

Targeted Consultation

American Chamber of Commerce to the EU (AmCham EU) – Summary

3 December 2020

AmCham EU acknowledges the existence of a regulatory gap and tentatively support the initiative of the Commission while highlighting the need to ensure companies are not unduly affected – especially if they come from countries which are transparent regarding subsidies, such as the US. It is important to consider close transatlantic ties between the EU and US and to ensure investment within the EU is not impeded.

The focus of the instrument should be on countries which are not transparent and provide the most distortive subsidies. American companies could otherwise be put in an unfair position. Subsidies provided by the US government are transparent, in a similar spirit to the EU's State aid framework. Other countries are less transparent and their distortive subsidies may not be so easily identified and addressed.

Most distortive subsidies and their impacts:

AmCham EU does not see a predominant or most distortive type of subsidy as there are many ways that foreign governments can increase the strength of a company in a market.

Subsidies linked to a specific operation/acquisition may be the easiest to identify and might thus be the best target for the instrument. However, other forms of support can potentially have more distortive effects in the market if significantly large and linked to activities within the EU, while also being more difficult to detect (eg tax exemptions, litigation funding, but more generally preferential market access, etc.).

Foreign subsidies may take unexpected forms (eg subsidisation of litigation costs). Emerging sectors with many start-ups are more exposed to subsidies.

AmCham EU highlighted third country actors who are aligned with EU foreign subsidy rules may be disadvantaged in an attempt to tackle issues stemming from specific actors.

Generally, all types of distortions and subsidies may be observed. One example can be access to key technologies. In this context, an increasing number of EU Member States are introducing FDI screening mechanisms to tackle access to critical technology.

AmCham EU highlights the importance of clear terminology. For example a number of schemes could fall under the definition of 'subsidies', which has a specific meaning in WTO. There are many forms of subsidies that will not distort competition in the EU.

Subsidies which would be allowed under EU State aid rules should also be allowed under the foreign subsidy instrument. It is important that realistic thresholds are set so that the instrument is effective, not unduly burdensome, and does not disadvantage non-EU companies fairly competing with European companies.

AmCham EU noted that it is necessary to clarify the concepts, legal standards, assessment criteria, the thresholds, the procedure and the judicial review process that will be applied under the new instrument.

AmCham EU stressed the need for legal certainty in particular where the burden of proof falls on the company. AmCham EU represent 160+ American companies committed to and invested in Europe, many of whom operate globally in different regimes.

In acquisitions, it is difficult to quickly assess which subsidy might distort competition. It would be useful to provide a list of subsidies that are presumed to not distort competition. In general, early guidance material would be of significant help in ensuring a smooth and equitable implementation of the instrument.

Policy options:

Distortive effects of subsidies in certain jurisdictions present a global challenge. A solution at the WTO level is desirable and the EU should take a proactive approach in reforming the WTO. A bilateral/multilateral solution offers another option, finding alignment with like-minded countries on the issue of subsidies. Alternatively, a single standalone instrument that provides legal certainty, in addition to addendums to various existing legislation for isolated issues, could be explored for e.g. by changing the public procurement Directives and merger Regulations.

AmCham EU agrees with the elements to be taken into account when assessing the various policy options, but these broad elements need to be translated into concrete objectives and legal standards. AmCham EU propose to assess the possibility of appeal under the various policy options.

The complexity of the instrument and the administrative burden should also be specifically considered. The procedure needs to be fit for purpose as the better the instrument is aligned with existing instruments - EU State aid framework, EUMR, FDI screening, PP Directives - the leaner the procedure will be.

AmCham EU favours the Commission as the sole competent authority for the whole instrument. The involvement of multiple competent authorities would increase complexity and administrative burden, potentially complicating the efficiency and consistency of such a system.

Impact of policy options:

AmCham EU is concerned about the administrative burden on companies. It is important to ensure proportionality of the burden with the objectives the proposal aims to achieve.

AmCham EU notes that even the least burdensome regime will place foreign companies active in the EU at a competitive disadvantage as it will result in additional costs or delays. This burden is not mutually experienced by EU-subsidised businesses who are not investigated in a similar manner under EU State aid rules. The proposal should not undermine the new EU-US agenda for global change.

The instrument may create a risk of loss of innovation. If companies are restricted in their ability to sell at globally competitive levels, this may result in less European innovation where companies set-up operations in less restrictive environments. It may also influence SMEs operating inside the EU with regard to the level of foreign investment they can attract or outside the EU where they wish to expand operations and are supported by national funding schemes in non-EU jurisdictions. It is difficult to say whether funding an SME could have a significant distortive impact.

If the rules are too strict, it could negatively affect EU start-ups that receive funding from outside the EU or even push them outside of the EU market. Stifling SMEs ability to grow may result in job losses or have negative environmental impacts if innovation in green tech is affected for example.

The burden of the notification system under Module 2 is one concern where this places beneficiaries of foreign subsidies at a disadvantage to companies who receive EU Member State aid. A merger review process already creates a burdensome process, the addition of a similar parallel process for foreign subsidies would add to this burden. While it is more difficult to detect foreign subsidies in this context, AmCham EU encourage the development of a balanced system in order to prevent the positive effects of direct investments from being disproportionately reduced or annulled.

The cost for a company to assess whether it should notify a merger increase exponentially if that company is active in 50-60 countries around the world with various applicable regimes.

If clarification can be offered that clearly defines Module 2 as only being concerned with subsidised acquisitions the cost for companies may be reduced.

AmCham EU are also concerned about the future public procurement regime under this instrument. The potential complexity of a notification requirement to ensure compliance for a non-EU consortium, including all suppliers and subcontractors, based on three-year period is significant, coupled with the risk of a three year ban. Any future instrument cannot create barriers significant enough to disadvantage non-EU bidders who wish to fairly partake in procurement processes.