

Foreign Subsidy Control

EU Competition Law Briefing

Agenda



Background of the initiative

Andreas Schwab



Overview / General Subsidy Control Tool

Claire Vannini



Impact on Mergers & Acquisitions

Roderick Nieuwmeyer



Impact on public procurement procedures

Virginie Dor



Outlook / Next steps

Andreas Schwab

Background of the initiative

Andreas Schwab

Overview / General Subsidy Control Tool

Claire Vannini

Overview

Main principles

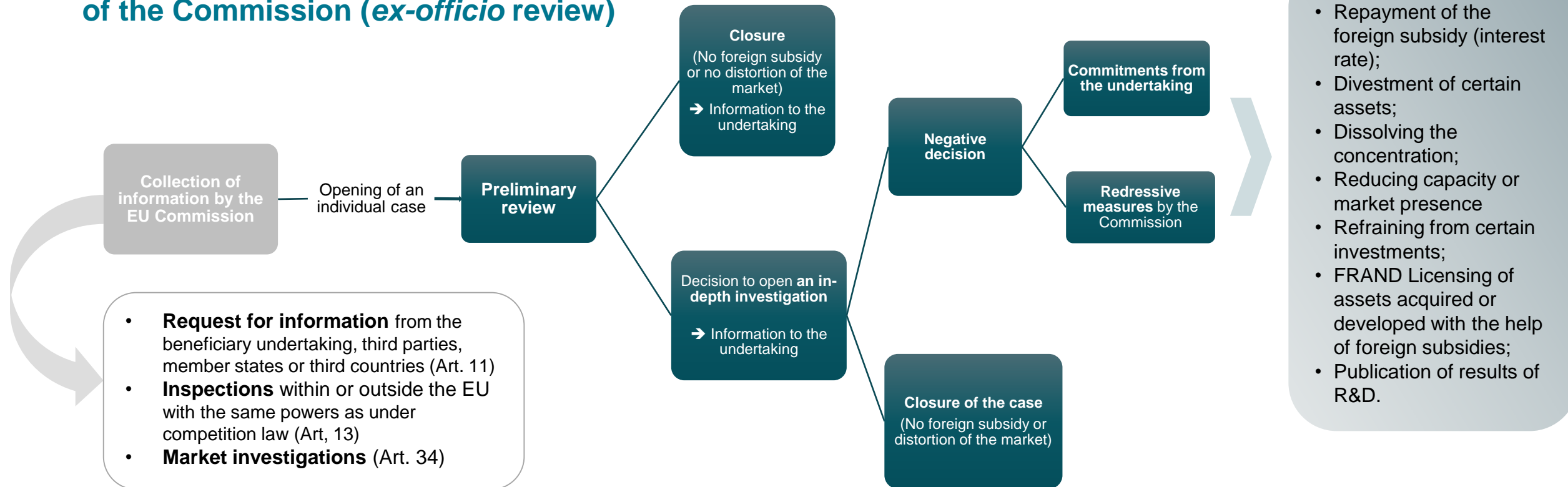
- Three-tiered investigative tool
 - **An ex-officio general control** of foreign subsidies
 - **Two notification-based control tools:**
 - Subsidized acquisitions
 - Subsidized bids tenders
 - Notification subject to specific thresholds
- Broad scope of application: **all foreign subsidies granted to undertakings involved in an economic activity in the EU**
- Aiming to target the **most distortive foreign subsidies**
 - Exceeding a *de minimis* threshold (**€5 million**)
 - Where a substantive assessment showed an effect of the subsidy on the competitive position of the beneficiary undertaking
- **Wide range of powers** granted to the EU Commission (inspections, interim measures, imposition of remedies, fines for non-cooperation or non-compliance with the Commission's decision)

What is a “foreign subsidy”? (Article 2)

- A **financial contribution** provided by a **third country**
 - Including transfer of funds or liabilities, foregoing of revenue otherwise due or provision or purchase of goods or services
 - From central governments at all levels, foreign public entities, or private entities acting on behalf of a third country
- Which confers a **benefit** to an undertaking engaging in an economic activity in the internal market; and
- Which is limited, in law or in fact, to an individual or to several undertakings or industries

The “general subsidy control” tool

Decision-making powers of the Commission (*ex-officio* review)



Impact on Mergers & Acquisitions

Roderick Nieuwmeyer

Main principles

Features

- **Goal:** Prevent the acquisition of EU companies through (distortive) non-EU subsidies
- **Authority:** European Commission
- **Merger notification obligation**
 - if thresholds are reached, or
 - at request European Commission
- **Two phases**
 - Phase 1: Preliminary review (25 working days)
 - Phase 2: In-depth investigation (90 working days)
- **Stand-still obligation**
- **Balancing test (vs. SIEC-test)**
 - Balancing negative effects with positive effects subsidy
 - Distortion internal market vs. development relevant economic activity

Elements

- **Concentration:** Acquisition of control in an undertaking
 - Same notion as under EU Merger Control regulation
 - Removed: Acquisition of 'material influence', e.g. [x]% of shares / voting rights
- **Thresholds (filing obligation):**
 - EUR 500 million turnover (one undertaking)
 - EUR 50 million financial contribution from non-EU countries in 3 years prior to notification
 - Financial contribution can be anything!
- **Suspicion European Commission (request):**
 - Undertakings may have benefitted from non-EU subsidies in 3 years prior to concentration
 - No thresholds!

Decision making powers European Commission

Decisions

- **No objection**
- **Commitments / redressive measures**
 - Merger control toolbox, e.g.
 - Reducing capacity / market presence
 - Divestments
 - FRAND-licensing
 - But also:
 - Repayment foreign subsidy (incl. interest)
 - Not limitative!!
- **Prohibition**

Gun jumping & non-cooperation

- **Fines**
 - **max. 10% turnover**
 - Failure to notify
 - Gun jumping
 - Implementation despite prohibition-decision
 - **max. 1% turnover**
 - Supplying incorrect / misleading information
 - intentionally or negligently

Impact on public procurement procedures

Virginie Dor

Specifics applicable to procurement procedures

Specific thresholds for public procurement

- Public procurement value of **> EUR 250 million**
- Subsidies granted during the **three years** prior to the notification



Implications for contracting authorities and bidders

Economic operators

- Economic operators receiving foreign subsidies shall:
 - **Notify:**
 - (i) either foreign subsidies received in the 3 years preceding that notification or
 - (ii) confirm that they did not receive any foreign financial contributions in the 3 last years
 - this obligation also applies to **“main” subcontractors** and **“main” suppliers** (“main” : share of their contribution exceeds 30% of the estimated value of the contract)
- Options for the other economic operators?

Contracting authorities

- The contracting authority shall **transfer the notification to the Commission** without delay
- The contracting authority shall continue the evaluation during the investigation of the EU Commission
- The contracting authority shall :
 - **not award the contract before** the Commission terminates it's preliminary review (max. 60 days) or
 - **not award the contract to the undertaking that made a notification** before the Commission terminates it's in-depth investigation (max. 200 days)

Outlook / Next steps

Andreas Schwab



Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS locations:

Aberdeen, Abu Dhabi, Algiers, Amsterdam, Antwerp, Barcelona, Beijing, Beirut, Belgrade, Berlin, Bogotá, Bratislava, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Dubai, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Mexico City, Milan, Mombasa, Monaco, Moscow, Munich, Muscat, Nairobi, Paris, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Rome, Santiago de Chile, Sarajevo, Seville, Shanghai, Sheffield, Singapore, Skopje, Sofia, Strasbourg, Stuttgart, Tirana, Utrecht, Vienna, Warsaw, Zagreb and Zurich.

cms.law