

Unclassified

English - Or. English

19 December 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**SUBSIDIES, COMPETITION AND TRADE**

**Summary of Discussion**

1 December 2022

This document is a summary of the discussion held during Session II of the 21st meeting of the Global Forum on Competition on 1-2 December 2022.

More documents related to this discussion can be found at  
[www.oecd.org/competition/globalforum/2022-global-forum-on-competition.htm](http://www.oecd.org/competition/globalforum/2022-global-forum-on-competition.htm)

Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.]

**JT03535122**

## *Summary of Discussion*

*By the Secretariat*

1. **The Chair** opened the roundtable discussion on subsidies, competition and trade, an issue that is at the intersection between competition law and trade law. He said that the aim was to observe the extent to which competition authorities consider the dimension of subsidies in their analysis, and how they do it. He introduced the guest speakers: **Anabel González**, Deputy Director-General at the World Trade Organisation (WTO); **Alicia García-Herrero**, Senior Fellow at Bruegel; and **Miguel de la Mano**, Partner at RBB Economics. He then invited the **OECD Secretariat** to present the background paper for the discussion.
2. The background paper focuses on the way in which subsidies have played or should play a role in competition enforcement cases. It describes the reasons behind subsidies and their increasing use, the ways in which they can affect trade and competition, and the tools used to scrutinise them as well as the ways in which competition authorities have considered or may consider subsidies in merger or abuse of dominance cases. Even though there may be legitimate reasons for subsidies, they can lead to inefficiencies as well as to serious trade tensions, but there are tools to tackle this.
3. The paper also explores the role of subsidies in competition enforcement cases. It describes potential competition concerns and how, in existing cases, subsidies have entered the analysis by authorities. Financial strength as a result of a subsidy can be an issue by creating or enhancing a dominant position, and by facilitating harmful conduct. Subsidies may enable this by increasing the financial resources of a company providing it with deep pockets.
4. Competition authorities have looked at subsidies in the context of mergers and abuse of dominance cases. When looking at existing case law, it was found that the number of cases that explicitly include a subsidy in its analysis is fairly scarce. Subsidies have played a role in merger cases in two ways: subsidy offence and subsidy defence. Among the merger cases that were observed, none concluded that the proportion of subsidies was such that it could create competition problems. Merger cases in which financial strength played a part in the competitive analysis were also considered, and abuse of dominance cases in which subsidies played a material role are also rare. In conclusion, subsidies have played a modest role to date, or no role at all, in competition enforcement. This may however change in the near future because of the increase in their use as well as the new tools used to scrutinise them. Competition authorities may face some challenges such as the difficulty to establish the existence of subsidies. Finally, there are jurisdictions in which recoupment is a necessary condition for predatory pricing to be credible. This may be an issue because state owned enterprises (SOEs) do not have a profit maximising objective so the recoupment requirement does not hold.
5. According to **the Chair** some of the reasons that explain the little jurisprudence in this area are: that it should not be part of the competition analysis; that competition authorities may have trouble gathering information on subsidies; and recent changes regarding competition between countries. He said that there has been a shift from a world where open trade and exchange were considered to be the most efficient solution for economic development, to one where building domestic industry is seen more favourably.

As competition between nations increases, subsidies tend to increase. The Chair then invited **Ms Anabel González** to the stand.

6. **Ms Anabel González** discussed three issues: Firstly, why do trade policymakers care about subsidies, and how have they managed some of the long-standing challenges they pose? Secondly, are existing global disciplines to regulate subsidies currently fit for purpose? Thirdly, how can co-operation on subsidies be improved and what should be the role of the trade and competition policy community?

7. She said that subsidies can be a powerful tool to advance policy objectives, such as correcting market failures, accelerating green technologies, and helping businesses and households during emergencies. They can also alter trade and investment flows and erode the value of the trade commitments. Furthermore, they may feed the perception that international competition is not handled, and that the international playing field is tilted against those who follow the rules. This makes it harder for trade policy makers to maintain public support for an open trading environment and can cause trade frictions and complicate negotiations. There is also the risk that subsidies in one country will trigger them in another, giving rise to a race to the bottom that ends up hurting everyone. The growing use of subsidies is amplifying some of these concerns.

8. Although information is incomplete, subsidies are on the rise across sectors and countries. Since the financial crisis of 2008, they have been the most frequent form of economic policy intervention. According to estimates, more than half of global trade in goods occurs in products and markets in which at least one subsidised firm operates. Therefore, it is not surprising that the multilateral trading system has included subsidy disciplines such as the WTO Agreement on Subsidies and Countervailing Measures, and the WTO Agreement on Agriculture. Free trade agreements, the OECD export credit arrangement, or the OECD recommendation regarding the core principle of competitive neutrality are some of the other tools used to regulate subsidies. Competition enforcement could also serve as a complementary tool and the global trading system could benefit from the greater efforts of competition authorities. First, because they could contribute to a more level playing field in international markets. Second, because the value of negotiated market access rights can be undermined by the anti-competitive behaviour of local companies.

9. The WTO Agreement on Subsidies and Countervailing Measures, defines a subsidy as a transfer by a government to an enterprise of something of value on better than market terms. It distinguishes between prohibited subsidies, presumed to distort trade, and actionable subsidies, subject to possible counter measures in case another country can demonstrate adverse trade effects in its home market or in a third country market. The application of these rules is overseen by the WTO Committee on Subsidies and Countervailing Measures, and they are enforced through the WTO Dispute Settlement Mechanism.

10. New and unforeseen challenges are prompting debates about the role of subsidies and whether global subsidy disciplines need to be strengthened. First, there is climate change that makes a case for stepping up public investment as part of an ambitious green policy package. Second, the digital transition. In the context of winner takes all digital markets with high scale economies, there is a temptation to use subsidies as industrial policy to create, secure, or protect national champions. Third is emergency support. Support measures may be counterproductive in the longer run. Fourth, is supply chain resilience. Governments are seeking alternative sources of supply and production for key inputs in response to COVID-19 and other shocks. There is a case to be made for diversification as a tool to manage risk. Fifth, state owned enterprises and the role of the state. Being internationally active, the operation of SOEs in economies in which the state plays a central role raises many questions about the effects and international spill overs of SOE related

subsidies. Some trade agreements have sought to address these issues. At the WTO, some members are concerned about the potentially distortionary effect of lending to uncreditworthy firms. Considering that between 1995 and 2021, the share of WTO members that notified to the subsidies committee decreased from 75% to 35%, they are also focused on the lack of transparency.

11. WTO discussions on level playing field issues are controversial because they touch on trade and investment among countries with different economic systems. During the WTO Ministerial Conference, several Members expressed a view on the importance of addressing subsidies. Likewise, an agreement on fishery subsidies was adopted. It shows that multilateral co-operation on a topic as difficult as this one is possible. The WTO also partnered with the OECD, the IMF and the World Bank to look into facilitating co-operation on subsidies. Their first important finding is that a subsidy's design is as important as its rationale. The second one is the need for better information. More and better information analysis would facilitate competition authorities' efforts to identify best practises for dealing with subsidies in the enforcement of competition law.

12. To conclude, Ms González said that the international community has made significant progress in building a system of trade rules and competition policy frameworks that has underpinned decades of trade led growth and prosperity around the world. However, there are new and unforeseen challenges. She said that turning our backs on competition and market openness would be a mistake. It would weaken the ability to tackle collective challenges. It is therefore necessary to safeguard and nurture the multilateral trading system, and to better coordinate between trade and competition policy authorities.

13. **The Chair** turned to the **United Nations Conference on Trade and Development (UNCTAD)** and asked what are some of the solutions that developing countries can use? What prompted the initiative of developing co-operation between competition authorities on subsidies? Were there signals of anti-competitive effects of those subsidies? Could this have been dealt with by competition law?

14. **UNCTAD** said that both competition and trade policies are complementary. Also, regional economic organisations are increasingly recognising competition policy as a key element of market integration. UNCTAD works with developing countries and their regional economic organisations that highlight competition policy as a key element. From their point of view, regional competition law and policy can be very beneficial because they provide for pooling of resources that tend to be limited. It can pave the way for joint activities, promote more effective enforcement, and increase leverage vis-a-vis big market players that dominate international trade. It has also been observed that the mandates of several competition authorities do not include monitoring or overseeing public measures that distort competition. This leads UNCTAD to believe that several young and small competition authorities may not be familiar with considering the effects of subsidies in competition.

15. In the case of the Central American Integration System, the regional competition regulation entered into force in March 2020 and created the Regional Competition Committee that has the power to make recommendations in the field of competition advocacy and to promote co-operation between authorities. UNCTAD recommended that the committee carry out a study on the public measures granted in the region in order to understand their extent and analyse their effects. After carrying out this study, the committee would be in a position to actually make recommendations to the governments on how to improve public aid policies while reducing their negative impact in order to preserve a pro-competitive dynamic in the region.

16. Together with the Latin American Caribbean Economic System, UNCTAD has kept an ongoing working group that brings together trade and competition experts that work to improve their understanding of each other's points of view, identify areas of synergy, and common challenges.

17. When it comes to the possible signals of anticompetitive effects of subsidies, it is clear that public measures that have an impact on the market may distort competition and thereby undermine regional integration. There are often Member States that may have more means than others. It is therefore important to make sure that there is a level playing field.

18. UNCTAD suggests that the advocacy role of competition authorities stays strong so that markets can remain competitive. For smaller authorities, there is an opportunity to learn from more advanced jurisdictions.

19. **The Chair** turned to the **Dominican Republic** that explained how the competition authority analyses the impact of the subsidy. He asked how the process is conducted. Have there already been cases where it could help analyse abuse of dominance cases or merger cases?

20. The **Dominican Republic** published a study where it defines the steps to determine the effects of state interventions. They put together a rationality analysis that evaluates whether the aid corrects or matches the market deficiency, what is at stake, and what objectives it pursues. Then, there is a social impact analysis. One of the approaches is the counterfactual scenario that allows to determine what the result would be if there had not been any state aid. An analysis of the impact on competition is also carried out. Its goal is to estimate whether or not the state aid has distorted or could significantly distort market competition. Then follows the analysis that compares the benefits in terms of their economic and social consequences with the costs of state aid in terms of government spending, market distortion or welfare loss, if any, resulting in the net social impact. First, it considers the objectives set in terms of efficiency and equity, then it examines whether the aid design is proportional and promotes economic efficiency, and finally it considers the estimate impacts on competition. PRO-COMPETENCIA then addresses a set of recommendations to the competent government authority. If there is a distortion, the decision specifies whether the social benefits compensate its cost or not.

21. **The Chair** introduced **Ms Alicia García-Herrero** to discuss the potential competition distortions of government support and what practises can currently be observed.

22. **Ms Garcia-Herrero** went through the case of China saying that it is very difficult to know how big China's government subsidies are, let alone how distorting.

23. It is important to understand the way in which the process of globalisation creates linkages between industrial policy and trade policy. Between 2011 and 2021, China contributed nearly 30% to the global economy. It is an open economy, which is why it has been growing. Chinese companies have also been growing and expanding overseas. Currently, no other region of the world is competing with China in terms of Fortune 500.

24. Since the 19th and 20th Party Congress in 2017 and in 2022, the direction of the Chinese economy is much clearer. In the 19th Congress, the importance of state assets was highlighted by saying that the state should maintain and increase its value to support state capital. More recently, the idea of state-owned capital, and with it the idea of having more competitive SOEs, has appeared. The idea of state-led innovation is therefore very clear.

25. Overseas revenue is becoming increasingly relevant for Chinese corporates despite some stagnation since 2017. In some sectors, such as the semiconductor industry or the information technology industry, the share of overseas revenue is very large. The relation between industrial policy and trade is to be found in them. The key question is to know how big China's government subsidies are, but what can be measured from financial statements and readily available data is not necessarily revealing. About 85% of Chinese companies receive subsidies. The available data shows that private enterprises actually receive as much subsidies as SOEs. Based on the information in financial statements, software services, technology, hardware, and automobiles are the sectors that receive the largest share of subsidies.

26. Beyond what can be calculated based on financial statements, there are some characteristics of the Chinese economy that must be considered. One is the deep pockets that come from the fact that China's banking sector is still state-owned. China's policy banks lend more domestically than overseas. There are also state-owned commercial banks which represent about 41% of bank assets, as well as city commercial banks and joint stock commercial banks, most of which are controlled by local governments.

27. The other characteristic of the Chinese economy that makes this measurement of subsidies very complex is the fact that SOEs are oligopolistic and present in several sectors. In the case of China, the dividend policy of SOEs is very lax, so retained profits may be used for things like overseas acquisitions. The idea of having deep pockets does not only come from the lending, it also comes from the idea that profits can be accumulated and not necessarily given back to the state. This relates to competitive neutrality, and with this concept in mind, she tried to measure subsidies that cannot be directly observed. In order to do that, she looked in a recent paper at a measurement of funding cost and the effective tax rate per company, per sector. She compared state owned enterprises and private owned enterprises, to find that while many subsidies can be identified in financial statements, once you focus on the funding costs or the effective tax ratio, it is possible to see that SOEs are favoured. When doing the same exercise per sector, usual suspects, such as the ICT sector, are found. Even more so in the case of automobiles because the funding costs are cheaper for SOEs than for private companies. This shows the linkage between industrial and trade policy.

28. What can be done? According to Ms García-Herrero, the concept of competitive neutrality is quite relevant. To come up with this result, she compared what is considered neutral to other cases. Another idea is including foreign subsidies. This is all about trade channels, but also about the way in which large companies from economies that are able to subsidise can reap the profits and support their operations elsewhere to increase market share. That is why foreign subsidy legislation seems important.

29. **The Chair** turned to the **European Union** where there are introducing new regulations. He asked what were the reasons that led to adopting the new Foreign Subsidies Regulation. What are their expectations regarding the merger notification requirement and the extent to which this could curb the harmful competitive effect of foreign subsidies?

30. For over 60 years, the **European Union** has had a very well-developed system of state aid rules which makes sure that the aid granted by Member States is targeted, proportionate and that it does not undermine a level playing field in the single market. By having such a system of state aid control, the EU is able to prevent harmful subsidy races among Member States. Unfortunately, until now, there have not been any rules similar to state aid that would exist for subsidies granted by third jurisdictions, but which do not affect the EU internal market. There was a regulatory gap that allowed foreign subsidies to distort the EU internal market.

31. European state aid rules only apply to aid granted by EU Member States, not third countries. Merger rules look at how mergers affect competition, but not at how they are financed. There were also trade defence rules that intervened on the SCM agreement, but they only apply to certain situations, such as to the goods imported into the EU where countervailing duties can be imposed, or where it is possible to go to a dispute settlement. There is also the framework for screening foreign direct investment which only considers situations that threaten the public order or national security. The regulatory gap has led to the proposal of the Foreign Subsidies Regulation.

32. Under the new regulation, companies will have to notify foreign financial contributions received from non-EU countries before they conclude a concentration, or before they can be awarded an EU public procurement procedure above certain thresholds. To make sure that this does not create an undue administrative burden on the companies, the thresholds are relatively high. For concentrations, the notification would be required where the EU turnover of the target company is at least €500 million, and where the parties to the concentration have received in the last three years, a foreign financial contribution of more than €50 million. In the case of a public procurement procedure, a notification would be required for contracts of a value of more than €250 million, where the bidder has received a foreign financial contribution of more than €4 million per third country in the last three years. As long as the Commission's review is pending, the concentration cannot be completed. The regulation also allows the Commission to conduct ex-officio investigations into other economic activities, or it may also request an ad hoc notification for smaller concentrations and for public procurement procedures below the notification thresholds. This is completed with a range of investigative powers to allow the Commission to gather the necessary information to assess whether a foreign financial contribution is a subsidy and whether it is distortive.

33. The Commission will also rely on information from various market participants. When it finds that the foreign subsidy is distortive, it may balance the negative effects. If they outweigh the positive ones, the Commission may impose redressive measures or accept commitments to remedy the distortion. These may include the divestment of certain assets, the prohibition of a certain conduct, the access to infrastructure, etc. The beneficiary of the subsidy may also commit to repaying the subsidy. This has to be done in a transparent, verifiable, and effective way. Ultimately, the Commission may also prohibit the transaction, the notified concentration, or the award of the bid to the subsidised bidder.

34. The fact that there is a new regulation on distorted foreign subsidies does not change the assessment standards under the EU Merger Regulation. Parties will have to file separately for each regulation. The threshold for the notification is twice as high as the one for the EU Merger Regulation, so it is expected that the vast majority of the cases notifiable under the Foreign Subsidies Regulation will also be notifiable under the Merger Regulation. The assessment standards under the two instruments are different. For the purpose of the EU Merger Regulation, there is significant impediment to effective competition. In the Foreign Subsidies Regulation, a distortion to the internal market consists of two things: that there is a competitive advantage on the beneficiary of the subsidy and that it has a negative effect on competition. The assessment will have to show that both of these elements have been fulfilled.

35. Under the current EU Merger Regulation, subsidies may be taken into consideration only if there is clear evidence of their existence and if the market shares of the subsidised competitors have already reflected the existence of these subsidies or if they are likely to increase in the future as a result of them. Subsidies allow the competitor to enter the market and they may give them the ability to foreclose the market to the competitors.

36. **The Chair** asked if it is correct that there is a competition assessment within the assessment of the level of distortion of the subsidy? The **EU** answered that its approach is a combination of different elements. The concepts used are familiar, but they are not used in the same way. For instance, to the improvement of the competitive position of an undertaking, if they look at how it is assessed under state aid rules, for some types of subsidies it would depend on their nature. Certain types of subsidies would be almost presumed to be distortive. In the state aid system, it is possible to carry out an ex-ante review on state aid measures before it is implemented by the Member States. It is therefore possible to prevent those subsidies from taking place. Subsidies will have to be assessed case-by-case, on the basis of the improvement of the competitive position where, under state aid rules operational aid is one of the most harmful types of aid and it can be prohibited, whereas under the Foreign Subsidies Regulation they have to show that there is a negative effect also on competition due to the existence of such subsidy.

37. **The Chair** asked the European Union if when they get to the merger review control, there is no chance that they are going to find that the merger does not distort competition because the subsidy of the firms that merge in themselves already distort competition and this has been assessed in the subsidy examination. The **European Union** said that there is a difference in what is assessed. There is the concentration module where they look at how the subsidy affects the concentration at hand, if there is a distortion to the acquisition process. Under the Merger Regulation, they would look at the market post-merger and the competitive effects of the merger. Under the ex-officio tool of the FSR they could still look at the effects of a subsidy in a different economic context but it does not have to be a concentration.

38. **The Chair** then gave the floor to the **United States** that presented the Foreign Merger Subsidy Disclosure Act. The **United States** said that their new legislation is at a more preliminary state than that of the EU, as it had not yet been adopted in the Congress. The Foreign Merger Subsidy Disclosure Act is part of the US Merger Filing Modernization Act that raises some interesting issues. One of them is that it identifies the problem with subsidies for the merger review process. It notes that “subsidies can distort the competitive process by enabling the subsidised firm to submit a bid higher than other firms in the market, or otherwise change the incentives of the firm in ways that undermine competition following the acquisition.” Its goal is to ensure that the Federal Trade Commission and the Department of Justice have the necessary documentation and information to determine if the acquisition would violate the US antitrust laws. It promotes transparency of information about subsidies, which means that antitrust agencies can use this for their competition law review. As part of a pre-merger notification, the act would require merging firms to include a detailed accounting of each subsidy. The legislative package also includes bills aimed at increasing funding for the agencies through reform of merger filing fee regime, and a venue issue for state attorney generals. Once the legislation is adopted, antitrust agencies will develop implementing rules.

39. **The Chair** asked the **United States** a hypothetical question: assuming that a very large European car manufacturer gets several subsidies for producing electric cars and then decides to buy a dealer in the US, would that subsidy be counted as an element in the assessment in the new legislation? The **US** answered that it would not because of the definition of the foreign entity of concern and the subsidies to which the reporting obligation would apply. The subsidies are considered in the assessment of the legislation are those of the foreign entity of concern. Therefore, a very limited number of jurisdictions.

40. **The Chair** then introduced **Mr Miguel de la Mano** and asked him to what extent subsidies are a relevant element to take into consideration in competition analysis? **Mr Miguel de la Mano** said that subsidies constitute the great majority of trade interventions that have been imposed in the last decade. The Global Trade Alert initiative shows that subsidies are frequently used both in developed and developing countries and that the most frequently observed measures are public sector loans or loan guarantees. Together, subsidies accounted for 52% of all trade related measures that were implemented between 2009 and 2019. In this context, it is understood that subsidies can distort competition between the firm that gets the subsidy and those that do not, especially when subsidies are large and only available to one or a subset of market participants. Competition authorities are expected to carefully consider these distortions, but it has not been the case.

41. The economic approach of the past decade has led to identifying subsidies and applying a balancing test. This makes it easier for competition authorities in Europe to observe that even if there were subsidies, they would not have been distorted as they would have been corrected by the state aid regime.

42. Subsidies were not a relevant factor in competition assessment. However, it seems they are affecting the level of market shares and the level of concentration in certain industries within Europe. The EU state aid regime does not apply to foreign subsidies. Therefore, it is clear that they will distort competition in global markets. The new legislative instrument intends to correct that, and, as a complement to competition policy enforcement, it may be more impactful than it seems.

43. With the new regulation, participants to a merger or acquisition will have to notify the foreign contributions from non-EU governments. The deals that meet the thresholds will need to be approved by the Commission, that may impose structural remedies or even prohibit the transaction if its negative effects outweigh the positive ones.

44. When a given transaction is notified for both regulations (merger review and the FSR), the notification and the assessment will be dealt with separately. If the Commission considers that an acquiring firm is benefiting from a foreign subsidy, and assesses that this may significantly distort competition in one or more markets affected by the merger, these distortions as a result of the subsidy may be taken into consideration when assessing the competitive effects of the transaction. This is why Mr de la Mano thinks that theories of harm may actually be reinforced.

45. When a merger involves a subsidised firm which strengthens a dominant position, this leads to a significant impediment to competition. If the target is already dominant, the acquisition by a foreign firm that benefits from a foreign subsidy, strengthens those demands, because it softens the budget constraints of the target, allowing it to make investments and take risks that rivals cannot take, or because it gives it firepower to protect its dominant position. Attacking the customers of competitors and attracting them to the merged firm may deter aggressive behaviour from rivals. If a firm that is already dominant, is acquired by a rival firm who benefits from a foreign subsidy, that may strengthen the dominant position, and it would be a significant impediment on competition. These concerns may arise even if the overlap is modest or non-existent. In principle, this could be remedied by offsetting that advantage through the FSR.

46. A second theory of harm applies to cases where one of the merging firms benefits from significant foreign subsidies. Through the acquisition, the firm may obtain, create, or increase the ability and incentive to engage in anti-competitive foreclosure conduct. Similarly, large conglomerates that are benefiting from deep subsidised pockets may also turn to predatory bundling.

47. Subsidy defence appears to be conceptually sensible, economists have therefore developed the theory of second best. Authorising a merger that increases market power may allow a particular firm to overcome potential entry barriers that are created by the deep subsidy to a foreign rival, or simply to withstand the predatory conduct. This raises serious political economy concerns in relation to subsidy defence, as it may increase lobbying and rent seeking behaviour. It may be difficult to control and set the right set of precedents in those circumstances. To be a first best is to eliminate the distortive effect of the subsidy through the FSR, and then assess the merger on its own merits, assuming that the subsidy distortions have been eliminated through the FSR.

48. While antitrust rules address all types of anticompetitive market conduct, they do not consider whether they are related to subsidies granted by Member States, or by non-EU governments. This is because it is assumed that the EU state aid regime works well. Another problem is the lack of information and transparency, which makes it difficult to obtain the evidence to establish causality in the context of an antitrust enforcement action. This may be partially solved through the market investigation regime that allows the Commission to start the review ex-officio of the potential impact of foreign subsidies on a given firm's ability and incentive to compete within the EU. This tool will allow the Commission to obtain accurate information and help it determine whether or not there is an impact on competition.

49. The FSR expands the range of theories of harm. First, subsidies can strengthen the market power of the recipient making it more likely that a subsidised firm would need a dominance threshold that makes it possible that there is a finding of dominance. It can also increase the ability and the incentive to engage in predatory practices which require temporary profit sacrifice. There may be no problems in using subsidies to expand the market in ways that are considered to be predatory. Several theories of harm can be considered such as predatory rebates or predator innovation. They all have in common that the exclusionary effect results from a predatory strategy. Predatory practices always involve profit sacrifice.

50. It is very difficult for competition authorities to prove a predation case, because it is not economically rational. If the prey knows that it is subject to predatory attack, the most rational response is to just sit it out and come back once prices go up again. However, if the predator knows what is going to happen then, it is not rational to predate. Economic analysis suggests that predation can be rational in certain circumstances related to information asymmetries in capital markets, which can be addressed by foreign subsidies. Once there is information on the extent and the nature of foreign subsidies, these theories of harm may resurface.

51. The distortions generated by subsidies should be considered in competition enforcement. Lack of information is one of the reasons that explains why this has not happened yet, but the new tools are correcting this. Well established theories of harm show that deeply subsidised firms are more likely to engage in abusive conduct. Mergers involving such firms will be likely to create distortions in competition with non-subsidised rivals. Ultimately, they may tip the competition authorities over the line towards the finding of significant impacts on competition. The speaker predicted that this will be seen more and more in the next five to ten years.

52. **The Chair** turned to **Germany** and asked them to explain how they were able to take into consideration the existence of subsidies of an acquiring firm in their competition analysis of a merger, and whether it made a difference or not. **Germany** presented a merger case that concerned the acquisition of the German shunter manufacturer Vossloh by CRRC, a Chinese state-owned company. Vossloh was the European market leader in producing locomotives, while CRRC's activities were focused in China and it had limited success in

Europe despite its intensive efforts. CRRC was not a close competitor of Vossloh in this specialised market.

53. Since the annual sales of shunters are subject to large variations, there can be several years between the sale and the delivery of the project. That is why the Bundeskartellamt based market analysis on a period of five years. Vossloh's market shares pre-transaction amounted to 40-50%, and the lead over the next largest competitor was significant. CRRC was only entering the European market but it was expected to strengthen its position. A change in the market shares of both parties was foreseeable. It was also clear that historical market share data provided only limited information for the future market position of both companies. The Bundeskartellamt made an extensive assessment of all relevant factors influencing the situation, and found that technological standards played a role in the rationale of the deal. CRRC added vast technological resources, but it had to adapt to the track control technology and driving voltage in the country in which it wanted to sell.

54. For the analysis of the companies' resources, the role of subsidies comes into play. In its analysis of the merger case, the Bundeskartellamt took note of the general public debate regarding the acquisition of German companies by Chinese SOEs. It found that not all aspects being discussed were relevant from a competition law perspective. Some distortions mentioned by European manufacturers related to trade policy and to procurement law, and could not be solved with the tools provided by competition law. In terms of merger control, the financial resources of an SOE from a centrally planned economy become very relevant. German law assumes that a company is controlled by another company holding a majority share. This applied to this case, as China indirectly holds a majority of 51% in CRRC shares. The investigation also showed that it was the express intention of the State-owned Assets Supervision and Administration Commission to exert influence on essential aspects of economic practises of its state-owned income. In view of this, the affiliated group to be considered included all the companies in which China holds the majority share. However, the Bundeskartellamt encountered some challenges to receive information on these. The second important consideration regarding the role of the SOE is the ability and willingness to implement low price strategies, and the Bundeskartellamt found foreign subsidies to be an important factor. In this case, it may be expected that the SOE follows objectives such as the state's industrial strategy. The investigation showed that CRRC strongly based its actions on the provisions set out in the 13th 5-year plan that was applicable at the time. In view of this, it was not possible to apply the standards used for potential predatory pricing strategies. CRRC was actually following the Made in China 2025 initiative and the Belt and Road initiative.

55. In its annual report, CRRC recorded subsidies of about €75 million, and an EU competition report led to assume that additional subsidies were granted. CRRC also had access to additional funding from state-owned banks. These are the deep pockets. In this context, the Bundeskartellamt found that CRRC had extensive possibilities to implement low price strategies. This was supported by the fact that the EU had already handed down a large number of anti-dumping decisions against Chinese state-owned companies. Since they all belong to the same owner, this behaviour could also be expected from CRRC. The Bundeskartellamt analysed various scenarios regarding the development of market positions trying to find out whether this acquisition would really be a game changer. It concluded that Vossloh's competitiveness had considerably decreased, and that new competitors with innovative traction technologies had entered the market. Vossloh had already decided to sell its subsidiary in 2014 and had not invested in new traction technology. In this specific case, the expected increase in financial resources and the vertical integration was balanced by uncertainties with regard to the future development of the market. In the end, remaining doubts did not allow for a sufficiently reliable conclusion

as to whether the prohibition requirements were met. This led the Bundeskartellamt to clear the merger without conditions.

56. This case illustrates that the involvement of a SOE results in several particularities with regard to the assessment under competition law. In a merger proceeding, these have to be analysed in detail and with regard to the concrete market in question.

57. **The Chair** predicted that the first competition authorities are going to be in a better position because they will have better access to information and they will probably consider issues of subsidies more than they used to. He turned to the EU, the US and BIAC for some final remarks.

58. **The European Union** said that the Foreign Subsidies Regulation does not change the assessment standard for antitrust cases or mergers. It is a new instrument, and the theories of harm may also not be exactly the same. Another key issue is transparency. The approach that is set out in the regulation includes the ex-ante notification requirement, because if the market is only looked at with the ex-officio tool, it might come to a difficult situation where there is nothing to pursue the case. The question of dominance tends to be more of a contributing part of the assessment and has never been the decisive factor. With the theory of harm that has been used before, it would not be possible to conclude that the subsidy was a decisive factor, so it might be necessary to find a new theory of harm. In the situation of predatory pricing and dominance, it would need to be decided whether antitrust or the new Foreign Subsidy Regulation would be the better tool to tackle it. Since the regulation did not exist, it is difficult to say what the theories of harm will be.

59. **The US** said that if the new regulation is adopted, it will be an addition to the notification requirement, increasing the amount of evidence and information available when examining a merger. In the merger area, the US was also concerned with the role of SOEs and the subsidised firms with market power.

60. In general terms, **BIAC** is not convinced that competition authorities should have the unilateral ability to determine whether the subsidies received by companies should form the basis for enforcement action. They think that it is not correct to conclude that it is anti-competitive that some companies receive benefits and others do not. While the competition authority might theoretically have a role in examining the effect of subsidies in competition investigation, there are factual and analytical difficulties. Some subsidies may be hidden. This does not mean that competition authorities do not have a role. Nor does it mean that there is not an issue to address, but the issue of subsidies and their anti-competitive impact would be better addressed at the legislative level.

61. To close the discussion, **the Chair** stated that there was plenty of emphasis on the fact that there should be a theory of harm and a more restrained approach to considering subsidies in antitrust. Just knowing that there is a subsidy is not enough. If enough subsidy with the proper causality already creates a distortion, maybe that is the basis on which competition authorities could intervene. It was clearly stated that there can be distortion of competition due to subsidies, but many things still have to be figured out. However, there is a potential competition issue. Maybe, the added transparency is going to be useful. In the meantime, the tools are being improved. The competition community is restrained because it does not want to act in an inconsiderate way, but it is aware of the problem and developing tools to tackle it. The Chair hopes this is reassuring for the trade community.