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Global Forum on Competition

SUBSIDIES, COMPETITION AND TRADE

- Executive Summary -

1 December 2022

This executive summary by the OECD Secretariat contains the key findings from 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.

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

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Executive Summary

By the Secretariat¹

On 1 December 2022, the OECD held a roundtable on Subsidies, Competition and Trade as part of the Global Forum on Competition. Considering the background note prepared by the OECD Secretariat, the written contributions, and the discussion by delegates and the expert panellists, the following key points emerged:

1. *Subsidies have been on the rise globally due to multiple factors such as COVID-19 recovery, climate change, fragile and disrupted global value chains and the digital transformation. These developments have prompted increased government intervention, leading to a higher number and larger size of subsidy measures implemented worldwide. While legitimate reasons exist for subsidies, they can lead to inefficiencies and serious trade tensions, and as their use continues to grow, competition authorities may need to consider them in their enforcement activities, especially in relation to mergers and abuse of dominance.*
 - The concerns revolve around the increased financial strength from subsidies, which can be an issue by (i) creating or enhancing a dominant position or (ii) facilitating harmful conduct. Financial strength has been a contributing factor, but not the sole determinant, in assessing potential dominance in merger cases.
 - Mergers involving heavily subsidised companies can give rise to competition concerns. For instance, if a dominant firm is acquired by a competitor benefiting from foreign subsidies, it may further strengthen the dominant position, leading to potential anti-competitive behaviour.
 - Subsidies can also raise competition concerns when they provide incentives for businesses to employ abusive, predatory strategies. This can encompass various theories of harm, such as predatory rebates, predatory bundling and predatory innovation.
 - Nonetheless, proving a predation case is highly challenging for competition authorities. While predation is often considered hard to implement, economic analysis suggests that predation can be rational in certain circumstances, particularly when there are information asymmetries in capital markets that foreign subsidies can address. Furthermore, recoupment does not necessarily give an indication on the likelihood of such a strategy when a company does not follow profit maximisation goals, but instead focuses on other goals such as a national industrial strategy.
 - More information on the extent and the nature of foreign subsidies may result in an increase in the relevance and importance of subsidy-related theories of harm. New regulatory instruments may help with providing increased transparency about the subsidies.

¹ This executive summary does not necessarily represent the consensus view of the Global Forum participants. It does however identify key points that emerged from the Roundtable discussion, including the views of the expert panellists and the participants' oral and written contributions.

2. *Subsidies have played a role in merger cases in two different ways: subsidy offence and subsidy defence. A subsidy offence is a case in which the merging entities receive a subsidy, which may provide them with a competitive advantage vis à vis its competitors. In the case of a subsidy defence, a third party or a competitor of the merging parties receives a subsidy, and the merging entities claim that this might be a mitigating factor for potential anti-competitive concerns.*
- In a number of merger cases, the European Commission has included in its analysis the receipt of foreign subsidies by (one of) the merging parties (subsidy offence). Such subsidies led competitors to argue that the merging parties would be able to undercut prices post-transaction and to drive existing competitors out of the market. However, the cases show that the conclusion is still driven by the assessment of the market position of the merging parties, and that subsidies alone won't change the already existing assessment.
 - In the case of a (successful) subsidy defence, a merger which increases (or creates) market power of the merging parties is allowed in order to offset larger competition concerns before the merger that are a result of subsidisation of a rival (theory of second-best). Examples of such competition concerns can be the erection of entry barriers or the use of predatory conduct as a result of significant subsidisation. The choice for a second-best outcome can raise serious political economy concerns in relation to subsidy defence, as it may increase lobbying and rent seeking behaviour.
3. *Understanding the size and impact of subsidies remains difficult due to the lack of information and transparency. This makes it complicated to establishing causality between subsidies and potentially abusive conduct in the context of an antitrust enforcement action. New instruments aim to address this challenge.*
- Substantiating the existence of government subsidies can be difficult given the data issues with regards to subsidies.
 - Newly introduced tools and increased attention for (the collection of) data on foreign subsidies may alleviate the issue of insufficient information and transparency. Such data can be required by competition authorities or regulatory agencies in the case of a merger or a public procurement process.
 - Recent examples of such new instruments are the European Foreign Subsidies Regulation (FSR) and the US Foreign Merger Subsidy Disclosure Act. These new instruments require the party(ies) involved to provide information about potential foreign financial contributions received before they conclude a concentration, or before they can be awarded a public procurement procedure.
4. *Different tools have been used in the past to address competition distortive subsidies, including multilateral rules, Free Trade Agreements and trade blocs, competitive neutrality principles and State Aid control. The discussion showed that while subsidies have only played a modest role in competition enforcement cases to date, well established theories of harm can explain why companies may be more likely to engage in predatory strategies as a result of increasing government subsidisation.*
- It is crucial to recognize the progress made by the international community in establishing trade rules and competition policy frameworks that have fostered global growth and prosperity. However, there is a need to improve and deepen international co-operation on subsidies, despite the challenging geopolitical landscape.

- Greater intergovernmental consultation and interdisciplinary co-operation could contribute to improving subsidy design and achieving better outcomes. Trade and competition policy officials have a common interest in joining efforts to share existing information, identify and fill gaps and coordinate on data collection. This could benefit national competition authorities in detecting best practices for dealing with subsidies in competition enforcement.
- New tools to scrutinise subsidies will help increase the transparency around foreign subsidies. This increased transparency, combined with the continued increase in government intervention around the world, may lead to an increase in competition enforcement cases in which subsidies will play a part in the assessment.