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EUROPEAN COMMISSION IMPOSES COUNTERVAILING DUTIES ON IMPORTS FROM EGYPT FOR SUBSIDIES PROVIDED BY CHINA

To Our Clients and Friends:

On 15 June 2020, the European Commission (the ***Commission***) published Implementing Regulation 2020/776, which imposes definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in China and Egypt (the ***Regulation***).[1] The Regulation was adopted two days before the publication of the Commission's White Paper on tackling foreign subsidies, and appears to form part of a broader move to level the playing field with China.

While a few years ago the Commission considered that imports from China cannot be subject to an anti-subsidy investigation because China was considered as a non-market economy, in recent years the Commission has conducted a number of anti-subsidy investigations concerning imports from China. The new countervailing duties against imports from Egypt extend the boundaries of the EU anti-subsidy regime, as this is the first time that the Commission has imposed countervailing duties on imports not only from the country that provided the subsidy (China), but also on imports from another country where the subsidies in question were put in place (Egypt).

Subsidies countervailed by the Regulation

In addition to countervailing subsidies that the Chinese Government granted to Chinese exporting producers and subsidies that the Egyptian Government granted to exporting producers located in Egypt, the Regulation also countervails subsidies provided by the Chinese Government to exporting producers located in Egypt.

More specifically, the Regulation concerns the following types of subsidies:

1. Subsidies of various forms (*e.g.*, preferential financing) provided by the Chinese public authorities to Chinese exporters (*e.g.*, companies belonging to the China National Building Materials Group);

2. Subsidies granted directly by Egypt to companies carrying out activities in the China-Egypt Economic and Trade Cooperation zone (the ***SETC-Zone***), located in Egypt,[2] in the form of supply of land and tax incentives; and

3. Subsidies granted by Chinese public authorities in the form of preferential financing to the companies carrying out activities in the SETC-Zone.

The two main companies concerned by the Commission's investigation, Jushi Egypt and Hengshi Egypt, are producers of Glass Fibre Fabrics (***GFF***), a light-weight construction material used in the production of various products such as medical devices, vehicle body panels and boats. They both have corporate links to Chinese mother companies, which are ultimately owned by the State-owned Assets Supervision and Administration Commission of the State Council (***SASAC***).

Attributing Chinese subsidies to Egypt

During the Commission's anti-subsidy investigation, China took the position that the Commission could not legally investigate Chinese involvement in the financing of companies operating in the SETC-Zone, because the alleged financial contributions by Chinese authorities to the companies operating in Egypt did not fall under the definition of 'subsidy' pursuant to Article 1.1.(a) of the WTO Agreement on Subsidies and Countervailing Measures (the ***SCM Agreement***).[3] The SCM Agreement provides that a subsidy exists only where there is a financial contribution by a government or a public body within the territory of the WTO member. According to Article 3.1.(a) of Regulation 2016/1037 on protection against subsidised imports from countries not members of the European Union (the ***Basic Regulation***)[4] (which is the direct legal basis for the Commission to conduct anti-subsidy investigations and adopt countervailing duties), a subsidy exists if there is a financial contribution by the government in the country of origin or the country of export of the product concerned.

While the Commission acknowledged that only subsidies granted by the government of the exporting country can be subject to countervailing duties, a position that it consistently held in the past,[5] it considered that the notion of contribution "*by the government*" should include not only measures that are directly emanating from the government of Egypt but also measures which can be *attributed* to that government.

In order to attribute to the Egyptian Government the subsidies granted by the Chinese authorities to exporting producers in Egypt, the Commission relied on principles of public and customary international law, giving an expansive interpretation to both the SCM Agreement and the Basic Regulation, as well as to its own powers regarding the type of subsidies that it can investigate. The Commission argued that according to Article 3.2 of the Dispute Settlement Understanding (***DSU***)[6] and Article 31.3.(c) of the Vienna Convention on the Law of Treaties (***VCLT***)[7] *"[a]ny relevant rules of international law applicable in the relations between the parties"* must be taken into account in the assessment of the context of the terms of a treaty. This includes the rules on State responsibility which are part of customary international law and have been codified by the International Law Commission (the ***ILC Articles***).[8] These rules provide guidance on when certain acts or omissions can be attributable to a State, even if those acts or omissions do not emanate from that State directly. Article 11 of the ILC Articles provides that even if a conduct is not attributable to a State *per se*, it can nevertheless be considered an act of that State if the State acknowledges and adopts the conduct as its own.

To determine whether the Egyptian Government had acknowledged and adopted the conduct of the Chinese Government as its own, the Commission focused its analysis on the *links of cooperation between the two countries*. In particular, the Commission held that the Egyptian authorities had publically acknowledged that the Chinese financing of the SETC-Zone was to play a significant role in Egypt's

industry upgrade. Furthermore, the authorities were clearly aware that the Chinese 'One Belt and One Road' initiative involved State financing through different financial instruments. By jointly setting up the SETC-Zone, the Egyptian authorities clearly acknowledged and adopted the financing as their own conduct.

In addition, the Commission held that Egypt explicitly accepted that China may apply its laws with respect to operators in the SETC-Zone and it can designate the zone as an "overseas investment area" for the purposes of its 'One Belt and One Road' initiative. Egypt has also expressed full endorsement of the preferential financing benefiting its GFF producers in the zone.

For the above reasons, the Commission held that the preferential public financing from Chinese public bodies to the GFF producers Jushi and Hengshi Egypt was attributable to the government of Egypt as the government of the country of origin/export under Article 3.1.(a) of the Basic Regulation.

What this means for future EU anti-subsidy investigations

While the Commission's decision to extend the application of countervailing duties to imports from Egypt against subsidies granted by China is based on the specific circumstances of this particular investigation, it clearly demonstrates the Commission's willingness to broaden the scope of its existing toolbox when it comes to tackling the effects of Chinese subsidies in the European economy.

China and Egypt as well as the Egyptian exporting producers will no doubt contest the validity of the Regulation both before the EU General Court (on the basis that it infringes the Basic Regulation) and before the WTO (because of the interpretation that it gives to the SCM Agreement).

This is, however, unlikely to be the last regulation by which the Commission imposes countervailing duties on non-Chinese imports because they have benefitted from Chinese subsidies. Indeed, the SETC-Zone is far from being unique and forms part of a larger Chinese initiative. Producers exporting to the EU and located in similar economic and trade cooperation zones may need to reassess their EU export strategy.

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[1] Implementing Regulation 2020/776 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the Chinese mainland and Egypt, OJ L 189, 15.6.2020, p. 1– 170 . The Regulation was adopted on the basis of and amended Implementing Regulation 2020/492 imposing definitive anti-dumping duties on such imports.

[2] This cooperation concerns the pooling of resources between the two Countries in order to benefit their industries. This project is part of the Chinese 'One Road One Belt' initiative, a global development strategy adopted by the Chinese government in 2013. The initiative involves infrastructure development in nearly 70 countries. Companies 'going abroad' can receive various forms of preferential financing such as fiscal and tax support, project financing, concessional loans, export credits and support through syndicated loans.

[3] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

[4] OJ L 176, 30.6.2016, p. 55–91.

[5] Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China (OJ L 146, 9.6.2017, p. 17) (the ***HRF case***).

[6] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

[7] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations.

[8] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

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