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NCTM REPLY TO THE WHITE PAPER ON LEVELLING THE PLAYING FIELD AS REGARDS FOREIGN SUBSIDIES

23 September 2020

*On 17 June 2020, the European Commission published a White Paper dealing with the distortive effects caused by foreign subsidies in the Single Market. The Commission now seeks views and input from all stakeholders on the options set out in the White Paper. The public consultation, which will be open until 23 September 2020, will help the Commission to prepare for appropriate legislative proposals in this area. The questions stakeholders can answer during the consultation process are set out in **ANNEX II** of the White Paper. This document contains Nctm's replies to these questions.*

Introduction

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

Nctm is an independent law firm in Italy providing a full array of legal services to business and corporate clients on a national and international basis. Nctm is headquartered in Milan, with offices in Rome, Brussels, London and Shanghai.

Nctm is one of the leading firms for M&A and private equity in Italy and advises on cross-border and domestic transactions and works with a wide array of operators, including global private equity firms on transatlantic transactions. The firm has a renowned reputation in competition matters, including State aid and in international trade and WTO issues (market access, unfair trade, compliance and customs).

The Commission's proposal can have a significant impact, in many instances, on the lives of businesses and practitioners. For this reason, and also in light of its experience in M&A, Trade and competition law, the firm intends to submit its views on the tool in question.

Questions relating to the three Modules

1. Do you think there is a need for new legal instruments to address distortions of the internal market arising from subsidies granted by non-EU authorities ('foreign subsidies')? Please explain and also add examples of past distortions arising from foreign subsidies.

As private consultants, we have registered an increased activity of foreign enterprises in the Internal market. While the presence of foreign investments is important for the EU economy, in some circumstances foreign subsidies may create an uneven playing field in which less efficient, subsidized operators increase their market share at the expense of more efficient, unsubsidized competitors.

Nctm shares the underlying philosophy that all companies should compete on equal footing to acquire key assets in the internal market. It is however important to struck the right balance between the need of

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controlling certain foreign investments which can be detrimental to fair competition and the freedom to conduct a business, which is also enshrined in the EU Charter of fundamental rights, in order to avoid unwarranted protectionist solutions.

Foreign investments remain a vital source of job creation, know-how, and prosperity in the EU and will be also essential for Europe's recovery from the COVID-19 crisis. Therefore, Nctm calls for a proportionate tool that should not result in an obstacle to investment.

2. Do you think the framework presented in the White Paper adequately addresses the distortions caused by foreign subsidies in the internal market? Please explain.

Nctm believes that the new tools should ensure that:

- only measures producing a significative distortion within the Internal Market – *i.e.* those that are truly capable of undermining the level playing field for EU and non-EU companies – should be caught by the new instruments;

- the procedure framework must be swift and efficient, in adherence to the principle of legal certainty, guaranteeing at the same time the full participation of the interested parties. Private and public undertakings – both recipients and their competitors - are, in many instances, the players which will be mostly affected by the measures in question and should be placed, accordingly, at the center of the new system;

- as the new system might be burdersome, forcing foreign investors to deal in parallel with merger control, FDI, and foreign subsidy filings, it is key to design a system of referrals so that in the same procedure, for example in merger matters, the competent authority can also decide whether or not distortive foreign subsidies are present.

Certain aspects deserve, in our opinion, a closer scrutiny.

2.1. Definition of foreign subsidies

Regarding the definition of foreign subsidies, the White Paper defines a "foreign subsidy" as a financial contribution by a government or any public body of a non-EU country (including a private body entrusted or directed by a non-EU country's government) which confers a benefit on a recipient and which – reflecting a requirement of selectivity – is limited to an industry, individual company or group of companies[1].

As per Module 1, for the sake of legal certainty, Nctm agrees with the idea by the Commission to define a pre-set category of distortive subsidies, which can have an obvious detrimental effect to the EU market, and to leave open the possibility that other types of measures not covered by the above mentioned category

[1] Under the White Paper's proposal, a foreign subsidy would cover: (i) foreign subsidies granted directly to companies established in the EU; (ii) foreign subsidies granted to a company established in a third country where those subsidies are used by a related party established in the EU; and (iii) foreign subsidies granted to a company established in a third country where those subsidies are used to facilitate an acquisition of an EU undertaking or participate in public procurement procedures. In essence, any undertaking directly or indirectly benefitting from subsidies of non-EU origin and seeking to access or otherwise operate in the EU market is likely to be affected.

could be scrutinized by the supervisory authority, on the basis of certain indicators. It is suggested, however, that the measures that are presumed to have negative effects on competition as well as the list of indicators be exhaustive.

To this end, the Commission should consider the possibility of adopting Guidelines or a Communication on the notion of foreign subsidies and "financial contribution" in line with what has been done in the context of State aid with regard to the Communication on the notion of aid.

2.2. Coordination with existing instruments

Nctm believes that the design of each Module should be carefully formulated in the framework of and in complementarity with existing instruments, especially in the field of competition law and trade Law. To ensure that the instrument delivers on its objectives, it would be important to implement a system of referrals among the different authorities possibly involved, for the sake of procedural economy and consistency. For instances:

- the Commission entrusted with a merger case should verify the existence of a foreign subsidies and should be entitled to launch a sub-procedure under Module 2;

- the national competition authority entrusted with a merger case should deliver a *prima facie* opinion on the existence of a foreign subsidies and possible effect on the internal market and should have the right/obligation to refer the matter to the Commission under Module 2;

- the national government or FDI authority, while verifying whether a foreign investment is acceptable in terms of national security and essential public interests, shall refer the matter to the Commission under Module 2 in order to verify the existence of distortive effects on competition;

- the European Commission, when dealing with a State aid cases may *ex officio* verify if similar aid in the sector in question are made by third countries parties and either start an investigation or deliver information to the national supervisory authority under Module 1.

2.3. Procedural consideration

In all modules, the procedures need to be transparent, clear and predictable. Reducing uncertainties for both European and foreign companies is of paramount importance. Therefore, defining reasonable timeframes for the investigations to be undertaken under all three of the modules is essential.

Private parties (both recipients, their competitors/complainants and trade associations) should have adequate procedural rights, the launch of investigation should be made public and the rights of defence of beneficiaries should be duly guaranteed (also in light of the lack of enforcement power against third-party States).

Module 1

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1. Do you consider that Module 1 appropriately addresses distortions of the internal market through foreign subsidies when granted to undertakings in the EU?

Foreign subsidies should be regulated as far as possible in a manner similar to State aid granted by EU Member States, and the enforcing activity should be focused on major subsidies that lead to significant distortions.

It is essential that the focus be the fact that distortive activities are taking place in the EU internal market rather than the place of establishment of the recipient. In our opinion, in addition to undertakings established in the EU, the scope of Module 1 should also include undertakings active in the EU. This would be consistent with State aid legislation, whereby the prohibition of State aid laid down in the Treaty does not depend on a stipulation of nationality.[2]

Like under the EU state aid rules, there should be the possibility for companies to voluntarily notify foreign subsidies to the competent authorities. The final instrument should encompass a system of *ex ante* notification and of exemptions from notifications, as this will make it easier for companies to comply, without unwarranted red tape which will have the only effect of discouraging foreign investment in the EU.

A block exemptions Regulation, under which certain forms subsidies are allowed, should be foreseen.

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)

Overall, Nctm agrees with the procedural set-up proposed in the White Paper and welcomes the fact that is a two-stage procedure shaped in line with State aid procedures.

Below, we set out some elements that need to be clarified/taken into account in the final instrument.

Section 4.1.1. states that the competent supervisory authority can close a case at the end of the preliminary review if "the case is not a priority". This leaves too much discretion to the authorities. In our opinion, it needs to be clarified under what circumstances a case is not a priority and whether this would be linked with the notion of "EU interest".

Interested parties should be entitled to file a complaint about the possible existence of foreign subsidies. Complainants are a useful tool for investigation and should be considered accordingly. In order to enhance transparency, a "universal" (not-mandatory) form for complaints should be introduced, indicating the data and information to be included in the submission.

The Commission or the national supervisory authority, as the case may be, should have an obligation to keep the complainants fully informed about the progress of the procedure.

[2] The prohibition has an objective character; it refers to 'aid ... which distorts or threatens to distort competition by favouring certain undertakings Consequently a case of State aid to an undertaking governed by foreign law and interests is, theoretically at least, perfectly possible (see in this regard Case C-353/96, *Tiercé Ladbroke*, conclusions of Advocate General Cosmas, para 25).

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More generally, it would be important to ensure full involvement of private parties (both complainants and beneficiary undertakings) from the outset of the procedure.

Interested parties should be invited to present their views in writing and submit information on the existence of a foreign subsidy and its potential distortive effect in the internal market not only in the course of the in-depth examination but also before and during the preliminary review.

In addition, it would be important to ensure full transparency of the procedure ensuring publication of a notice on the submission of a compliant as well as of both the decisions to initiate the preliminary review and the in-depth investigation.[3] Complainants should be the addressees of a decision on a case concerning the subject matter of the complaint and should enjoy the right to access to the file and, possibly, to be heard before the competent authority.

The same holds true for the beneficiary undertakings, which can be significantly affected by the proposed redressive measures. Beneficiaries should have the right to be involved with the procedure in an adequate manner, receiving the comments of the State concerned (if available) and of other interested parties; they should have the right to reply to those comments, to submit their view on documents and elements which concern them directly, to access to the file and to be heard in an oral hearing.

Undertakings in the new system should not play the role of the mere source of information: the possibility for the supervisory authority to impose fines and periodic penalty payments for failure to timely supply the information requested or for supplying incomplete, incorrect or misleading information should be counterbalanced with the right to be fully part of the procedure.

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?

For the sake of legal certainty, Nctm agrees with the idea of the Commission to define a pre-set category of distortive subsidies, which can have an obvious detrimental effect to the EU market, and to leave open the possibility that other types of measures not covered by above mentioned category could be scrutinized by the supervisory authority, on the basis of certain indicators.

However, Nctm respectfully points out that:

- Section 4.1.3.1 of the White Paper, in making reference to certain categories of foreign subsidies that are likely to create distortions in the internal market and makes reference to "*operating subsidies in the form of tax reliefs, outside general measures*". The exception relating to general measure should be, in our opinion, deleted or at least replaced with "*purely general measures not producing distortive effects on the market*". General measures may distort competition within the internal market in the same way as specific

[3] In the current version of the paper it is only set out that that the competent supervisory authority will inform the undertaking concerned, the third country allegedly granting the subsidy, and the case being, the Commission, as well as the competent supervisory authorities of the other Member States of the launch of an in- depth investigation.

ones. The inclusion of general subsidies would be consistent with the EU legal system, which has instruments and tools to address distortion caused by general measures (see for instance Article 116 TFEU;

- For the sake of legal certainty, the list of relevant indicators related to the subsidies and the relevant market situation should be exhaustive (i.e. a "closed list"). Guidelines for the competent supervisory authorities should be established in order to ensure a consistent approach across the internal market.

- Similarly, a list of subsidies that are considered unproblematic should be defined. This list should particularly include those subsidies authorised in the EU (e.g. under EU State aid regime).

Regarding the list of **redressive measures**, legally binding commitments should be preferred over other types of sanctions. Structural remedies should be the last resort and only used if there is no other way of addressing the market distortions.

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

The EU interest test closely follows the approach taken under the EU's trade defence instruments. A decision as to whether an EU interest exists in the relevant case should only be taken if all the parties concerned have been given the opportunity to provide their comments.

Nctm respectfully points out that the evaluation criteria proposed by the Commission need to be clarified as the current lack of clarity regarding the EU Interest test could lead to extensive discretion for the supervisory authorities.

To avoid arbitrary decisions, common criteria should be applied across all sectors to assess the contribution of a subsidised company to EU public policy objectives (e.g. increase employment, economic growth, address climate change, support digital transformation, develop new skills, promote new technologies, increase diversification and resilience of supply chains). A closed list of the EU's public policy objectives that can be taken into account by the Commission or the Member State concerned should be considered.

The EU interest test must be performed by the European Commission exclusively.

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

Module 1 should not allow any *ex post* control of acquisitions, which should be governed for the sake of clarity by one and the same instrument.

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 (section 4.1.3)?

Nctm agrees with the fixing of a "de minimis" threshold to ensure that the investigative efforts are addressed to market disruptive subsidies. In this context there should be an objective impact assessment regarding the

proposed de minimis threshold of EUR 200.000 suggested for Module 1 to ensure that the scope of the instrument is not disproportionately enlarged at the expense of its effectiveness.

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

In principle, Nctm agrees with the establishment of a system of shared enforcement between the Commission and the national authorities.

However, the current formulation of Section 4.1.7. leaves possible diverging outcomes between national authorities investigating the same (or similar) measures open. It should be made clear when a single Member State has jurisdiction and when, conversely, the Commission retains exclusive jurisdiction (for instance, if the subsidies presumably have significant effects on more Member States). In order to avoid conflicting outcomes, if an investigation is started by multiple authorities, the Commission must retain exclusive jurisdiction and must have a final word on the case (the national supervisory authorities shall be prevented to continue their cases even if the Commission closes its in-depth investigation).

Companies should be able to choose whether to notify the measure to the Commission or to the national supervisory authority.

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)?

Since it addresses a field where there is currently no legal framework, we consider Module 2 appropriate in that it complements a set of rules aimed at tackling distortive foreign subsidies.

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)

The procedural set-up is largely based on the EU Merger Regulation: since it draws from such experience, including many well-established legal principles, we find it appropriately structured. We note the following:

Timing: when the same transaction is to be notified also under the EUMR, it is essential to include coordination mechanisms to ensure that the proposed system and the EU merger control rules may be run in parallel, without giving rise to excessive extensions of the time needed to obtain a final outcome.

Hearing of third parties: third parties should be entitled to be heard in cases they have an interest to intervene (see in this regard Article 18, Regulation 139/04).

Conditional clearance: the applicable redressive measures should be issued taking into account those applicable under merger control regulations as regard scope and timing. This coordination should be provided for on a general basis, but should have to be capable to be adjusted also on a case-by-case basis.

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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.

Acquisition: in our view the case of non-controlling stakes should be addressed, in the interest of legal certainty, by means of a quantitative threshold only, in terms of percentage of voting rights. Based on the existing legislation and application practice of some member States (Germany, Austria and UK), a 25% threshold could be introduced.

Thresholds: a quantitative threshold based on target's turnover seems appropriate in light of the EUMR practice on turnover calculation; however, too high a threshold, although a sensible means of keeping the administrative burden low, may lead to significant gaps, in particular when relevant markets are small, and/or when targets (as new entrants or innovators) may in perspective play a crucial role in highly concentrated industry (as many recent studies and reports highlights as a concern in the digital economy, and in digital eco-systems). A second threshold based on transaction value may properly address these issues (whereas a test based on likelihood to generate significant EU turnover in the future may not).

Potentially subsidised acquisition: a *de minimis* threshold would avoid the burden on the parties to notify any subsidised transaction and reduce the amount of transactions to be examined. Within a one-stop-shop system based on the Commission's exclusive jurisdiction, a higher threshold (e.g. €500,000 over a period of 3 years) may be considered.

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)?

Extending the obligation to all acquisitions of EU targets risks to create additional red tape for non-subsided undertakings which may potentially end with an overlap with merger control, and would not be required to ensure effective control.

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) presented in the White Paper?

We agree with the substantive assessment criteria and the list of measures. However, the presumptive approach regarding direct subsidies ("foreign subsidies directly facilitating acquisitions would normally be considered to distort the internal market") should be tempered by guidelines addressing both direct and *de facto* subsidies and distortion in the internal market as a consequence.

On redressive measures, if the focus is to be on structural remedies, it seems particularly important to ensure coordination with merger control rules and procedures (including timing) to avoid likely contradictory outcomes and duplication of efforts and administrative burdens.

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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 it useful to include an EU interest test for public policy objectives in accordance with the general criteria laid down in Module 1, Section 4.1.4.

Balancing criteria, at least in terms of a set of principles as in Article 101(3) TFUE (and in the EUMR) should be added for the purposes of containing discretionary applications, enhancing ex-ante assessments and guiding judicial review.

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

We agree that there are strong advantages by establishing a "one-stop-shop" as set out in Section 4.2.7. However, should the European Commission be exclusively responsible for enforcing Module 2, transactions of a purely national relevance will be communicated both to the national antitrust authority (under national merger control law) and to the Commission (under the applicable rules concerning the control of potentially subsidised acquisitions).

Therefore, a referral mechanism to national authorities should be envisaged, which, as in the EUMR, may be designed so as to be triggered by request of the notifying parties (see in this regard Article 4(4) Regulation 139/04) or of the competent national authority (see in this regard Article 9 Regulation 139/04).