Position document attached to the Consultation questionnaire

The China Chamber of Commerce would like to present the following text as a more comprehensive reply to the Consultation on the White Paper on Foreign Subsidies.

Introduction

Registered as a business association under the Belgian law, the China Chamber of Commerce to the EU (CCCEU) is an active bridge-builder that helps Chinese enterprises in Europe chart the way for increased China-EU economic interaction and cooperation. Its overarching aim is to contribute to common prosperity while respecting the diversity in the EU.

The CCCEU offers a platform of dialogue between China and the EU businesses. It strives to serve the best interests of member companies investing in the EU, to convey their opinions, suggestions and concerns to the European institutions or member states, and to explore ways to enhance the cooperation of Chinese businesses in this multicultural continent.

Founded by Bank of China (Luxembourg) S.A., China Three Gorges (Europe) S.A., and COSCO Europe GmbH in August 2018, CCCEU now has more than 60 company members and chambers members in the EU member states. It represents more than 1,000 Chinese enterprises active in numerous industries, such as count finance, energy, transportation, manufacturing, ICT, Internet, artificial intelligence.

The White Paper on Levelling the Playing Field as Regards Foreign Subsidies adopted by the European Commission proposes the establishment of a new legal framework to scrutinise subsidies from non-EU countries governments. This legal instrument will directly affect all foreign undertakings including CCCEU members and the legal environment of the EU market where they operate in. The White Paper therefore draws our particular attention and concerns.

We would like to take the opportunity of this public consultation to express the views and concerns of our member companies. We hope that these views and concerns will be duly and carefully considered by the European Commission in its legislative process forward.

Questions relating to the three Modules - General questions

While the EU's response to the demands in the internal market for the redress of the distortion caused by subsidies from non-EU governments is appreciable, the CCCEU would like to stress that it would be unnecessary for the EU to build up a new set of legal instruments specifically destined to cope with the issue. The new legal instruments as proposed in the White Paper could potentially be incompatible with the EU treaties and international agreements to which the EU is a party. We believe that the existing legal framework at EU and its member states levels are equipped with toolkits, which could be adapted or interpreted where necessary, sufficient to redress the distortion

caused by external factors, including subsidies and to restore fair competition in the EU internal market. Adding new legal tools will lead to overlapping or even conflicting legal norms or procedures and bring about legal uncertainties to the business environment to investors, to the detriment of EU economy overall. The new tools will also increase the administrative burden of undertakings already present in the EU market or constitute new barriers for foreign companies to enter the EU internal market, as well as the upsurge the management costs of administrative institutions. We will comment in detail below.

We believe that the European Commission needs to carefully examine the legality, rationality and necessity of adopting a new set of legal tools, especially taking into account the fundamental issues below which are not explained in the White Paper.

First, the legal rationale for the formulation of new EU legal tools is absent. The White Paper does not clearly point out the legal basis in the Treaty on the Functioning of the European Union (TFEU) on which the new legal tools will be adopted. According to the regulatory areas of the new tools, they go beyond the exclusive EU competence over the "competition policy" and "trade policy" and the shared legislative authority with member states on the "internal market" issues. The European Commission's proposal is susceptible of overstepping into the legislation and enforcement power of the members states under the EU treaties. The White Paper is however silent on this fundamental issue throughout, which is rare as a legislative proposal document.

Second, the new tools are parallel to many other existing EU or member states legal instruments, resulting in overlapping regulatory schemes and "double standards" in their enforcement. According to the TFEU, the competition rules regulating the behaviours of undertakings allow for the scrutiny of foreign subsidies if they have the objective or effect of distort competition in the EU market. The EU State Aid rules set out the definition and review standards concerning (government and public bodies) subsidies. Disciplines about government procurement and the use of public funds also prescribes possibility to take into consideration the foreign subsidies in their contracting process. We believe, by refining existing policy tools, the Commission can meet its legislative objectives and fill the so-called regulatory gap. The White Paper overemphasises the limits of the above existing tools and insists on the need to adopt completely new tools. It should have first studied the existing rules in sufficient details and proposed the way of adaptation to the extent necessary. The White Paper cites the need to avoid such overlapping but does not provides any concrete proposals in this respect. Moreover, in comparison to the existing policy tools, the new tools expand the definition of "subsidy", set a lower threshold and evidentiary standards for initiation of investigation, impose a higher standards and excessive burden of proof on the party under investigation, and stipulate more diverse and severe redressive measures than the parallel competition review schemes. The new set of regulatory tools prescribe differentiated review standard towards foreign or foreign invested companies, as opposed to those normally applicable to EU undertakings. Consequently, not only the proposed new instrument overlap with other regulatory procedures in areas such as merger control, state aid and public procurement reviews, but the overlapping instruments create double standards in their enforcement.

Third, the new legal tools will shake and undermine the foundations on which the EU internal market is established and relied, namely the free movement of goods, services and capital. These rights and freedoms are embodied in articles 34 (free movement of goods), 54 (freedom of establishment), 56

(freedom to provide services) and 63 (free movement of capital) of the TFEU. A series of measures under the new tools will directly hinder the freedoms and rights of legal persons to sell goods, provide services, transfer funds, establish and carry out normal operations in the EU internal market.

Fourth, the new legal tools are susceptible of violating the EU's commitments and obligations under the international agreements (e.g. double standards in violation of national treatment). The EU has constantly opposed the practice of unilateralism, "double standards" and protectionism. The new tools proposed by the Commission introduce a wide range of measures that are potentially incompatible with the EU's WTO obligations including the general principles such as the national treatment, most favoured nations and non-discrimination, and its obligations under agreements including ASCM, GATS, TRIPS, TRIMS and GPA. This is clearly inconsistent with EU's previous position of rule-based multilateralism.

Even if the European Commission considers that the legal tools it proposes are consistent with the EU treaties and the international agreements to which the EU is a party and that their new legislation proposal is justified, we believe that the proposed rules set out in the White Paper contain unclear or unreasonable concepts and standards, unequal procedural rights, or contradict the fundamental principles of law. Brief comments to the questions relating to each Module are provided in the questionnaire. We hereby present our views in detail concerning several horizontal issues of general significance and an in-depth analysis of these aspects and issues that are not sufficiently elaborated in the questionnaire due to character limits.

First, the proposed legal framework regarding foreign subsidies obviously takes inspiration and predominantly makes references to EU State aid rules. It is noteworthy that the parties subject to scrutiny under the proposed legal framework and those subject to state aid investigation are not equal footed. The EU State aid rules regulate the behaviour of EU member states governments, whereas the direct subject of investigation under the proposed legal framework on foreign subsidy is "undertaking". The White Paper jets enormous inks on the obligations of undertakings under scrutiny. It does not however describe how a foreign sovereign country's government will be involved in the investigation. This difference in the subject under investigation results in a severe asymmetry and imbalance with respect to the treatments between "governments" and "undertakings" in the context of investigation processes. This is reflected in their respective procedural privileges, way of participation, ability to provide information, and access to information and resources, all of which could lead to potential procedural inequality in practice. If the main objective of the White Paper is to ensure a level playing field for all EU and foreign undertakings, adopting a mechanism similar to that described in Article 107 of the TFEU targeting "member states governments", for the purpose of regulating foreign "undertakings", would lead to a mismatch between regulatory target ("foreign countries' governments") and actual subject of investigation ("undertakings"). It is apparent that "governments" and "undertakings" differ significantly in their desire, discretion and ability to participate in investigatory processes. Requiring undertakings to bear the burden of proof and responsibility that ought to be undertaken by foreign countries' governments would ultimately constitute discrimination against foreign businesses.

Second, assigning burden of proof to undertakings notably violates the fundamental legal principle of privilege against self-incrimination. Pursuant to the investigative framework outlined in the White Paper, the competent supervisory authority is responsible for conducting the investigation and

assessment of evidence. An investigated undertaking is under obligation to provide all information relevant to the subsidy in question. Fault of doing so, the investigated undertaking risks severe penalties. It amounts to forcing the investigated undertaking to produce evidence that would incriminate itself. This stands against privilege against self-incrimination – a longstanding fundamental legal principle upheld by the European Charter of Human Rights. The new legal instruments shall allocate the burden of proof in a fair manner, fully in compliant with the general legal principles, and require the investigating authorities to produce the evidence on the foreign subsidies.

Third, discriminatory treatment could be present in regard to undertakings of specific industries. In cases where State aid rules are enforced in accordance with Article 107 of the TFEU, undertakings receiving State aid that are entrusted with the provision of services of general economic interest may be exempted, provided that the four conditions stipulated in Article 106 are fulfilled. Article 106 of the TFEU provides that undertakings (whether private or state-owned) entrusted with the provision of Services of General Economic Interest (SGEI) may, under certain conditions, be entitled to receive aid from Member States. The SGEI is a legal concept under EU Law that has been interpreted and clarified by the EU courts through extensive rulings. In the event that an undertaking, whether foreign or EU domestic, provides services of general economic interest but is also recipient of foreign subsides, shall be equally exempted from scrutiny as long as it is able to satisfy public welfare or SGEI requirements established by EU case-law. Any determination to the contrast would constitute a violation of non-discrimination principle.

Under the State aid legal framework, derogations and exceptions are also granted in other circumstances. Agriculture sector, for example, is completely exempted from the EU State aid review, whereas sectors such as transportation or export subsidies are governed by a different ruleset. Yet, the White Paper only suggests the exclusion of agriculture from the scope of review under Modules 2 and 3, with no attempts to grant equal treatments to foreign undertakings of similar sectors that are otherwise derogated from existing legal framework. This inconsistency and differential treatment shall be duly addressed when formulating the new legislation.

Similarly, sovereign funds should also be assessed on a differentiated basis under the proposed legal instruments. Despite the consideration that their establishment is commonly associated with national political objectives, sovereign funds generally aim to achieve a high degree of investment returns to ensure the stability of purchasing capacity through maintaining a national economic surplus. To this end, sovereign funds tend to, in practice, engage in a diversified investment activity, and often exhibit distinct public interest features. These ultimate profit-earning oriented operations require sovereign funds to engage in market activities entirely through fair competition with private players, and as such, each project involving the participation of sovereign funds should be subject to a case-by-case study. Some of these projects engage in businesses that promote local and national economic development, especially in areas including employment promotion, urban development, entrepreneurship and sustainable development, and is also invested in sectors such as energy, logistics and transportation. The sovereign funds and special purpose private equity funds whose management goals are to achieve stable investment returns and control investment risk should be treated equally as market players that engage in business activities on a fair competition

basis. They shall not be considered as entities entrusted with public authority dedicated to executing subsidy policies.

We expect the Commission to grant equal treatments to foreign undertakings as those EU companies are currently treated under the EU State aid scheme, in that exemption shall be granted to subsidies to undertakings providing SGEI, or other defined sectors where clear conditions for exemption are set out. Foreign sovereign funds and other special purpose private equity funds shall also be treated as market players in the same way as EU undertakings alike as long as they behave in reaction to the market signals and are profit oriented.

Also, the proposed legislation should insert grandfather clauses to protect legitimate expectation. Part of Chinese undertakings' investments in Europe were introduced when the European debt crisis took place. The impacted member states invited investment participation from Chinese undertakings and favourable terms were afforded to them by the member states governments at the time. The legitimate expectations arising from these investments should be taken fully into consideration under the EU's proposed foreign subsidy review mechanism. Grandfather clauses shall be inserted in the future legislation to exempt the said undertakings from any future scrutiny.

Additionally, the procedural rights of the parties being investigated should be safeguarded under the proposed new tools. Considering the extensive scope of scrutiny involving foreign subsides as well as the potentially severe legal consequences, our members currently hold a great measure of concern regarding the right of defence and due process under each proposed Module. As clearly stated in the White Paper, the proposed instruments will inspire from the EU's existing experience in trade remedy investigations (in particular anti-subsidy and countervailing measures). The competent supervisory authority investigating into the subsidies will enjoy a greater degree of discretionary power. Making direct reference to the EU's trade remedy mechanism for the foreign subsidy scrutiny schemes under construction also carries the implication that the investigating authority may choose to adopt investigation techniques and sources of evidence that differ from those normally used by antitrust or state aid reviews. In this context, acute issues arise regarding the right to defence of the parties under investigation. As a matter of example, the Directorate General for Trade (DG Trade) frequently makes use of "facts available" in trade remedy investigations into "foreign subsidies" to local companies, that is factual determination relating to an investigated party may be directly made in accordance with the Commission's internal guidelines entitled the Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purpose of Trade Defence Investigations dated in 2017. DG Trade does not explore other sources of evidence for its factual findings and satisfies with the very general conclusions drawn in the above guidelines, which would be otherwise outdated or not sufficiently specific to the undertaking or the sector concerned. We suggest that the foreign subsidies scrutiny schemes under construction should include adequate safeguards of the right of defence in the investigative procedures.

Concretely, the new legal instruments shall provide investigated parties with opportunities for making written or oral defence, establish mechanism and procedures for hearings, set statutory time limits for procedures, and make public of the review standards and guidelines that the investigating authorities will refer to. These safeguards of right of defence are needed to ensure

legal certainty to undertakings and minimize costs to transactions incurred due to excessive red tape.

Transparency is another vital principle in the EU legal system and one which White Paper does not put much emphasis on. As the enforcement of the proposed legal instruments involves a multitude of cross-lingual, cross-jurisdictional and extraterritorial factors, we contend that transparency should be further emphasized as one of the founding principles of the new legal instruments.

Last but not least, a clear venue of judicial review concerning unfavourable decisions made by supervisory authorities is expected in the upcoming legislation, where parties affected could seek judicial remedy and redress.

Module 1

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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)

We have two critical remarks to the procedural set-up under Module 1. First, the burden of proof should not be reversed and imposed on an undertaking concerned. Nor should an undertaking concerned assume the responsibilities to produce evidence beyond its abilities. As above mentioned, an undertaking concerned has much less capacity and resources than a supervisory authority when it comes to the collection of evidence. Therefore, the supervisory authority should clearly specify the information and documents that an undertaking concerned is expected to supply and accept the information that is provided by the undertaking concerned to its best ability to meet the request of the supervisory authority. Most importantly, an undertaking shall not be penalised for its failure to supply evidence which are beyond its abilities.

Second, the preliminary review envisaged by the White Paper does not provide for any involvement or right of an undertaking concerned. The latter will be informed about the investigation and the subject matter of the review only after the preliminary findings are made. That in effect deprives the undertaking concerned of its legitimate right to defend itself and provide counterevidence and arguments under due process at the preliminary investigation stage. Therefore, the preliminary investigation conducted 'behind closed doors' contravenes the legal principle of 'due process'.

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?

Our comments to the substantive assessment criteria of Module 1 under Section 4.1.3 are three folded.

First, there exists a relatively clear source of reference about the definition of subsidy under the State aid scheme. On the official website of DG COMP State aid, the Commission lists near twenty types of State aid. However, when it comes to foreign subsidies, only five broad categories are listed in the White Paper, which are believed to be very likely to cause distortion in the internal market.

As regards the other forms of foreign subsidies, the extent to which they might distort the internal market needs to be assessed against a non-exhaustive collection of indicators. There is lack of clear guidance and legal certainty with regard to the assessment methodologies in this regard. The Commission should specify the definition and forms of 'foreign subsidies' in a way as clear-cut as possible and where necessary provide the business community with guidelines in the same way as it did in competition and state aid enforcement.

Second, we took note of the inclusion of 'leveraging effects' into the considerations for assessing the 'distortive effects' caused by subsidies according to the new legal instrument envisaged by the White Paper. It is alleged that if a subsidised beneficiary enjoys privileged market access in its domestic market through measures equivalent to special or exclusive rights, it could leverage such competitive advantages in the EU internal market and exacerbate the distortive effects of such subsidies. In the context of competition law, the applicability of 'leveraging effects' is determined further to the prior definition of the geographical market concerned. If the geographical market is global, it is reasonable to assert the potential leveraging of competitive advantages from the domestic market to the EU internal market. On the contrary, in the case of a national or regional market, it is unclear how competitive advantages obtained in the home country market could be leveraged from to the EU internal market. Therefore, we urge the Commission to provide a clear and specific guideline about the boundaries and methodologies for the application of 'leveraging effects' to avoid any potential abusive use of this concept.

Third, in the determination of whether a business entity is entrusted with government functions or authorities with regard to grant or channelling of subsidies, its ownership structure (such as state-owned banks or other types of SOEs) should not be the only factor to be considered. Rather, the analysis should be focused on whether comparable prices and cost are available under identical conditions in its domestic market for the provision of the same goods, services or funding, and on whether there is significant difference between this entity and other privately-owned ones in the same business sector in terms of business models and operational conducts.

We also disagree with the redressive measures under Module 1 in the following aspects.

First, there is no legitimate ground to ask an undertaking concerned to make redressive payments to the EU or its member states in relation to the subsidy that it has received. The only possible redressive measure involving repayment should be for the undertaking concerned to pay the received subsidy back to the granting government, which is a typical redressive remedy provided for by the EU State aid rules.

Second, structural redressive measures such as divestment of certain assets, reducing capacity or market presence shall not be referred to unconditionally and under all circumstances. The redressive measures shall be proportionate to the effect of the foreign subsidy on competition, because structural redressive measures will introduce drastic changes into the market structure, with direct consequence on fair competition among economic operators. Additionally, quantifiable criteria should be used to define the scope of application of redressive measures to avoid excessive redress, which could result in discrimination against undertakings under investigation.

Third, the time limit for the competent supervisory authority to impose redressive measures is too long. The White Paper states that the supervisory authority is allowed to impose redressive

measures on subsidies within a period of ten years "beginning on the day on which a subsidy is granted" and that period can be stopped by any action taken by the authority with regard to the subsidy in question and "start to run afresh" after such interruption. The long timeframe of pursuing subsidies is incompatible with the ordinary duration of the effect of subsidies, which is usually short- and medium-term in nature. Nor is it coherent with the period of three years within which subsidies could be scrutinised. Furthermore, even if an undertaking received a subsidy ten years before, redressive measures should be imposed only if the distortive effect of said subsidy on competition in the internal market can be carried over and proven. Considering that the combined effect of preliminary investigation conducted behind closed doors as mentioned above, and the long- and refreshable-time limit for imposing redressive measures, a subsidy can theoretically be pursued and redressed eternally, creating considerable legal uncertainty to undertakings having historically received subsidies.

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?

We noted that the White Paper requires a competent supervisory authority to conduct the EU interest test, and take into account the fact that investments and other business activities subsidised by foreign governments can have positive impacts locally in the EU (for example, on local employment, environmental protection and health). That is, the EU interest test is necessary to strike the balance between the distortive impact of subsidy in the EU internal market and EU's other policy objectives. When the said impact is positive overall, in other words when the beneficial impact of said subsidy outweighs its distortive effect on the EU's internal market, the competent supervisory authority will stop the investigation.

This is in our view indispensable to have the EU interest test to balance the various policy objectives. It is particularly necessary to look into the fact that our member companies have been operating in strict adherence to local laws and regulations and undertaking social responsibilities in a proactive manner. Having invested millions of euros in supporting European societies and projects of public interest, many Chinese companies have been playing an active role in local community development, donating to educational, environmental and social assistance causes based on local needs. Chinese companies' engagement in Europe has contributed to sustainable socioeconomic development where they operate and to economic, cultural and educational exchanges between China and Europe. In doing this, Chinese companies contribute economically and socially.

To make the EU interest test practical enforceable, and considering this assessment process is likely to be influenced by political factors, we recommend that the Commission establish a clearly defined list of factors to be considered as well as the standard of review, so as to limit to the extent possible the excessively wide margin of discretion of the competent supervisory authority and to provide more legal certainty to business operators.

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)?***

White Paper sets a minimum threshold under Module 1, as well as in the other two modules, that an undertaking that have received subsidies in a cumulative amount of EUR 200,000 "granted over a consecutive period of three years" by a non-EU government would trigger review by the EU or its Member States.

We are in favour of a minimum (de minimis) threshold for foreign subsidy investigation. However, the "one-size-fits-all" threshold in the White Paper sets a value too low to achieve substantive justice amongst undertakings and transactions of different size and nature. One of the authors of the White Paper explained at a forum that this numerical threshold was established to maintain consistency with the minimum threshold defined in the EU State aid rules applicable to EU Member States, reflecting a legislative objective of equal treatment towards non-EU states vis-à-vis Member States. Nevertheless, this pursuit of apparently "fair and equal treatment" ignores the underlying dynamics.

Identical amounts of subsidy can have vastly different effects on competition depending on the sector in which the recipient operates and the size of the transaction. Accumulated subsidies of EUR 200,000 over three years can have a negligible impact on the market if granted to companies in a capital-intensive sector or an industry with high level cash flow, or to a high value transaction. Setting the threshold too low without considering the size of companies and transactions would result in, among others, too many small investment transactions or undertakings being subject to scrutiny. This will increase costs for parties to the proposed transaction and overburden EU's supervisory authorities. Applying the one-size-fits-all threshold to all companies in all sectors that have received subsidies from non-EU countries goes against the principle of substantive justice.

We recommend the Commission to set up different review thresholds depending on the size of transaction or undertaking, adopt sector-specific approach or apply a relative threshold instead.

Module 2

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) and definition of potentially subsidised acquisition?***

We've noted that what constitutes an "acquisition" and thus triggering the notification obligation under Module 2 is defined in the White Paper. The concept refers to the interpretation given for the idea of "control" in EU's current acquisition review practices. Notwithstanding, the proposed Module 2 introduces a new concept: i.e. a transaction enables an undertaking to exercise, directly or indirectly, "material influence" over another undertaking. Given the lack of clarify over the definition "material influence" in the White Paper, which could otherwise be overarching, we urge the European Commission to provide a clearer definition and standards of review for the concept of "material influence", so as to enhance legal certainty.

Furthermore, similar to our remarks about the de minimis threshold, we believe there should be differentiated turnover based threshold applicable to different industrial sectors. For instance, it would be unreasonable to set a threshold too low for certain industries like banking, automobile and energy.

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?

Our comments on the substantive assessment criteria under Module 2 (section 4.2.3) are as follows.

First, the White Paper puts forward two ways in which foreign subsidies facilitate an acquisition, directly and de facto. The de facto facilitation means the subsidies are not used directly for the acquisition, but "increasing the financial strength of the acquirer". However, the White Paper does not explain how the facilitation should be ascertained and standard of review for increased financial strength. Moreover, since the financial strength is not directly linked to an acquisition, it would be speculative to bridge between them and allege that the increased financial strength would be carried over to the acquisition capability.

If this carry-over of financial strength also refers to the concept of "leveraging effects" under Module 1, namely that the recipient of subsidies enjoys certain privileges (e.g., exclusive rights) in its domestic market, thereby carried over to the competitive advantage to the EU, giving rise to a distortion in the EU internal market, our comments on the "leveraging effects" under Module 1 equally apply here.

Conclusion

An open and rule-based internal market is vital for a thriving EU for the people. The CCCEU hopes that the European Commission will give full and due consideration to the comments above. We particularly look forward to the Commission's further elaboration and analysis of legality and legitimacy of the new instruments. We hope that the European Commission will agree with and accept the views and recommendations we put forward on specific substantive and procedural issues under each module. We would appreciate that non-discriminatory rules with clear concepts and objective standards, transparent and fair procedures are developed if the European Commission believe that the new regulatory instruments are legally founded and compatible with the EU's obligations under international agreements, and are necessary to redress the distortions in the EU internal market caused by subsidies from non-EU countries.

The CCCEU looks forward to a more direct and open dialogue with the European Commission to exchange views and discuss the concerns expressed above.