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SUBSIDIES, COMPETITION AND TRADE – Contribution from Business at OECD (BIAC)

- Session II -

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This contribution is submitted by Business at OECD (BIAC) under Session II of the Global Forum on Competition to be held on 1-2 December 2022.

More documentation related to this discussion can be found at: oe.cd/sctr.

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Subsidies, Competition and Trade

- Contribution from Business at OECD (BIAC) –

1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to submit comments to the roundtable on subsidies, competition, and trade at the 2022 Global Forum on Competition.
2. The interaction between subsidies and competition law has been discussed at several OECD sessions, and BIAC previously has submitted comments on the topic.¹ The current session looks at whether granted subsidies should be considered as relevant factors by competition authorities when conducting their investigations (such as merger review or abuse of dominance).
3. Recently, the role of competition authorities in reviewing potentially distortive subsidies when granted by foreign governments, has attracted more attention. In particular, the EU is enacting a broad foreign subsidy scrutiny regime, and the U.S. is considering legislation addressing the impact of foreign subsidies in merger review proceedings.
4. BIAC submits that it is useful for the OECD to examine current perspectives of competition authorities on some of the key issues that anticompetitive subsidies raise. However, given the sometimes-competing roles of trade, taxation, industrial development and competition, we are not convinced that competition authorities, in their daily work, should have the unilateral ability to determine whether subsidies received by companies under investigation should form a basis for enforcement action. Rather, given the difficulties of scope, assessment and remedy design, anticompetitive impact of state subsidies should be addressed primarily at a legislative level where the appropriate trade-offs between competing priorities should take place.
5. As highlighted below, there are substantial practical difficulties in factoring in subsidies as part of anticompetitive assessment or a review of subsidies in themselves.
6. Determining whether a subsidy has been provided, and the potential anticompetitive effects of a subsidy, can also be a challenging task, particularly where different countries provide different economic benefits to business. For example, should a tax benefit—in a country with high corporate taxes—be seen as an anticompetitive subsidy by another country that has lower corporate taxes? Should low energy costs in a country with state-owned energy production be seen as a subsidy by a country with privatized energy that has higher costs? Should local tax relief used to induce a company to locate its business headquarters in a particular city be considered anticompetitive where the property costs are much higher than in other countries? In these cases, even some large “subsidies” may not have a direct impact on the competitive dynamics of a market or distort competition as compared to the package of costs and benefits faced by other businesses in other places. Thus, using subsidies in isolation as a basis to weaponize competition enforcement, without regard to other factors, may risk distorting markets as much as the

¹ OECD, Competition, State Aids and Subsidies—Note by BIAC, DAF/COMP/GF(2010)5, at 223-228 (May 19, 2011), <https://www.oecd.org/daf/competition/48070736.pdf>.

underlying subsidies themselves. In addition, reviewing foreign governments' industrial policy decision risks pitting competition authorities against sovereign governments.

2. Subsidies and Competition

7. As mentioned above, governments routinely support companies in numerous ways. This can be done by providing grants, loan guarantees, tax breaks, preferential input costs, or other benefits of value going beyond financial contributions.² Subsidies are used to promote a variety of governmental policies and domestic priorities and well-targeted subsidies can help to overcome obstacles to market evolution, including addressing market failure.

8. Subsidization, in whatever its form, is intended to induce certain public policy outcomes, which may result in a change in market dynamics. In this context, the OECD's 2021 Recommendation of the Council on Competitive Neutrality, clearly urges those governments that adhere to the recommendation to "[a]void offering undue advantages that distort competition and selectively benefit some Enterprises over others. Such advantages would for example include loans, loan guarantees and state investment in capital, at conditions not in line with market principles, as well as favourable tax treatment, grants and goods or services provided by governments at favourable prices. Where achieving an overriding Public Policy Objective requires an exception, this should be transparent to all, proportionate and periodically reviewed."³ BIAC notes that this framework pre-supposes that government support is not legitimate ("undue"), might distort competition and be discriminatory ("selectively benefit some Enterprises"), but "overriding Public Policy Objective" should be an exception.⁴ However, legitimate state support, based on transparent public policy objectives and granted through a transparent and non-discriminatory process falls outside the Recommendation.

9. States use subsidies to give effect to economic (or other) policies and to encourage economic development or activities. This may be to address societal priorities (e.g., to fulfil public policy imperatives in the communications or health sectors), major infrastructure projects to boost economies, or to achieve growth or "autonomy" in sectors deemed strategic, such as alternative energy sources or semiconductors. These are by no means an exception in the industrial policy playbook. Viewing subsidies solely through the competition lens may therefore be a mistake.

10. In addition, targeted state intervention in the economy, in the form of subsidies, has been necessary over the years to address various crises facing the world economy. For example, governments engaged in significant banking and insurance sector bail outs in 2007-2008, as they sought to mitigate the worst effects of the world financial and economic crisis. In those situations, it was accepted that sustaining businesses in difficulty brought benefits which outweighed the negative or distortive effects. However, given the run of more recent exogenous economic shocks since 2020 (including the supply chain crisis; the impact of Covid-19; geo-political security concerns; fuel shortages and resulting inflationary pressures, as well as the climate emergency), it must be recognized that state intervention in the market may well become more routine, rather than exceptional.

² For the purposes of this contribution, we will adopt a broad definition of the term "subsidy" as other commentators have done.

³ OECD, Recommendation of the Council on Competitive Neutrality, [OECD/LEGAL/0462](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462), § II.2.a (May 30, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

⁴ *Id.*

11. However, competition authorities do have an increasingly important role to play in helping government understand whether particular advantages stemming from subsidies impede the competitive process, create significant anti-competitive distortions, or affect the long-term trade-offs. Authorities should be able to share their knowledge and expertise throughout government, “advising on possible solutions, through evidence-based market studies and competition advocacy.”⁵

3. Subsidies and Competition: National or International Level

12. It is well acknowledged that certain subsidies can have an effect on competition, and the EU has a well-established state aid regime which ensures a level playing field amongst EU players in the EU single market. Any state aid by EU governments above certain thresholds must be notified to the EU Commission which will clear it or prohibit illegal EU government subsidies that distortion competition within the EU Single Market. Similarly, following the exit of the UK from the EU, the UK competition authority, the UK’s Competition and Markets Authority (CMA), has been given a role to supervise the new UK subsidies regime. But neither of the two regimes gives either DG Comp or the CMA a competence to consider whether subsidies should be taken into account in the context of merger or abuse of dominance investigations, rather creating a separate regime with its own institutional and procedural structure.

13. It is also recognised that distortions can also occur with public tenders where the recipient of a subsidy can bid lower than others and win the bid, again distorting competition. In some rare cases subsidies can also facilitate abusive conduct: the subsidies can lead to changes in the market and allow the recipient to increase its market share to a level at which it has the power to behave independently of competitive pressures. If barriers to entry are sufficiently high, it can then raise its prices.⁶ It could also allow companies which receive subsidies to price at a very low level for a sustained period without the need to recoup those costs. Recipients of subsidies, especially if state-supported, may be able to sustain losses for long periods of time without the need to seek recoupment.

14. Given the nature of certain markets and global trade, the effects of subsidies are likely to be felt at the international level, where firms that are active internationally receive state support. Such government assistance may enable firms in one jurisdiction to expand market share in another jurisdiction at the expense of rivals. This includes state-owned enterprises (SOEs) which operate abroad, as well as state “directed” companies.

15. It is notable that in June 2017 the OECD Ministerial Council recognised the need to address and “prevent government policies [] that distort competition, including state aids and subsidies” to help level the international playing field.⁷ However, given the exogenous economic shocks highlighted above and increased state interventions, it may not be easy to assess what the “level playing field” should actually look like. The World Trade Organization’s Agreement of Subsidies and Countervailing Measures is meant to provide international oversight of subsidies and provide a mechanism to offset injury caused by subsidies. While more work is needed to improve compliance with this tool and adapt its

⁵ G7, Common Understanding of G7 Competition Authorities on “Competition and the Digital Economy” 2 (June 5, 2019), https://www.banque-france.fr/sites/default/files/media/2019/08/02/commonunderstanding_0.pdf.

⁶ See Mathew Heim, *How Can European Competition Law Address Market Distortions Caused By State-Owned Enterprises?*, BRUEGEL (Dec. 2019), https://www.bruegel.org/sites/default/files/wp_attachments/PC-18_2019-181219.pdf.

⁷ OECD, 2017 Ministerial Council Statement—“Making Globalisation Work: Better Lives for All,” C/MIN(2017)9/FINAL, ¶ 17 (June 8, 2017), [https://one.oecd.org/document/C/MIN\(2017\)9/FINAL/en/pdf](https://one.oecd.org/document/C/MIN(2017)9/FINAL/en/pdf).

scope to today's business environment, a global tool managed by WTO member governments could prevent political and trade tensions caused by unilateral policing of another government's policies.

4. Mergers & Acquisitions

16. Countries' concerns regarding foreign subsidies and their competitive impact have intensified, especially due to companies or their valuable assets being cheaper to acquire following the financial crisis and Covid-19 pandemic. The geopolitical and economic situation has also increased concerns about "strategic acquisitions," notably where the objective of the acquisition may be unrelated to day-to-day commercial activity and the acquisition was enabled by state support. This has resulted in a significant increase of foreign direct investment regimes across the world.⁸

17. There are additional approaches being considered. As discussed in Section VI, both the EU and US are considering granting their competition authorities the ability to assess the impact of foreign subsidies in the context of merger review, though their approaches differ. The EU is creating an additional review process outside the existing merger control regulation, that requires the notification of any merger or acquisition involving a financial contribution of at least €50 million by a non-EU government, where one of the merging parties, target or joint venture generate an EU turnover of at least €500 million. On the other hand, the U.S. proposal requires premerger notifications to disclose information involving subsidies from an organization designated as posing strategic or economic risks to the United States ("foreign entity of concern").

5. Role of Competition Authorities

18. Over and above the responsibility of competition authorities to advocate for competitively neutral policies and to highlight the limits of subsidies as a competition policy matter, further work is needed to bridge the nexus between different industrial policy imperatives (e.g., allowing ailing industries an exit path to avoid social shocks). BIAC recommends that the OECD undertake more work to understand what a meaningful anti-competitive distortion as a result of state support could be. Any policy that equates state support directly with competitive harm would seem to lack the requirement of causal connection and undermine the legitimate exercise of governmental discretion in making public policy choices.

19. BIAC is of the view that while competition authorities might theoretically have a role in examining the effect of subsidies in competition investigations, that analysis requires a series of factual, analytical, and practical considerations that go well beyond competition law considerations and makes this a very difficult and politically delicate task.

20. It may be very difficult sometimes to define whether assistance received constitutes a subsidy, whether such a subsidy is "undue", whether it impacts competition and whether such impact rises to the level of an offense. While some government support may be public, other forms may be hidden (especially if there is an attempt to favour particular firms) or harder to assess, for example where SOEs have dual public service and commercial activities). Apart from monetary contributions or tax breaks and loans, there are more subtle

⁸ See Comments by the *Business at OECD* (BIAC) Competition Committee to the OECD Competition Committee—The Relationship Between FDI Screening and Merger Control Reviews (forthcoming Nov. 2022).

ways to assist a company.⁹ These distinctions could lead to disparate enforcement at equivalent levels of support. Other relevant questions include:

- How can sufficient evidence of subsidy support be gathered? It is clear that gathering sufficient evidence held by a foreign government in order to establish subsidies may prove difficult, making the use of RFIs a suspect endeavor. Should an authority supplant the decision by a third country government and instead apply an objective assessment e.g. of a prudent investor? Is this relevant where the support is not a financial injection but some other type of support?
- It can be difficult to assess whether the market has been affected by the subsidy. If subsidies are intended to change market dynamics, should there be a presumption that subsidies distort the market? Could one design a “safe harbour” if support was provided transparently and in a non-discriminatory manner where subsidies are de minimis or too far removed from any anti-competitive effect?
- What is the theory of harm? If many companies, groups, or sectors routinely receive state support, when is a particular subsidy more distortive? Is it necessary to show that the subsidy enables an inefficient firm to remain in the market, or to dominate a market, or that entry barriers are increased?
- What is the causal nexus between the subsidy and the distortion? Is the intent of the subsidy an aggravating factor or is it principally the effect of the subsidy that is material? Where subsidies are provided for a clear strategy acquisition, the nexus may be easier to show. If the subsidy comes in the form of debt forgiveness that enables a company to access capital for an acquisition, the connection becomes weaker. Where is the line to be drawn?
- Have other market participants also received support from their own governments and in what form? How can this be assessed?
- Is it possible to design meaningful remedies that do not intervene in the sovereign activity of another government to support their economy?

6. Current EU and U.S. Proposals

21. EU rules on competition, public procurement, and trade defence instruments play an important role in ensuring fair conditions for companies operating in the European Single Market. However, none of these tools apply to subsidies granted outside the EU which provide their recipients with an unfair advantage when acquiring EU companies, participating in public procurements in the EU, or engaging in other commercial activities in the EU.

22. As a result, the EU recently approved the Regulation on Foreign Subsidies,¹⁰ due to enter into force by the end of 2022, which takes a novel approach to address concerns

⁹ See Joined Cases C-399/10 P and C-401/10 P, Bouygues SA, Bouygues Télécom SA v. Comm'n, ECLI:EU:C:2013:175 (Mar. 19, 2013) (where the European Court of Justice found that state intervention could constitute support, and placing particular companies in a more favourable position than others, even if there is no immediate burden on state resources (i.e. outlay), so long as there is a sufficiently concrete risk of imposing an additional burden on the State in the future. As a result, a state guarantee can entail such an additional burden on the State and constitute state aid.).

¹⁰ Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (COM(2021)0223–C9-0167/2021–2021/0114(COD)) (July 11, 2022), https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/INTA/DV/2022/07-13/1260231_EN.pdf [hereinafter EU Foreign Subsidies Regulation]. The Regulation was approved by the

about foreign subsidies, broadly defined, distorting the EU Single Market. In particular, the regulation aims to ensure a “level-playing field” by addressing distortions on the internal market “where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market.”¹¹ The Regulation will introduce three tools. There are two notification-based tools, whereby a company which is active is a recipient of financial contributions granted by non-EU governments must pro-actively notify the Commission (i) of any merger or acquisition involving a foreign government financial contribution of at least €50 million by a non-EU government, one of the merging parties, target or joint venture generate an EU turnover of at least €500 million; and (ii) of any public procurements bids involving a financial contribution by a non-EU government of at least €4 million per third country, where the estimated contract value is at least €250 million.¹² Whether these obligations are proportionate to the concern about subsidy distortion or place an undue burden on companies remains to be seen. The regulation creates a broad third tool allowing the Commission to investigate any other market situation, where the Commission can start a review on its own initiative (ex-officio), or it can request an ad-hoc notification for smaller concentrations and public procurement procedures. With this regulation, the EU created a new instrument, decoupled from traditional competition analysis that requires proof of market power and consumer welfare.

23. On September 29, 2022, the U.S. House of Representatives passed the *Foreign Merger Subsidy Disclosure Act*.¹³ While limited to mergers, the Act addresses distortive subsidies, specifically subsidies from a “foreign entity of concern.” The Act requires parties submitting premerger notifications to the relevant U.S. antitrust authority to disclose information on subsidies from a “foreign entity of concern.” The bill has not yet passed the Senate or been passed into law.

7. Conclusion

24. Subsidies, in all of their various forms, are a normal part of economic life used by every jurisdiction and an often-legitimate reflection of industrial policy. Competition review based on existing tests and theories may not be the best mechanism to address “distortions” caused by subsidies, given that information gathering powers and remedies are ill suited to redress any harm caused. BIAC recommends that competition authorities focus on advising and advocating for pro-competitive government interventions and subsidies structures that conform to OECD competitive neutrality principles. In addition, reviewing foreign subsidies under existing (or indeed, new) competition mechanisms may place the competition system in the invidious position of reviewing, through an industrial

European Parliament on November 10, 2022 and is expected to be officially adopted by the Council November 82, 2022. The Regulation will enter into force twenty days after its publication in the Official Journal. *See* Press Release, Eur. Parl., Parliament approves new tool to ensure fair competition on the single market (Oct. 11, 2022) <https://www.europarl.europa.eu/news/en/press-room/20221107IPR49609/parliament-approves-new-tool-to-ensure-fair-competition-on-the-single-market>.

¹¹ EU Foreign Subsidies Regulation, *supra* note 10, art. 3 (1).

¹² The Regulation also clarifies that the provision of goods and services to governments which are in line with normal market conditions do not constitute a foreign subsidy, which offers additional legal certainty and lowers compliance to any entity which would otherwise have had to disclose all their EU government contracts as a means to participate in procurement or M&A in the EU.

¹³ Press Release, House Passes Budd-Sponsored Foreign Merger Subsidy Disclosure Act (Sept. 29, 2022), <https://budd.house.gov/news/documentsingle.aspx?DocumentID=1575>; *see also* Foreign Merger Subsidy Disclosure Act of 2021, H.R.5639, 117th Cong. (2021).

organisation lens, the political decision of their home or foreign governments, which is likely to result in unwanted political intervention, if not trade tensions. Sound competition policy should not ignore concerns about heavily state-backed foreign takeovers or strategic subsidies that could put the level playing field at risk. However, appropriate legislative measures should be considered, rather than adding a new, highly political, role for competition authorities in the conduct of their existing powers.