Update State aid

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The new White Paper – EU combats distortions of competition by third states

Michael Vetter, LL.M. (Univ. of Miami)
Dr. Christoph Schork, LL.M.

In June, the European Commission has published the "White Paper on levelling the playing field as regards foreign subsidies". For the first time that the European Commission has brought together State aid and investment control as well as trade defence instruments. Companies coming from third countries can expect costly and lengthy examination procedures in M&A transactions, but also new hurdles for other activities in the internal market.

Problem: Activities of subsidised non-EU companies in the internal market

In the White Paper, the European Commission takes up on an old idea: The concern about sovereign wealth funds, which acquire up European companies with the financial support of their domestic state. Today, the focus is more on state-subsidised companies. The starting point here is to combat distortions of competition in order to create a level playing field in the internal market. In addition to critical acquisitions of EU companies by non-EU companies, the European Commission has also identified the award of public contracts to those companies as problematic because only EU companies must comply with European State aid law.

European State aid law not applicable to subsidies granted by third states

The prohibition of State aid in Article 107 TFEU applies only to aid granted by the EU and its Member States. Although Art. 107 (2) and (3) TFEU allows exceptions, the overall aim is to create a level playing field for all market participants in the internal market. The State aid rules do not apply to subsidies granted to companies from outside the EU by their domestic state. To fill this gap, the White Paper uses a broad concept of "subsidies from third countries". This means that any financial contribution by state actors from third countries are included in the definition.

Criteria to assess subsidies from third countries

The European Commission suggests various criteria to assess whether a third country subsidy distorts competition in the internal market:

- The relative amount of the financial contribution (in relation to the target to be acquired, the tender volume, etc.),
- the market situation, e.g. degree of market concentration, existence of overcapacity, market development,
- the size and market position of the beneficiary,
- the market behaviour of the beneficiary, e.g. outbidding other competitors in transactions, underbidding in tenders.

In this context, the European Commission also wants to take into account any links between the subsidy and the market position of the company as well as its market situation in its domestic market. These "negative" criteria should then be weighed against positive criteria. These are, for example, the EU's objectives in climate and environmental protection, job creation, digitisation projects etc. A subsidy should only be regarded as permissible if it could also be approved in the EU.

The EU's existing possibilities to address such subsidies through trade defence instruments are limited to subsidised products and do not apply to subsidies for services or to the acquisition of EU companies. The White Paper therefore proposes three new instruments:

Instrument 1: Assessment of market distortions by third state subsidies

The **first instrument** is an assessment of market distortions by third state subsidies, which is based on the prohibition of abuse under competition law. The competent competition authority can investigate in the event of respective complaints. The decisive factor is the existence of a subsidy from a third country - this also includes companies based in the EU and online traders operating in the EU if they receive subsidies from third countries. The intervention threshold is low, namely at the level of *de minimis* aid: EUR 200,000 in three fiscal years. To remedy the anti-competitive situation, the competition authority could, among other things, order the sale of assets, prohibit certain investments or order to reduce the capacity and market presence of a company.

Instrument 2: State aid merger control

As a **second instrument,** the European Commission proposes an extension of EU merger control. In contrast to the first instrument, this instrument assesses the effects of a transaction on the market structure. A subsidy must not give the beneficiary company from a third country an advantage for acquisitions vis-a-vis other interested parties. This approach is familiar from aid in the context of the COVID-19 pandemic – here too, the funds obtained must not be used to acquire other companies. As a threshold, the European Commission has set a turnover of only EUR 100 million. There are qualitative criteria for companies with less turnover expecting rapid growth in the future. The European Commission proposes a review period of three years prior to the transaction and one year thereafter. As in merger control, a prohibition to implement a transaction should apply until the assessment by the competition authority is completed. The Commission could then either clear or prohibit the transaction, or a company could offer commitments (e.g. the divestment of certain parts of the company).

Instrument 3: Assessment of subsidies in context of procurement procedures

With a **third instrument**, The European Commission proposes to place a special focus on public tenders. Subsidies by third countries threaten to distort competitive conditions in the internal market by benefitting non-EU companies in tenders, e.g. by allowing them to offer lower prices. Non-EU companies will have to disclose when submitting their bids whether (and if so, to what extent) they have received subsidies in the last three years. The period for the competition authority to review tenders runs until the year following the year in which the contract is fulfilled. In case of infringements, the White Paper provides for a three-year exclusion from public tenders.

Conclusion

With its White Paper, the European Commission has proposed far-reaching instruments to assess subsidies by third countries. Implementing these plans would require an expansion of the capacities of the competition authorities. Even if only partially implemented, especially companies from outside the EU (but also EU companies receiving subsidies from third states) would be threatened with a huge administrative burden for every activity in the internal market. While the competition authorities take action when there grounds for suspicion and have far-reaching rights of examination and inspection during the proceedings, the burden of proof lies with the companies concerned that they have acted in conformity with the EU State aid rules. Non-EU companies must therefore be prepared for lengthy and costly procedures.

The consultation phase will continue until 23 September 2020. Comments to the European Commission can be submitted here.

Further information

Your contact

Lawyer
Michael Vetter, LL.M.
T +49 211 600 55-535
F +49 211 600 55-530
m.vetter@heuking.de

Lawyer, Partner
Dr. Christoph Schork, LL.M.
T +49 221 20 52-507
F +49 221 20 52-1
c.schork@heuking.de

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