EUROPEAN COMMISSION WHITE PAPER ON LEVELLING THE PLAYING FIELD AS REGARDS FOREIGN SUBSIDIES

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Response of Mayer Brown to the Commission's questionnaire

Introduction

1. **Please introduce yourself and explain your interest and motivation to participate in this public consultation.**

This response to the Commission's questionnaire is submitted by Mayer Brown Europe-Brussels LLP. Our comments are confined to legal and procedural issues arising from the White Paper, based on our experience as practitioners in antitrust, public procurement and trade law.

Module 1

2. **Do you agree with the procedural set-up presented in the White Paper, i.e. 2-step investigation procedure, the fact-finding tools of the competent authority, etc? (See section 4.1.5 of the White Paper).**

Since Module 1 introduces significant economic and legal liabilities for beneficiaries (for example, fines for non-provision or misleading provision of information and the risk of redressive measures), we question whether the Module 1 procedure would not benefit from:

1) a procedural mechanism that allows a planned foreign subsidy to be notified voluntarily and pre-cleared, *inter alia*, in the interests of procedural fairness and legal certainty and we note here the outline of such a notification system under Modules 2 and 3;
2) the right to notify a non-notified foreign subsidy and obtain a retroactive clearance. This could provide valuable legal certainly in the context of the long period of potential exposure to an investigation and redressive measures (10 years under section 4.1.6 of the White Paper);
3) recognising the corresponding procedural burden (and safeguard), a reconsideration of the *de minimis* threshold which at €200K looks to be very low. Clearly, the administrative burden of a voluntary notification system (which would require clearances) needs to be balanced against the need to catch only the most distortive foreign aids; and also the recognition that legitimate foreign investment is important to the EU economy;
4) a set of procedural and judicial safeguards to ensure that foreign subsidy decisions are made subject to appropriate levels of supervision; including the right to be heard and a limitation period for intervention; as well as appropriate judicial review of Commission decisions. The current EU Charter of Fundamental Rights, and the European Convention on Human Rights (in relation to which the current Commission has made accession a priority) would both, for example, require that EU entities have access to justice and a proper respect of property rights;
5) a procedural harmonisation and efficiency to be brought about by giving the EU Commission exclusive jurisdiction over Modules 1, 2 and 3 (see below).

As currently described (see section 4.1.1 of the White Paper), the pursuit of Module 1 cases will be reliant upon either the "own initiative" of a Member State regulator or a complaint from

a market operator. Given the informational imbalances in relation to the detection of foreign subsidies (which the White Paper itself recognises at section 4.1.3.2, third paragraph), we question whether a procedure which makes no provision for notification and clearance could work satisfactorily in practice. In particular, the uncertainty created by the possibility of investigation for up to 10 years could have a dampening effect on legitimate and desirable economic activity.

The term "distortions in the internal market" will require further explanation. For example, should this term be equated solely with the proper competitive functioning of economic markets; or does it capture wider trade and industrial elements (as, for example, cited under the EU interest test, such as public interest security, environmental, digital and employment concerns)? Would the term cover both national distortions (upon the basis that they are a smaller, yet significant, part of the internal market as a whole) as well as pan-EU distortions? We would also expect there to be a materiality element, i.e. the distortion would need to affect negatively the internal market to a "material extent" and this also would need explanation.

We note that Modules 2 and 3 appear to have a wider definition of foreign subsidies than Module 1, in that they pick up an "indirect"/"de facto" increase in the financial strength of a party, which might in turn facilitate an acquisition (or procurement). It is not, as a matter of principle, clear why this wider definitional approach would not also apply under Module 1. There is some suggestion of this at section 4.1.3. last paragraph (in terms of privileged access to a domestic market, for example, a local monopoly, and the use of such advantage to cross-subsidise foreign activities), but procedurally and substantively we would see merit in a harmonisation of the test of subsidisation across Modules 1, 2 and 3, with the broader definition looking more comprehensive and effective.

The above said, indirect/de facto foreign subsidies look likely to raise a number of complex issues relating to domestic markets, for example:

- how would access to a monopoly right or a concession be treated if it were won on the merits in a competitive domestic procurement?
- how would financial strength derived from lower domestic costs be treated if the beneficiary could be shown to be paying the domestic market rates (for say utilities and labour)?

- how would lower costs of capital/borrowing be treated where a beneficiary is state owned/controlled and is able, legitimately, to have access to domestic public sector credit rating and cost of borrowing advantages?

The adequacy of the investigative tools is open to question. Even if beneficiaries are made subject to information requests, with penalties, they may, as a matter of practice, simply not have access to the necessary information. The seeking of information from third party(s) must also be expected to meet material informational barriers.

It is notable that the grantor of a foreign subsidy has no role in the procedure, despite running the risk of having the aid made subject to redressive measures and/or an eventual block. We question whether the procedure should not allow the grantor the right to participate.

The lack of third party involvement in the preliminary review under Module 1 will potentially increase the risk that there will be insufficient information and checks and balances to make this important, first procedural step, fully effective. We would therefore recommend a consideration of early third party involvement as under Module 2.

The current procedure indicates that a foreign subsidy case may be closed if the case is not a "priority". This discretion could be a material disincentive for third parties to put the time and effort into filing complaints. There is no discussion of "what" may or may not amount to an enforcement priority. We note in the context of third party involvement that there are no transparency/publication requirements – e.g. a minimum standard of public notification that a case is being investigated, or has been closed. Such transparency obligations (if in place) would facilitate the engagement of other market operators.

3. **Do you agree with the substantive assessment criteria (section 4.1.3) and the list of redressive measures (section 4.1.6) presented in the White Paper?**

See the comments above on the distortion of the internal market test and on the notion of subsidy, in particular indirect/de facto subsidies.

With regard to the redressive measures, we note that the most obvious form of redress, the repayment of the subsidy to the foreign state grantor, seems to have been discarded.

The proposed redressive measures are material in their potential financial and commercial impact upon both the beneficiary and the foreign state. We note generally in this context that

this must make the case for appropriate procedural checks and balances, including judicial review, all the more important.

4. **Do you consider it useful to include an EU interest test for public policy objectives (see section 4.1.4) and what should, in your view, be included as criteria in this test?**

This would seem an equitable addition to the substantive review. However, we note that it is proposed that the EU Commission have exclusive jurisdiction in this respect. This raises a question as to whether, procedurally, the Commission should not have exclusive jurisdiction in relation to the compatibility assessment of all foreign subsidies (as it does in relation to Member State subsidies under current State aid law). The procedural complexity, risks and burden of multiple parallel reviews looks unwelcome, in particular in relation to a ground breaking and new legal regime, and lies behind our suggestion that exclusive Commission jurisdiction be considered across all three Modules (1, 2 and 3). As noted under Module 2 below, we also question whether the EU interest test should not be aligned more closely with the notion of an objective of common interest, as under current State aid law.

5. **Do you consider that Module 1 should also cover subsidised acquisitions (e.g. the ones below the threshold set out under Module 2)? (section 4.1.2).**

In principle, we would expect a *de minimis* threshold (as under Module 2 acquisitions) to offer absolute legal certainty (and not to be caught by another Module).

6. **Do you think there should be a minimum (*de minimis*) threshold for the investigation of foreign subsidies under Module 1 and if so, do you agree with the way it is presented in the White Paper?**

We support a materiality threshold but consider (see above) that €200K is too low.

7. **Do you agree that the enforcement responsibility under Module 1 should be shared between the Commission and the Member States (section 4.1.7)?**

We are inclined to the view that the Commission should exercise exclusive jurisdiction over compatibility assessments, with national courts able to rule on the existence of an illegal foreign subsidy which has not been notified and cleared (but not make a compatibility assessment).

Module 2

1. **Do you consider that Module 2 appropriately addresses distortions of the internal market through foreign subsidies that facilitate the acquisition of undertakings established in the EU (EU targets).**

We consider that Module 2 addresses satisfactorily a number of the key themes which we found lacking in relation to Module 1:

- a notification and clearance system which will enable beneficiaries of foreign aid to obtain legal certainty;
- the entitlement for third parties to engage in the process, including during a first phase review, ensuring that third party views/objections are obtained early;
- the recognition that centralised control at EU Commission level has a number of procedural and legal advantages.

We note that there are a number of more technical and detailed issues in relation to Module 2 which will require further development:

- the notion of an indirect/*de facto* subsidy, which increases a party's financial strength and which subsidy facilitates an acquisition, will need careful/further explanation. The notion of subsidies in a domestic market (e.g. below market price utilities, preferential tax treatment, advantageous cost of borrowing or the benefits of domestic monopoly rights) being used to cross-subsidise foreign acquisitions raises complex issues of fact which will challenge the informational requirements of the regime;
- the lack of judicial review of a mandatory regime with procedural penalties and material redressive measures is also notable (as under Module 1); and
- the fact that the procedure does not provide for the involvement of the foreign grantor (even on a voluntary basis) again as noted under Module 1, is surprising, *inter alia*, given the material nature of the redressive measures.

2. **Do you agree with the procedural set-up for Module 2, i.e. ex ante obligatory notification system, 2-step investigation procedure, the fact-finding tools of the competent authority, etc. (see section 4.2.5 of the White Paper).**

We broadly concur.

We prefer Module 2's non-reliance upon third party complaints and/or own initiative investigations, bearing in mind the informational requirements, and generally favour (for Modules 1, 2 (and 3)) a voluntary notification system under the EU Commission's exclusive jurisdiction, with potential legal consequences in the absence of notification and clearance.

3. **Do you agree with the scope of Module 2 (section 4.2.2) in terms of**
    - **definition of acquisition**
    - **definition and thresholds of the EU target (4.2.2.3)**
    - **definition of potentially subsidised acquisition**

As regards thresholds, please provide your views on appropriate thresholds.

We consider generally that the White Paper discusses all of the relevant themes on this topic.

4. **Do you consider that Module 2 should include a notification obligation for all acquisitions of EU targets or only for potentially subsidised acquisitions (section 4.2.2.2.2)?**

We consider that Module 2 should be limited to distortions of the internal market brought about by foreign subsidised acquisitions of EU targets.

5. **Do you agree with the substantive assessment criteria under Module 2 (section 4.2.3) and the list of redressive measures (section 4.2.6) in the White Paper?**

Broadly, but subject to the comments on Modules 1 and 2 (and 3).

6. **Do you consider it useful to include an EU interest test for public policy objectives (section 4.2.4) and what should, in your view, be included as criteria in this test?**

We consider that an EU interest test is important if the regime is to be balanced and equitable. We wonder whether the test should not be broadened to the notion of EU common objectives, i.e. in line with the current EU State aid compatibility assessment criteria.

7. **Do you agree that the enforcement responsibility under Module 2 should be for the Commission (section 4.2.7).**

See above, we support this approach and consider that it could be extended to Modules 1 and 3.

Module 3

1. **Do you think there is a need to address specifically distortions caused by foreign subsidies in the specific context of public procurement procedures? Please explain.**

We broadly agree that there is a legislative gap in the Procurement Directives regarding the possibility of rejecting the tender of an economic operator in receipt of a foreign subsidy.

We question whether the provisions of Article 69 (2)(f), if extended to cover foreign subsidies as well as State aid, would not provide an adequate remedy under the general umbrella of abnormally low tenders.

2. **Do you think the framework proposed for public procurement in the White Paper appropriately addresses the distortions caused by foreign subsidies in public procurement procedures? Please explain.**

We question whether a separate regime in respect of public procurement is required and we would encourage the Commission to consider whether the concerns raised in respect of public procurement could not also be addressed in a single foreign subsidy regime applying to Modules 1,2 and 3. We note, in this regard that:

- Bidders in receipt of foreign subsidies may be able to notify (voluntarily) and pre- clear (as suggested in Modules 1 and 2) with a view to participating in an EU public procurement; and that
- The regime could be administered exclusively by the Commission (as in State aid) and be supported by a third-party complaints system.

In combination with Modules 1 and 2, the suggestion above would achieve a single foreign subsidy regime which offers legal certainty and procedural rights to grantors and beneficiaries of foreign subsidies. Bidders in a public procurement context would be incentivised (though not required) to obtain clearance from the Commission in respect of their foreign subsidies, in recognition of the fact that a failure to do so would put at risk their participation in a tender. Conversely, bidders in receipt of decisions (whether positive or negative) would benefit from greater legal certainty as to the position of their procurement activities within the Internal Market. In this context, appropriate levels of procedural transparency, as put forward in the context of Modules 1 and 2, will be important if third parties are to play an effective role.

As discussed above, substantive and procedural harmonisation could be achieved through the grant to the Commission of exclusive competence in relation to Module 3 (and 1 and 2). Indeed, a system which invites 27 Member States to review and apply the rules with varying degrees of regulatory experience and resource looks in practice to be undesirable, in particular in the context of a quite new area of law and practice.

3. **Do you consider the foreseen interplay between the contracting authorities and the supervisory authorities adequate e.g. as regards determination of whether the foreign subsidy distorts the relevant public procurement procedure?**

See above, in relation to exclusive Commission jurisdiction in relation to Module 3.

4. **Do you think other issues should be addressed in the context of public procurement and foreign subsidies than those contained in this White Paper?**

<u>Interplay between Modules 1, 2 and 3</u>

1. Do you consider that (d) Modules 1, 2 and 3 should be combined and operate together.

We consider that active consideration should be given to a single EU foreign subsidy regime, as discussed in the responses above.

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