FEPORT Position Paper on the White Paper on Foreign subsidies

FEPORT welcomes the White Paper on Foreign subsidies as it tackles the crucial issue of level playing field for EU companies exposed to fierce and unfair competition from third country players.

FEPORT hopes that the EU will translate the White Paper's proposals into concrete and effective measures against distortive practices.

The White Paper recognizes a fundamental regulatory gap in existing EU legislation on competition, trade, public procurement and in EU funding as regards distortions arising from foreign subsidies in the Internal Market.

It also acknowledges that foreign subsidies can be driven by strategic objectives, such as establishing a strong presence in the EU, promotion of acquisitions and transferring technologies to production sites outside of the EU. Finally, the White Paper rightly points out to the fact that EU companies do not always compete on an equal footing with companies benefiting from foreign subsidies which are "artificially competitive" but "extremely aggressive and successful" in the markets they target.

FEPORT subscribes to the above-mentioned findings and has been supportive of the previous initiative of the Commission aiming at adopting an efficient FDI screening mechanism. However, we believe that there is a need for a more effective response. Europeans must acquire a better capacity to anticipate potential risks from FDI, including a common perspective regarding strategic assets and ecosystems.

In this respect, FEPORT hopes that the inclusion of the port sector as part of the ecosystem "Mobility-Transport-Automotive" will translate into policies that recognize the strategic nature of ports.

Ports are important strategic nodes for the connectivity of people and goods with the rest of the world and decisive entry points to the Single Market, particularly for energy and goods' supplies and distribution. In addition to their role in value chain logistics, they also have geopolitical positions, as they may play a key role in emergency supply or military operations.

Distortions can be caused through state-owned enterprises of any nationality but the insights we provide in this paper aim at describing the situation today through the example of Chinese State-Owned Enterprises' (SOEs)[1] investments as they are among the most active in the EU landscape.

Our paper includes suggestions on how the EU can remain attractive for FDI while preserving the interests and the competitiveness of the EU port businesses.

Example: Chinese FDI in EU ports

Maritime EU ports have recently caught the attention of various Chinese corporations, as China undertakes infrastructure projects around the world as part of its Belt and Road Initiative (BRI).

The "Belt" includes overland transportation routes spanning Eurasia that connect China, Europe, Russia, and the Middle East. The "Road" refers to maritime routes starting in China that go on to Sri Lanka, Pakistan, the Middle East, eastern African states and, eventually, end in the Mediterranean Sea and northern European countries.

In 2016, the China Development Bank provided $12.6 billion[2] in funding to BRI projects. China also set up the Silk Road Fund solely to invest in BRI ventures.

There is a strong presence of Chinese state-owned enterprises (SOEs) in European ports. In this context, over the last decade, private and state-owned Chinese firms have acquired stakes in eight maritime EU ports[3]. The Chinese SOEs compete with EU private companies which do not receive subsidies or which benefit from State Aid in compliance with transparent EU State Aid rules. In the case of China, it remains difficult to have access to similar transparency on the origin of subsidies granted to SOEs. As a consequence, the of level playing field threatens the competitiveness of EU private port companies.

The acquisition of a 35-year lease of Greece's Piraeus Port by the China Ocean Shipping Company (COSCO), certainly represents China's flagship project in this field. This major investment reflects the fact that China considers the southern and eastern European regions as strategic. The Piraeus investment indeed extends beyond the maritime port itself, as China also plans to build the Land-Sea Express Route – a network of railroad connections from the port to the western Balkans and northern Europe.

In 2013, Piraeus port was connected to the Greek railway system. China's project to establish new railway lines connecting Piraeus with the western Balkans and northern Europe will have significant impact on EU trade routes. The Chinese contribution to the financing of the Budapest-Belgrade rail project is provided by two public banks, China Exim Bank and China Development Bank.

---

[1] According to Business Europe, in 2017, there were around 174,000 companies in which the Chinese government, through special purpose vehicles, had a minority or majority shareholding.
[2] Mercator Institute for China Studies, "Made in China 2025", 2016 and Ministry of Industry and Information Technology, "Interpretation of "Made in China 2025": Promoting the Development of Clean and New Energy Vehicles", 2016.
[3] In Belgium, France, Greece, Italy, the Netherlands, and Spain.

Compared to existing shipping routes, which go around the Strait of Gibraltar, the Land-Sea Express Route could indeed have a significant competitive advantage and will significantly impact ports by decreasing the number of port calls and shipping time between China and the EU by 8-12 days.

The SOE China Ocean Shipping Company (COSCO) has the ambition to become the most important vertically integrated player in the market. In other words, it is most probable that COSCO's objective is to become a leading door to door logistics company within the EU market with strong ties with e-commerce platforms such as Alibaba. Together with another Chinese SOE, Orient Overseas (International) Limited (OOIL), COSCO is also part of the world's most powerful shipping consortium, Ocean (horizontal) Alliance, which operates along maritime trade routes between Europe and Asia.

Chinese acquisitions in the port sector are expected to continue and Chinese government's support for its industries, particularly in the context of its 5-year plans and industrial policies will certainly intensify.

What will be the long-term impact of the Chinese government's increasing control of the European port infrastructure and maritime logistics chains through the acquisition of other vertically EU integrated terminals?

Should we fear distortions for European trade?

Can the reduction in logistics costs, nominally targeted by Chinese investments, make these ports more attractive and divert trade flows to their benefit?

What about the ability of Member States to ensure customs controls in these ports, which are destined to receive an increasing volume of goods?

Is it possible that we could see the development of a military use of European port infrastructure in which the Chinese government has acquired a majority position?

How does the classification of ports as part of critical infrastructures translate into concrete policy measures?

Can EU companies which receive State Aid and own assets in EU ports sell them to foreign SOEs? Should the EU Commission/Member States impose some conditions in this respect?

The above-mentioned questions are among those many observers and journalists raise and which certainly deserve attention from EU policy makers.

Competition policy tools

The lack of a level playing field poses a serious challenge for European companies as SOEs do not always play under the same rules, leading to unfair competition. This does not only negatively impact European businesses competing in China, but it also affects the level playing field in the EU Single Market and in third markets. In order for European companies to remain competitive at a global level, the EU should proceed to a smart implementation of EU competition rules to ensure that effective competition between companies exists and that it contributes to job creation, growth and investment.

Well-functioning competition rules play an essential role within the Single Market and in a market-oriented economy, both in terms of limiting distortions and ensuring efficiency and innovation by protecting consumer choice and allowing competitors to enter new markets.

In recent debates in relation to Siemens-Alstom case, the suggestion has been made that relaxing EU merger review conditions is necessary to allow for greater European market concentrations in the context of increasing global and Chinese competition.

Allowing greater European market concentrations would however not necessarily mean that European companies would be better able to compete with Chinese SOEs which would continue to benefit from state subsidies and Chinese state companies would still be protected from foreign competition on their domestic market through various market access barriers.

Therefore, the EU Commission should explore how EU competition policy can adapt to developments on global markets and where necessary change relevant notices and guidelines.

Regarding the **definition of markets**, the Commission should identify - on the basis of objective and transparent criteria - whether there are situations where it should put more weight on the global market environment when assessing certain concentrations, while bearing in mind overall market developments as well as competition within the internal market.

By not properly taking the global market environment and dynamics into account and by focusing too much on immediate effects in the EU, or on narrow geographical markets, the Commission may put EU companies at a disadvantage, preventing them from achieving greater scale and technological leadership which enables them to compete at global level.

The Commission should also take account of the various forms of **public subsidies** (e.g. export subsidies, loans, funding of state-owned companies, etc.) that companies from outside the EU enjoy.

These subsidies are most relevant when assessing both markets' dimensions (as they may allow companies from outside the EU to sell globally, while EU companies often cannot, thereby giving the impression of the market being smaller) and market players' power on the same markets (as companies benefitting from public subsidies might consequently have much stronger market power). A bottom-up fact-finding exercise, with the help of company information, would be key to build a picture of the situation and should be implemented immediately.

State subsidies, market protection and unfair trade practices that infringe market-based principles give an unfair competitive advantage to competing firms. **To counter this, the EU needs effective state aid control.**

In the EU, we need more coherent application of the rules at national level. At international level, we need strengthened rules to address market-distorting subsidies, including **indirect industrial**

subsidies in the form of tax cuts, cross-subsidisation, cheap sovereign loans to state-owned enterprises and/or inflated procurement prices paid by local public authorities.

EU state aid rules have usually arranged for a level playing field within the EU, without ensuring also a level playing field for EU companies competing worldwide. The existence of a so-called "matching clause" in some situations (e.g. the Research, Development and Innovation framework) aims at compensating for the distortive third-country subsidy. However, this clause has never been applied, because there is a lack of data regarding aid granted by third countries to competitors. This reinforces the need for a fact-finding exercise, as stressed above.

In any event, support received by competitors from non-EU countries should not only be considered in the context of the level of aid granted to the EU firm (as covered by the matching clause) but more generally to achieve an accurate assessment of the overall competitive environment.

Work needs to be done to improve the scope and implementation of relevant WTO rules and the Commission should address this issue in the context of free-trade agreements.

The EU should develop **an 'SOE burden of proof principle'**. Since SOEs form a dominant part of certain non-EU economies, including China's, and form one of the main avenues through which these distortions are felt within the European market, the EU should develop an 'SOE burden of proof principle' to mitigate the impact of government-induced market distortions through SOEs. This entails that EU policies should be designed in such a way that they address the market-distortive effects of foreign SOEs.

Since it would be very difficult to distinguish the market behaviour of one company from another, the EU should reverse the burden of proof for foreign SOEs, whether from China or elsewhere. This would capture the company segment that is most likely to benefit from or behave in distortive ways while ensuring that EU action would be compliant with WTO rules on non-discrimination. At the same time, it would avoid unduly burdening private enterprises and ensure the European economy remains firmly open for market-based players.

This principle can be applied in at least three ways in order to mitigate the distortive effects outlined above:

Subsidies: the EU could reverse the burden of proof for foreign state-owned enterprises within the internal market and instead let them prove that they do not receive subsidies on their home market. This measure would overcome issues of transparency while being compatible with the WTO's non-discrimination principle.

Investment: the EU could include additional provisions on foreign SOEs in a future revision of its investment screening mechanism.

Procurement: the EU could include provisions in rules on 'abnormally low tenders' that devote special attention to tenders that are submitted by foreign SOEs.

The EU should examine whether an SOE "burden of proof principle' of this kind could be applied to more policy areas in order to mitigate the distortive effects of foreign SOEs on the European single market.

The EU should be careful not to limit the scope of provisions covering SOEs to ownership thresholds or the number of members of the board of directors appointed by the government. The EU should avoid a narrow definition of SOEs as hybrid forms of SOEs may also be benefitting from state assistance or be politically influenced.

Final comments on the White Paper proposals

The European Commission has recently acquired powers[4] to ensure the protection of certain strategic EU assets from foreign investors from a national security or public order perspective.

However, according to the Commission, these instruments leave an enforcement gap, both when it comes to the review of acquisitions of EU companies by subsidised non-EU companies, and for the distortive effects of certain foreign subsidies on the internal market. This is certainly valid in the port sector.

First, as the White Paper notes, neither EU antitrust rules nor EU merger control regulations "specifically take into account whether an economic operator may have benefited from foreign subsidies (even if in principle it could form part of the assessment) and they do not allow the Commission (or Member States) to intervene and decide solely or even mainly on this basis".

Second, the White Paper notes that financial support granted by third countries (either to undertakings active in the EU or to their parent companies outside the EU) is not covered by EU State aid rules.

Third, under national FDI screening mechanisms and the EU FDI Screening Regulation,[2] authorities may assess and block FDI based on security and public order grounds, but this does not explicitly include considerations of foreign state subsidies.

Finally, EU anti-dumping and anti-subsidy rules, themselves based on WTO Agreements, apply to the import into the EU of goods only, and – importantly – do not cover trade in services, acquisitions of EU companies or other financial flows in relation to the activities of undertakings in the EU.

FEPORT believes that, as stated above, there is indeed an enforcement gap relating to the distortive impact of foreign subsidies on the EU's internal market and that the proposed new measures can contribute to close it.

---

[4] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1.

The new proposed measures are complementary to EU merger control and EU antitrust rules. In a situation where a transaction would have to be notified under both Module 2 and the EU Merger Regulation (or national merger control regulations), there would be parallel proceedings.

As the Commission rightly notes "while subsidies may be taken into account when assessing for instance the financial strength of the merged entity relative to its rivals, the focus of the analysis of the significant impediment to effective competition is on the structure of competition in a given market, not on the existence or effects of foreign subsidies as such. A new instrument would therefore with its different objective complement the Merger Regulation.

If a given acquisition has to be notified under both such a new instrument and the Merger Regulation, the notification and possible assessment would be dealt with in parallel, but separately from each other under the respective instruments."

FEPORT believes that the new tools are complementary to EU trade defence instruments and WTO Agreements as well as to the FDI screening mechanisms which will come into force in October 2020.

But while the FDI Screening Regulation does not introduce FDI screening at EU level but a limited soft harmonization of the assessment of threats to public security and public (i.e. critical or strategic) assets, the newly proposed instruments may provide the possibility to assess potential distortions in the internal market more broadly, without any limitation on the type of assets and in all sectors including ports.