



23 September 2020

The Danish Government's response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies

The Danish Government welcomes the opportunity to comment on the White Paper on levelling the playing field as regards foreign subsidies.

The Danish Government welcomes the initiative from the Commission to address distortions from foreign subsidies, as such subsidies are currently not under the same scrutiny as state aid originating from EU countries. Unregulated foreign subsidies risk distorting competition in the single market leading to unfair competition between subsidized and non-subsidized companies. This is not fair. Therefore, the Danish Government agree that we need the right tools to ensure that foreign subsidies do not distort our market, just as we do with our European subsidies.

A well-functioning Single Market that ensures effective competition between companies – foreign as well as European – is essential for prosperity, competitiveness, growth and consumer welfare in the European Union. Consequently, it is paramount for the Danish Government that a new legal act respects the principles of open and effective competition and avoids fencing out competition from foreign companies that would otherwise be active in the single market on equal terms. The objective of a new legal act as proposed in the White Paper should indeed be to ensure a level playing field to the benefit of consumers without creating an instrument fostering protectionism.

In general, the Danish Government recommends the Commission to introduce a general instrument as described in Module 1 and a specific instrument as described in Module 2. We find that these instruments will be able to address distortions of the Single Market appropriately. In order to ensure that the instruments will detect all distortive foreign subsidies and that enforcement is efficient, the Danish Government suggests to evaluate the instruments within a short time frame. However, the Danish Government cannot support a specific instrument addressing foreign subsidies in public procurement. In the following, our specific remarks will be elaborated:

General issues needed to be addressed in the coming Impact Assessment

Analyze the economic effects and administrative burdens

In the coming Impact Assessment, we urge the Commission to analyze both positive and negative economic effects and the administrative burden of regulating foreign subsidies, including further analysis into the magnitude of current and future expected distortions caused by foreign subsidies

within the single market and to what extent the modules will effectively address the distortive effects and how they can be expected to impact consumers. Such analyses should also include assessing the likely effects on investments, including investments from non-EU companies, growth and prices in the internal market.

Interplay between the new instrument and existing regulation

It is important to analyze and consider how the proposed instruments will relate to and interact with existing EU regulation, including merger control and trade defense instruments (cf. below) as well as the screening of foreign direct investments (FDI) and the public procurement directive. A new instrument should provide companies with transparency and a high degree of legal certainty as regards the regulation that applies for a certain practice or activity, and it should minimize the economic and administrative burdens on companies complying with or being investigated under the regulation.

Furthermore, the Danish Government finds that it is important to make clear how the proposed instruments are conceived to interact with the trade defense instruments and in particular make sure that foreign subsidies are not offset twice (e.g. both by the instruments proposed in the White Paper and by the trade defense instruments). Consequently, it is important to ensure effective and comprehensive cooperation in regard to trade defense instruments investigations (conducted by DG Trade) and the investigations proposed with regard to the instrument to tackle foreign subsidies (conducted by DG COMP).

Finally, Danish government encourages the Commission to share its views on how the proposed instrument will possibly affect international trade and investment relations, including the risk of retaliatory measures from other countries keeping in mind that many EU-firms with activities outside EU also receive domestic subsidies.

General remarks

Table the new instrument as a Regulation to ensure uniform application

The new legal act will affect all subsidized businesses operating in the Single Market. In order to avoid fragmentation across the Single Market by member states implementing the legal act differently, the Danish Government urges the Commission to put forward a regulation that ensures harmonized and effective application.

Clear and objective definitions

In order for the instrument to work effectively, central concepts need to be put into place. The Danish Government finds it important that definition of foreign subsidies corresponds to the EU rules and case-law on state-aid in order not to discriminate.

Further, it is important that the definition of the EU-test is based on clear and objective criteria, insofar as the EU-test will not be subject to political posturing, which will create legal uncertainty for the businesses in question.

Specific remarks on Module 1-3

General instrument addressing foreign subsidies (Module 1)

The Danish Government agrees with the Commission that there is need for a general instrument addressing foreign subsidies distorting competition in the Single Market. We agree that there is a regulatory gap and we find that the framework described by the Commission under Module 1 in principle will be able to address distortions of the Single Market appropriately.

The Danish Government finds it suitable to provide the Commission with exclusive enforcement responsibility until further experience of the functioning of the instrument is gathered. Further, the Danish Government supports the redressive measures as regards to redressive payments or behavioral remedies. The Danish Government does not in general support structural remedies, since such remedies are very extensive on the businesses in question. If structural remedies are considered, proportionality must be paramount.

The introduction of a new instrument as described in Module 1 should be evaluated within a short time frame focusing on the effects of the enforcement and whether any “gap cases“ giving rise to significant distortions have been identified.

Acquisitions facilitated by foreign subsidies (Module 2)

The Danish Government agrees with the Commission that there is a need for an instrument addressing acquisitions facilitated by foreign subsidies. However, the Danish Government finds that there is a need to elaborate on the interplay between module 1 and 2 as acquisitions facilitated by foreign subsidies can be addressed ex post under the general instrument described under Module 1.

The Danish Government support the Commission to place the competence exclusively at EU level and not shared between EU level and Member State level.

The Danish Government finds it important to ensure that the instrument and its scope is as transparent as possible in order to avoid unnecessary administrative burdens for the companies, and consequently it would be appropriate to use a quantitative criteria/threshold to specify the obligation

to notify an acquisition. A turnover-based threshold – benefitting from the experience of calculating turnover with respect to merger control – would be much preferred.

Furthermore, the Danish Government finds that it will be appropriate if thresholds are based on relatively high turnovers, e.g. turnover thresholds equivalent to the thresholds in the existing merger regulation system in Regulation 139/2004. The introduction of a new instrument as described in Module 2 should be evaluated within a short time frame, and based on such evaluation it should be considered whether it is necessary to lower the thresholds to require notification of more transactions. If the Commission decides to develop a general instrument as described in Module 1, such instrument will make it possible to carry out ex post-investigations of acquisitions facilitated by foreign subsidies that fall below the threshold.

Furthermore, if the Commission decides to develop an instrument addressing acquisitions facilitated by foreign subsidies the Danish Government urges the Commission to reflect on the following in the coming Impact Assessment:

- First, we urge the Commission to reflect on the magnitude of current and/or future expected distortive effects due to acquisitions facilitated by foreign subsidies. In this regard we also urge the Commission to elaborate on the amount of acquisitions in the EU that are (potentially) facilitated by foreign subsidies.
- Second, we recommend the Commission to elaborate on how the instrument described under Module 2 can work in parallel with the existing merger regulation system in Regulation 139/2004, the possible new instrument described under Module 1 and the FDI screening mechanism. We find it important that the proposed new instrument can work in parallel with the existing regulation. In this regard we also find it very important that the proposed new instrument in Module 2 does not lead to unnecessary administrative and economic burdens for the involved undertakings.
- Third, we advise the Commission to elaborate on how information received in relation to a merger notified according to the existing merger regulation can be shared in relation to a proceeding regarding foreign subsidies.
- Fourth, we urge the Commission to demonstrate how acquisitions facilitated by foreign subsidies causes a distortion in the Single Market *per se*? In particular, the Commission is recommended to elaborate on the theories of harm caused by foreign subsidized acquisitions as well

as the standard for intervention. The Danish Government is not convinced that all acquisitions facilitated by a foreign subsidy would automatically distort the internal market.

- Finally, we urge the Commission to reflect on how transparency can be ensured for acquiring undertakings. We find that it is important that it is clear to acquiring undertakings when they have received a financial contribution – or expect to receive a financial contribution after the notification – that will be defined as foreign subsidies.

Foreign subsidies in public procurement (Module 3)

The Danish Government does not see a need to address distortions caused by foreign subsidies in public procurement procedures by a separate instrument as suggested in Module 3, but prefers to address this in the context of the provisions regarding abnormally low tenders in the public procurement directive. Moreover, the Danish Government would prefer to initiate the investigation process by the contracting authority determining whether the tender is abnormally low or not. We assume that foreign subsidies only cause distortions of the procurement procedure through abnormally low tenders. By restricting the tenders being investigated to abnormally low tenders we limit the number of tenders being investigated and the number of procurement procedures being delayed. This will be in line with the procurement directive, which stipulates that the contracting authority only can make requirements linked to the subject-matter of the contract.

The Danish Government finds that Module 3 in fact poses the risk of resulting in less competition and higher prices in the EU procurement markets to the disadvantage of the citizens in the member states. Obligating the tenderer to notify the contracting authority whether they, any of their consortium members, subcontractors or suppliers have received a financial contribution classified as foreign subsidies within the last three years or during the execution of the contract requires a lot of information on the supply chain, which the economic actors do not necessarily have. Consequently, we risk putting ourselves in a situation where many economic actors might abstain from participating in the public procurement procedures because of the administrative burden and the subsequent risk of receiving a penalty. Especially SME's might be reluctant to participate in public procurement procedures.

The interplay between contracting authority and supervisory authorities have to be well-functioning with a clear ambition to keep the investigation and in-depth review period within strict time limits and within the existing time limits of the public procurement directive.

Module 3 will cause a substantive administrative burden on the public sector as well. If the Commission intends to continue the work on Module 3, we urge the Commission in its Impact Assessment to put forward figures illustrating to which extent foreign subsidies cause distortions in public procurement procedures. We urge the Commission to reflect the following issues:

- How many companies active in the EU that are subsidized by foreign governments win tenders in the EU?
- How many companies active in the EU that are part of a consortium, are subcontractors or suppliers are subsidized by foreign governments and win tenders in EU?
- How can we ensure that public buyers do not have an incentive to prioritise bids from the EU over bids from third countries and thus de facto discard these in order to avoid prolonged investigations?

Final remarks

We hope these comments will be useful for your further work. The Danish Ministry of Industry, Business and Financial Affairs would be at your disposal to further elaboration or any follow-up questions you may have.