

What Is Happening?

Non-EU companies doing business in the EU are likely facing future regulatory hurdles. The recent [White Paper on levelling the playing field as regards Foreign Subsidies](#), aims to limit the “distorting effects” of subsidies received outside the EU. The White Paper is not legally binding, but provides the EU Commission’s current thinking for addressing foreign subsidies.

This step follows a toughening of the EU member states’ rules to control Foreign Direct Investments (FDI) into the EU that had already started in 2019 but accelerated when the COVID-19 pandemic highlighted the “economic vulnerability” of certain strategic EU industries. Moreover, EU member states mechanisms will be subject to the EU Framework Regulation as of 11 October 2020. See our summaries on EU FDI control (here and here).

With the White Paper, the EU Commission tackles a different angle of perceived vulnerability by addressing the issue of foreign subsidies, i.e., subsidies received in a company’s non-EU home country. We are not aware of any similar regime anywhere else in the world.

The main features of the proposed regime are:

- Foreign subsidies will trigger filing requirements and/or investigation by the EU Commission if used by recipients to:
 - Compete in the EU against non-subsidised undertakings
 - Acquire an EU undertaking (even a minority shareholding)
 - Participate in EU public procurement procedures
- A foreign subsidy covers any financial contribution by a government or public body of non-EU states to an undertaking (including any entity that is part of the same group in the EU)

An interest free loan

Unlimited guarantees

Capital injections

Preferential tax treatment

Tax credits

Grants

- The EU will be given the power to impose significant “redressive measures” if it is found that recipients of subsidies benefitted from an unfair advantage, including the divestment of certain assets, reducing capacity or market presence, prohibition of certain investments, third-party access requirements, FRAND licensing, prohibition of certain market conduct, prohibition of the subsidised acquisition, publication of certain R&D results, a ban on companies from participating in public tenders and/or redressive payments to the EU or EU member states.
- The new regime will complement, and not replace, the existing EU/WTO rules, in particular, as:
 - EU state aid rules are limited to subsidies granted by EU member states, not non-EU foreign states
 - WTO rules are generally perceived as ineffective in tackling the issue of subsidies



Timetable

- White Paper published **17 June 2020**
- Three-month public consultation until **23 September 2020**
- Draft legislation in **2021**
- Future legislative measure to follow [ordinary legislative procedure](#)
- Subject to the adoption of individual positions following the **legislative scrutiny** by the Council of the EU and the European Parliament, the **inter-institutional negotiations** would determine the outcome of the piece of legislation
- Timeline for the **final adoption** and publication in the **Official Journal of the EU** can **vary** but may be **one to two years** after the draft legislation’s publication in 2021

Who Is Concerned by the New Policy Proposal?

- **Foreign governments** are at risk because subsidies granted may be neutralised by the EU Commission and/or EU member states – including the UK (post-Brexit).
- **Recipients of non-EU subsidies** could be subject to notification requirements where it has received a financial contribution by a third-country authority in the past three years or expects such contribution in the coming year and could anticipate acquiring an EU undertaking or participating in an EU public procurement procedure. The same recipients could also be subject to an investigation by the EU Commission.
- **State-owned Enterprises** might be simply prevented from acquiring EU undertakings.
- **EU undertakings** competing against these recipients as they may wish to report distorting effects of subsidies placing them at a competitive disadvantage.



EU Commissioner for Trade Phil Hogan said, “The EU is amongst the most open economies in the world, attracting high levels of investment from our trading partners. However, our openness is increasingly being challenged through foreign trade practices, including subsidies that distort the level playing field for companies in the EU. Along with other tools available at EU level, such as foreign direct investment screening and trade defence measures, the White Paper is a welcome addition to the toolbox for our open strategic autonomy”

Initial Reaction From Stakeholders

Since publication, the White Paper has drawn criticism.

Whilst the EU Commission hopes that a future legislative proposal will ensure a level playing field with European companies, concerns have been voiced that these measures could have a negative impact on future investment decisions and reduce inbound FDI in Europe. Stakeholders have highlighted that the implementation of the policies outlined in the White Paper could cause important political, legal and economic issues:

- The White Paper seeks to expand EU jurisdiction outside its borders over subsidies granted by foreign countries
- A potential blanket ban of acquisition of EU undertakings by foreign state-owned enterprises (SOEs)
- A risk of backlash/retaliation measures by foreign countries on EU undertakings operating abroad
- A potential impact on current bilateral investment or trade treaty negotiation with foreign governments (including with China)
- Legal uncertainty for undertakings operating in the EU – including around the notion of “subsidies”
- Complexification of EU inbound investment
 - Foreign Direct Investment Control
 - Merger Control
 - Foreign Subsidies Control

Brexit

It has been suggested that the EU Commission’s proposal could be used as an EU regulatory “back-stop” if the UK rejects EU state aid rules in the Brexit Agreement. The UK government however already indicated that, “historically the UK has not generally granted the types of subsidies that the EU has identified as likely to be distortive,” thereby suggesting that the Commission’s proposal will likely not impact UK companies doing business in the EU post Brexit.

How we can help

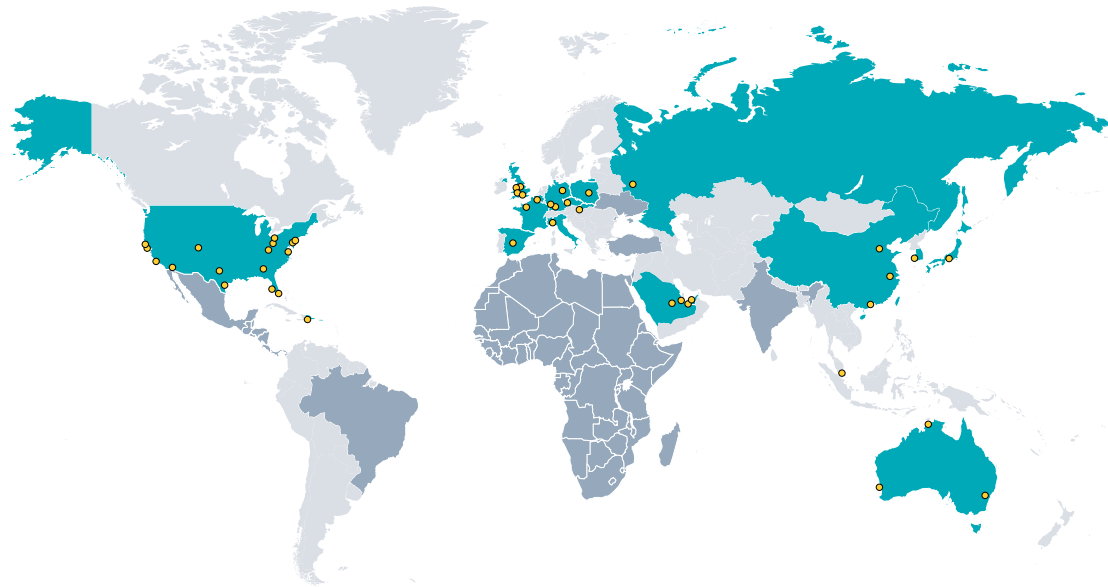
We offer a unique combination of our EU policy experience in combination with our state aid, merger control, public procurement and international trade/WTO law experts offering unrivalled 360° insight. Our EU Public Policy Practice draws upon the strength, reputation and resources of a well-connected team of experienced EU policy practitioners to advise clients about the most effective way to engage with EU institutions.

With a team of more than 600 legal and policy experts in Europe alone, we are able to provide **industry-leading legal, regulatory, policy and communications expertise**. The EU Public Policy Practice has been recognised as a leading public policy law firm in Brussels in 2019 and 2020.

We can help you engage effectively in this ongoing and important EU policy debate, ensuring that your voice is heard at the right time and by the right person. If you have questions about this new EU policy proposal, or how to best engage in this debate, please get in contact with us.

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