



WHITE PAPER

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The EU “Club” Gets More Exclusive: Closing the Doors on Foreign Subsidies?

Although the EU has strict rules that limit the circumstances in which Member States can subsidize companies in the EU, the rest of the world does not. The European Commission considers this difference unfair because it would distort competition in the EU and global markets.

The European Commission recently released a White Paper that discusses a future framework to address the perceived imbalance. The goal of the proposal is to “level the playing field” with regard to foreign subsidies and ensure competitive neutrality. The framework aims to address distortions caused by companies active in the EU that have received foreign subsidies. It would also review acquisitions of EU companies where foreign subsidies are involved. A new tool would also be created to address distortions where companies benefitting from foreign subsidies compete for EU public tenders. Finally, it also envisages a mechanism to address foreign subsidies giving companies an unfair advantage in obtaining EU grants and funding.

In our analysis of the White Paper, we will assess the different mechanisms put forward by the European Commission, in the context of the EU’s existing tools to address subsidies and the ever increasing focus of the EU on foreign subsidies in the recent past.

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“If you ran a club, and you wanted to make sure there was no trouble, you could check people [at] the door, before they came in. You could also have checks inside the club, to make sure everyone followed the rules once they were in.”

— European Commission Executive Vice-President Margrethe Vestager, Statement on 17 June 2020

INTRODUCTION

As European nations move to ease COVID-19 restrictions, nightclubs, as feared sources of transmission, may remain shuttered for some time. Other fears also permeate the European business landscape. While its leaders frequently say that “Europe is open for business,” the European “club” wants its visitors to adhere to prescribed rules of etiquette. Europe is uneasy in the face of companies that enjoy state support from foreign governments.

Companies benefitting from foreign subsidies not only export to Europe but also compete for European M&A opportunities, sell from their European subsidiaries, and participate in public tenders in direct competition with European firms.

Foreign subsidization of companies operating or established in the European Union (“EU”) contrasts sharply with the EU’s limits on State aid within the EU. The EU’s well-established State aid regime features unique and strict internal subsidy controls (see our Jones Day [Commentary](#)) aimed at preventing marketplace distortions that result from government subsidies. Similar rules do not exist elsewhere in the world and the European Commission (“Commission”) believes that foreign subsidies give an unfair advantage to recipient companies that operate or are established in the EU.

As anticipated in our June 2020 [Alert](#), the Commission attempts to “level the playing field” in its recent *White Paper*, which suggests instruments to remedy EU marketplace distortions that arise from foreign subsidies.

The *White Paper* is part of a broader EU response to concerns that foreign subsidies may distort competition, placing EU companies at a disadvantage relative to foreign competitors.

If implemented, the new measures would significantly expand the EU’s existing toolbox for combating subsidies.

Interested parties are invited to comment on the *White Paper*’s suggestions in a [public consultation](#), open until September 23, 2020. The consultation is particularly important, as the Commission acknowledges the complexity of these issues and the novel nature of the proposed solutions. Therefore, the Commission calls for “careful discussion,” and if the consultation’s outcome suggests the need for new rules, the Commission will release a legislative proposal in 2021.

As explained below, the wide-ranging options set out in the *White Paper* include (i) targeting ongoing operations in the EU of companies that have received foreign subsidies (“Module 1” of *White Paper*); (ii) subjecting acquisitions of EU companies to an *ex ante* mandatory clearance procedure where foreign subsidies are used to facilitate such acquisitions (“Module 2” of *White Paper*); and (iii) creating a new tool to review foreign subsidies in the context of public tenders in the EU (“Module 3” of *White Paper*). In addition, the *White Paper* recommends developing a mechanism to address foreign subsidies in the context of EU funding.

The discussion below examines the EU’s existing toolbox to tackle subsidies and the EU’s increasing scrutiny of foreign subsidies as reflected in recent cases. In the remaining portion of the paper, we analyze the key elements of the Commission’s *White Paper*.

THE EU’S EXISTING TOOLBOX ON SUBSIDIES

The EU already exercises oversight of state subsidies that it considers distortive of competition in the EU. Certain measures are limited to subsidies granted by EU Member States:

- **State aid.** The EU’s State aid framework significantly limits Member States’ ability to grant selective financial support to private companies. This strict system of subsidy control goes well beyond the World Trade Organization (“WTO”) subsidies regime and is unique in the world. Member States must rescind and recover any aid the Commission deems unlawful. The Commission recently issued guidance (the State aid Temporary Framework) that provides

Member States with more flexibility to address the economic fallout of the coronavirus outbreak.¹ However, the Temporary Framework subjects subsidies to certain conditions, and support must relate to a well-defined policy objective of common EU interest. The EU's State aid rules, however, do not address foreign government subsidies to companies operating or established in the EU.

- **Public procurement.** Under the EU's public procurement rules, the procuring "contracting authority" may reject an abnormally low bid if the tenderer received unlawful State aid.²

Other measures address subsidies from outside the EU:

- **Anti-subsidy investigations.** The EU can target the distortive effects of certain foreign subsidies through anti-subsidy investigations pursuant to the EU Anti-subsidy Regulation,³ under which the Commission examines subsidies provided to foreign companies that manufacture goods for export to the EU. In certain circumstances, the EU may impose countervailing duties (additional import taxes) where such subsidized exports are found to harm the EU market. Such duties are based on the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), which allows WTO Members to impose duties to counteract certain foreign subsidies.
- **Anti-dumping investigations.** The EU also increasingly relies on recently modified EU anti-dumping legislation that addresses, *inter alia*, the possible distortive effects of foreign subsidies granted to producers exporting to the EU. Most importantly, the Commission may find that such subsidies significantly distort costs and prices in the investigated country, which can lead the Commission to increase the costs incurred by the exporting producer for calculation purposes.⁴ This will, in turn, lead to inflating the dumping margin, and thus the duty imposed.
- **Investment screening.** EU Member States have increased scrutiny of foreign investments in EU companies. The EU has also established a framework that Member States must comply with in conducting such screening on the basis of security or public order grounds.⁵ These rules

will become applicable as of October 2020. In assessing whether a foreign investment is a security threat, subsidies received by a foreign investor are a specific factor to consider. Significant funding by a government (through subsidies or otherwise) to a private company, can give rise to a finding that a private company is actually controlled by the government.⁶

- **Sector-specific rules.** EU legislation also tackles subsidies in the air transport sector, enabling the Commission to investigate and adopt corrective measures against foreign subsidies that distort competition and cause, or threaten to cause, injury to EU air carriers.⁷

- **WTO disputes.** At the international level, the EU also can bring a WTO dispute against a WTO Member for granting subsidies prohibited under the above-mentioned SCM Agreement or resulting in adverse effects as defined in the SCM Agreement.

The Commission's *White Paper* identifies gaps in the EU's existing toolbox to regulate foreign subsidies, particularly with respect to foreign government subsidies to companies active or established in the EU. The EU's trade defense instruments (anti-subsidy and anti-dumping investigations) only tackle subsidies that distort the EU market through the import of goods, but do not cover, e.g., trade in services, investments, or other financial flows. And while the FDI Regulation empowers EU Member States to scrutinize subsidies that back investments and acquisitions in the EU, such review is limited to security and public order concerns, not competitive distortions of the EU market.

The *White Paper's* new contemplated tools would complement existing measures, towards addressing this regulatory gap.

THE EU'S GROWING SCRUTINY OF FOREIGN SUBSIDIES

In recent years, the EU has increasingly advocated for competitive neutrality in international fora and trade negotiations, including by proposing reforms to the WTO's subsidy rules and through bilateral talks with specific countries.

The Commission also has recently taken novel approaches to its trade defense actions to expand oversight of foreign subsidies, going significantly beyond its established practice. Recent noteworthy developments are described below.

Countervailing duties imposed in connection with foreign subsidies granted to acquire an EU company. In 2018, the Commission imposed countervailing duties against Chinese producers of pneumatic tires, identified as benefiting from Chinese government subsidies.⁸ One of the subsidies targeted and eventually countervailed by the Commission concerned support given to a Chinese firm to facilitate its acquisition of a majority stake in an EU company, Pirelli.

In 2015, China National Chemical Corp (“ChemChina”), through its subsidiary China National Tire & Rubber Company (“CNTR”), acquired control of Italian Pirelli, then the world’s fifth-largest tire maker, for EUR 7.1 billion. The Commission’s Directorate-General for Competition (“DG COMP”) cleared the transaction without conditions, as it “would raise no competition concerns as the market share increments are modest, the two companies are not close competitors, and customers will continue to have an adequate number of alternative suppliers in all markets.”⁹

At the time of the acquisition, CNTR was a relatively small producer globally, and media reports highlighted that Pirelli was acquired by a tire company less than a third its size. Subsequently, in October 2017, the Commission initiated an anti-subsidy investigation targeting imports of certain bus and lorry tires originating in China. The investigation led to imposing countervailing duties in 2018. In the Regulation imposing such duties, the Commission’s Directorate-General for Trade (“DG TRADE”) addressed a wide range of subsidies granted to Chinese exporting producers of tires. One of the schemes investigated by the Commission, of particularly relevance to the *White Paper*, relates to subsidies granted by the Chinese government to ChemChina, a Chinese company, to purchase Pirelli, an EU company.

The Commission devised novel legal and factual reasoning to link a subsidy for the acquisition of a company in the EU to the Chinese exports, resulting in the countervailing of this subsidization. In other words, the Commission imposed countervailing duties on imports of Chinese tires based, *inter alia*, on the subsidies received by a Chinese exporting producer that were

not directly related to the Chinese production of tires, but to the acquisition of an EU company. This approach significantly expanded the ordinary reach of the anti-subsidy instrument.¹⁰

This case was the Commission’s first attempt to use countervailing duties as a means to tackle foreign subsidies that facilitate acquisitions of EU companies. Certainly, the countervailing duties instrument was not designed or intended to address this type of concern.

Countervailing duties imposed in connection with transnational subsidies. In a case of first impression in June 2020, the Commission imposed countervailing duties on imports of glass fibre fabric originating in China and Egypt after finding that the relevant producers benefited from foreign subsidies.¹¹ The duties apply to all imports of glass fibre fabric originating in these two countries. In imposing duties, the Commission’s findings included financial contributions received by Egyptian entities from Chinese public bodies. This is the first time that the Commission has imposed countervailing duties as a result of so-called transnational subsidies, i.e., subsidies provided by a government of one country to a recipient in another country. This case foreshadows the Commission’s strategy to expand oversight of foreign subsidies. Previously, the Commission only countervailed subsidies given by the government of the exporting country, consistent with the WTO’s SCM Agreement.

The Egyptian companies in question operated in the China-Egypt Suez Economic and Trade Cooperation Zone (“SETC-Zone”), a special economic zone established by China and Egypt as part of China’s Belt and Road Initiative. This Initiative is a global development strategy adopted by the Chinese government for international infrastructure development and investments. Although the two companies received Chinese, not Egyptian, financing, the Commission concluded that the financial contributions could be attributed to the Egyptian government. The Commission determined that the Chinese preferential measures in favor of the entities established in Egypt “were [...] “identified” and “made its own” by Egypt.”¹² In this context, the Commission relied on the fact that the President of Egypt was aware that the Belt and Road Initiative involved heavy State financing, such that Egypt according to the Commission engaged in “a clear act of acknowledgment and adoption” of Chinese preferential financing in creating the SETC-Zone with China.¹³

Concerns raised in merger review. Other prominent cases that also may have influenced the Commission's *White Paper* include the recent *CRRC/Vossloh* case. In this transaction, the world's largest rolling stock manufacturer, Chinese State-owned CRRC, acquired the locomotive business of German-based Vossloh. The transaction did not meet the thresholds of the EU Merger Regulation but was instead notified to the German Federal Cartel Office (Bundeskartellamt) and unconditionally cleared in April 2020. The Bundeskartellamt assessed the role of state subsidies, which is unusual in a merger decision. The decision noted that CRRC's "access to financial resources is exceptional," in particular due to Chinese strategic initiatives such as "Made in China 2025" and the *Belt and Road Initiative*. It further stated that subsidies can "considerably distort competition" and that compliance with State aid rules is monitored "by the EU Commission, a forceful supranational authority...[but a] similar legal framework with a corresponding degree of transparency and public enforcement does not exist with regard to state subsidies in China."¹⁴ Nonetheless, the Bundeskartellamt found that the presence of foreign subsidies did not affect the substantive assessment of the transaction and therefore did not impede its unconditional clearance of the transaction.

Brexit. The ongoing Brexit negotiations between the EU and the UK are another element potentially fueling the *White Paper*. The EU's Single Market Commissioner Thierry Breton noted the importance of compliance with EU subsidy rules, "especially when a major partner has decided to leave us."

COVID-19. Additional support for the *White Paper's* proposals also may stem from fears that the COVID-19 economic downturn will generate opportunities for non-EU subsidized companies to acquire financially weakened EU companies or distort competition in the EU market.

The following sections analyze the *White Paper's* main components, in addition to the proposed mechanism to address foreign subsidies in the context of EU funding.

WHITE PAPER MODULE 1: GENERAL INSTRUMENT TO CAPTURE FOREIGN SUBSIDIES CAUSING MARKET DISTORTIONS

Module 1: All types of foreign subsidies.¹⁵ Module 1 subjects to review foreign subsidies provided to "economic operators"

established or active in the EU. This broad-based instrument would cover foreign subsidies in all market situations, irrespective of whether the subsidy benefits the production of goods, services, or investments in the EU.

However, the Commission suggests that Module 1 should exclude foreign subsidies provided for imports of goods and agricultural products into the EU. These imports would continue to fall under EU Anti-subsidy Regulation.¹⁶

Module 1 would, at a minimum, apply to companies established in the EU that benefit from foreign subsidies. The *White Paper* also suggests to extend Module 1 to companies established outside the EU but active in the EU.

Causing market distortions. Module 1 would serve to detect and take measures against foreign subsidies that cause distortions in the EU. Certain categories of subsidies, such as export financing, subsidies to ailing undertakings, and subsidies directly facilitating an acquisition, would be considered "to most likely cause distortions." All other foreign subsidies would require more detailed assessment to determine whether they could cause a distortion based on a number of indicators, such as the size of the subsidy and the situation of the beneficiary. Moreover, the Commission proposes a de minimis threshold (€200,000) below which it presumes a subsidy will not have a negative distortive effect.

Foreign subsidies. Examples:

- The transfer of funds or liabilities (e.g., capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, or rescheduling).
- Foregone or uncollected public revenue, such as preferential tax treatment or fiscal incentives such as tax credits.
- The provision of goods or services or the purchase of goods and services.

EU interest test. If the Commission finds that a foreign subsidy is capable of distorting the internal market, under the proposal, it will weigh such distortion against any positive effects of the subsidy within the EU (e.g., creating jobs, protecting

the environment). The Commission will not consider positive effects of the subsidy outside the EU.

Shared institutional oversight. Under the Commission's proposed system of shared oversight, both the Commission and the EU Member States would establish mechanisms to investigate foreign subsidies. This system of parallel competences and division of work is modeled on EU competition enforcement under Regulation 1/2003, which allocates cases between the Commission and EU Member State competition authorities.¹⁷

Module 1 would empower each national authority to enforce subsidy rules in its jurisdiction. The Commission's oversight would extend to any foreign subsidy benefitting a company in the EU, irrespective of whether it concerns the territory of one or more EU Member States. Only the Commission, however, may apply the EU interest (or "balancing") test.

Procedure: two-step system and ex officio investigations.

Module 1's proposed procedure is a two-step system consisting of (i) a preliminary review to assess whether a foreign subsidy is in fact provided to a company established (or in certain cases active) in the EU, and whether that subsidy distorts the EU's internal market; followed by (ii) an in-depth investigation, if a foreign subsidy is suspected of distorting the EU's internal market.

Module 1 does not require parties receiving a subsidy to notify any authority. Rather, the competent authorities would review foreign subsidies on their own initiative. Information regarding subsidies could arise from market participants such as competitors and customers or Member States (see also below: Shared institutional oversight).

Inspections at company premises. Module 1 includes the possibility of "fact-finding visits" at the EU premises of alleged beneficiaries of foreign subsidies. Subject to agreement from the foreign government of the country where the fact finding visit takes place, such fact-finding visits could also occur outside the EU.

Information requirements. During the preliminary review and the in-depth investigation, information requests could be sent to the company in question and to third parties. The competent authority could impose fines and periodic penalty payments for failure to timely supply the information requested or for supplying incomplete, incorrect, or misleading information.

Redressive (i.e., corrective) measures or commitments. If an in-depth investigation determines that a subsidy creates, or could create, a distortion, the competent authority may impose redressive measures if such measures are in the EU's interest. Such measures could include:

- Divestment of certain assets, reducing capacity or market presence of the company.
- Prohibition of certain investments.
- Prohibition of a subsidized acquisition.
- Mandated third-party access to products or services.
- Licensing on fair, reasonable, and non-discriminatory ("FRAND") terms.
- Prohibition of specific market conduct linked to the foreign subsidy.
- Publication of certain R&D results such that other companies can reproduce these.¹⁸
- Redressive payments to the EU or to Member States.

The Commission also may close an investigation following a decision with commitments. The competent authority may choose to accept commitments offered by the company that are deemed appropriate and sufficient to mitigate the distortion.

Reporting and transparency obligations. Once imposed, redressive measures would be subject to subsequent reporting and transparency obligations. This is consistent with the Commission's view that poor transparency regarding foreign subsidies is detrimental to competitive neutrality and must be tackled to avoid future distortions.

Catch-all system. The Commission also intends Module 1 to operate as a catch-all mechanism that captures possible distortions that would otherwise escape review under Module 2 or Module 3. For example, acquisitions falling below the thresholds for mandatory notification under Module 2 could still be reviewed under Module 1. The *White Paper* indeed recommends a combination of Module 1 and Module 2 and that "Member States would in any case be competent to examine acquisitions ex post, even below the thresholds set up in Module 2." Thus, proposals would empower the Commission or Member States to investigate even if a transaction does not require a notification to the Commission. Although the *White Paper* provides little additional detail about how such reviews would work, parallel authority can be found in voluntary, non-suspensory merger filing regimes that grant the reviewing

authority power to impose interim (hold separate) and unwinding measures.

The *White Paper* also explains that subsidized bidding in public procurement procedures could be reviewed under Module 1 when such conduct falls outside the scope of Module 3 to the extent that a bid distorts the EU's internal market.

WHITE PAPER MODULE 2: FOREIGN SUBSIDIES FACILITATING THE ACQUISITION OF EU TARGETS

Module 2: Foreign subsidies to acquire EU targets. Module 2 addresses foreign subsidies that facilitate an acquisition of an “EU target” (defined below). It would capture transactions where subsidies are explicitly linked to a given acquisition or indirectly facilitate an acquisition by *de facto* increasing the acquirer's financial strength. The Commission proposes to subject “potentially subsidised acquisitions” to a mandatory EU notification with an obligation that suspends closing until Commission approval, similar to the EU Merger Regulation (“EUMR”).

Notification would be required where “control” is acquired (as defined in the EUMR), as well as when acquiring equity or voting rights as low as 35%, or even in case of “material influence” (as yet undefined).

Any acquisition would need to concern an “EU target.” This concept appears to include any company established in the EU, and the Commission currently recommends an EU turnover threshold of EUR 100 million. Only the acquisition of an EU company with annual revenues in the EU exceeding this threshold would require notification. The *White Paper* does not discuss to what extent target companies established outside the EU (e.g., holding companies) that have significant operations within the EU, would be within the scope of the suggested regime.

The notification requirement also may be limited to acquisitions based on the size of the foreign subsidy received by the acquiring company. The *White Paper* suggests a threshold for foreign subsidies received (in the three calendar years prior to the notification) in excess of EUR 10 million or 5-10% of the acquisition price.

Procedure: notification and two-phase review. Companies planning an acquisition that would meet the above criteria would be subject to a compulsory notification requirement and a two-step review process: (i) a preliminary review phase; and where relevant (ii) an in-depth investigation. The notification would require including, *inter alia*, information on alternative prospective acquirers of the target in the last three years, including any bid received as part of the sale process of the target.

The *White Paper* recommends granting the Commission exclusive jurisdiction to review notifications under Module 2. The Commission review would proceed in parallel with competition reviews, if any, filed with the Commission (or any Member State competition authority), but the specifics of such parallel review remain undefined.¹⁹ The Commission would assess whether a foreign subsidy (directly or indirectly) distorts the EU's internal market and would use the same Module 1 factors to, by analogy, conduct the “EU interest test.”

A failure to notify (or a violation of the standstill period) would be subject to penalties. The Commission's threat of “effective tools to sanction failures to notify transactions” suggests the imposition of procedural sanctions similar to those applied under the EUMR in recent years. For example, in 2018, the Commission imposed a record €124.5 million fine on Altice for jumping the gun when it implemented an acquisition before obtaining the Commission's clearance, and in some instances, even before its notification.²⁰

Commitments or prohibition. Following any in-depth investigation, if the Commission finds a distortion, it could either accept proposed commitments to remedy the distortion, or adopt a decision prohibiting the proposed transaction. Potential commitments for remedying the distortion may include one or more of the redressive measures under Module 1 (applying *mutatis mutandis*).

WHITE PAPER MODULE 3: FOREIGN SUBSIDIES IN EU PUBLIC PROCUREMENT PROCEDURES

Module 3: Foreign subsidies in EU public procurement. Module 3 addresses foreign subsidies in the context of EU public procurement procedures. This Module would introduce

a new exclusion ground from public tenders for companies receiving distortive foreign subsidies.

Procedure: notification and two-step system. A company would be required to notify the contracting authority of foreign subsidies when submitting a bid, if such company benefited from a financial contribution over a certain value (not yet defined). The contracting authority must transmit this notification to the Commission or Member State authorities to assess whether there is a foreign subsidy with a distortive effect. The two-step investigation would consist of (i) a preliminary review to determine the existence of a foreign subsidy, and if the authority finds that a foreign subsidy may exist; and (ii) an in-depth investigation to confirm the existence of such foreign subsidy.

To avoid too many delays to public procurement procedures, the *White Paper* suggests a maximum of 15 working days for the preliminary review by the national supervisory authority and maximum three months for an in-depth review.²¹

Exclusion from the bid. If the in-depth investigation concludes that the company has received a foreign subsidy, the contracting authority would then determine whether that subsidy distorted the company's bid. If so, it would disqualify the bidder from the specific tender. Importantly, the *White Paper* suggests that a company may be black-listed from future public tenders for a period of up to three years. Such black-listing is currently possible under EU public procurement rules, upon a finding of bribery, fraud, and certain other serious offences.²²

Shared institutional oversight. Similar to Module 1, the Commission and the Member States authorities would share the power to investigate. During the investigation, the contracting authority would be prevented from awarding the contract to the investigated bidder.

WHITE PAPER PROPOSALS ON FOREIGN SUBSIDIES IN THE CONTEXT OF EU FUNDING

Foreign subsidies in EU grants and funding. The *White Paper* also contains several proposals to address the issue of foreign subsidies that provide companies an allegedly unfair advantage in winning applications for EU grants and funding. It suggests that foreign subsidies may be tackled by excluding

subsidized bidders, similar to the envisaged public procurement procedures mentioned above.

CONCLUSION

The EU takes pride in its unique and long-standing State aid regime, which prohibits allegedly distortive subsidies granted by EU Member States. However, the Commission believes that foreign government subsidization of companies in the EU, which is not subject to the same level of scrutiny as Member State subsidies, jeopardizes the "competitive neutrality" that it has pioneered.

The Commission's *White Paper* concludes that the EU State aid system affords no meaningful protection against the vast majority of market distortions that allegedly arise from subsidies granted by foreign governments. The Commission argues that foreign governments can boost the competitiveness of certain companies, or support their M&A activities, without EU scrutiny (even if this support could impact the EU market). Although foreign subsidies can be addressed through the EU's anti-subsidy instrument and other tools available to the EU (e.g., action at WTO level), the Commission considers these insufficient to ensure a "level playing field."

Assuming that the Commission *White Paper's* ideas become law, companies are likely to face far greater complexity, costs, and uncertainty in pursuing regulatory clearance for M&A transactions, due to expanded multi-jurisdictional and multi-agency procedures. Companies benefiting from foreign subsidies also can expect that their daily operations in the EU could be challenged and subject to wide-ranging restrictions.

The *White Paper* is likely to initiate an intense debate on both the merits of the suggested framework, as well as the mechanics of a future EU foreign-subsidy control system.

Some companies in Europe would likely welcome a new EU framework, in support of the Commission's intended "level playing field." In contrast, companies outside the EU will be wary of any future rules that would stifle their business and investment activities in Europe. In particular, State-owned Enterprises (SOEs) in China and the Middle East should closely examine the impact of these proposals. Similarly, U.S. companies will

assess the extent to which the EU's new potential regime would capture, e.g., U.S. Federal and State support measures.

From a practical standpoint, the new rules could alter deal negotiations as transacting parties consider the impact of the new regulatory regime on risk allocation. SOEs also would need to navigate expansive data requirements from authorities in the EU, which could implicate information considered to be sensitive or secret in their home jurisdictions. Timing considerations will also be critical, as the risk of (additional) lengthy regulatory reviews for M&A could discourage both foreign-subsidized buyers and sellers of "EU targets." In public procurement, the inclusion of a foreign-subsidized bidder could also cause delays and uncertainty for tender awards, creating headaches for procuring hospitals, municipalities, and others who must source through public tenders.

The EU "club" appears poised to become more exclusive. The eventual features of EU legislative proposals and how these are received and concretized will shape the future mix on the EU dance floor. Those showing up with subsidies may soon find themselves out in the cold.

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ENDNOTES

- 1 Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as adopted on 19 March 2020 (C(2020) 1863) and its amendments C(2020) 2215 and C(2020) 3156 as adopted on 3 April 2020 and 8 May 2020.
- 2 Article 69 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Article 84 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.
- 3 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union.
- 4 Article 2(6a) of 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.
- 5 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 screening of foreign direct investments the Union.
- 6 Recital 13 and Article 4(2)(a) of the 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.
- 7 Regulation (EU) 2019/712 on safeguarding competition in air transport.
- 8 Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163.
- 9 See the Commission's [press release regarding this merger decision](#).
- 10 The *White Paper* also explains that the EU Anti-subsidy Regulation allows the EU to act against subsidised imports of goods from a third country, but not against subsidies related to the establishment and operation of companies in the EU that are backed by foreign subsidies and that do not entail any trade in goods. *White Paper*, page 42.
- 11 Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt.
- 12 Commission Implementing Regulation (EU) 2020/776, recital 694.
- 13 Commission Implementing Regulation (EU) 2020/776, recital 692.
- 14 Case B4-115/19, 27 April 2020. [See the case summary](#).
- 15 The *White Paper* (Annex I) provides the definition of a subsidy, which the Commission considers as largely in line with subsidies as defined under the SCM Agreement.
- 16 The Commission appears to consider that such exclusion of imports would avoid any inconsistency with its obligations under Article 32.1 of the SCM Agreement, which specifies that no specific action against a subsidy of another WTO Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. See *White Paper*, page 42.
- 17 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See also Commission Notice on cooperation within the Network of Competition Authorities.
- 18 For example, drawing inspiration from the requirements for important projects of common European interest, or set out in the Block Exemption Regulation 651/2014.
- 19 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).
- 20 M.7993 ALTICE / PT PORTUGAL (Art. 14.2 proc.). The fine has been appealed before the General Court. See Case T-425/18.
- 21 The in-depth review period would be extended if the Commission disagreed with the national supervisory authority's assessment.
- 22 See, e.g., Article 57 of the Directive 2014/24, which lists a series of offences that would automatically lead to a mandatory debarment from public tenders ("Exclusion Grounds"): "a. participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA; b. **corruption**, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and Article 2(1) of Council Framework Decision 2003/568/JHA as well as corruption as defined in the national law of the contracting authority or the economic operator; c. **fraud** within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests; d. **terrorist offences** or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA respectively, or inciting or aiding or abetting or attempting to commit an offence, as referred to in Article 4 of that Framework Decision; e. **money laundering or terrorist financing**, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council; f. **child labour and other forms of trafficking in human beings** as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council." (emphasis added).

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