EU?

Criticism came from *Thomas Wilson* for Module 2 on the *ex-ante* notification of foreign subsidies that facilitate the acquisition of EU firms. He fears that it will create a (pandemic induced: further) chilling effect on M&A in the EU. While it is clear that we are only at the White Paper stage, he stresses that Module 2 needs to be made more precise. First of all, it needs to be clearer what distortions Module 2 aims to cover. He particularly criticized that Module 2 seems to lack a requirement concerning competitive relationships for some types of envisaged distortions. This would go far beyond EU merger control today. Second, the link between subsidy and distortion needs to be established, which, in *Thomas Wilson's* mind has to be a direct link. Third, there must be further guidance by the Commission on the EU interest test. This way, the outcome of the Module 2-test remains predictable. Fourth, he was very critical concerning the jurisdictional criteria of 'material influence'. It is extremely hard to fulfil the test. Concepts existing at national level, f.ex. in Germany, cannot necessarily be replicated on EU level, as long as Module 2 does not require a competitive relationship. Lastly, the Commission needs to address the parallel notification issues to avoid procedural inefficiencies in a more clear-cut manner.

At this point I (as a member of the audience) asked whether Module 2 is necessary in the first place. Merger case law exists, where foreign subsidies and foreign ownership are already addressed, such as *CRRC/Vossloh* in Germany. Why create another instrument with another notification requirement, next to the existing merger control and FDI screening? *Thomas Wilson* and *Andrzej Kmiecik* responded with EU examples where foreign acquisition subsidies already played a role in EU Commission merger proceedings, such as the 1997 *Boeing/McDonnell Douglas* merger. The Commission will have to be creative and address all these concerns. We will likely see some changes in further Commission proposals for Module 2 if it stays after all.

Module 3: Foreign subsidies in public procurement procedures – not the center of attention

Module 3 would require EU public buyers to exclude from public procurement procedures all companies that have received distortive foreign subsidies. It was only discussed briefly. A participant from the audience pointed out that a trade-off between consumer welfare and industrial policy would be necessary for Module 3. Excluding companies who obtained foreign subsidies from bidding will reduce the number of competitors and therefore, may raise the price.

Elisabetta Righini again focused on the question of discrimination and repercussions: if we apply

Module 3 to any Member State or EU public funding, EU public procurement as we know it today would be over. *Eddy De Smitjer* raised the point that the existing [EU Procurement Regulations](#) discriminates towards state aid: if state aid allows a company to give a low bid, this bid is excluded – which is not the case for bids made possible through foreign subsidies.

Next steps for the White Paper

The consultation is over and the Commission is skipping the green paper-stage. This means that the submissions now need to be addressed, and a proper proposal needs to be drafted. *Eddy De Smitjer* took many notes during this webinar that will hopefully, one way or the other, find their way into the proposal. Even though the formal consultation has ended, he stressed that his unit still welcomes comments (COMP-FOREIGN-SUBSIDIES@ec.europa.eu), and he is happy if the debate keeps going. The coming month could be interesting in that regard with the ongoing pandemic, the US elections, and the UK's transition period after Brexit that is coming to an end this year and is leaving UK-EU relations in uncertainty. Will multilateralism shine again one day, or do we see a further rise in trade wars and protectionism? Much to write and talk about (on the blog or other webinars)!

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