July 2020

**BusinessEurope’s Reply to the White Paper on Foreign Subsidies**

On 17 June 2020, the European Commission published a [White Paper](https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf) dealing with the distortive effects caused by foreign subsidies in the Single Market. The Commission now seeks views and input from all stakeholders on the options set out in the White Paper. The [public consultation](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12452-White-Paper-on-Foreign-Subsidies), which will be open until 23 September 2020, will help the Commission to prepare for appropriate legislative proposals in this area. The questions stakeholders can answer during the consultation process are set out in **ANNEX II** of the White Paper. This document contains BusinessEurope’s 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](https://www.businesseurope.eu/members) are our direct members.

The organisation is [headquartered in Brussels](https://www.businesseurope.eu/departments) 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](https://www.businesseurope.eu/publications/eu-and-china-addressing-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 paper 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 State Aid 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, its 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 noteworthy non-EU authorities whose extensive subsidization programmes are well recorded. While they may not be the only non-EU authority whose subsidies have an impact on the European market, the extensive use of subsidies that occur within a state-led economy is a good case study for understanding how foreign subsidies impact the Single Market. Although the distortions stemming from China’s state-led system were previously mainly noticeable within China’s domestic market, 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 practicesbecause 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 subsidized. Beyond direct subsidies, indirect subsidies 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 below market prices.
4. Competition distortions: non-EU authorities who 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.

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. Finally, many States do not respect their obligations to notify subsidies to the WTO, which complicates the imposition of sanctions to remedy situations of unfair competition.

* the European regulation on the screening of foreign investments and European competition law do not provide a legal basis preventing the acquisition of a (strategic) European company under the existence of a distorting subsidy.
* The European public procurement directives and the Commission proposal for an International Procurement Instrument (IPI) that is currently under discussion do not specifically aim to respond to the distortions of competition linked to the presence of one or more subsidies, even if indirectly they can make it possible to fight against “abnormally low tenders”.
* The European Union is also reinforcing the distortions of competition on the single market by allowing players already heavily subsidized to benefit from European funding.

Foreign subsidies are harmful because they lead in the single market to:

* The de facto exclusion of competitors who do not benefit from such aids / subsidies, in particular in public procurement;
* 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 subsidized foreign competitors take market share in the EU and may themselves also benefit from European funding to their detriment. All forms of subsidies (e.g. financial and non-financial, direct and indirect) likely to generate distortions of competition in all market situations (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 with overcapacity);
* 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 (eg funding granted to universities which then benefit companies that collaborate with these universities).

***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 are created with other EU tools. To ensure that the instrument delivers on its objectives, we would like to submit a few comments:

More focused instrument

BusinessEurope calls for a more focused and consistent instrument, where the European Commission is granted the role of supervisory authority. 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 supervisory authority for the following reasons:

* Being exclusively responsible for EU trade policy and for EU competition policy the Commission has the necessary experience to carry out investigations when market distortions occur, either when they are caused by y third country or 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 and not the interests of a specific Member State. In a post-Covid19 era this is even more relevant as national economic interests will understandably be prioritised over other interests.
* The EU interest test must be performed by the European Commission exclusively, so it is logical to give it the responsibility for the whole procedure rather than creating a disjoint system that could lead to longer deadlines and divergent views.

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.

FDI-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. The final instrument should be as close to the European state aid framework as possible as this will make it easier for companies to comply.

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 state aid rules. If a trading partner has already committed to complying with state aid rules in a bilateral trade agreement with the EU it should not be covered by the new instrument. In case the partner does not comply with its obligations the EU should activate the dispute settlement procedure of the Free Trade Agreement. This would avoid unnecessary overlap and could give a new incentive for trading partners to accept more ambitious provisions in the FTA.

Finally, the instrument is no silver bullet. Rather, it must be part of a broader and desirable multilateral solution. It is, therefore, important that the EU keeps pushing for common, global rules on illegal state aid. 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

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 all modules, the procedures under the Instrument on Foreign Subsidies need to be transparent, clear, predictable and unbureaucratic. This includes a closed catalogue of obligations for businesses, clear explanations of the criteria the investigation and assessment are based on, 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. This further includes clear rules to determine the competent authority and safeguards to prevent arbitrary decisions. Moreover, a 'help desk' should be set up where companies especially SMEs can get more information that helps them comply with the instrument.

Reducing uncertainties for both European and foreign companies is of paramount importance. Therefore, defining reasonable timeframes for the investigative activities that can be undertaken under all three of the modules can help avoid long, drawn-out investigations. We welcome the Commission’s attempt at defining such a timeframe for Module 3 and encourage the Commission to do the same for Modules 1 and 2.

## **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 flied in the European Single Market in case certain improvements and clarifications are made. Necessary 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 and the importance of companies’ fundamental rights should be acknowledged (e.g. rights of defence).
* In addition to 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), as suggested under 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.
* 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 Commission states that the list of subsidies potentially covered by Module 1 is non-exhaustive. To avoid legal uncertainty, it would be better to have an exhaustive list that could be updated to factor in market changes.

***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:

* 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 (e.g. when the government granting the subsidy exerts pressure on the country conducting the assessment).
* 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 of the modules to avoid long, drawn-out investigations. While timeframes have been suggested for Module 3, this still needs to be done for Modules 1 and 2.
* BusinessEurope supports the possibility for the competent authorities 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 this obligation is included in the final instrument, the Commission should be the intermediary between the third country government and the competent national supervisory authority.

***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:

* An assessment of whether an entity under investigation has privileged access to its domestic market (e.g. measures equivalent to special or 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.
* A list of subsidies that are considered unproblematic should be defined. This list should particularly include those subsidies authorised in the EU (e.g. under EU State Aid regime).
* The assessment criteria need to be specified. Moreover, guidelines for the competent supervisory authorities should be established in order to ensure a consistent approach across the internal market.
* 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 concerned undertaking 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.
* 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 be the last resort and only 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. Yet, 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 proposed by the Commission need to be clarified as the currentlack of clarity regarding the EU Interest test could lead to extensive discretion for the supervisory authorities and further politization of cases.

* 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 across all sectors to assess the contribution of a subsidised company to EU public policy objectives(e.g. 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.
* With regards to acquisitions and procurement, the same positive effects created by a subsidised offer/bid, would also be created by the next best offer/bid. The only difference is the price. The main objective should be to ensure that the best offer wins and the decision is not undermined by the price. In the end it is critical to assess the sustainability of the investment.
* 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.

***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)***

Module 1 should not allow any ex post control of acquisitions unless the notification obligations under Module 2 were breached.

Section 4.2.7 of the Whitepaper 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. The fact that, under section 4.1.6 of the Whitepaper, the Commission clearly favours structural remedies for such an ex post acquisition control makes this even more problematic:

“If for example a foreign subsidy facilitated an acquisition, structural remedies might be more appropriate than redressive payments.” The proposed combination of Modules 2 and 1would be contrary to the design of EU competition rules, which seems 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 bind Member State authorities when they combine Module 2 and 1.

If such a possibility is included, it should only cover strategic sectors, following the definitions of these sectors set out in the EU investment screening mechanism.

***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 more market disruptive subsidies. 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 we are not disproportionately enlarging the scope of the instrument at the expense of its effectiveness.

As in case of EU state aid, there should be a mechanism in place for account for multiple subsidies lower that the de minimis which when added exceed the limit. In addition, prohibited subsidies should not be subject to de minimis threshold.

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

* Being exclusively responsible for EU trade policy and for EU competition policy the Commission has the necessary experience to carry out investigations when market distortions occur, being they caused by third country or 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 and not the interests of a specific Member State. In a post-Covid19 era this is even more relevant as national economic interests will understandably be prioritised over other interests.
* The EU interest test must be performed by the European Commission exclusively, so it is logical to give it the responsibility for the whole procedure rather than creating a disjoint system that could lead to longer deadlines and divergent views.

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 in order that the instrument is applied coherently across the entire Single Market. The Commission should also establish a clear coordination procedure for situations where several Member States evaluate the same case/foreign subsidy. For example, if one Member State closes a case, the relevant authority of another Member State could challenge this decision by appealing to the Commission (e.g. if the investigation did not duly follow the legal framework or if the redressive measures adopted are inadequate).

Finally, when and if companies appeal decisions taken under the instrument before national courts, it is important that the courts in different Member States 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)?***

Module 2 complements the EU’s toolbox, in particular the Foreign Investment Screening regulation, which only covers national security and public order concerns. Currently there is no legal framework addressing 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.

***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. The merger investigation and assessment procedure already needs to be of streamlined because it puts too much administrative burden on companies (excessive requests for information, excessive investigation periods blocking legitimate mergers, etc.).

**On the ex-ante notification system**

Overall, BusinessEurope welcomes the obligation for beneficiaries of foreign subsidies to notify acquisitions of European targets ex-ante and we have the following comments:

* According to section 4.2.5 of the Whitepaper the notification of potentially subsidised acquisitions under Module 2 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 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 the 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.
* The timeframe for relevant future financial contributions (up to one year after the closing of the acquisition) is too vague. 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.
* A political commitment from a non-EU government to provide a financial contribution in the future is a very uncertain criterion. Political commitments are not legally enforceable, which means that it 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.
* 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 obligatory ex-ante notification system if the consequences (redressive measures) of the relevant authorities finding out about unnotified foreign subsidies later on are not severe enough. In the current proposal, the incentives for being transparent on this are too weak. Moreover, if companies submit false information, it will be very difficult for public authorities to determine whether false information has been submitted and to prove this. One possibility is to use as basis the country reports that have been elaborated by the European Commission in the context of the Trade Defence Instruments procedures.
* Respect for due process in the investigation procedure.

***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. Overall, Module 2 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.

*Members are invited to comment on the suggestions made by the Commission on page 23 and 24 of the White Paper (e.g. voting rights threshold)*

The definition of potentially subsidised acquisitions is vague and risks to not include all relevant situations. Officially, subsidies may not be granted to support an acquisition of an EU target but they could be disguised (e.g. as support for a research programme). Therefore, the module should cover any foreign subsidy falling within the thresholds, no matter its official purpose.

* 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

need to be examined if the acquirer received a foreign subsidy falling within the thresholds of Module 2.

* Acquisitions of companies in strategic sectors (according to the definitions set out in the FDI screening mechanism), no matter their size, 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)?***

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. However, 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. Overall, BusinessEurope favours a proportionate approach, preferring legally binding commitments over the prohibition of acquisition, which should the measure of last resort. Nonetheless, it should 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?***

Please see our overall comments on the EU interest test under Question 4 on Module 1.

With regards to acquisitions, we would like to emphasise that the same positive effects created by a subsidised acquisition, would also be created by the next best offer. The only difference is the amount for which a company is acquired, where the difference is paid by the third country granting the subsidy. Therefore, we question the necessity for a EU interest test under Module 2.

***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. Including national authorities would lead to more coordination challenges, the risk of diverging outcomes in the EU, higher costs, and legal uncertainty.

## **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. Thus, the Commission rightly points out that the existing EU legal framework for public procurement does not address distortions to the EU procurement markets caused by foreign subsidies.

It will also be important to pursue the adoption of the International Procurement Instrument (IPI). Its objective is clearly different (i.e. open third country procurement markets) and complementary to the instrument on foreign subsidies, but redressive measures are similar (i.e. exclusion of third country economic operators) and coherence should therefore 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 the suggested module is necessary to avoid distortive competition in EU public tenders. However, certain issues need to be taken into account for Module 3 to achieve the expected results:

* 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. For example, it should be considered whether abnormally low offers, as referred to in the EU public procurement Directives, could be investigated in a more structured and uniform manner. 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.
* BusinessEurope favours the exclusion of entities that have been found to benefit from distortive foreign subsidies from future procurements in the EU for a period of time. However, such an exclusion 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. This way, it can be ensured that companies that have been rejected in one Member State do not win a public tender in another. At present, it seems unclear how this will be done in practice.
* Overall, the obligation for bidders to notify to the contracting authority whether they or their consortium partners, subcontractors or suppliers have received foreign subsidies is appropriate. As EU tender procedures are already complex and this would add a further burden for companies, we recommend that the Commission clarifies if this is an obligation for all participants in the tender, also those that received no foreign subsidies, and what is the burden of proof in the latter case.
* This notification obligation should not cover any supplier 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). 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 is excessive, and a more pragmatic approach needs to be taken.
* 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.
* Regarding the tendering process in public procurement, the Commission should note that the bidder generally commits to a tender for six 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 may deter both EU public authorities from launching procurement processes and companies from bidding in them. Such an outcome must be avoided. 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, so they are able to meet these deadlines.
* 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. 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. 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.
* 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 supervisory authority but the Commission challenges ex-post the decision of the national 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.
* 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 to exchange suppliers / sub-contractors benefitting from distortive foreign subsidies.
* 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.

***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 may not be best placed to determine whether a foreign subsidy, which has been identified by the supervisory authority, has distorted the public procurement procedure as some companies could exert significant pressure on the contracting authorities. Moreover, some contracting authorities may be more interested in cost savings than in safeguarding fair competition in the internal market. Furthermore, it would make contracting authorities responsible for a critical part of the investigation whereas many contracting authorities lack professionalisation and resources.

Therefore, the national supervisory authority should decide on the distortive nature of a foreign subsidy. This decision should be legally binding for the contracting authority. Moreover, in order to have consistent outcomes across the EU, there needs to be a possibility for the Commission to review the decision of the national supervisory authority before its final adoption and reopen the case if necessary during a limited period of time (e.g. in case of possible conflicts of interest, if procedure was not duly respected, etc).

It must be noted that, within the scope of the EU state aid regime, only few bids have been rejected by public authorities due to illegal state aid. Likewise, under the proposed instrument, national authorities may have an incentive to accept attractive bids even if they suspect that foreign subsidies are involved. Therefore, it is very important to make contracting authorities well aware of the new rules.

***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. Therefore, it should be taken into consideration whether a bidder has a privileged access to their domestic market (e.g. exclusive rights), which gives them a competitive advantage in the internal market. In such a situation, specific redressive measures need to be taken.

*We would ask members to provide additional input if relevant*.

# **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?***

Module 2 should be the main instrument for dealing with foreign acquisitions of EU targets whereas 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 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 can be used for tackling foreign subsidies in any area even if they fall below the thresholds specified under Module 2 and Module 3 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.

# **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 who 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 subsidized firms by allowing them to participate in European R&D or Development programmes. The European Commission could examine whether, in the context of limited funding, it would be desirable to exclude foreign subsidized firms, 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[[1]](#footnote-2).
* 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[[2]](#footnote-3);
* 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[[3]](#footnote-4);
* In February 2019, Hyundai-Rotem won an order of 213 new trams in Warsaw, with the support of EU Cohesion Fund[[4]](#footnote-5).

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.

***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 reciprocityshould 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 to 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.

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. 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.
1. <https://www.railwaypro.com/wp/astra-vagoane-wins-in-court-the-tender-for-bucharest-tram-procurement/> [↑](#footnote-ref-2)
2. <https://www.railwaygazette.com/modes/metro-do-porto-selects-crrc-to-supply-light-rail-vehicles/55362.article> [↑](#footnote-ref-3)
3. <https://www.railwaypro.com/wp/crrc-astra-consortium-ranks-first-for-romanian-emu-tender/> [↑](#footnote-ref-4)
4. <https://www.railwaypro.com/wp/controversial-warsaw-tender-concluded-hyundai-rotem-selected-to-deliver-the-213-new-trams/> [↑](#footnote-ref-5)