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Subject: Annex – Consultation on the White Paper on Foreign Subsidies

Dear Sir, Madame,

This letter contains the remaining parts of my answers to the questions posed in your consultation form, with a request for clarification at the end. I submit them for your consideration.

Yours sincerely,

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Module 1 – Question 1 (continued)

The acceptance of module 1 will very much depend on the predictability of the rules, i.e. whether it is clear to companies and investors from abroad which rules to abide by. A subsidy definition that is too broad, especially in respect to determining selectivity, might be detrimental to how these rules will be perceived by third countries.

If module 1 is to be effective, given the existence of some subsidies the EU would probably not object to, this should be an exclusive competence of the Commission as it closely relates to international trade and investment protection rules. However, grandfathered existing bilateral tax treaties with non-discrimination provisions might hinder module 1 in its execution if it is applied arbitrarily or if foreign tax incentives are targeted that would have been approved of if they had been granted in an intra-EU setting. The latter is unlikely based on the proposal, but at this stage the definition of foreign subsidies is not set in stone yet.

On page 15 it is asked whether or not module 1 should be extended to undertakings otherwise active in the EU. This depend on how you would define 'establishment' on page 14. If it would cover both subsidiaries as well as branch offices the proposed definition of otherwise active would indeed suffice (including those seeking to acquire EU targets).

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Module 1 – Question 3 (continued)

As indicated in the main consultation form, I recommend to split the definition of subsidies in two: first to determine the presence of a financial benefit (vis-à-vis the normal legal system or market operator behaviour) and then to determine the presence of (de jure or de facto) selective access. These need to be treated as two distinct criteria, which would also allow the EU to stay more in line with current custom in international trade law (i.e. the benefit and specificity criteria under the WTO SCM Agreement) instead of moving towards the unified test of a 'selective advantage' as has been developed under intra-EU state aid rules.

The generic exclusion of proportional aid that remedies serious national or global disturbances of the economy is understandable against the background of COVID-19 developments and other disasters that arise from non-economic events.

With respect to para. 4.1.3.1, maybe the definition used could clarify how to deal with a situation where a national tax system taxes worldwide income, but allows for a lower tax rate on foreign income in general or on passive investment income? Would this fall within the definition of operating aid, or would this still fit within the definition of general measures, as this would generally apply to all residents from the country at hand?

At para. 4.1.3.2 it should be clarified that the 'level of activity' of the beneficiary should not only relate to the current level but also to the potential level of activity, especially if module 1 would be introduced while module 2 on acquisitions would not.

Module 2 – Question 3 (continued)

The reference to 'financial contributions' in Annex I instead of 'foreign subsidies' would exclude a selectivity/specificity test in its current wording. While I agree that there is a need to use a broader term like financial contributions to avoid a misunderstanding with the classic definition of a subsidy (even though that is a matter of legal definition), we must be careful not to broaden module 2 to generally available financial contributions. The latter might, in the end, affect any investment incentive or tax incentive and would put the EU in a tough spot if other states would adopt reciprocal regimes.

If adopting a selectivity/specificity test for module 2 (and 3) as I proposed in the first part of my answer, it should be considered to extend the definition to include any benefit exclusively aimed at facilitating foreign acquisitions, investments, tenders and alike, even when generally available. This would create something of a 'prohibited subsidies' category as we know from the WTO's SCM Agreements (with regard to subsidies contingent upon export or import-substitution), notwithstanding the possible escape of an EU interest test.

Module 2 notifications would be restricted to subsidies received by third countries in the past three years. If imposing a reporting obligation why not extend it to all subsidies as to ensure transparency, or is it assumed that all intra-EU subsidies are above board?

Keep in mind that if sovereign wealth funds would engage in acquisitions, they might be able to use funds made available to them at favourable terms by their respective governments many years ago. This possible flaw in the scope of module 2 reporting obligations and time limits might need to be addressed for module 2 to be sufficiently effective.

Module 3 – Question 4 (continued)

In para. 4.3.3.3 it is proposed to consider extending the suspension of public procurement proceedings when the winner would be a company having received incompatible intra-EU state aid. What stage should the state aid investigation be in? If there does not need to be a final decision taken, this raises a number of issues. A state aid investigation may focus on aid schemes as such. Would the mere use of an aid scheme make an individual company 'being investigated' at that stage?

Assumedly, companies that received approved intra-EU state aid will not be an issue in the context of module 3. But what if one of the tendering conditions refers to use of renewable energy or green technology? What if one of the parties received a foreign investment subsidy to become green. Would such a subsidy, which could be directly relevant for the outcome of the tender (given a higher score on being 'green'), result in exclusion while intra-EU state aid would not? Or would there also be an EU interest test as part of module 3. The latter is not stated explicitly in the White Paper.

Request for clarification

Any regulation proposed should clarify the position of foreign governments involved. Most likely, foreign governments will be allowed to submit comments as interested parties during in-depth procedures under modules 1, 2 and 3? But will they be given privileged status and be allowed – as the grantors of the foreign subsidies – to file an appeal at the EU's Courts by themselves against any final decision, as the addressee will be the company and not the foreign country/grantor involved?