

The EU White Paper on Foreign Subsidies: Initial Comments

GCLC Lunch Talk

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Points

- 'Foreign subsidies' : a new animal?
- Internal and external coherence
- The bigger picture
- *Caveat*

Annex I: Definition of foreign subsidy

'A foreign subsidy refers to a financial contribution by a government or public body* of a non-EU State, which confers a benefit to a recipient** and which is limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries.

Foreign subsidies would fall under any new legal instrument only insofar as they directly or indirectly cause distortions within the internal market.

Thus, the current definition covers (i) foreign subsidies granted directly to undertakings established in the EU; (ii) foreign subsidies granted to an undertaking established in a third country where such subsidy is used by a related party established in the EU; and (iii) foreign subsidies granted to an undertaking established in a third country where such a subsidy is used to facilitate an acquisition of an EU undertaking or participated in public procurement procedures.

The financial contribution can take various forms (e.g. transfer of funds or liabilities, foregone not collected public revenue, provision of goods/services or purchase of goods/services).

*According to this definition, a private body entrusted with functions normally vested in the government or directed by the non-EU government can also grant a 'foreign subsidy'.

*The recipient may be an undertaking established in the EU or in a third country.

WTO law transplant?

- 'The definition of subsidy according to the SCM Agreement by and large coincides with the definition of a subsidy set out in the annex ...' (White Paper, section 6.5; see also Annex I)
- Correct?
- On a standard interpretation, WTO definition covers only subsidies granted 'within the territory'
- Foreign subsidy definition: focus on 'beneficiaries established or active in the EU' but there may be various beneficiaries in various jurisdictions, inside and/or outside the territory (e.g. parent-subsidiaries)
- Foreign subsidy can also be a WTO subsidy

EU State aid law transplant?

- Similar structure, including specificity and test on 'direct and indirect distortions in the internal market'
- Similar substantive tests to assess distortions and presumptions
- But different because it is granted by a government of non-EU Member State

A new animal?

- Certainly a new animal because it attempts to address a transnational subsidy scenario and its complexities
- There is clearly no overlap with the definition of EU State aid
- Jury is out vis-à-vis WTO law, in particular issues turns on identity and location of beneficiaries

Internal coherence

- Two suggestions:
 - Clearly outline the boundaries between new instruments and existing EU tools and regulate any overlap
 - Ensure that regulation of ‘foreign subsidies’ is substantially comparable and linked to disciplines of similar measures (i.e. State aid) in the EU: this is important at the international level ...

External coherence: clouds at the horizon?

- Very important to ensure any instrument does not encroach on current international disciplines
- WTO subsidy rules: Article 32.1 ASCM: 'No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted in this Agreement' (*US – 1916 Act; US – Byrd Amendment; EC – Commercial Vessels*)
 - New interpretation of Article 32.1?
- WTO services rules: Article XVII GATS prohibits 'treatment no less favourable' of foreign services/service supplier *vis-à-vis* domestic services/services suppliers:
 - Key question is: are 'foreign subsidies' regulated similarly to 'EU State aid'?

Another EU export?

- Background:
 - WTO subsidy rules ‘do not bite’ and need reform
 - ‘Trilateral’ (EU, US, Japan) initiative to reform subsidy, SOE, transparency and other rules
 - ‘Foreign subsidies’ are not a uniquely EU concern: look at the US and all issue concerning ‘investment subsidies’. Hufbauer, Moll, Rubini (2008)
- White Paper:
 - Highly-innovative, even visionary, raising a lot of interest beyond EU circles
 - Strategic alignment of trade law to EU law (see e.g. PTAs, WTO litigation). Rubini (2015), (2020)
 - Could it become *another* EU export?