



Unbundling Competition

Episode 6: Screening of Asian investment in Europe – The European Commission’s White Paper on foreign subsidies

In this episode, Adelaide Luke, Partner and Head of Competition Asia in the HSF Hong Kong office, and Kyriakos Fountoukakos, Head of Competition EMEA and Managing Partner of the HSF Brussels office, discuss the European Commission (EC)’s recent “white paper on levelling the playing field as regards foreign subsidies” (White Paper) and its impact on Asian companies doing business in the EU.

The White Paper comes at a time when the EC, as well as individual Member States, are more closely scrutinising foreign investment into the EU. Unlike the EU State Aid rules (which governs subsidies from EU Member State governments to businesses), there is currently no regulatory power allowing the EC to scrutinise the effects of subsidies provided by foreign governments or related public bodies on competition in markets in the EU. The White Paper considers options to allow the EC to “level the playing field”, ensuring that companies from the EU or elsewhere alike compete fairly and equally on merits.

The White Paper considers three possible “modules” to this end. Module 1 proposes a general tool allowing the EC to assess foreign subsidies that may already have an impact on the EU internal market. It provides a two-fold analysis framework. The EC will first identify a foreign “subsidy”, which would include a wide range of measures from direct export financing to unlimited state guarantees. The EC will then assess any distortive effect caused by that subsidy, the finding of which could lead to remedies imposed by the EC, such as redressive payments or behavioural/structural remedies.

Modules 2 and 3 propose introducing ex ante notification regimes. Module 2 would require companies receiving subsidies from any non-EU authorities in support of a merger or acquisition of an EU company to notify the subsidy before the relevant transaction

completes. It would be similar to (and operate in parallel with) the existing EU merger control regime; however, its scope would be wider, as it would also require notification for, for example, acquiring a non-controlling stake. Similarly, Module 3 proposes a prior notification obligation for foreign subsidy recipients either participating in public procurement in the EU or applying for EU funding.

Notification under Module 2 (and likely Module 3) would also be triggered by a substantially lower filing threshold (a subsidy value of only EUR 200,000), and would cover an expanded timeframe to capture any subsidy received within the three years prior to a transaction and any subsidy expected to be received within one year after the transaction. These give rise to a possibility that a foreign subsidy notification may be required even where no merger control filing is triggered (or triggered at Member State level only), as an additional factor to be considered in deal planning.

Although the White Paper puts forward proposals only at this stage, it could have a substantial impact on Asian businesses if it leads to concrete legislation, given that many businesses in some parts of Asia have a quasi-public character, or else receive support from public entities. The development of these proposals should, therefore, be watched closely and advance planning is recommended.

