

Consultation on the White Paper on Foreign Subsidies

Fields marked with * are mandatory.

Introduction

The questionnaire is available in [English](#), [French](#) and [German](#).

The White Paper is available in the following languages:

[BG](#) | [CS](#) | [DA](#) | [DE](#) | [EL](#) | [EN](#) | [ES](#) | [ET](#) | [FI](#) | [FR](#) | [HR](#) | [HU](#) | [IT](#) | [LT](#) | [LV](#) | [MT](#) | [NL](#) | [PL](#) | [PT](#) | [RO](#) | [SK](#) | [SL](#) | [SV](#)

White Paper on levelling the playing field as regards foreign subsidies

Subsidies by Member States have always been subject to EU State Aid rules to avoid distortions. Subsidies granted by non-EU governments to companies in the EU appear to have an increasing negative impact on competition in the Single Market, but fall outside EU State aid control. There is a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU companies or distorted the investment decisions, market operations or pricing policies of their beneficiaries, or distorted bidding in public procurement, to the detriment of non-subsidised companies.

Moreover, the existing trade defence rules relate only to exports of goods from third countries and thus do not address all distortions caused by foreign subsidies granted by non-EU countries. Where foreign subsidies take the form of financial flows facilitating acquisitions of EU companies or where they directly support the operation of a company in the EU, or facilitate bidding in a public procurement procedure, there appears to be a regulatory gap

The [White Paper on Foreign Subsidies](#), adopted by the European Commission on 17 June 2020, therefore proposes solutions and calls for new tools to address this regulatory gap. In this context, it puts forward several approaches.

General instrument to capture distortive effects of foreign subsidies (“Module 1”)

Module 1 proposes the establishment of a general market scrutiny instrument to capture all possible market situations in which foreign subsidies may cause distortions in the Single Market.

Foreign subsidies facilitating the acquisition of EU companies (“Module 2”)

Module 2 is intended to specifically address distortions caused by foreign subsidies facilitating the acquisition of EU companies. This module aims at ensuring that foreign subsidies do not confer an unfair benefit on their recipients when acquiring (stakes in) EU companies, either directly by linking a subsidy to a given acquisition or indirectly by de facto increasing the financial strength of the acquirer.

Foreign subsidies in EU public procurement procedures (“Module 3”)

Foreign subsidies could also have a harmful effect on the conduct of EU public procurement procedures. This issue is addressed under Module 3. Foreign subsidies may enable bidders to gain an unfair advantage, for example by submitting bids below market price or even below cost, allowing them to obtain public procurement contracts that they would otherwise not have obtained.

Foreign subsidies in the context of EU funding

Finally, the White Paper sets out ways to address the issue of foreign subsidies in the case of applications for EU financial support. All economic operators should compete for EU funding on an equal footing. Foreign subsidies may however distort this process by putting the beneficiaries of such subsidies in a better position to apply. The White Paper proposes options to prevent such unfair advantage. Among others, in case of funding distributed through public tenders or grants, a similar procedure would apply as the one foreseen for EU public procurement procedures.

Public consultation

The White Paper is now open for public consultation until 23 September 2020. In light of the input received, the Commission will present appropriate legislative proposals to tackle the distortive effects of foreign subsidies on the Single Market.

Respondents can provide their opinion by choosing the most appropriate answer among the ones suggested for each question or suggesting their own ideas in dedicated text boxes.

Written feedback provided in other document formats, can be uploaded through the button made available at the end of the questionnaire.

The questionnaire is available in [English](#), [French](#) and [German](#). You can submit your responses in any official EU language.

The survey will remain open until 23 September 2020.

About you

* Language of my contribution

- Bulgarian
- Croatian

- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- Gaelic
- German
- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Benedikt

* Surname

Wiedenhofer

* Email (this won't be published)

b.wiedenhofer@businessseurope.eu

* Organisation name

255 character(s) maximum

BusinessEurope

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

3978240953-79

* Country of origin

Please add your country of origin, or that of your organisation.

- | | | | |
|--------------------------------------|--|-------------------------------------|--|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |

- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland

- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria

- Burkina Faso
- Burundi

- Cambodia

- Cameroon

- Canada
- Cape Verde
- Cayman Islands

- Central African Republic
- Chad
- Chile
- China

- Christmas Island
- Clipperton

- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau

- Guyana

- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong

- Hungary

- Iceland

- India
- Indonesia
- Iran

- Iraq

- Ireland
- Isle of Man
- Israel

- Italy

- Jamaica

- Nepal

- Netherlands
- New Caledonia
- New Zealand
- Nicaragua

- Niger

- Nigeria
- Niue

- Norfolk Island
- Northern Mariana Islands
- North Korea

- North Macedonia
- Norway
- Oman
- Pakistan

- Palau

- Palestine
- Panama
- Papua New Guinea
- Paraguay

- Peru

- Syria

- Taiwan
- Tajikistan
- Tanzania
- Thailand

- The Gambia

- Timor-Leste
- Togo

- Tokelau
- Tonga

- Trinidad and Tobago
- Tunisia

- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu

- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States

- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

Publication settings

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

I agree with the [personal data protection provisions](#)

* Confidentiality of information

The Commission will publish the responses to this public consultation. You can choose whether your contribution can be made public, or whether it will remain fully or partially confidential.

Public

Your contribution may be published in full.

Fully confidential

All parts of your contribution will remain confidential and will not be published.

Partially confidential

You can select which parts of your contribution will remain confidential, the remaining parts may be published.

QUESTIONNAIRE - Introduction

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

1000 character(s) maximum

BusinessEurope is the leading advocate for growth and competitiveness at European level. A recognised social partner, we speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

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 EU regulatory framework on state aid, the latter has thus far not been tackled. BusinessEurope has repeatedly pointed to this problem (e.g. in our January 2020 report *The EU and China - Addressing the systemic challenge*).

Therefore, BusinessEurope welcomes the White Paper and we would like to submit our initial comments to ensure that the instrument delivers on its objective, is efficient, and does not impose an undue burden on companies.

We submit more detailed replies in the annex.

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')?

Yes No Other

Please explain and also add examples of past distortions arising from foreign subsidies.

1000 character(s) maximum

A new instrument is needed as the increased activity of foreign subsidised enterprises in the EU market in recent years has exposed several regulatory gaps not addressed by our existing instruments. Four policy areas stand out in which these distortions are increasingly felt within the EU:

- 1) Trade distortions (e.g. dumping)
- 2) Investment distortions (e.g. acquisition of EU companies by foreign companies using subsidised capital)
- 3) Public procurement distortions (e.g. abnormally low tenders)
- 4) Competition distortions (market concentrations in third countries beyond what internationally accepted competition rules permit)

The negative effects foreign subsidies have on the single market include:

- De facto exclusion of competitors who do not benefit from such subsidies
- Acquisition of businesses in an unfair manner
- Weakening of EU policies encouraging the development of European players

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

Yes No Other

Please explain.

1000 character(s) maximum

The following points should be considered:

- To have a more focused instrument, the Commission should be the 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 tool should focus on major subsidies leading to significant distortions of the level playing field.
- The instrument must be non-discriminatory and WTO-compliant. Also, the EU should use its FTAs to promote and enforce ambitious competition rules. Finally, the EU needs to keep pushing for global state aid rules in all relevant IOs.
- The rules and procedures under the instrument need to be coordinated with those under other relevant EU regulations.
- Companies should be able to voluntarily notify foreign subsidies to the authorities in charge.
- The instrument should not apply retroactively when it enters into force.

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

- Yes No Other

Please explain.

1000 character(s) maximum

Yes, provided certain improvements and clarifications are made, including:

- The Commission should be the sole supervisory authority
- The information requested by the supervisory authority needs to be relevant for assessing the case, based on a closed catalogue of obligations. Confidential business information must be adequately protected. Also, the importance of companies' fundamental rights should be acknowledged (e.g. rights of defence)
- Module 1 should also cover undertakings active in the EU (e.g. providing a service via Mode 1 or using subsidised equipment)
- Regarding section 4.1.1., industry associations should also be able to file a complaint about possible foreign subsidies. The definition of "interested party" under EU state aid rules (Article 1(h), Procedural Regulation) could be used as basis
- 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)

- Yes No Other

Please explain.

1000 character(s) maximum

Some comments:

- Section 4.1.1. needs to clarify under which circumstances a case “is not a priority” to avoid politicisation.
- The investigation needs to have a reasonable timeframe.
- European companies should be able to inform the competent authorities of suspected foreign subsidies.
- If the Commission is not made the sole supervisory authority, it should be the intermediary between the third country government granting the subsidy and the competent national supervisory authority to avoid politicisation.
- Appropriate framework conditions need to be established for fact-finding visits under Module 1. The supervisory authority should be required to obtain a court order authorising the visit and clearly defining the scope of such investigations. On-site monitoring visits should be a last resort.
- The procedural rights of companies need to be further described and secured
- The module should seek to resolve issues through constructive dialogue before imposing sanctions

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?

Yes No Other

Please explain.

1000 character(s) maximum

Concerning the assessment criteria:

- Privileged access by a foreign company to its domestic market or any other markets should be a mandatory assessment criterion
- Guidelines for the competent supervisory authorities should be established to ensure predictability and a consistent approach across the internal market

Regarding the redressive measures:

- The duration of redressive measures as well as the time limits for their suspension need to be clarified.
- Regarding “commitments to mitigate distortions”, it needs to be clarified under which circumstances such commitments are considered as “sufficient”. Also, if these commitments are breached redressive measures must be imposed
- The Commission should set out safeguards which companies can implement proactively before any investigation to provide legal certainty upfront
- Legally binding commitments should be preferred over other types of sanctions, with structural remedies as measure of last resort

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?

Yes No Other

Please explain.

1000 character(s) maximum

Regarding the EU'S TDIs, this test has proven controversial in the past. Thus, the EU interest test should be limited to a closed catalogue of EU interests that could outweigh the distortive effects for the Single Market of a foreign subsidy. Such EU interests should be based on a set of objective criteria that need to be applied coherently across all sectors to avoid extensive discretion for the supervisory authorities and the politization of cases.

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 would 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.

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)

Yes No Other

Please explain.

1000 character(s) maximum

Module 1 should not allow for reopening ex-post cases already cleared under Modules 2 or 3, unless the notification requirements under the dedicated module have been breached. 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 implies that acquisitions, including those not subject to a notification obligation, could be assessed under Module 1 after they have been finalised in compliance with Module 2.

The proposed combination of Modules 2 and 1 would be contrary to the design of EU competition rules. Under EU 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.

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)?

Yes No Other

Please explain.

1000 character(s) maximum

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 disproportionately 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 threshold 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)?

Yes No Other

Please explain.

1000 character(s) maximum

We call for a more focused model where the Commission is the 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 pass on high quality information to the Commission. Depending on the specific circumstances of a case, the relevant national authorities should be involved in the decision making process of the Commission too.

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

Regarding appeals to decisions taken under the module, we would prefer these to be handled by the EU courts. If this is not the case, the competent national courts in different Member States need to be provided with guidance to deal coherently with these issues.

Module 2

1. Do you consider that Module 2 appropriately addresses distortions of the internal market through foreign subsidies that facilitate the acquisition of undertakings established in the EU (EU targets)?

Yes No Other

Please explain.

1000 character(s) maximum

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)

Yes No Other

Please explain.

1000 character(s) maximum

Overall, we welcome the obligation for beneficiaries of financial contributions to notify acquisitions of European targets ex-ante, but we have a number of comments. This module should feature a threshold for financial contributions; clear guidance on what should be considered a future financial contribution; clarity on the start of the timeframe for future financial contributions; legal certainty surrounding ex post financial contributions that should have been notified; the maximum duration of the standstill period triggered by a preliminary review should match the timelines of the EU Merger Regulation procedure to avoid administrative complexity for companies; sanctions for procedural infringements should be specified; and there should be the possibility for companies or sectorial organisations to file complaints. Finally, this module should not be applied retroactively when it enters into force. This would create legal uncertainties and have a strong impact on the EU market.

3. Do you agree with the scope of Module 2 (section 4.2.2) in terms of

	Yes	No	Other
definition of acquisition	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
definition and thresholds of the EU target (4.2.2.3)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
definition of potentially subsidised acquisition	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain. As regards thresholds, please provide your views on appropriate thresholds.

1000 character(s) maximum

The qualitative and quantitative threshold for eligible EU targets as well as thresholds for subsidies covered by Module 2 should be specified and subject to an impact assessment on investment. 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. The thresholds should reflect this.

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. Minority shareholding can confer material influence over a firm, without the necessity of taking full control.

We favour a double threshold for the definition of an EU target: review acquisitions of EU companies with a yearly turnover exceeding EUR 100 million in the EU if the acquirer received a foreign subsidy within the scope 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)?

Yes No Other

Please explain.

1000 character(s) maximum

Module 2 should only cover potentially subsidised acquisitions in order to minimise red tape for non-subsidised entities. The notification obligation set out in the White Paper is a heavy due diligence procedure for companies likely requiring external legal advice. 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 interplay of Module 2 and the EU Merger Regulation as well as national merger control rules, especially when merger cases uncover potential subsidies under the scope of Module 2.

Companies need clear criteria and legal certainty on when an acquisition is considered potentially subsidised. Moreover, the sanctions on companies that do not comply with their notification obligation if 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?

Yes No Other

Please explain.

1000 character(s) maximum

We agree with the assessment criteria and the list of redressive measures. The Commission should clarify these in guidelines together with Member States and the EU private sector to avoid misuse and inconsistent enforcement.

An entity under investigation that has privileged access to its domestic market should be included in the assessment of distortions caused by foreign subsidies.

The instrument should impose penalties for not notifying subsidies, no matter the outcome of an investigation. The penalties for violating the procedures of Module 2 need to be deterrent to avoid incentivising non-notification. We support the possibility of the ex post annulment of an acquisition or investment that was not notified or implemented without clearance.

We prefer legally binding commitments over the prohibition of acquisition, as a measure of last resort. It should be clarified under what circumstances commitments taken by the beneficiary of a foreign subsidy are satisfactory.

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?

Yes No Other

Please explain.

1000 character(s) maximum

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)?

Yes No Other

Please explain.

1000 character(s) maximum

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?

Yes No Other

Please explain.

1000 character(s) maximum

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. 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.

Coherence with the upcoming IPI- International Procurement Instrument will also be necessary.

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?

Yes No Other

Please explain.

1000 character(s) maximum

Module 3 should focus on subsidies that are of such a magnitude that the level playing field on the internal market is distorted. The qualitative and quantitative thresholds for subsidies covered by the module should be adequately high, be specified further and supported by a thorough impact assessment.

Considering that a general ex ante notification system for procurement places a heavy burden on businesses and potentially disrupts procurement procedures, we would favour 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.

If the initial approach is kept, besides other suggestions we made in our submission in Annex, we ask for consistent application by national authorities and to include only key subcontractors.

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?

Yes No Other

Please explain.

1000 character(s) maximum

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; 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.

The national supervisory authority should therefore decide on the distortive nature of a foreign subsidy. This decision should be legally binding for the contracting authority. Nevertheless, the Commission should be able to review the decision of the national supervisory authority before its final adoption and to reopen the case if necessary.

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?

Yes No Other

Please explain.

1000 character(s) maximum

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).

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 case, specific redressive measures need to be taken.

Abnormally low offers should be investigated in a more efficient, structured and uniform manner, for example by providing a definition of abnormally low tenders; 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

	Yes	No	Other
a. Module 1 should operate as stand-alone module	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
b. Module 2 should operate as stand-alone module	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
c. Module 3 should operate as stand-alone module	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
d. Modules 1, 2 and 3 should be combined and operate together?	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Please explain.

1000 character(s) maximum

- 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 foreign subsidies in public procurement procedures in the internal market.
- Module 1 should 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 these areas even if they fall below the thresholds specified under Module 2 and Module 3, would create 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 and was cleared under Module 2 or 3. 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.

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?

Yes No Other

Please explain.

1000 character(s) maximum

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.

While EU funding is not the root cause of distortions emerging from subsidies granted by non-EU authorities, access to EU funding can strengthen or reward subsidised firms. The Commission should examine ways to exclude foreign subsidised firms from EU funding or to make their bids subject to specific safeguards to ensure a level playing field, taking a non-discriminatory approach.

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. However, the proposed framework should be reinforced and the Commission's powers should be strengthened as EU funds can also be used outside procurement activities, for instance in R&D.

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?

Yes No Other

Please explain

1000 character(s) maximum

Direct management: The Commission should be the sole supervisory authority. 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.

Indirect management of EU funds by IFIs (e.g. EIB, EBRD): IFIs should apply similar principles regarding foreign subsidies as EU authorities. The same goes for cases where EU funds are managed jointly with Member States.

In addition:

- When pillar-assessing IFIs, the way IFIs deal with abnormally low bids should be a key criterion
- The EU should coordinate its Member States' efforts to reform the OECD Arrangement on Export Credits
- The selection criteria for EU-funded projects need to focus more on a project's life-cycle costs instead of its immediate costs
- Research consortia found to benefit from distortive foreign subsidies should have the possibility to take redressive measures to avoid their automatic exclusion from a EU tender/grant award

Thank you for your contribution to this questionnaire. In case you want to share further ideas on these topics, you can upload a document below.

Please upload your file

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

0447a86e-7d31-4f01-8f5d-6ca12738579a

/BusinessEurope_s_Reply_to_White_Paper_on_Foreign_Subsidies_-_Detailed_Answers.pdf

Contact

COMP-FOREIGN-SUBSIDIES@ec.europa.eu

