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BusinessEurope's Reply to the White Paper on Foreign Subsidies

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 asked all interested stakeholders to submit their views and input on the options set out in the White Paper. **While BusinessEurope submitted some of its key messages through the consultation website, this document contains BusinessEurope's detailed replies to these questions.**

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Introduction

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

BusinessEurope is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and campaigning on the issues that most influence their performance. A recognised social partner, we speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

The organisation is headquartered in Brussels at the heart of the EU institutions. We work on behalf of our member federations to ensure that the voice of business is heard in European policymaking. We interact regularly with the European Parliament, Commission and Council as well as other stakeholders in the policy community. We also represent European business in the international arena, ensuring that Europe remains globally competitive.

It is critical to European companies that the terms of competition within the internal market are not undermined by economic entities benefitting from illegal state aid – either from EU member states or third countries. While the former has already been addressed by the existing EU regulatory framework on state aid, the latter has thus far not been tackled.

BusinessEurope has repeatedly pointed to this problem. For example, our report "The EU and China - Addressing the systemic challenge" released in January 2020 elaborates on the challenges that China's state-centric capitalism present to European businesses both within and outside the EU Single Market. State subsidies and the prominent role of State-owned enterprises (SOEs) in the Chinese economy generate some of the market distortions that the Commission's White paper aims to address. In our report we also suggested possible remedies, including the reversal of the burden of proof for SOEs, leaving it to them to prove that they do not receive subsidies in their home market, and the creation of an instrument to ensure the competitive neutrality of SOEs.

Therefore, BusinessEurope welcomes the European Commission's White Paper on Foreign Subsidies and we would like to submit the initial priorities and concerns of the European business community. Our comments aim to ensure that the instrument delivers on its objective, is efficient, and does not impose an undue burden on companies. We believe that it is precisely by addressing unfair trade practices that broad support for a liberal trade and investment agenda can be maintained. This is important as trade and investment flows are cornerstones of job creation and prosperity.

Questions relating to the three Modules

General questions

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.

We believe there is a need for new legal instruments to address distortions of the Single Market that arise from foreign subsidies. Several regulatory gaps have been exposed in recent years due to the increased activity of foreign subsidised enterprises in the European economy.

The People's Republic of China is one of the most noteworthy non-EU countries whose extensive subsidization programmes are well recorded. While it is not the only non-EU country whose subsidies have an impact on the European market, the extensive use of subsidies that occurs within a state-led economy may serve as a good case study for understanding how foreign subsidies impact the Single Market. In the past, the distortions stemming from China's state-led system were mainly noticeable within China's domestic market. However, as Chinese firms and financing increasingly go abroad and enter the EU, the distortions they are subject to within China also affect the European market. Although not exhaustive, four broad policy areas stand out in which these distortions are increasingly felt within the EU:

1) Trade distortions: distorted prices within China means that a number of products are exported at below market prices, leading to anti-dumping and anti-subsidy measures within the EU. The rise of the platform economy and e-commerce mean that product subsidies that were hitherto addressed through the EU's trade policy instruments cannot be properly addressed. This business-to-customer model of international trade enables companies to circumvent much of the regulations and tariffs to which regular business-to-business trade is subject.

2) Investment distortions: the acquisition of EU companies by foreign companies using subsidised capital. It is difficult to prove whether foreign companies who wish to acquire European companies engage in fair competition without proper accounting transparency. Foreign private or listed enterprises are usually less likely to engage in these practices because they are subject to market forces and are held accountable by their investors. Foreign state-owned enterprises can be much less accountable and transparent in this regard, because they could in some cases benefit from the full backing of the state without public scrutiny. Nevertheless, all foreign companies might benefit from direct and indirect subsidies in an economy in which some factors of production are highly subsidised. Beyond direct subsidies, indirect subsidies (e.g. non-financial subsidies such as free allocation of resources) might free up more capital than would otherwise have been available for the acquisition of EU companies.

3) Public procurement distortions: when foreign companies can benefit from subsidised finance, cheaper inputs and preferential backing from a non-EU authority, they are able to offer procurement bids significantly below market prices. Due to gaps in the EU public procurement framework, and to the fact that more than half of procurement procedures still use the lowest price as the only award criterion[1], major contracts have been awarded to foreign subsidised companies at the expense of their European competitors.

4) Competition distortions: non-EU authorities that allow or encourage enormous market concentrations beyond what internationally accepted competition rules would permit contribute to a distortion of competition in their home markets which can have (ripple) effects on the European market. This is particularly problematic when state-owned enterprises receive more favourable treatment than privately owned enterprises due to their ownership structure. Enormous market concentrations create economies of scale and bargaining power that have the same effect as a subsidy. Competition distortions also occur in the form of public contracts that are more favourable than real market conditions.

While the aforementioned distortions caused by subsidies often occur with a view to China, it has to be kept in mind that distortions of this kind also occur in view of other third countries.

[1] *Guidance on the participation of third country bidders and goods in the EU procurement market*, European Commission, 24 July 2019.

Consequently, potential new EU tools against such distortions would not only aim at China but at distortions caused by subsidies from any third country.

The evolution in the way in which our companies and economies operate over time means that several of our existing instruments have reached their limits in capturing and mitigating the effect of foreign subsidies. A few examples are:

- Our trade defense instruments do not address distortions of competition induced by subsidies in investment and trade in services. When it comes to trade in goods, with the burden of proof falling on the EU, it is often difficult to prove the existence of subsidies and therefore to be able to effectively sanction unfair behavior. Another example is the shipbuilding and repair industry: While these sectors are highly subsidised in certain third countries, they are not covered by the EU trade defence system. Finally, many states do not respect their obligations to notify subsidies to the WTO, which complicates the imposition of measures to remedy situations of unfair competition.

- the European regulation on the screening of foreign direct investment and European competition law (including merger rules) do not provide a legal basis preventing the acquisition of a European company under the existence of a distorting subsidy.

- The European public procurement directives and the Commission proposal for an International Procurement Instrument (IPI), which is currently under discussion, do not specifically aim to respond to distortions of competition linked to the presence of subsidies, even if they can contribute to fight against “abnormally low tenders”. Thereby, while overall the aim of the provisions on abnormally low tenders in the EU Directives on Public Procurement is well formulated, their practical impact has often turned out to be comparatively weak, given a wide discretion of the relevant contracting authorities in charge and the lack of clear definitions.

- The European Union is also reinforcing the distortions of competition on the single market by allowing players already heavily subsidised to benefit from European funding.

Foreign subsidies are harmful due to the following negative effects they have on the single market:

- The de facto exclusion of competitors who do not benefit from such unregulated aid / subsidies, in particular in public procurement, as they cannot match the attractive financial terms proposed by subsidised companies

- The acquisition of businesses, including the most strategic ones, in an unfair manner;

- A weakening of European policies aiming to encourage the development of European players in the single market since their heavily subsidised foreign competitors take market share in the EU and may also benefit from European funding to their detriment.

All forms of subsidies (e.g. financial and non-financial, direct and indirect) may generate distortions of competition in any market situation (sale, supply/distribution and investments of goods and services). As examples, here are some grants that should be given special attention:

- Subsidies making it possible to reduce costs (eg: tax breaks excluding general measures) and / or to lower prices (eg: abnormally low offers due to subsidies granted to companies);

- Subsidies, including non-financial ones, which allow a competitor to have an advantage in its domestic market which strengthens its competitiveness on the single European market (eg: free allocation of land or even non-payment of energy bills on

the domestic market allowing to reduce production costs, access / transfer (almost free) of intellectual property rights;

- Export aid and more broadly support allowing companies to internationalize which generate direct distortions (eg: export credit that do not comply with OECD rules) or indirect (eg: subsidy to a subsidiary established outside of the EU which is then active on the European market);
- Direct and indirect subsidies through research, technological or industrial development programs (e.g. funding granted to universities which then benefit companies that collaborate with these universities).
- Subsidies awarded in the form of public contracts awarded under non-market terms.
- Sate aid in the form of unlimited guarantees and subsidies to companies in financial difficulty without any restructuring plans.

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.

BusinessEurope welcomes the Commission's White Paper and believes that it provides a good basis for a future instrument aiming to address the distortions caused by foreign subsidies in the internal market. The design of each Module should be carefully formulated in the framework of and in complementarity with existing instruments, in particular EU competition law, the EU public procurement directives, Trade Defence Instruments (TDIs) and the International Procurement Instrument (IPI). It is of course essential to address potential overlaps and ensure that no contradictions but rather best possible procedural interplay are created with other relevant EU tools. To ensure that the instrument delivers on its objectives, we ask the European Commission to carry out an impact assessment for each module.

We would also like to submit a few comments:

<u>More focused instrument:</u>

BusinessEurope calls for a more focused and consistent instrument, where the European Commission is granted the role of sole supervisory authority for Module 1 and 2. For Module 3, we could also envisage a scenario where the Commission acts as the sole supervisory authority but this depends on the final design and scope of the instrument. The Member States should have a coordinating authority role collecting, filtering, and then passing on high quality information to the Commission.

The European Commission should be the sole supervisory authority for the following reasons:

- Being exclusively responsible for EU trade policy and for EU competition policy, including state aid control, the Commission has the necessary experience to carry out investigations when market distortions occur, either when they are caused by a third country or by EU economic operators.
- If provided with an economically reasonable amount of resources, the Commission can guarantee consistency in implementation across the EU that individual Member States are not able to ensure.
- The European Commission will ensure a more neutral and depoliticized approach, taking into account the overall interests of the EU. This could also avoid a politization of the case resulting from the government which grants the subsidy exerting pressure on the country which conducts the assessment.

- The EU interest test must be performed by the European Commission exclusively. Thus, it is logical to give the Commission the responsibility for the whole procedure rather than creating a disjoint system that could lead to longer deadlines and divergent views.

The European Commission should ensure due diligence in all investigations and provide for coherence of decisions under all three modules. In case of disagreement between authorities regarding the assessment or the appropriate measures, specific rules should be specified.

Regarding the definition of foreign subsidies, a balance needs to be struck between a definition that is wide enough to ensure the effectiveness of each module capturing the main distortions but not too wide so as not to create undue uncertainty for companies on whether they received foreign subsidies covered by the instrument. It needs to be noted that this uncertainty could affect EU companies active in third countries as much as foreign companies active in the EU.

Foreign Direct Investment and relations with third countries:

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, BusinessEurope calls for a proportionate tool that does not regulate foreign subsidies any more than state aid granted by EU Member States and that focuses on major subsidies that lead to significant distortions of the level playing field. Any arbitrary interpretation of the rules must be avoided to minimise uncertainty for companies within and outside the European Economic Area. Therefore, the rules need to be as transparent, clear, predictable and practicable as possible.

In order to avoid that third countries impose retaliatory measures against EU companies in reaction to the instrument, the European Commission needs to communicate clearly to partner countries that the instrument is not protectionist, does not seek to exclude FDI and only aims to level the playing field. For this, the instrument must be non-discriminatory and WTO-compliant.

Furthermore, the EU should use its bilateral trade agreements to convince Third Countries to adhere to specific competition and state aid rules and use the tools available under these agreements more assertively to solve issues in this area. This could give new impetus to setting multilateral rules with like-mindedtrading partners that accept more ambitious provisions in the FTA.

Finally, the instrument will only address the distorting effects of foreign subsidies on the Single Market. As European companies also face competition from massively subsidised companies in third countries, it must be part of a broader multilateral solution. It is, therefore, important that the EU keeps pushing for common, global rules on illegal state aid in all relevant international organisations, particularly the OECD and the WTO. In this regard, the trilateral cooperation between the EU, the US, and Japan on industrial subsidies is promising and could lead to effective WTO rules in this field. Therefore, the EU, Japan and the US need to urgently come up with a formal proposal that can be submitted to other WTO members.

Creating legal certainty and minimising the burden on business:

The implementation of the instrument, particularly regarding Modules 2 and 3, creates additional administrative burden and costs to both companies and authorities. Therefore, the rules and procedures under the instrument need to be coordinated with those under other relevant EU regulations. For instance, Module 2 needs to be coherent with current Merger Control regulations and procedures, and Module 3 with Public Procurement rules. Without proper coordination, simultaneous investigations (e.g. under merger control rules and the

foreign subsidy instrument) could create enormous burden for companies and authorities. There is also a risk for dual appeal processes in case the outcome of e.g. a merger control investigation differs from that of a foreign subsidy investigation.

Like under the EU state aid rules, there should be a possibility for companies to voluntarily notify foreign subsidies to the authorities in charge. Otherwise, companies receiving a foreign subsidy will have no legal certainty on whether they could be the target of an investigation and, ultimately, redressive measures - or if they could be prevented from an acquisition or from bidding in a public tender in the EU. In the same spirit, companies should also have the possibility to notify a competent authority in case of reasonable doubt about a competitor that might benefit from unfair subsidies.

Reducing uncertainties for both European and foreign companies is of paramount importance. Thus, in all modules, the procedures under the Instrument on Foreign Subsidies need to be transparent, clear, predictable and unbureaucratic. In particular, this includes:

- A closed catalogue of obligations for businesses;
- Clear explanations of the criteria the investigation and assessment are based on;
- Clear and reasonable timeframes for the investigative activities which can be undertaken under the three modules to prevent long, drawn-out investigations. We welcome the Commission's attempt at defining a timeframe for Module 3 and encourage the Commission to do the same for Modules 1 and 2.
- Access to relevant information respecting privacy and business sensitivities;
- Streamlined procedures to prevent unnecessary risks and economic burden for businesses involved, such as disproportionate bureaucratic expenses to fulfil obligations;
- Guidelines should be provided to spell out measures or safeguards which could be implemented by companies in a proactive manner (i.e. without any investigation) and which could (at least in certain situations such as M&A transactions, public tendering offers) provide legal certainty even if a supplier or a partner has potentially received non-EU subsidies;
- Clear rules to determine the competent authority and safeguards to prevent arbitrary decisions;
- A 'help desk' should be set up where companies especially SMEs can get more information to help them comply with the instrument;

The instrument should not apply retroactively when it enters into force. Especially with regards to modules 2 and 3, this would otherwise would create significant legal uncertainties for market actors.

Targeting specific subsidies:

Some subsidies should be presumed "illegal" as they create distortions in the EU internal market. In this regard, we should reverse the burden of proof onto the companies benefiting from those subsidies. In particular, this should be the case for export credits which do not respect the OECD arrangement.

Beyond these specific subsidies, it would be very useful that the Commission establish specific guidelines with a more exhaustive explanation of the types of targeted subsidies that could distort competition (for instance RDI related support, procurements at non market prices, support to firms in difficulty, etc.). In addition, the scope of non or less distortive subsidies (e.g. subsidies that have no significant effect on the market and would not as such unlevel the

playing field) should be clarified. Examples could be used here, as in the state aid guidelines. Given the novelty of the issue, such elements would be key to provide guidance and clarity to companies and national authorities.

Module 1

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

This instrument fills existing legislative gaps and could lead to a more level playing field in the European Single Market, provided certain improvements and clarifications are made. Necessary improvements and clarifications include:

- The Commission should be given the role of supervisory authority for Module 1 (see General questions (1)).
- BusinessEurope is supportive of the transparency obligation for entities under investigation and agrees penalties should be imposed if the entity in question does not cooperate or submits incomplete, incorrect or misleading information. Nonetheless, the information requested by the competent supervisory authority needs to be relevant for assessing the case and confidential business information must be adequately protected. Also, the importance of companies' fundamental rights should be acknowledged (e.g. rights of defence). Moreover, such a transparency obligation must be based on a closed catalogue of obligations including clear explanations of the criteria for the investigation and assessment.
- Besides undertakings established in the EU, the scope of Module 1 should also include undertakings active in the EU (e.g. providing a service via Mode 1 or using equipment the construction or repair of which was subsidised, such as in the case of ships), as suggested under section 4.1.2.2. However, it should be defined more clearly what entities are considered "active in the EU" and thereby covered by Module 1.
- Section 4.1.1. states that the information on possible foreign subsidies which competent supervisory authorities may act upon could stem from market operators or Member States. In this context it should be possible for industry associations to file a complaint about the possible existence of foreign subsidies under similar conditions. The definition of "interested party" under EU state aid rules (Article 1(h), Procedural Regulation) could be used in this regard.

  The surrounding comitology rules will need to be considered to ensure that necessary EU action cannot be paralysed by divergences between Member States.

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, BusinessEurope agrees with the procedural set-up proposed in the White Paper. Below, we set out some elements that need to be clarified/taken into account for the final instrument:

- This module should not be applied retroactively when it enters into force. This would create strong legal uncertainties and have a negative impact on the EU market ;

- 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". It needs to be clarified under what circumstances a case is not a priority. Otherwise, this criterion can lead to a politicisation of a case.

- Reducing uncertainties for both European and foreign companies is of paramount importance. Therefore, it is important to define reasonable timeframes for the investigative activities under all three modules to avoid long, drawn-out investigations. While timeframes have been suggested for Module 3, this also needs to be done for Modules 1 and 2.

- BusinessEurope supports the possibility for the competent authority to launch an ex-officio investigation – particularly if this is based on information received from market actors. In this regard, European companies should be able to inform the competent authorities of suspected unfair subsidies and ask them to launch an enquiry.

- The obligation to inform the state that granted the foreign subsidy under investigation can lead to a politization of the procedure, especially if the company concerned is a state-owned enterprise. If in the final instrument the Commission is not made the sole supervisory authority, the Commission should be the intermediary between the third country government and the competent national supervisory authority.

- For Module 1, it is suggested that the competent supervisory authority should have the possibility to perform fact finding visits at the EU premises of the alleged beneficiary of a foreign subsidy. In order not to impede the due process of companies established in the EU, appropriate framework conditions need to be established for such visits. For example, the supervisory authority should be required to obtain a court order authorising the visit and clearly defining the scope of such investigations. Also, the decision to initiate on-site monitoring visits must take due account of the principle of proportionality, especially regarding SMEs. Overall, on-site monitoring visits should be considered only as a last resort.

- The legal rights of companies to appeal in cases where their interests are affected are guarded by the Treaties. Thus, the procedural rights of undertakings need to be further described and secured. This includes, for instance, access to the case file, the right to be heard, the relevant time limits, and the rights of the companies in cases where on-site investigations take place.

- In order to avoid escalation, the instrument should seek to resolve issues through constructive dialogue before imposing measures, while maintaining a deterrence effect.

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?

Overall, BusinessEurope agrees with the assessment criteria and the list of redressive measures but we would like to submit comments.

Concerning the **assessment criteria**, BusinessEurope considers that:

- It should be a mandatory criterion in the assessment of distortions caused by foreign subsidies whether an entity under investigation has privileged access to its domestic market (e.g. measures equivalent to special or exclusive rights) or to any other reserved markets, leading to an artificial competitive advantage that can be leveraged in the EU internal market.

- The assessment criteria need to be further specified. Moreover, guidelines for the competent supervisory authorities should be established to ensure predictability and a consistent approach across the internal market. Specific and concrete explanation should be provided.

- We would like to stress the importance of export financing not in line with the OECD arrangement on officially supported export credits given the distortions created by this category. Regarding the criteria '*level of activity in the market of the beneficiary*' we would like to point out that in many sectors the still limited presence of a subsidised foreign entity can evolve quite quickly at the detriment of EU players. This is especially true when it comes to public procurement for large infrastructure projects, as a single actor can capture significant market shares in a limited time span. In addition, a distortive foreign subsidy may result from a third country's industrial strategy to penetrate a new market in which the beneficiary was not yet active.

Regarding the list of **redressive measures** presented, BusinessEurope has the following comments:

- The list of redressive measures needs to be specified more precisely, e.g. regarding the obligation for subsidised entities to cede licenses on fair, reasonable and non-discriminatory terms (e.g. in the telecoms sector).

- The duration of redressive measures as well as the time limits for their suspension would need to be clarified. These might need to be adjusted according to the type of measure and the targeted sector.

- For cases where the undertaking concerned offers commitments to mitigate the distortion created by a foreign subsidy it received, it needs to be clarified under which circumstances such commitments are considered as "sufficient" to avoid diverging outcomes across the EU. Moreover, if the competent supervisory authority accepts these commitments, their implementation should be monitored with the possibility to impose redressive measures if commitments are breached.

- The Commission should set out safeguards or measures which companies could implement proactively, before any investigation, in order to ensure a level playing field and provide legal certainty upfront.

- A proportionate and gradual approach should be adopted with regards to redressive measures. Legally binding commitments should be preferred over other types of sanctions. Structural remedies should only be used if there is no other way of addressing the market distortions.

- The type of distortion caused by a subsidy should be considered in the selection of the most appropriate redressive measure.

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 suggested for this instrument closely follows the approach taken under the EU's trade defence instruments and is in some aspects similar to the approach of Art. 101 or Art. 107 TFEU in EU competition law, which allow the "justification" of in principle anti-competitive behaviour only in cases where the requirements of Art. 101 (3) or Art. 107 (3) TFEU are objectively fulfilled. Therefore, the EU interest test should be limited to a closed catalogue of EU interests, which could outweigh the distortive effects for the Single Market of the specific foreign subsidy.

Such EU interests should be based on objective requirements that need to be fulfilled in each case. Yet, regarding EU's trade defence instruments,this test, even if desirable, has proven to be controversial in the past as it opposes the interests of different interest groups to one another (e.g. European producers vs. consumers, importers vs. exporters). In the context of climate change and the digital transformation of the economy, these criteria create additional issues as some related technologies are either sensitive (e.g. 5G) or hard to measure in absence of harmonised definitions and indicators (e.g. climate neutrality, sustainability of the production of a product, etc.). Therefore, the evaluation criteria for an interest test need to be clarified as the current lack of clarity regarding the EU Interest test could lead to extensive discretion for the supervisory authorities and further politization of cases. A politization of decisions under the modules would diminish the coherence of their application, legal certainty and attractivity of the Single Market for foreign investment and must hence be avoided.

- The effectiveness and impact of the instrument must not be diminished because of conflicting policy interests. To avoid arbitrary decisions, common criteria should be applied objectively and coherently across all sectors to assess the contribution of a subsidised company to EU public policy objectives (e.g. substantiated and evidenced contribution to a precisely determined EU policy, increase employment, economic growth, address climate change, support digital transformation, develop new skills, promote new technologies, increase diversification and resilience of supply chains) .

- A Member State authority will have to turn to the Commission to decide on the EU Interest test. This risks to be time consuming as the Commission will need to familiarise itself with the case first. This could be avoided if the Commission is in the lead for Module 1 from the beginning. The sole competence of the Commission under Module 1 would also diminish the scope for contradictory decisions under Module 1 and the other Modules concerning the same subsidy and the same beneficiary.

- It is unclear whether economic operators would have the possibility to challenge the outcome of an EU Interest test before a court and what rules would apply in this case. The rule of law demands a right to appeal for the economic operators concerned.

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)

A combination of Module 1 with Modules 2 or 3 should not allow for reopening ex-post a case already cleared under Module 2 or 3 – unless the notification requirements under the dedicated module have been breached – as this would lead to uncertainty and possibly conflicting decisions. This should not prevent the Commission from using Module 1 to investigate whether the operations of a company distort the Single Market due to foreign subsidies after it has been acquired by a non-EU company.

Section 4.2.7 of the White Paper clearly states: "If Module 2 is combined with Module 1, Member States could in any case examine acquisitions ex officio, even below the thresholds set up in Module 2 […]." This means that acquisitions, including those not subject to a notification obligation, could be assessed after they have been finalised in compliance with Module 2.

Also, the proposed combination of Modules 2 and 1 would be contrary to the design of EU competition rules, which seem to be the basis for the design of Modules 1 and 2. Under existing competition rules, ex post investigations into acquisitions are only justified in cases where a prior notification obligation for the acquisition has been breached and, based on an ex ante perspective, the acquisition would have been incompatible with competition rules.

This is even more concerning, as the White Paper does not state clearly that the decisions taken by the Commission under Module 2 will be binding on the Member State authorities when they combine Module 2 and 1.

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)?

We believe there should be a “de minimis” threshold to ensure that we are focusing our efforts in the subsidies that cause significant market distortions, while minimising the administrative burden on companies and public authorities. 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 disproportionally large, at the expense of its effectiveness.

As under EU state aid rules, there should be a mechanism in place to account for multiple subsidies lower than the de minimis theshold which when added exceed the limit or create a specifically detrimental network effect. In addition, prohibited subsidies should not be subject to de minimis threshold.

In any case, the instrument should not be stricter than EU state aid rules with regards to its scope.

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

The inclusion of both the European Commission and national authorities would lead to increased coordination challenges, higher costs, and legal uncertainty. Therefore, BusinessEurope calls for a more focused model where the Commission is granted the role of sole supervisory authority for Module 1, especially in cases where several Member States are affected by the same foreign subsidy.

The Member States should assign a coordinating authority that can collect, filter, and then pass on high quality information to the Commission. However, depending on the specific circumstances of a case, the relevant national authorities should be involved in the decision making process of the Commission.

The European Commission should be the supervisory authority for the reasons described in our answer to question 2 of the initial general questions.:

If the enforcement responsibility is shared between the Commission and the Member States in the final instrument, the Commission should establish guidelines for the evaluation of cases under Module 1 to ensure that the instrument is applied coherently across the entire Single Market.

Likewise, if companies appeal decisions taken under the instrument before national courts, it is important that the courts in different Member States are provided with guidance to deal coherently with these issues.It is however our first preferance that the Commission is granted the sole responsibility to exercise supervision of the rules, and that appeals thus are handled by the EU courts

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)?

Module 2 complements the EU's toolbox, in particular the EU Merger Regulation, which addresses possible market distortions of reduced competition due to increased market concentration, and the Foreign Investment Screening regulation, which only covers national security and public order concerns. Currently there is no legal framework that focuses on the impact of foreign subsidies on the level playing field with regards to acquisitions of targets established in the internal market. BusinessEurope therefore welcomes the Module and would like to bring forward some comments and proposals for improvements and clarification.

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)

Module 2 would be similar to the already existing EU Merger Control (Regulation 139/2004) in competition law, which also investigates acquisitions of EU companies. However, the merger investigation and assessment procedure under Regulation 139/2004 already needs to be streamlined because it is too time consuming and puts too much administrative burden on companies (excessive requests for information, excessive investigation periods blocking legitimate mergers, extensive pre-notification phases, etc.). Therefore, the notification and procedural timelines under Module 2 should be streamlined and match the timelines under the EU Merger Regulation procedure.

However, the two control procedures should remain separate, as their objectives would remain different. Nevertheless, it would be useful for merger control to take into account the impact of subsidies on the competitive landscape. It should be possible to trigger the instrument whenever a merger control notification reveals a problematic case of foreign subsidy.

Finally, this module should not be applied retroactively when it comes into legal force. This would create strong legal uncertainties and strong impacts on the EU market.

<u>On the ex-ante notification system:</u>

Overall, BusinessEurope welcomes the obligation for beneficiaries of financial contributions to notify acquisitions of European targets ex-ante, but we have the following comments:

- It needs to be clarified that financial contributions are subject to a threshold in the notification requirement in a similar fashion as foreign subsidies in general are under module 1. Otherwise, any financial contribution, no matter how small, would be necessary to account for under "short information notice", where it is required to account for "any financial contribution from third-country authorities received in the past three years". Failure to do so could constitute a violation of procedural rules and trigger sanctions in the form of fines. Only financial contributions of a business relevant size should need to be accounted for. The exact threshold should be the target of an impact assessment.

- According to section 4.2.5 of the White Paper the notification of potentially subsidised acquisitions under Module 2 needs to include information on expected "future financial contributions". The current concept of the White Paper places the risk of interpretation and assessment of what constitutes such a contribution entirely on the notifying company. If the assessment of the competent supervisory authority deviates from the

assessment of the acquirer, this could result in an extension of the investigation timeframe and a blocking period for the acquisition. To avoid such an outcome, the Commission needs to provide clear guidance to companies on what should be considered a future financial contribution as it may *inter alia* be difficult to prove the existence of such a future financial contribution.

- The timeframe for relevant future financial contributions (up to one year after the closing of the acquisition) is too vague and needs a more practice-oriented approach. With this timeframe, the notifying party would need to estimate the closing date of the acquisition prior to the notification. This would also include an estimation of the specific timeframe and results of other ongoing investigations into the acquisition, e.g. EU merger control or FDI-Screening. Perhaps a better date to start the one-year period is the date of signature of the relevant agreement. The notification timeline should allow to pursue investigations in timeframes comparable to merger control ones.
- Regarding relevant future financial contributions, a political commitment from a non-EU government to provide a financial contribution in the future is a very uncertain criterion. Political commitments are in general not legally enforceable, which means that they could, at any given moment, be unilaterally changed or revoked by the non-EU government.
- We should avoid legal uncertainty for instance if the Commission considers a financial contribution received by the undertaking after the clearance of a formally notified acquisition as a "future financial contribution" that should have been notified. These exceptional cases should be clearly defined to avoid sanctioning an already closed acquisition.
- The maximum duration of the standstill period triggered by the preliminary review and the in-depth investigation needs to be specified in a way that does not discourage foreign investment or other legitimate activities. It should remain in line with possible parallel merger control reviews.
- The sanctions for procedural infringement (e.g. submission of misleading or incomplete information by the beneficiary) need to be specified.
- The companies that are the most likely beneficiaries of foreign subsidies (e.g. third country SOEs) may not notify subsidies adequately in the ex-ante notification system if the consequences (redressive measures) of the relevant authorities finding out about unnotified foreign subsidies are not severe enough. In order to avoid this, sanctions for non-notification should be more severe than in case of notified but distortive subsidies. Otherwise we have a loophole in which companies have an incentive not to notify subsidies.
- Respect for due process in the investigation procedure.
- Like under the Module 1, there should be a possibility for companies or sectorial organisations to directly inform a competent authority in case of reasonable doubt about a competitor which might benefit from unfair subsidies.
- In general, the nature of the entity (i.e. a foreign SoE) could lead to the presumption that there are financial contributions of a distortive nature, and the burden of proof should then be on the State-owned enterprise to show it is not subsidised in a way that would lead to distortions within the Single Market.

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.

The qualitative and quantitative threshold for eligible EU targets as well as thresholds for the subsidies covered by the module need to be specified further and be subject to a detailed impact assessment. Overall, Module 2 should focus on subsidies which facilitate acquisitions and are of such a magnitude that the level playing field on the internal market is significantly distorted. Therefore, adequately high thresholds should be put in place. Higher thresholds and clear cases that can be completed are preferable to lower thresholds and a situation where several cases are initiated but not completed as the distortive effect of the subsidy in question is not clear enough. This means that the instrument should be comprehensive in the sense that it caches all forms of subsidies, but it should not necessarily cover all magnitudes of subsidies.

Regarding the definition of an acquisition, it is crucial to cover acquisition of both (direct or indirect) control, but also of at least a certain percentage of the shares or voting rights or otherwise of 'material influence' in an undertaking. In this respect, it is important to note that a certain percentage of the shares or voting rights or otherwise of 'material influence' in an undertaking may also provide some sort of control over the EU target. However, any widening of the definition of acquisition beyond "acquisition of control" should be carefully assessed in order to avoid any unintended consequences on venture capital investments, which constitute a main driver for innovation and economic growth in the EU. The current definition of potentially subsidised acquisitions should only cover foreign financial contributions benefitting the potential acquirer, which fall within the thresholds, no matter their official purpose.

We would favor the criterion of "material influence" and request that this be clarified in specific guidance (as done for the control criterion in merger control law).

Regarding the definition of an EU target, a double threshold should be adopted: acquisitions of EU companies with a yearly turnover of more than EUR 100 million in the EU need to be examined if the acquirer received a foreign subsidy falling within the thresholds of Module 2.

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)?

Module 2 should only cover potentially subsidised acquisitions; any other acquisition of EU targets is already subject to the EU Merger Regulation and its notification obligation and possible national merger control rules. However, there should be clear rules on the interaction of Module 2 and the EU Merger Regulation as well as possible national merger control rules, e. g. regarding cases notified under merger control rules, which in the process of the merger investigation raise the concern of being a subsidised acquisition in the sense of Module 2. The notification obligation set out in the White Paper is a heavy due diligence procedure for companies and will likely require external legal advice. Therefore, the notification obligation should ideally be limited to potentially subsidised acquisitions to focus on those cases problematic for the level playing field while minimising additional red tape for non-subsidised entities, especially considering the already existing notification obligations under EU and national merger control rules.

To avoid legal uncertainty, clear criteria need to be defined for the circumstances under which an acquisition is considered potentially subsidised. Moreover, the sanctions that the

competent supervisory authority can impose on companies that do not comply with their notification obligation although they are potentially subsidised need to be deterrent.

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?

BusinessEurope agrees with the substantive assessment criteria and the list of redressive measures presented for Module 2 in the White Paper. However, they need to be clarified. Moreover, the Commission should create precise guidelines in close cooperation with EU Member States and the EU private sector.

BusinessEurope believes that an assessment of whether an entity under investigation has privileged access to its domestic market (e.g. measures equivalent to special of exclusive rights) leading to an artificial competitive advantage that can be leveraged in the EU internal market should be included in the assessment of distortions caused by foreign subsidies.

Regarding the list of redressive measures, the instrument should impose penalties for not notifying subsidised acquisitions, no matter the outcome of a possible ex-post investigation. The penalties for violating the procedures of Module 2 (e.g. submitting incorrect or misleading information) and for disrespecting commitments taken need to be deterrent. In this spirit, redressive measures for non-notification should also be stricter than for notified subsidies to avoid incentivising non-notification. We support measures that allow for the ex post annulment of the reportable acquisition or investment that would not have been notified or that would have been implemented without clearance. BusinessEurope would, however, appreciate further clarity from the Commission on what other possible structural remedies the Commission is considering proposing, based on the admission in the White Paper that "*redressive payments and transparency obligations may in practice be less likely to be effective redressive measures under Module 2".*

Overall, BusinessEurope favours a proportionate approach, preferring legally binding commitments over the prohibition of acquisition, which should be the measure of last resort. The proposed remedies should to be further developed and be protected from possible misuse and inconsistent enforcement. It should also be defined more clearly under what circumstances the commitments taken by the beneficiary of a foreign subsidy are satisfactory to avoid diverging outcomes.

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?

Since state aid to facilitate an acquisition is not permitted within the guidelines or framework of EU State Aid rules for our internal market, foreign subsidies to facilitate an acquisition should likewise not be permitted.

A foreign subsidy can be directed towards a linked investment project, which could be justified and accepted through an EU interest test. What would be unacceptable, is a foreign subsidy that strengthens the acquirer prior to making an acquisition, for example by financing the acquisition itself, or by recapitalising the acquirer.

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

BusinessEurope fully agrees that the enforcement responsibility under Module 2 should be for the Commission. A shared competence with national authorities would lead to more

coordination challenges, the risk of diverging outcomes in the EU, higher costs, and legal uncertainty. However, depending on the specific circumstances of a case, national authorities and their expertise should be involved in the decision making process of the Commission.

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.

In recent years, companies from third countries, including SOEs, have repeatedly won public contracts in the EU on the basis of extremely low bid prices despite suspicions that these bids were based on subsidies from third countries, at the disadvantage of bidders from the EU. Contracting authorities enjoy a wide margin of discretion in the evaluation of tenders. So far, they are not legally required to investigate the existence of foreign subsidies when evaluating offers, and no specific legal consequences are attached to the existence of foreign subsidies causing a distortion. As already mentioned in the answer to question 1, the practical impact of the provisions on abnormally low tenders in the EU Directives on Public Procurement is often weak, given a wide discretion of the relevant contracting authorities in charge of the relevant procedure.

Accordingly, the Commission rightly points out that the existing EU legal framework for public procurement does not (or at least not sufficiently) address distortions to the EU procurement markets caused by foreign subsidies, especially in scenarios of underbidding. It seems necessary therefore to specifically address these distortions caused by foreign subsidies in the specific context of public procurement procedures.

Apart from that, it will also be important to pursue the adoption of the International Procurement Instrument (IPI), whereby some modifications of the revised proposal of the Commission from 2016 are still necessary and should be concluded in the ongoing Council negotiations on the IPI soon (cf. detailed position of BusinessEurope regarding the IPI with concrete proposals for amendments). While the main objective of the IPI is clearly different (i.e. to open third country procurement markets) the IPI is complementary to the instrument on foreign subsidies, and redressive measures are similar (i.e. exclusion of economic operators from third countries). Given their close relation, coherence of the two instruments should be ensured.

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.

Overall, BusinessEurope believes that having a module on public procurement is necessary to avoid distortive competition in EU public tenders by foreign subsidies. A further dialogue on what shape this module should take in order to ensure a proportionate approach will be necessary in view of the far-reaching impact on EU public procurement procedures. In this initial stage of the discussion, we would like to raise the following issues that in our view should to be taken into account for Module 3 to achieve the expected results.

The qualitative and quantitative threshold for eligible EU targets as well as thresholds for the subsidies covered by the module need to be specified further and should be supported by a thorough impact assessment. Overall, Module 3 should focus on subsidies that are of such a magnitude that the level playing field on the internal market is significantly distorted. Therefore, adequately high thresholds should be put in place. Higher thresholds and clear cases that can

be completed are preferable to lower thresholds and a situation where several cases are initiated but not completed as the distortive effect of the subsidy in question is not clear enough. This means that the instrument should be comprehensive in the sense that it caches all forms of subsidies, but it should not necessarily cover all magnitudes of subsidies.

The instrument should also cover procurements under intergovernmental agreements such as the EU's Joint Procurement Agreement regarding certain medical countermeasures against diseases. Also for this case, the applicable timelines, thresholds and redressive measures should be defined. As such a procedure could be politically sensitive, the Commission, with the support of the national supervisory authorities, should be in the lead of possible investigations.

Notification:

Considering that a general ex ante notification system places a heavy burden on businesses and potentially disrupts procurement procedures, BusinessEurope rather suggests a more targeted approach. Going forward, there are different options that could be explored: for example, a complaints-based system with a standstill period during the tender process, or a focus on sectors where systemic public procurement distortions occur. A targeted approach would not only reduce burdens for companies, ensure more legal certainty and achieve better overall results, but also allow for more centralised oversight at EU level. If the initial mechanism is kept, certain issues need to be taken into account for Module 3 to achieve the expected results respectively to avoid negative secondary effects.

- The methodology that national supervisory authorities have to follow needs to be set out clearly by the Commission to avoid heterogenous outcomes of investigations in the EU. Apart from the procedure of the Foreign Subsidies Instrument regarding public procurement (Module 3), it could be considered whether abnormally low tenders, as referred to in the EU public procurement directives, could be investigated in a more structured and uniform manner. It should be taken into account that for the time being, there is no common definition of an abnormally low tender and that the Member States lack guidance on how to implement those directives. Moreover, the Commission should be in charge of controlling whether national authorities comply with the uniform methodology and it should be entitled to override the decision of a national supervisory authority if it disagrees with its decision.

- Regarding the envisaged obligation for bidders to notify to the contracting authority whether they or their consortium partners, subcontractors or suppliers have received financial contributions, this may be very complex and burdensome for companies, also including very large companies, to overlook in how far the company or parts of it, subcontractors or suppliers may have received financial contributions and whether these might be seen problematic. This applies especially with a view to the fact that industrial cooperation and value chains of modern products are often very complex. Public procurement procedures pursuant to EU law are already complex, and too far-reaching obligations would add a considerable additional burden for companies. We therefore recommend that the Commission should carefully consider, supported by a detailed impact assessment, how far the aforementioned obligation should reach respectively might be limited in order to avoid a too far-reaching bureaucratic burden. Insofar it might be considered whether a notification will not be necessary for those companies that received no foreign subsidies, respectively what could be the burden of proof in the latter case. In any case, it has to be clarified which thresholds seem appropriate in order to avoid too much burden in cases of minor importance and how far the duty to notify financial contributions should be limited with a view to subcontractors or suppliers (see the following bullet points with more details).

- The notification obligation should not cover all suppliers of the bidder. For example, the notification obligation could be limited to the main suppliers / subcontractors, for

which certain criteria will need to be defined (e.g. main tier 1 suppliers). We recommend that the obligation of notification should either not cover subcontractors and suppliers or be limited to the most important ones. Moreover, such inquiries must not exceed what can be reasonably expected from companies to be able to document in similar instances of due diligence. Finally, business secrets must be protected. In this regard, demanding from a bidder to submit their entire list of subcontractors and suppliers and their respective weight in their supply chain would be excessive, and a more pragmatic approach needs to be taken.

- According to section 4.3.3.1 of the Whitepaper the notification of financial contributions under Module 3 needs to include information on expected "future financial contributions". The current concept of the Whitepaper places the risk of interpretation and assessment of what constitutes such a contribution entirely on the notifying bidder. If the assessment of the competent supervisory authority deviates from the assessment of the bidder, this could result in an extension of the investigation timeframe and the blocking period for the tender. To avoid such an outcome, the Commission needs to provide clear guidance to companies on what should be considered a future financial contribution.

Redressive measures:

- BusinessEurope favours the possibility to exclude companies that have been found to benefit from distortive foreign subsidies from future procurements in the EU for a period of time. However, also in view of practical difficulties with the implementation of existing exclusion grounds under the public procurement directives, such an exclusion requires more precise grounds than those currently proposed in the white paper and should not be automatic. Rather, the entity in question should have the possibility to take measures to correct the distortive effect of the subsidies received. Furthermore, the Commission needs to make available information on which companies have been banned from participating in public procurement processes within the EU.

- Companies could also be encouraged to adopt preventive measures when the offer is drawn up (such as separate accounting) in order to reduce or even remove the risks of potential distortive effects, for them or their key suppliers. This could help ensure legal certainty for the offer "ex ante" and without any need for an investigation.

- If a member or supplier of a consortium bidding in a tendering procedure has been found to receive a distortive foreign subsidy, the consortium should have the possibility to take redressive measures to avoid its automatic exclusion from the tendering procedure (e.g. by submitting a revised offer) provided this does not cause unnecessary delays in the tendering procedure

- In some markets, such as the infrastructure sector, it can be difficult to stop the execution of a public contract and exclude the consortium or company that the tender was awarded to. For cases where the competent supervisory authority discovers ex-post that the winning company/consortium benefits from a distortive foreign subsidy, the list of redressive measures should thus be extended. For example:

    - In case the notification obligation was breached, a high fine could be imposed and the entity could be temporarily excluded (e.g. for 3 years) from other European procurement markets to deter it from such behaviour in the future.

    - In case the tender was awarded to a bidder that notified a subsidy that was not considered distortive by the national contracting authority, the Commission could challenge ex-post (under Module 1) the decision of the national contracting authority, the company should have the possibility to offer commitments. An exclusion would not be fair under such circumstances as the

company did not infringe on any of its obligations. To avoid legal uncertainty the Commission and/or national supervisory authority should not be able to contest decisions made under Module 3, when applying Module 1, unless the circumstance of the specific case have changed significantly. Also, there should be guidance published on what would be considered such a significant change of circumstances.

- Other possible redressive measures include an obligation of a tenderer to yield certain parts of the tender to other competitors (in case a contract has been awarded already but the company cannot be excluded due to its know-how, technologies, etc.) or the possibility of the company to commit willingly to an exchange of suppliers / sub-contractors benefitting from distortive foreign subsidies. We favour the possibility to exclude the tender from future public procurement procedures for a maximum of 3 years, as suggested in the White Paper.

Timelines:

- Regarding the tendering process in public procurement, the Commission should note that the bidder generally commits to a tender for a limited number of months, while the public buyer evaluates the various offers given. Consequently, it could lead to practical complications, if a preliminary investigation followed by an in-depth investigation under Module 3 is extended beyond this period, as the bidder is no longer bound by the original tender. To reduce uncertainty for both parties, investigative processes should be concluded within the bid acceptance period.

- Regarding the preliminary review and the in-depth investigation, strict time limits for such assessments are necessary in order not to cause undue delays in procurement procedures.

- If the process causes undue delays and red tape, this will deter both EU public authorities from launching procurement processes and companies from bidding in such procedures and might even increase the already existing problem that meanwhile in many procurement procedures only one bidder exists (so-called “one bidder problem”). Such an outcome must be avoided in any case. Therefore, deadlines should also be set for companies to provide the authorities with the required information, so companies receiving disruptive state aid cannot stall the process. Companies need clear guidelines on how to comply, in order to be able to meet these deadlines.

- In order to ensure coherence with Modules 1 and 2, the relevant subsidy period could be limited to a period of three calendar years prior to the date of the notification and including the year following the expected completion of the contract.

- The timeframe for relevant future financial contributions (up to one year after the completion of the awarded contract) is too vague and needs a more practice-oriented approach. With this timeframe, the notifying party would need to estimate the closing date of the completion of the contract prior to the notification. This would also include an estimation of the specific timeframe and results of other ongoing investigations linked to the tender or contract fulfilment.

- Also, regarding relevant future financial contributions, a political commitment from a non-EU government to provide a financial contribution in the future is a very uncertain criterion. Political commitments are in general not legally enforceable, which means that they could, at any given moment, be unilaterally changed or revoked by the non-EU government.

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?

The contracting authority is in our view not well-placed to determine whether a foreign subsidy, which has been identified by the supervisory authority, has distorted the public procurement procedure. Contracting authorities may have an incentive to accept attractive bids even if they suspect that foreign subsidies are involved;[2] some companies could even exert pressure on the contracting authority. Furthermore, granting the competence to the contracting authorities would make them responsible for a very critical part of the investigation, whereas many of them lack expertise and resources to do this.

Therefore, not the contracting authority, but the national supervisory authority should decide on the distortive nature of a foreign subsidy. This decision should be legally binding for the contracting authority. Nevertheless, there is reason to fear that in some Member States also a national supervisory authority might act too much in favour of the budgetary interest to get low price tenders. Consequently, and in order to have consistent outcomes across the EU, it should be possible in any case for the Commission to discuss beforehand or effectively review the decision of the national supervisory authority before its final adoption and to reopen the case if necessary during a limited period of time (e.g. in case of possible conflicts of interest, if the procedure was not duly respected, etc). EU companies should also have the possibility to notify the Commission of their reservations.

The methodology that national supervisory authorities have to follow needs to be set out clearly by the Commission to avoid heterogenous outcomes of investigations in the EU. Moreover, the Commission should be in charge of controlling whether national authorities comply with the uniform methodology and it should be entitled to override the decision of a national supervisory authority if it disagrees with its decision. Awareness-raising with contracting authorities on the new rules will also be essential and to ensure that they have an incentive to comply with them.

The instrument should also cover procurements under intergovernmental agreements such as the EU's Joint Procurement Agreement regarding certain medical countermeasures against diseases. Also for this case, the applicable timelines, thresholds and redressive measures should be defined. As such a procedure could be politically sensitive, the Commission, with the support of the national supervisory authorities, should be in the lead of possible investigations.

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?

This instrument should be closely aligned with the International Procurement Instrument which should be subject to some modifications of the revised proposal of the Commission from 2016 in the ongoing Council negotiations (cf. answer to Module 3, question 1 above).

Therefore, it should be taken into consideration whether a third country bidder has a privileged access to his domestic market (e.g. exclusive rights), which gives him a competitive advantage in the EU's Single Market. In such a situation, specific redressive measures need to be taken.

The existing public procurement directives already offer some possibilities to address the issue of foreign subsidies. The EU public procurement framework provides for a mechanism allowing contracting authorities to reject, under specific conditions, abnormally low tenders (Article 69 of Directive 2014/24/EU). However, this tool is left unexploited by EU Member

[2] For reference, only few bids have been rejected by public authorities due to illegal (EU) state aid.

States and contracting authorities, and the level of protection of suppliers facing unfair competition on costs in EU tenders is currently insufficient. Abnormally low offers should be investigated in a more efficient, structured and uniform manner, for example by providing a definition of abnormally low tenders; issuing guidance on the scope and manner of assessment of tenders in terms of abnormally low prices and on how economic operators should provide explanations and evidence in this respect; strengthening the obligations of contracting authorities to verify the reasons for low prices in a complete and transparent manner; and providing additional support to Member States and courts on the evaluation and risks associated with such tenders.

Interplay between Modules 1, 2 and 3

1. Do you consider that

a. Module 1 should operate as stand-alone module;

b. Module 2 should operate as stand-alone module;

c. Module 3 should operate as stand-alone module;

d. Modules 1, 2 and 3 should be combined and operate together?

It is very important to avoid legal and practical uncertainties about the envisaged Instrument respectively potential duplication of activities or conflicts among its different procedures. Therefore it is necessary to reach clarity regarding the relation between the three different modules as well as the content regarding EU funding.

- Module 2 should be the main instrument for dealing with foreign acquisitions of EU targets.
- Module 3 should be the main instrument for dealing with potential foreign subsidies in public procurement procedures in the internal market.
- It should be stated very clearly that Module 1 can only be used in the areas of acquisitions or public procurement if notification requirements under the dedicated modules have been breached. A situation where Module 1 could be used for tackling foreign subsidies in acquisitions and procurement procedures even if they fall below the thresholds specified under Module 2 and Module 3, respectively, would create a high degree of legal uncertainty for companies as existing acquisitions could be unwound and signed contracts could be cancelled even if the company concerned duly complied with all procedures under Module 2 or Module 3 and was cleared under these modules, especially if the circumstances of the reviewed case have not changed. This should not prevent the Commission from using Module 1 to investigate whether the operations of a company distort the Single Market due to foreign subsidies after it has been acquired by a non-EU company.

The results of an investigation in a given Module should be duly taken into account for potential investigations under other Modules involving the same economic operator. This would increase the effectiveness and efficiency of the instrument.

Questions relating to foreign subsidies in the context of EU funding

1. Do you think there is a need for any additional measures to address potential distortions of the internal market arising from subsidies granted by non-EU authorities in the specific context of EU funding? Please explain.

European companies lead in providing sustainable long-term solutions, but they face increasing pressure from state-owned companies from emerging countries, which benefit from foreign subsidies, tied-aid and bilateral government-to-government deals.

We are in favour of taking specific measures to address potential distortions in the Single Market arising from foreign subsidies. We share the objective outlined in the White Paper of preventing European funding from reinforcing subsidised companies which distort the Single Market.

While European funding is not the root cause of distortions emerging from subsidies granted by non-EU authorities, European funding can strengthen or reward subsidised firms by allowing them to participate in European R&D or Development programmes. The European Commission should examine whether, in the context of limited funding, it would be desirable to exclude foreign subsidised firms or to make their bids subject to specific measures or safeguards if such measures are sufficient to ensure a level playing field, in order to improve the European competitive environment while observing a non-discriminatory approach.

Examples of EU funds benefiting non-European companies in the Single Market (and elsewhere) abound, in particular for large-scale projects which show a clear acceleration of a trend to award contracts to foreign entities benefiting from subsidies and proposing significantly lower prices. Only in the recent months, the following projects can be reported in the rail sector:

- In June 2020, CRRC in a consortium was confirmed as winning bidder for the purchase of 100 trams (with an estimated value of EUR 180 million) by Bucharest City Hall, with the support of the EU Cohesion Fund[3].
- In December 2019, CRRC won a tender valued at EUR 56 million to supply 18 light rail vehicles to the Metro of Porto, while the extension of the network supported by the EU Cohesion Fund[4];
- In September 2019, CRRC in a consortium was selected best bidder for a major rolling stock tender (40 to 80 electric regional trains for EUR 357-957 millions) in Romania, with the support of the EU Cohesion Fund[5];
- In February 2019, Hyundai-Rotem won an order of 213 new trams in Warsaw, with the support of EU Cohesion Fund[6].

In general, we support an alignment of actions along the lines of Module 3, as a significant part of EU funds goes through public procurement procedures (e.g. Cohesion Policy). However, the proposed framework should be reinforced and the Commission's powers in particular should be strengthened as there is EU money involved that can also be used outside procurement activities, for instance in Research and Innovation.

[3] https://www.railwaypro.com/wp/astra-vagoane-wins-in-court-the-tender-for-bucharest-tram-procurement/
[4] https://www.railwaygazette.com/modes/metro-do-porto-selects-crrc-to-supply-light-rail-vehicles/55362.article
[5] https://www.railwaypro.com/wp/crrc-astra-consortium-ranks-first-for-romanian-emu-tender/
[6] https://www.railwaypro.com/wp/controversial-warsaw-tender-concluded-hyundai-rotem-selected-to-deliver-the-213-new-trams/

2. Do you think the framework for EU funding presented in the White Paper appropriately addresses the potential distortions caused by foreign subsidies in this context? Please explain.

The Commission should set out in detail which European funds and financing instruments could be covered by this part of the instrument. While 5.2.1.1. states that "*the procedural steps should be appropriately adapted to those foreseen for procurement by national contracting authorities*" under Module 3, the timelines and thresholds need to be specified.

With respect to direct management, rules similar to Module 1 or Module 3 should apply, but the Commission should be the exclusive supervisory authority as EU funds are involved. As decisive criterion, a strict principle of reciprocity should be applied and understood in two ways: a) reciprocity in terms of access to respective markets; b) reciprocity in terms of access to funding (e.g. research funds in the third country or development aid). In other words, access to EU funding by non-EU companies should be made conditional upon EU companies' access to the market and public funding of the third country.

Concerning indirect management of EU funds by International Financial Institutions such as the EIB and the EBRD, we welcome the proposals made in the White Paper to ensure more consistency and stronger coordination with EU policy objectives as EU-backed IFIs should apply similar principles regarding foreign subsidies as EU authorities.

In cases where EU funds are managed jointly with Member States, Member States should also be instructed not to award contracts to foreign companies that benefit from foreign subsidies, in line with the criteria established by the instrument.

In addition to the measures set out in chapter 5 of the White Paper, the Commission should adopt the following measures to tackle foreign subsidies in the context of the EU's external financing instruments:

- When the Commission performs pillar assessments of International Financing Institutions applying for guarantees under the EFSD+ or other European funds, the way these institutions deal with abnormally low bids should be one of the key criteria taken into account.
- The EU should help coordinate its Member States' efforts to reform the OECD Arrangement on Officially Supported Export Credits to regain a global level playing field but also to make it more attractive for non-OECD countries to join the arrangement. Simultaneously, discussions in the International Working Group on Export Credits should be intensified to reach a truly multilateral agreement in this area.
- To confront the aggressive financing terms of emerging county actors and to truly foster the sustainable economic, social and environmental development of partner countries, the selection criteria for EU-funded projects need to focus more on a project's life-cycle costs instead of its immediate costs (Most Economically Advantageous Tender (MEAT) principle). Moreover, a number of additional non-financial indicators should be added to the selection criteria of EU-funded projects. These may include a project's environmental performance, the fulfilment of international standards, the creation of local employment, the promotion of local vocational education and training, social targets, etc.
- For research consortia where the majority of participants are European and that are found to benefit from distortive foreign subsidies, the consortium should have the possibility to take redressive measures to avoid its automatic exclusion from a EU tender/grant award (e.g. changing its composition if one of its members benefits from a distortive foreign subsidy.