

Brussels, 9 November 2020

Orgalim comments on the European Commission White Paper on foreign subsidies in the Internal Market

Executive summary

Orgalim welcomes the White Paper on foreign subsidies as an opportunity to start the discussions regarding this important topic. Orgalim also supports the aim of the White Paper on foreign subsidies to tackle illegal foreign subsidies in the EU, with the following specific recommendations:

- need to tackle illegal foreign subsidies through international cooperation and bilateral trade agreements;
- need for one uniform legislation to tackle all foreign subsidies in the EU;
- need for a clear definition of what constitutes an illegal foreign subsidy;
- no to creating red tape for our companies;
- need for clarity on 'ex officio' procedures;
- need to clarify the link between the instrument on foreign subsidies and other instruments.

1. Introduction

In June 2020, the European Commission published a White Paper on "levelling the playing field as regards foreign subsidies" in the Internal Market¹. The White Paper foresees three possible building blocks, including (1) a general instrument to address the distortive effects of foreign subsidies, (2) an instrument to tackle foreign subsidies facilitating the acquisition of the EU companies and (3) an instrument to tackle foreign subsidies in public procurement procedures, both at EU and Member State level.

As the Commission is planning to put forward a proposal on the topic in 2021, Orgalim would like to share its views on the White Paper on foreign subsidies.

Orgalim advocates for open and rules-based trade, and we are concerned about the increasingly protectionist policies of some third countries. In this context, Orgalim supports the aim of the White Paper on foreign subsidies to create a level playing field at international level, specifically by tackling illegal state subsidies by third countries in the Internal Market.

¹ See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1070

2. Orgalim recommendations

- *Need to tackle illegal subsidies at multilateral level:* We believe that efforts to tackle illegal state subsidies should be first and foremost undertaken at the multilateral (WTO) level. In this respect, Orgalim supports the EU proposal² on transparency and subsidy notifications at WTO level, including the creation of a general presumption according to which, if a subsidy is not notified to the WTO by the granting State it would be presumed to be illegal. In this case, the State in question would need to prove that the measure is not an illegal subsidy according to the WTO rules. Retaliatory measures against a State which does not notify a subsidy should be introduced.
- *Need to tackle illegal subsidies through bilateral trade agreements:* For example, China is a key market for our companies and a very important country for our sectors, both in terms of the value of goods exchanged and in terms of investments. The problem of illegal state subsidies should be tackled bilaterally through the current negotiations on the EU-China investment agreement. We also believe that illegal subsidies should be covered in the EU-UK trade agreement. There is a clear need to strengthen the enforcement and execution of the negotiated agreements, including on state aid.
- *Need for a uniform instrument:* Orgalim supports the introduction of one uniform legislation to tackle all foreign subsidies in the EU, covering acquisitions by foreign companies and participation of third country bidders for EU tenders. Only the Commission should be responsible for enforcement of this unitary instrument.
- *Need for a clear definition of illegal subsidies:* A clear distinction is needed between EU Member States' subsidies, which are covered by EU State aid control rules³, and subsidies by third countries. The definition of illegal State subsidy by a third country should be clear and should cover (1) export finance as defined by the OECD, (2) preferential loans with conditions to procure from the third country, (3) unlimited debt guarantees, and (4) tax reliefs. Moreover, we call on the Commission to define State Owned Enterprises as undertakings in which the foreign State owns more than a set percentage (for instance 20%) of the capital. We also call for a reduction in the €100 million threshold put forward in the White Paper⁴ as this might lead to 'below the radar' concentrations or takeovers. Furthermore, we call on the Commission to clarify the 'EU interest test'⁵ and the reasoning behind the €200,000 EUR threshold foreseen in Module 1⁶ of the White Paper.
- *No to red tape:* The White Paper foresees the need for the economic operator to comply with transparency obligations regarding subsidies of third countries (burden of proof). In particular, according to the White Paper, to participate in acquisitions and bids for public tenders, companies need to provide certain information⁷. The new instrument should not create red tape for our companies, in line with the 'better regulation' principle. Moreover, Orgalim would like to stress that both the intellectual property rights and the know-how of companies need to be protected. Furthermore, to reduce uncertainty for European companies it is of paramount importance that the investigations are carried out within a short and pre-set timeframe.
- *Call for clarity on 'ex officio' procedures:* The White Paper on foreign subsidies foresees the possibility for the competent authority, be it at European or at Member State level, to start 'ex officio' an inquiry into the legality of

² See http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157633.pdf

³ See https://ec.europa.eu/competition/state_aid/legislation/legislation.html

⁴ See White Paper - 4.2.2.3 "Thresholds"

⁵ See White Paper - 4.1.4 EU interest test

⁶ See White Paper - 4.1.3 Assessment of distortions in the internal market "Generally, it is suggested that foreign subsidies below a certain threshold are deemed unproblematic as they are unlikely to cause distortions of the proper functioning of the internal market. Foreign subsidies up to that threshold should be presumed to not be able to distort the correct functioning of the internal market. The threshold could be set at an amount of EUR 200 000 granted over a consecutive period of three years".

⁷ See the White Paper – (I) Module 2, 4.2.2.2 "Ex-ante notification obligation", (II) Module 3, 4.3.3.1 "Initiation of the procedure"

the subsidy of third countries⁸. Orgalim calls for clarity on the 'ex officio' procedures, in order to avoid red tape and sanctions in case of non-cooperation of companies and 'on site' investigations.

- *Need to clarify the link between the instrument on foreign subsidies and other instruments:* Orgalim would like to better understand the links between a possible instrument on foreign subsidies and the Regulation on screening of foreign direct investments into the Union⁹, the Trade Defence Instrument Regulation¹⁰, the EU State Aid legislation¹¹ and the plurilateral Agreement on Government Procurement (GPA)¹² at WTO level. The possible new instrument should not lead to a strengthening of the Regulation on the screening of foreign direct investment at European level. Moreover, it should only apply when the above-mentioned instruments are not applicable.

Conclusion

Orgalim welcomes the White Paper on foreign subsidies as an opportunity to start the discussions regarding this important topic. Orgalim looks forward to continuing the dialogue with the European institutions on tackling illegal foreign subsidies in the European Union, while avoiding red tape.

⁸ See the White Paper – (I) Module 1, 4.1.5 "Procedure"; (II) Module 2, "4.2 Foreign subsidies facilitating the acquisition of EU targets" and (III) Module 3, 4.3.3.2 "Investigation by the competent supervisory authority and interplay with the ongoing procurement procedure".

⁹ See 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 <https://eur-lex.europa.eu/eli/reg/2019/452/oj>

¹⁰ See Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1036>

¹¹ See https://ec.europa.eu/competition/state_aid/legislation/legislation.html

¹² See https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

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