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CLIENT ALERT

European Commission White Paper on Levelling the Playing Field as Regards Foreign Subsidies

June 18, 2020

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1 INTRODUCTION

The European Commission ("Commission") has published a White Paper on "levelling the playing field as regards foreign subsidies" ("Paper"). The Paper is the discussion basis for comments that can be provided until September 23, 2020 as part of a public consultation process. Based on the feedback provided, the Commission will present appropriate legislative proposals to be adopted by all member states. The Commission aims at providing a draft of legislative proposals in 2021.

The Paper aims at closing a perceived regulatory gap which arises when non-EU authorities grant subsidies to undertakings which compete in the European market. Several European and international rules, including the WTO rules on subsidies and anti-subsidy duties, govern public support granted by EU Member States designed to prevent these contributions from leading to competitive distortions in the European market. Other than the rules which allow the EU to impose anti-subsidy duties to level the playing field for EU companies there currently does not exist a mechanism which allows for the review of a financial contribution by a government or public body of a non-EU State to a company which competes in the EU.

The measures proposed in the Paper would have a significant impact on transactions in the European market with a non-EU party, as they will add another administrative regulatory review layer (whether at the EU or at the national level) to the acquisition process, possibly resulting in delays caused by a standstill obligation pending review.

2 SCOPE

- Three fields of potential distortions by non-EU subsidies have been identified, and the Paper presents a potential framework to address these areas (categorized in three modules):
  - Module 1: distortive effects caused by foreign subsidies provided to an economic operator in the EU market;
  - Module 2: distortive effects caused by foreign subsidies in the context of acquisitions of EU companies; and
  - Module 3: distortive effects caused by foreign subsidies in the context of EU public procurement procedures.
- The Paper also sets out a general approach to foreign subsidies in the context of EU funding.
- It is not entirely clear how the three modules relate to one another. It would seem that the implementation of the three modules could require legislation in a variety of different areas ranging from foreign investment review to competition law and the (national) rules on public procurement. It will also be important to ensure that any such rules are in line with the WTO rules on subsidies.
- In this context "distortion" shall include both actual and potential distortions of the proper functioning of the internal market. The Paper contains a non-exhaustive list of foreign subsidies that would be considered distorting to the internal market, e.g. subsidies in the form of export financing, subsidies (such as debt forgiveness) to ailing undertakings, operating subsidies in the form of tax relief and subsidies directly facilitating an acquisition.
- Several items that will be relevant for the envisaged legislation have been left open and have not been fully described, yet will be crucial to understanding the scope of the actual regulation that will come out of the initiative:
  - *What types of transactions would be subject to such a regulation?*
  - *Which authority or authorities will conduct the review (EU or potentially multiple national authorities*?
  - *How does the review relate to other regulatory reviews, especially foreign investment review or merger review?*
  - *If transactions cannot be implemented prior to clearance, how long will the review process take?*
  - *What will be the criteria for assessing whether a foreign grant of aid is ok or will require remedies?*

- *How will this analysis be viewed by the foreign states concerned and will this likely trigger a similar administrative burden for EU investors abroad?*

3 SUMMARY

Module 1 – General instrument to capture distortive effects of foreign subsidies

- Module 1 addresses foreign subsidies (financial contributions that grant a benefit) that cause distortions in the internal market and are provided to a beneficiary that is established or, in some instances, active in the EU.
- Foreign subsidies in this context shall not include payments below EUR 200,000 within three years.
- Module 1 would "include acquisitions facilitated by foreign subsidies and/or market behavior by subsidized bidder in public procurement".
- In case the foreign subsidy is capable of distorting the internal market, the competent supervisory authority shall conduct a two-step procedure with a preliminary review of a possible distortion and an in-depth investigation.
- The supervisory authority shall have adequate (yet to be defined) investigative tools to obtain the relevant information in this context.
- If the party investigated does not cooperate to the best of its abilities, the decision can be taken on the basis of the facts available.
- Should the supervisory authority find that the acquisition is facilitated by the foreign subsidy and distorts the European market, the party can commit to mitigating the distortion or the authority can impose repressive measures on the party such as:
    - divestment of certain assets,
    - prohibition of certain investments,
    - third-party access to a certain asset,
    - licensing, or
    - the institution of repressive payments.
- However, the supervisory authority could also conclude that the subsidized activity or investment has a positive impact which outweighs the distortion and not pursue the investigation further.

- Repressive measures could be imposed only within ten years after the subsidy was granted.

Module 2 - Foreign subsidies facilitating the acquisition of EU companies

- This module aims at ensuring that foreign subsidies do not confer an unfair benefit on their recipients when they are acquiring stakes in EU companies, either directly by linking a subsidy to a given acquisition or indirectly by increasing the financial strength of the acquirer.
- A "significant" but non-controlling stake shall already be subject to the review procedure; the exact threshold has not yet been determined.
- Under Module 2, companies benefitting from a financial contribution of a non-EU government would need to notify their acquisitions of EU companies, above a given threshold, to the competent supervisory authority.
- "Financial contribution" under this Module 2 shall be defined more broadly than foreign subsidy (does not require benefit).
- The relevant time period for receipt of a subsidy that triggers the review shall be three years prior to the transaction and one year thereafter.
- The acquisition target in the European market shall have a certain significance that is to be determined by a qualitative measurement of the assets likely to generate a significant turnover in the EU and a quantitative measurement of the turnover in the EU (suggested threshold is EUR 100m).
- Transactions could not be closed whilst the review is pending.
- Should the supervisory authority find that the acquisition is facilitated by the foreign subsidy and distorts the European market, it could either accept commitments by the notifying party that effectively remedy the distortion or, as a last resort, it could prohibit or rewind the acquisition.
- However, the supervisory authority could also consider that the subsidized activity or investment has a positive impact which outweighs the distortion and not pursue the investigation further.

Module 3 - Foreign subsidies in EU public procurement procedures

- Module 3 addresses the harmful effect of foreign subsidies on the conduct of EU public procurement procedures. Foreign subsidies may enable bidders to gain an unfair advantage in regards to EU public procurement procedures, for example by submitting bids below market price or even below cost.

- Under Module 3, a mechanism is proposed whereby bidders would have to notify the contracting authority of financial contributions received from non-EU countries.
- The competent contracting and supervisory authorities would then assess whether there is a foreign subsidy and whether it made the procurement procedure unfair.
- In that case, the bidder would be excluded from the procurement procedure.

Foreign subsidies in the context of EU funding

- The Paper intends to point out ways to address the issue of foreign subsidies in the case of applications for EU financial support.
- All economic operators should compete for EU funding on an equal footing. Foreign subsidies may, however, distort this process by putting the beneficiaries of such subsidies in a better position than other applicants.
- The White Paper proposes options to prevent such unfair advantage. Among others, in the case of funding distributed through public tenders or grants, a procedure similar to the one foreseen for EU public procurement procedures would apply.
- It shall be ensured that international financial institutions that implement projects supported by the EU budget, mirror the approach for foreign subsidies.

4 OUTLOOK

As noted above, the current proposal is – for now – merely a white paper, in other words only a study of the feasibility of a potential regulatory proposal, and it will take several years to mature into actual regulation. Companies, associations and other interested parties can submit comments until 23 September 2020. Subsequently, the EU Commission will evaluate the responses, a process that can take a year and sometimes longer. If the EU Commission receives positive feedback to the Paper, it will likely start a legislative process and eventually present draft legislation to the EU Member States and the EU Parliament for adoption, a process that will typically take a year or more to complete.

Following the tightening of the EU framework for foreign investments in Europe, which has already been picked up by the German government, the proposed legislation will – if implemented along the lines of the Paper – subject various types of international transactions by non-EU investors to additional regulatory review, with likely delays to closing and significant additional cost. The preparation of such transactions would then also require a thorough review of the investors' financial resources, whether these include what the legislation will finally define as subsidies and, if subsidies have been granted, the impact on the documentation, time frame and final success of the transaction.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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