AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Instrument on foreign subsidies

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and U.S. positions on business matters. Aggregate U.S. investment in Europe totalled more than €3 trillion in 2019, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@AmCham EU.eu • AmCham EU.eu • European Transparency Register: 5265780509-97

Executive summary

With its proposal for an instrument on foreign subsidies, the European Commission seeks to resolve gaps in its current legal powers in relation to distortive foreign government subsidisation of companies. The White Paper is a positive step towards this objective.[1] As American businesses invested in Europe, we share our perspectives on the White Paper and aim to ensure that future proposals on non-EU subsidies, acquisitions of EU assets by companies in receipt of non-EU government funding and public procurement bids from third country entities are balanced and proportionate.

To that end, we have set out the main areas for refinement that we have identified in the White Paper. In summary, the main issues include:

1. **Interplay of new rules with existing requirements:** (merger review, foreign direct investment [FDI] screening, etc), as well as key concepts and procedures, in order to minimise any potential compliance burden on the wider business community.
2. **Definition of foreign subsidies:** clear definitions, aligned with state aid rules, of which subsidies are to be considered distortive and which subsidies are more likely to have a negative impact on the Single Market. This should ensure that companies receiving foreign subsidies are not subject to a higher standard than companies receiving subsidies from an EU Member State.
3. **Ex-post / case-by-case and ex-officio:** consideration of the benefits of a case-by-case mechanism that would enable the Commission to focus its efforts on the most impactful cases, while minimising the risk of unnecessary and disproportionate compliance burdens for companies that are not in the intended target group of actors.
4. **European Commission to have sole competence:** of review for cases of general distortions and acquisitions. Such reviews can then take place on the basis of a complaint or ex-officio; which is particularly important for investigations into general distortions.
5. **No ex-ante notification requirement for acquisitions:** inclusion of any such requirement must set clear thresholds to ensure it only captures those transactions that are most likely to be distortive and that will not otherwise be addressed under EU or international rules. This also includes further clarifying the 'link' between the state aid received and the acquisition.
6. **Public procurement:** further consideration of inclusion of public procurement in scope. The objective to capture abnormally low tenders which benefit from foreign state support is sound. However, the proposal as presented in the White Paper may prove ineffective in capturing subsidised tenders while also leading to more complex and costly compliance systems for all businesses. The objective may be better achieved through a change in public procurement rules.

[1] European Commission, 'White Paper on levelling the playing field as regards foreign subsidies' COM (2020) 253 final, hereinafter referred to as 'White Paper'.

Introduction

The American Chamber of Commerce to the EU (AmCham EU) strives to facilitate business relations between the US and the EU. We represent American companies committed to and invested in Europe, advocating for their fair treatment across the EU single market. We therefore have an important stake-holding in the matter at hand. With this paper, we aim to ensure that future proposals on non-EU subsidies, acquisitions of EU assets by companies in receipt of non-EU government funding and public procurement bids from third country entities are balanced and proportionate.

The paper first sets out AmCham EU's general remarks on the Commission's White Paper, and how it can be further refined to more effectively achieve its objective of closing the gaps in the EU's legal powers. It then moves to the three Modules delineated in the White Paper and offers AmCham EU's perspectives on the issues addressed in each of these Modules. The paper then concludes with the areas where AmCham EU sees most room for refinement in the European Commission's work, highlighting elements for further consideration in the drafting process.

General remarks

We agree with the objectives the Commission is seeking to achieve, namely to resolve gaps in its current legal powers in relation to distortive foreign government subsidisation of companies. Such practices are distortive of competition in the single market and negatively impact both EU and non-EU companies subject to the EU state aid rules and who operate in the EU on market-economy terms.

There are, however, a number of areas in which AmCham EU believes the proposals as set out in the White Paper need to be further refined.

Firstly, more clarity is needed on how any newly proposed framework would interact with existing European requirements, notably competition rules as well as national and EU FDI screening. The Commission should also pay careful attention to align the new rules on foreign subsidies with EU state aid rules in order to ensure that the EU does not impose a stricter framework for foreign subsidies than for its own state aid rules. In view of the ongoing international debate around the policy concerns to be addressed with the new EU instrument, the Commission should equally consider the interplay between new domestic rules and the potential evolution of international law in this area; be it under World Trade Organization (WTO) rules or under bilateral EU trade agreements.

Secondly, some of the key concepts still need to be further clarified and delineated; in particular the definition of distortion. The Commission should clearly define distortion, evidence of distortion and the link between subsidies and such distortion. This should form the basis of the framework that drives the identification, assessment and redressive measures of foreign subsidies. Otherwise, it could raise issues of practical application and present a potential source for legal challenges. Further consideration is also needed to determine the threshold for suspicion of distortion in order to open an investigation in a manner that both ensures the Commission's ability to act and also provides legal certainty and predictability for companies.

Thirdly, the Commission should consider the benefits of an ex-post mechanism. This approach would enable the Commission to address the stated concerns whilst limiting the risk of unintended consequences for the wider business community. Applying an ex-post model as considered in the White Paper's Module 1 would ensure focus on those most problematic cases and avoid creating unnecessary new procedures such as the notification scheme considered under Module 2. Remedies as considered in Module 1 proceedings could then address future behaviour or mitigate risks. AmCham EU also believes that the Commission should be solely competent for these

ex-post reviews, as is the case with the EU state aid rules to ensure an effective system in line with the single market.

Regarding acquisitions specifically, we are concerned that the required notification system for foreign investments is too broad. We agree with the political concern that current FDI screening in Europe does not address the issue of distortion. However, we believe that further work is needed to target the specific transactions that raise such concerns in order to avoiding significant and disproportionate additional burdens on companies that do not form part of the intended target group of actors who actively seek to distort the terms of operation within our market-economy. We remain unconvinced that a notification system is required as opposed to an ex-post oversight.

As far as public procurement is concerned, we agree with the objective to capture abnormally low tenders which benefit from foreign state support. However, we are concerned that the proposal as presented in the White Paper would lead to all companies bidding for public contracts having to file self-declarations as the scope of the notifications also cover the bidder's subcontractors and suppliers. Whilst we accept that procurement may need to be addressed separately from a general foreign subsidies instrument, we urge the Commission to reconsider the basic tenets of such an instrument from what was proposed in the White Paper. This includes considering whether the issue could be addressed through a change to EU public procurement rules.

Module 1: General market distortions ('Module 1')

Module 1 gives the European Commission a broad margin of action. This will be important for the instrument to prove effective but equally necessitates a solid, clear and consistent legal framework.

When seeking to outline the details of the process, the Commission should make sure to address and avoid unintended consequences for the wider business community.

This first and foremost entails defining in a clear manner which subsidies are to be considered distortive and which are more likely to have a negative impact on the Single Market. As is the case under the WTO rules, we agree that there should be certain forms of subsidies that should be considered more likely to cause distortion, (eg, export credits outside Organisation for Economic Co-operation and Development [OECD] guidelines in this regard are particularly important and should be presumed distortive). These should be clearly defined in the regulation to provide business certainty. Any further revision of the definition of 'foreign subsidies' should enable the EU to address distortions caused by state support that would otherwise fall outside of the limited remit of the WTO rules (eg, state subsidies for litigation against foreign companies). Such further revisions should remain aligned with the concept of state aid under EU law to ensure that companies receiving a foreign subsidy are not subject to a higher standard than companies receiving a subsidy from an EU Member State.

Secondly, to safeguard the Single Market and prevent overlapping potentially conflicting procedures, AmCham EU has a preference for the Commission to be the sole competent authority exercising the power laid out in Module 1. The 'EU interest test' is to be conducted with a perspective that extends beyond that of a Member State. That assessment, as the proposal stands now, is reserved for the Commission. Ensuring that the Commission has exclusive competence offers a consistent and predictable approach. It is highly unlikely that a company receiving foreign state aid, the amount of which would warrant an investigation, could produce effects confined only to a single EU member state and without impact on the single market. It is therefore essential that the Commission is given sufficient resources to supplement its requisite expertise to investigate market distortions resulting from foreign aid.

If the Commission is not granted exclusive competence by the EU Member States in the implementing legislation, we would support at the very minimum the Commission gaining exclusive powers where more than

one Member State has begun an investigation on a connected matter. Only such an approach can guard against several national authorities simultaneously enforcing Module 1 against one entity and thus avoid any risk of fragmented, conflicting decisions. Where competence is shared, the legislation should establish minimum coordination rules, timelines, processes and best-case practice sharing mechanisms. Practices developed by the European Competition Network (ECN) should also be drawn upon, including an 'exhaustion principle'.

AmCham EU highlights the importance of and voices support for granting *ex-officio* powers to the Commission. This will enable the Commission to focus its scarce resources in areas where it can impactfully align EU industrial policy. AmCham EU members' experience with trade defence investigations shows that the requirement for an investigation to be triggered by formal complaints and by representatives of a sizeable proportion of the relevant EU sector is a significant barrier to the invocation of such instruments. Potential complainants are reluctant to seek recourse from the Commission under these instruments as they fear retaliation by (some) non-EU states.

We agree with the two-stage process which allows the Commission to focus attention on significant cases. We reiterate to the Commission the need for relatively swift processes with clearly identified timelines, transparent procedures and procedural checks and balances. The procedure should learn from the pros and cons of the best practices of investigative measures available in competition proceedings whilst providing safeguards against phase 2 investigations being continually extended without an appeal mechanism.

We further agree that the competence to carry out on-site inspections should be extended to this area of enforcement in accordance with rules of due process. The Commission should take care, however, that a lack of evidence arising from such a fact-finding mission should not automatically conclude there is no foreign state aid. The Commission would only have jurisdiction for such inspection within the EU and key information held in other jurisdictions may be inaccessible. The Commission therefore needs to think about how it may otherwise obtain information and evidence, including - but not limited to - by way of cooperation with other countries. It is important that the design of the system allows for proportional evidence gathering.

Distortive impact from strategic acquisitions ('Module 2')

AmCham EU supports the creation of a European-wide, harmonised tool to prevent or remedy distortions following from strategic acquisitions by companies benefitting from foreign state aid. The recent European Court of Auditors report on Chinese State-owned Enterprises' (SoEs) FDI in Europe illustrates the issue.[2]

We are, however, concerned that the current proposals for Module 2 could unintentionally lead to a broad notification requirement. This would create additional disproportionate administrative burdens on companies. Companies not in the intended target group may feel compelled to notify on a precautionary basis because it is unclear when an acquisition could be considered to benefit from foreign subsidies. As the thresholds for mandatory notifications are not yet defined it is difficult to adequately assess the impact of the proposals and their consistency with current merger control thresholds. However, such consistency dictates that an obligation to notify should only arise where the subsidised acquisition entails the possibility of exercising 'decisive influence' over the target company. The Commission is right to note the complexity of assessing if and when indirect subsidies have a meaningful impact on the internal market.

It is important to have further clarification on subsidies that 'indirectly by de facto increase the financial strength of the acquirer' to avoid unrelated activities outside of the EU creating unnecessary barriers for companies.[3] As the White Paper reads, where the acquirer is part of a large international group it will have to be aware of any

[2] European Court of Auditors 'Review No 03/2020: The EU´s response to China´s state-driven investment strategy' (2020).

[3] White Paper, 4.2.1.

possible 'foreign subsidy' received by any company of its group anywhere in the world during the last three years or that is expected to be received in the coming year – this risks creating significant administrative burden for companies.[4]

The Commission should therefore assess whether it could not more effectively utilise the investigatory powers of Module 1 and review transactions only on a case-by-case basis; either *ex officio* or based on complaints from third-party market participants. While preferable to investigate prior to closing, the opening of post-transaction investigations should be possible within a limited period (eg, three months) after closure. A case-by-case approach would allow the Commission to focus on those transactions that are most likely to be distortive of the Single Market, without risking imposing significant additional burdens on companies and creating legal uncertainty. This would also be more in line with the EU state aid framework, where the beneficiary of possible state aid is under no obligation to notify any acquisition it intends to enter into simply because it may be the recipient of an aid. Alternatively, it could be established that only those companies which are subject to a Module 1 procedure would be under the obligation to notify any acquisition of an EU target they intend to make during the time Module 1 proceedings are ongoing.

If the Commission concludes that it requires a mandatory ex-ante notification system, it must set clear thresholds and only target transactions that are most likely to raise potential concerns and not otherwise addressed under EU or international rules. Additional burdens on companies that are not part of the intended target group of actors who actively seek to distort the terms of operation within our market-economy must be avoided. A lack of clear thresholds will result in an overwhelming number of irrelevant notifications where companies unable to adequately self-assess exercise due caution.

The Commission should therefore consider how best to set the relevant thresholds to ensure it captures those transactions that are most likely to be distortive and clarify the 'link' between the state aid and the acquisition. Any connection between state aid and an acquisition should distinguish between the government making funding specifically available to undertake a given acquisition and where the acquirer is otherwise generally subsidised which should be addressed under Module 1.

Finally, if the Commission does decide to further develop a Module 2 type tool and not roll reviews of acquisitions into Module 1 on a case-by-case basis, we support granting sole competence to the Commission.

Distortive impacts on public procurement ('Module 3')

AmCham EU fully supports the intention and objectives of the proposed Module 3. Public procurement is an area where action is easily justified and is a logical extension of exclusion grounds already contained in the applicable, albeit very rarely used, regulations despite July 2019 EC Guidance on the issue.[5]

However, the proposed design of Module 3 carries significant risk, as outlined above in relation to Module 2, to create an environment of caution among actors who diligently adhere to market-economy terms while failing to address those who flout the system. The Commission should consider a more centralised supervisory structure similar to Module 1 or consider modifying public procurement rules.

This issue under Module 3 is largely due to the broad scope of the self-declaration, ie, that it should also include information on subcontractors and suppliers. There is a significant risk that companies feel they would need to file such self-declarations, or at a minimum examine and assess an exponential number of subcontractors and

[4] White Paper, 4.2.2.2 and 4.2.5.

[5] European Commission 'Guidance on the participation of third country bidders and goods in the EU procurement market' (2019) 5494 final.

suppliers even if the company itself does not benefit from subsidies which would have a distortive effect on the internal market. Due to complex global supply chains it would be difficult, if not administratively unworkable, to supply such information in a timely manner to ensure a smooth bidding process. This would negatively impact both European as well as non-European companies

In parallel there is a high risk of non-compliance from entities intended to fall in scope as recognised by the White Paper, as they either would not file a self-declaration or, more likely, file one stating that they did not receive any financial contributions from a foreign government. Whilst the proposal does seek to address this high risk of non-compliance with the publication of notifications and the right for competitors to inform contracting authorities in case of non-compliance, it is questionable whether transparency will be an effective tool. As a minimum for that to work, competitors would have to have strong assurances of confidentiality. In any case, it does not make up for the administrative burden imposed on non-subsidised companies.

As such, Module 3 as currently proposed could lead to the perverse outcome that heavily subsidised foreign companies do not comply whilst good corporate citizens feel compelled to self-declare for subcontractors and suppliers without having a sound basis for making these assessments, at least not without a significantly increased administration burden.

Further clarity is also needed on how a company can appeal a determination against them, such as the three-year ban from future public procurement bids. For instance, if a consortium or company can remove a problematic supplier or subcontractor who is deemed to benefit unfairly from foreign subsidies, it is unclear how they can re-enter the bidding process from which they were excluded.

Lastly, the system currently proposed would also create significant burdens on the contracting authority that has no experience in handling such matters and may have little other incentive than to close the tender as quickly as possible. Furthermore, the decentralised supervisory competence seems complex. It is unclear how it would address overlapping situations. Presumably contracting authorities across Europe are engaging in tenders on relatively similar products and services with an undertaking suspected of receiving unfair foreign state aids pricing these relatively similarly. How would this procedure prevent one Member State supervisory authority from excluding a tenderer while another permits it? We therefore believe that if the Commission were to opt for a separate Module 3, the supervising authority should be exclusively the European Commission.

Conclusion

Subject to the comments expressed above, AmCham EU supports the Commission as they seek to resolve gaps in its current legal powers in relation to inappropriate foreign government subsidisation of companies and we remain a committed partner in this regard. Such practices are distortive of competition in the Single Market and negatively impact both EU and non-EU companies subject to the EU state aid rules and who operate in the EU on market-economy terms.

We would like to stress the need for further clarity on how any newly proposed framework would interact with existing European requirements, such as competition rules, national and EU FDI screening, etc. Particular attention should also be paid to alignment with EU state aid rules.

We also believe the Commission should consider the overall implications of its proposals and refrain from imposing unnecessary burdens on companies that may not be proportionate to the goals the Commission seeks to achieve. As the Commission continues its drafting work, the following key design elements should be considered:

- **Ex-post / case-by-case and ex-officio:** be it regarding general distortions or acquisitions, we believe a case-by-case approach provides the best option for making sure the Commission can focus its resources on the most impactful cases. Such an approach also minimises any administrative or compliance burdens on the wider business community.

- **No ex-ante notification requirements as relates to acquisitions**: we remain unconvinced an ex-ante notification is necessary for the Commission to be able to review subsidised acquisitions. Should the Commission nevertheless decide to progress with a notification scheme, its scope should be tightly delineated with well-defined thresholds, including for what qualifies as a subsidised acquisition.

- **European Commission to have sole competence:** whether to review general distortions, subsidised acquisitions or impact on procurement, the Commission should be solely competent to review.

- **Definition of foreign subsidies:** should align with EU state aid rules to ensure that companies receiving a foreign subsidy are not subject to a higher standard than companies receiving a subsidy from an EU Member State. This entails providing a clear definition of what is considered distortion and how the Commission will seek to establish the links between the foreign subsidy and distortion.

- **Public procurement:** if procurement is addressed in its own separate instrument it needs to be fundamentally re-thought potentially as a wider change to EU procurement rules.