



Brussels, 17.6.2020
COM(2020) 253 final

WHITE PAPER

on levelling the playing field as regards foreign subsidies

WHITE PAPER

on levelling the playing field as regards foreign subsidies

Table of Contents

1	Introduction.....	4
2	Problem definition	6
2.1	Foreign subsidies risk distorting the EU internal market	6
2.2	Overview of cases involving foreign subsidies	8
3	Gap analysis.....	9
3.1	EU competition rules	9
3.2	EU trade policy	9
3.3	Public procurement.....	10
3.4	EU funding.....	12
4	Framework to address distortions caused by foreign subsidies in the internal market generally and in the specific cases of acquisitions and public procurement	13
4.1	General instrument to capture foreign subsidies (Module 1)	13
4.1.1	Basic features.....	13
4.1.2	Scope of Module 1	14
4.1.3	Assessment of distortions in the internal market.....	15
4.1.4	EU interest test.....	17
4.1.5	Procedure	17
4.1.6	Redressive measures	19
4.1.7	Supervisory authorities	21
4.2	Foreign subsidies facilitating the acquisition of EU targets (Module 2).....	22
4.2.1	Basic features.....	22
4.2.2	Scope of Module 2.....	23
4.2.3	Assessment of distortions related to subsidised acquisitions	26
4.2.4	EU interest test.....	27

4.2.5	Procedure	27
4.2.6	Redressive measures	29
4.2.7	Supervisory authorities	29
4.3	Foreign subsidies in public procurement (Module 3).....	30
4.3.1	Introduction.....	30
4.3.2	Distortions by foreign subsidies in the context of public procurement procedures.....	30
4.3.3	Procedure	31
4.3.4	Foreign subsidies in procurement pursuant to intergovernmental agreements.....	34
5	Foreign subsidies in the context of EU funding	35
5.1	Problem definition	35
5.2	Framework and measures to fill the gap.....	36
5.2.1	Direct management.....	36
5.2.2	Shared management.....	38
5.2.3	Indirect management	39
6	Interplay with other EU and international instruments.....	40
6.1	EU Merger Regulation.....	40
6.2	EU antitrust rules	41
6.3	EU State aid rules	41
6.4	EU public procurement rules	41
6.5	The WTO Agreement on Subsidies and Countervailing Measures.....	41
6.6	Trade defence instruments – protection against subsidised imports	42
6.7	FDI Screening Regulation	42
6.8	Bilateral trade agreements	43
6.9	The Agreement on Government Procurement and procurement chapters in FTAs	44
6.10	Sectorial rules: safeguarding competition in air and maritime transport.....	44
7	Public Consultation.....	45
	ANNEX I: DEFINITION OF FOREIGN SUBSIDY	46
	ANNEX II: QUESTIONNAIRE.....	48

1 INTRODUCTION

Openness to trade and investment underpins Europe's prosperity and competitiveness. Trade accounts for almost 35% of the EU's GDP. 35 million European jobs are linked to exports. The EU is the world's main provider and the top global destination of foreign direct investment¹ with 16 million European jobs linked to it.

A strong, open and competitive single market enables EU companies to operate and compete globally. On 10 March 2020, the European Commission presented a New Industrial Strategy for Europe which mapped out a clear path for Europe to allow our industry to lead the green and digital transitions based on competition, open markets, world-leading research and technologies and a strong single market.

To reap the full benefits of global trade, Europe will pursue a model of open strategic autonomy. This will mean shaping the new system of global economic governance and developing mutually beneficial bilateral relations, while protecting ourselves from unfair and abusive practices.

Openness to trade and investment is part of the economy's resilience, but it must go hand in hand with fairness and predictable rules. The current global economic environment is the most difficult in recent memory. Trade openness based on a level playing field is being challenged, as is the objective of seeking mutually beneficial trade relations. This is exemplified by state sponsored unfair trading practices, which disregard market forces and abuse existing international rules, with a view to building up dominance across various sectors of economic activity. Such unfair practices typically include shielding industries from competition through selective market opening, licensing and other investment restrictions, as well as providing subsidies which undermine the level playing field to both state-owned and private sector companies. The distortive economic effects of such practices are relevant in any affected sector, whether strategic or otherwise.

In today's intertwined global economy, foreign subsidies can however distort the EU internal market and undermine the level playing field. There is an increasing number of incidences in which foreign subsidies appear to have facilitated the acquisition of EU undertakings, influenced other investment decisions or have distorted the market behaviour of their beneficiaries. Within the EU, the single market and its rule book ensure a level playing field for all Member States, economic operators and consumers so they can benefit from the scale and opportunities of the EU economy.

The single market rule book also includes rules on public procurement in order to ensure that undertakings benefit from fair access to public contracts, and that contracting authorities benefit from fair competition.

¹ Foreign direct investment stocks held in the rest of the world by investors resident in the EU amounted to EUR 8,750 billion at the end of 2018. Meanwhile, foreign direct investment stocks held by third-country investors in the EU amounted to EUR 7,197 billion at the end of 2018.
<https://ec.europa.eu/trade/policy/accessing-markets/investment/>

Competition rules have been part of the EU internal market from the beginning. Notably, EU State aid rules ensure that subsidies by public authorities are compatible with the internal market. Many foreign subsidies would be problematic if they were granted by EU Member States and assessed under EU State aid rules. EU State aid rules however apply only to public support granted by EU Member States. In contrast, subsidies granted by non-EU authorities fall outside EU State aid control.

Moreover, the limited degree of openness of the domestic market of third countries may further distort the market. Where a beneficiary faces no or limited competition in its domestic market, it could leverage its privileged position in other markets, thereby enjoying an undue advantage over others. Foreign subsidies originating in States where access to markets is closed or restricted may be even more likely to cause distortions.

In the current context of the COVID-19 crisis, EU Member States grant significant amounts of State aid to support individual undertakings and the EU economy as a whole. It is a situation in which State aid is an indispensable means at the disposal of public authorities to stabilise the economy and accelerate research in the coronavirus. At the same time, public support continues to be subject to EU State aid control also in the current situation, ensuring for example its proportionality and minimising the potentially distortive effect on competition. Moreover, the current assessment framework is temporary and limited in scope to crisis measures. The current situation illustrates the importance of preserving the level playing field within the internal market, even in exceptional economic circumstances.

This White Paper intends to launch a broad discussion with Member States, other European institutions, all stakeholders, including industry, social partners, civil society organisations, researchers, the public in general and any other interested party on the best way to effectively address the challenges identified. The results of the consultation on the White Paper will prepare the ground for choosing the most appropriate way to address the distortions created by foreign subsidies, including appropriate proposals for legal instruments.

The White Paper first outlines the rationale for addressing foreign subsidies, including typical examples of foreign subsidies that appear to undermine the level playing field in the internal market. The White Paper then presents an analysis of the existing legal instruments to address foreign subsidies and discusses the question of a regulatory gap. Subsequently, the White Paper sets out preliminary substantive and procedural orientations for legal instruments to address the regulatory gap in relation to:

- Foreign subsidies distorting the internal market regarding
 - the general market operation of economic operators active in the EU;
 - acquisitions of EU undertakings;
 - public procurement procedures;
- Foreign subsidies in the context of access to EU funding.

2 PROBLEM DEFINITION

2.1 Foreign subsidies risk distorting the EU internal market

EU State aid rules help to preserve a level playing field in the internal market among undertakings with regard to subsidies provided by EU Member States. However, there are no such rules for subsidies that non-EU authorities grant to undertakings operating in the internal market. This situation may include circumstances where the benefitting undertakings are owned or ultimately controlled by a non-EU company or a foreign government.

There is limited information on the actual amount of foreign subsidies being granted. This is mainly due to a lack of transparency and low compliance² with the obligation to notify subsidies under the Agreement on Subsidies and Countervailing Measures (SCM Agreement³). Some reports by the Organisation for Economic Co-operation and Development (OECD) indicate however that government interventions appear widespread in certain sectors.⁴

The EU economy is open to foreign investment. This is reflected by recent economic data. In 2016, 3% of European companies were owned or controlled by non-EU investors representing 35% of total assets and around 16 million jobs.⁵ More recently, there has been an increase in investment also from third countries other than from traditional investors such as the United States and Canada. Investment by state-owned enterprises has grown rapidly over the last few years, as has the presence of "offshore investors".

The level of foreign direct investment (FDI) to the EU, its composition and the top recipient Member States are not a constant and keep changing. The scale of the impact of the COVID-19 pandemic on the level of FDI inflows and the origins of FDI to the EU remains to be seen.

Greater openness to foreign investment has come with opportunities for the EU economy but also with increased risks, such as foreign subsidisation, which needs to be controlled to avoid undermining competitiveness and the level playing field in the EU market. Concerns about subsidisation may also be exacerbated where public undertakings are not subject to the same rules as private undertakings, and where financial relations between the state and its undertakings are not transparent. The Treaty is neutral as regards public or private ownership of undertakings. Both public and private undertakings are subject to competition rules. In

² A recent background note prepared by the WTO Secretariat (G/SCM/W/546/Rev.10) notes that between 1995 and 2017 the number of members that have failed to make a notification rose sharply. As on April 2019, 77 WTO members had not yet submitted subsidy notifications for 2017, 62 members have still not submitted subsidy notifications for 2015. See also: https://www.wto.org/english/news_e/news19_e/scm_30apr19_e.htm

³ WTO Agreement on Subsidies and Countervailing Measures Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [Not reproduced in I.L.M.].

⁴ The OECD estimated that in the aluminium sector total government support for firms studied reached between USD 20-70 billion over the 2013-17 period (depending on how financial support is estimated). See: <https://www.oecd-ilibrary.org/docserver/c82911ab-en.pdf?expires=1587470829&id=id&accname=guest&checksum=CA92281E81EB5ECE7D5F87CED76198CF>. Furthermore, the OECD estimated that, for a sample of 21 large semiconductor firms, total government support exceeded USD 50 billion over the period 2014-18:

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC\(2019\)9/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC(2019)9/FINAL&docLanguage=En)

⁵ Based on a sample and as described in https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf

addition, under the Transparency Directive,⁶ Member States are obliged to be transparent on the financial relations between them and their public undertakings in addition to complying with the transparency requirements under EU State aid rules.⁷

As in the case of State aid granted by EU Member States, foreign subsidies can distort competition in the internal market and result in an uneven playing field in which less efficient operators grow and increase market share at the expense of more efficient operators. In a similar manner, foreign subsidies may also result in costly and often wasteful emulation and lead to subsidy races between public authorities. Furthermore, the lack of transparency and reciprocity in accessing third-country markets are additional factors that tend to exacerbate such harmful effects.

In addition to the general concerns about foreign subsidies provided to undertakings in the EU, there is a specific concern about foreign subsidies in the contexts of the acquisition of EU targets and of public procurement.

As regards acquisitions the price that acquirers are willing to pay typically reflects the efficiency gains or increase in revenues they can obtain by acquiring the asset. However, the subsidy may allow the subsidised acquirer to pay a higher price to acquire the asset than it would otherwise have paid, and can thus distort the valuation of EU assets. Foreign subsidies therefore may lead to excessive purchase prices (outbidding) and at the same time prevent non-subsidised acquirers from achieving efficiency gains or accessing key technologies.

Foreign subsidies therefore may lead to an inefficient overall allocation of resources and, more particularly, a loss of competitiveness and innovation potential of companies that do not receive such subsidies. In some cases, the granting of foreign subsidies can also be driven by a strategic objective to establish a strong presence in the EU or to promote an acquisition and later transfer technologies to other production sites, possibly outside of the EU. There is thus a specific need to ensure a level playing field for the acquisitions of EU targets. This can ensure that all companies compete on equal footing to acquire key assets and stay at the technological frontier, while preserving the benefits that international competition and inward foreign direct investments deliver.

The EU procurement markets are largely open to third country bidders. EU-wide publication of tenders ensures transparency and creates market opportunities for EU and non-EU companies alike. However, EU companies do not always compete on an equal footing with companies benefiting from foreign subsidies. Subsidised companies may be able to make more advantageous offers, thus either discouraging non-subsidised companies from participating in the first place or winning contracts to the detriment of non-subsidised more

⁶ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

⁷ Detailed transparency has been one of the key principles of the State aid reform programme in the Communication on State aid modernisation:

https://ec.europa.eu/competition/state_aid/modernisation/index_en.html

efficient companies.⁸ It is therefore important to ensure that recipients of foreign subsidies bidding for public contracts in the EU compete on an equal footing.

Many public buyers, mindful of their budgets, have an incentive to award contracts to bidders offering low prices regardless of whether those prices are facilitated by foreign subsidies. This may be the case not only for contracts awarded on the basis of price, but also for contracts awarded on the basis of the best price-quality-ratio, as quality criteria rarely compensate important differences in prices, such as those that may be enabled by foreign subsidies.

The same distortive effect can occur when companies benefitting from foreign subsidies seek access to funding from the EU budget.

2.2 Overview of cases involving foreign subsidies

There could be several objectives which non-EU authorities pursue by granting foreign subsidies, not necessarily entirely of economic nature, and also different ways in which a subsidy may be provided to an undertaking in the EU. A few examples are provided below.

First, undertakings may receive subsidies to promote their existing activities in the EU. Foreign states may give subsidies (e.g. grants) or provide cheaper financing to an undertaking in the EU (e.g. a subsidiary located in the EU). Foreign states may also give a subsidy to a parent company located outside the EU (e.g. corporate tax regimes providing selective incentives), which then in turn finances the subsidiary located in the EU through intragroup transactions. An undertaking in the EU may also receive financing at preferential terms from foreign banks directly upon instruction of foreign states. Furthermore, third countries might have cooperation arrangements with EU local authorities or EU development banks, and may thus channel foreign subsidies through these authorities or banks to undertakings in the EU.⁹

In some cases, foreign subsidies are granted with the express objective of enabling companies to submit bids for public contracts, at prices that are below market price or even below cost, directly “underbidding” to the detriment of competing non-subsidised undertakings. Subsidies may also generally facilitate aggressive market conduct. Such behaviour, not driven by normal commercial considerations, may be driven by strategic goals, in order to get a foothold in strategically important markets or regions, or to get privileged access to critical and major infrastructure, including infrastructure governed by the rules of Directive 2014/25/EU.

Finally, foreign subsidies can also facilitate acquisitions to help non-EU companies expand in the EU. Non-EU authorities may seek to steer acquisitions by offering preferential financing, loan guarantees and other means of reducing capital costs. Such measures may directly aim at supporting the outward investment of undertakings by granting dedicated tax rebates (income tax reductions) or financing from government supported investment funds or intermediaries.¹⁰ All these different possible benefits can have a significant impact on the premiums offered for acquisitions. A substantial number of foreign direct investments takes place through offshore

⁸ A wide lack of information in the Tender Electronic Daily (TED) files makes it difficult to collect reliable and relevant public procurement data in the EU.

⁹ Some financing or cooperation agreements may be signed with EU development banks which may then be involved in the implementation of providing financing to companies in the EU.

¹⁰ See e.g. the Sino-CEEF fund (EUR 10 billion), an investment fund especially created for investments in the EU.

financial centres which may offer special tax conditions. Notably, 10.9%¹¹ of the foreign investors controlling EU companies are established in such offshore financial centres.

3 GAP ANALYSIS

There are certain EU and international instruments that should be taken into account when considering how to address the distortions caused by foreign subsidies on the internal market. While these international and EU rules address these distortions to a certain extent, the following gap analysis demonstrates that the issue so far has not been exhaustively addressed by any of the existing instruments. In particular, where foreign subsidies take the form of financial flows facilitating acquisitions of EU undertakings or where they support the operation of an undertaking in the EU, there appears to be a regulatory gap. The same applies where foreign subsidies distort public procurement procedures or where foreign subsidies provide a benefit when it comes to access to EU financial support. This White Paper therefore sets out possible features of such new tools to address the existing regulatory gap and to ensure a level playing field in the internal market.

At the same time, there may be overlaps between such new tools and existing rules. Section 6 explains those overlaps more in detail and how such new tools would interact with current EU and international rules.

3.1 EU competition rules

The EU's merger and antitrust rules allow the Commission to intervene where concentrations or companies' market practices distort competition in the internal market. Neither EU antitrust rules nor EU merger control specifically take into account whether an economic operator may have benefited from foreign subsidies (even if in principle it could form part of the assessment) and they do not allow the Commission (or Member States) to intervene and decide solely or even mainly on this basis.

EU State aid rules apply where financial support granted by EU Member States to undertakings distorts or threatens to distort competition in the internal market. However, financial support granted by non-EU authorities to undertakings in the EU, either directly or through their parent companies outside the EU is not covered by EU State aid rules.¹²

3.2 EU trade policy

In the area of trade policy, the EU has some instruments at its disposal to restore a level-playing field for trade in goods and investments: at multilateral level, the WTO SCM Agreement, at bilateral level free trade agreements, and unilateral measures such as the trade defence instruments. These instruments allow the EU to react to unfair competition where

¹¹ Source : EC-JRC Foreign Ownership database and https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.

¹² A new instrument on foreign subsidies would not affect the current rules on antitrust and mergers. In the case of parallel procedures under the FDI Screening Regulation, Merger rules and/or any new legal instrument, those instruments will include a mechanism to address any overlap and ensure that procedures are efficient.

products have been manufactured with the support of non-EU funding (anti-subsidy).¹³ The measures to counteract the unfair practices usually take the form of extra import duty for the subsidisation received by the overseas competitors to eliminate the injury.

These instruments, however, have their limitations and do not allow to address all foreign subsidies affecting the internal market. The EU anti-dumping and anti-subsidy rules apply to the import of goods into the EU. They however do not cover trade in services, investment or other financial flows in relation to the establishment and operation of undertakings in the EU.

The Regulation establishing a framework for the screening of foreign direct investments into the EU (FDI Screening Regulation)¹⁴ constitutes an important tool to address risks to security or public order brought by foreign investments that target the EU's or Member States' critical assets. However, the scope of application of the FDI Screening Regulation is to determine the likely impact of foreign direct investment on security and public order by considering its effects, amongst others, on critical infrastructure, critical technologies, critical inputs, and it does not specifically tackle the issue of distortions caused by foreign subsidies.

On the international level, the EU can bring litigation against a WTO Member for breaches of the SCM Agreement, in particular when a WTO Member grants subsidies, prohibited under that Agreement, or subsidies that cause adverse effects to its interests, and have the matter adjudicated by a WTO panel. However, the scope of application of the SCM Agreement is also limited to trade in goods. The WTO GATS contains an inbuilt mandate to develop rules for subsidies in the area of trade in services, but thus far, no such rules have been developed.

3.3 Public procurement

The existing EU legal framework in the field of public procurement does not specifically address distortions to the EU procurement markets caused by foreign subsidies. As single market instruments, the EU Public Procurement Directives do not set out any specific rules regarding the participation of economic operators benefitting from foreign subsidies. Contracting authorities enjoy a wide margin of discretion both in the design of a public tender procedure as well as in the evaluation of tenders submitted in the procedure. In addition, contracting authorities 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.

The EU has committed itself under several international agreements (such as the Agreement on Government Procurement and bilateral Free Trade Agreements with Procurement Chapters) to grant access to its public procurement market to the goods, services and suppliers of several third countries. Accordingly, the Public Procurement Directives provide, for public buyers in the EU, the obligation to accord to the works, supplies, services and economic operators of the signatories to those agreements treatment that is no less favourable than the

¹³ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 21. Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55.

¹⁴ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21.3.2019, p. 1.

treatment accorded to the works, supplies, services and economic operators of the EU, in so far as the procurement in question is covered by these agreements.

Beyond that obligation, economic operators from third countries, which have not entered into any agreement with the EU providing for the opening of their public procurement market or whose goods, services or works, do not have secured access to procurement procedures in the EU and may be excluded.¹⁵ In practice, decisions to exclude third-country bidders without secured access could be justified by the receipt of foreign subsidies, but in the current legal framework there is no such link.

Public buyers may consider the existence of foreign subsidies when evaluating risks in terms of contract performance and execution. More specifically, public buyers may consider the reliance on subsidies when assessing the overall financial viability of an offer. For this assessment, Article 69 of Directive 2014/24/EU¹⁶ provides the contracting authorities with the possibility to reject offers they consider to be abnormally low in situations where the explanations and evidence supplied by the bidder do not sufficiently account for the low price offered. Where, as part of that assessment, it can be established that a bidder has obtained EU State aid incompatible with the TFEU, enabling it to make a low offer, the tender may – under additional conditions - be rejected on that ground alone¹⁷. In contrast, Article 69 of Directive 2014/24/EU contains no corresponding provision for foreign subsidies that enable bidders to submit low offers. If the grant of foreign subsidies can be considered in the overall assessment, and the public buyers ultimately decide to reject an offer as abnormally low, such a rejection needs to be justified by demonstrating that the foreign subsidies impede the viability of the offer and the bidder's capacity to execute the contract at the (abnormally low) price offered.¹⁸

Public buyers in the EU are also encouraged to require high environmental and social standards in their procurement and to ensure that EU and third country bidders are held to the same standards. In fact, they can use technical specifications, exclusion, selection and award criteria as well as define contract performance clauses that ensure the respect of high standards¹⁹. While such requirements might in practice help creating a level playing field they are not designed to address the potential distorting effect of foreign subsidies in general, and even less so for subsidised entities established in the EU as those are already subject to the same rules as their non-subsidised peers.

In practice public buyers do not have the information necessary to investigate whether bidders benefit from foreign subsidies or to assess to what extent the subsidies have the effect of causing distortions in procurement markets. Public buyers may also have a short-term

¹⁵ Communication of the European Commission, "Guidance on the participation of third-country bidders and goods in the EU procurement market", C(2019) 5494 final, p. 6. This does not apply to subsidised EU subsidiaries of excluded third country bidders.

¹⁶ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.

¹⁷ Article 69(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65.

¹⁸ For guidance, see Communication of the European Commission "Guidance on the participation of third-country bidders and goods in the EU procurement market" C(2019) 5494 final, section 2.

¹⁹ Communication of the European Commission, 'Guidance on the participation of third-country bidders and goods in the EU procurement market', C(2019)5494 final, chapter 3.

economic incentive to award contracts to such bidders, even if the low prices offered result from the existence of foreign subsidies.

Finally, the main objective of the International Procurement Instrument (IPI)²⁰ is to incentivise trading partners to negotiate with the EU the opening of their procurement markets for EU businesses. Provided the IPI will be adopted in its current form, it aims at improving access to public procurement markets *outside* the EU, but it will not tackle distortions of the procurement processes in the internal market arising from foreign subsidies granted to undertakings participating in EU procurement markets.²¹

The existing rules in the field of EU public procurement are not sufficient to address and remedy the distortions caused by foreign subsidies. Hence, where foreign subsidies facilitate and distort the bidding in an EU public procurement procedure, there appears to be a regulatory gap.

3.4 EU funding

Access to EU financial support is subject to the rules established by the Financial Regulation ('Financial Regulation', or 'FR').²² Agreements with third countries govern the access to EU funding for third-country entities. Those rules are complemented by regulations established for the EU spending programmes and funds.

All these rules contain provisions aimed at protecting the level playing field. For instance, they do so by establishing measures to reduce the impact of abnormally low bids.²³

However, none of these rules currently takes into account the existence of foreign subsidies and their impact on the ability of a company, irrespective of its place of establishment, to access EU funding on the basis of such subsidies.

With regard to shared management, the gap analysis in section 3.3 and the considerations on EU public procurement rules in this paper are highly relevant also for EU funding, as Member States apply these rules to EU funded projects implemented through shared management.

²⁰ Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2016) 34 final, 29 January 2016. This proposal is being discussed in the Council.

²¹ Following the call by the Commission and the European Council in March 2019 to resume the discussions, the co-legislators are currently engaged in constructive discussions on IPI, on the basis of the 2016 amended legislative proposal of the Commission.

²² Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1.

²³ See Point 23, Annex I to the Financial Regulation. For examining abnormally low bids, the contracting authority may take into consideration bidder observations relating to the possibility of the tenderer obtaining State aid in compliance with applicable rules. The contracting authority may exclude a tender offer that is abnormally low for the reason that the tenderer has obtained State aid if the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU.

4 FRAMEWORK TO ADDRESS DISTORTIONS CAUSED BY FOREIGN SUBSIDIES IN THE INTERNAL MARKET GENERALLY AND IN THE SPECIFIC CASES OF ACQUISITIONS AND PUBLIC PROCUREMENT

As the gap analysis has shown, the EU already has certain tools to address the distortions that foreign subsidies may cause in the internal market, in particular where foreign subsidies are provided for the import of goods. However, it also emerges from the gap analysis and problem definition that the existing tools need to be complemented to specifically address and remedy distortions in the EU internal market arising from subsidies granted by non-EU authorities. In this Section, the White Paper therefore puts forward for discussion a framework that could address, on the one hand, the distortions caused by foreign subsidies provided to an economic operator in the EU market (Module 1) and, on the other hand, the distortions caused by foreign subsidies in the context of acquisitions of EU targets (Module 2) and of public procurement (Module 3). In all Modules, it is the origin of the subsidy, namely granted by a third country, which is the decisive trigger. The Modules can either be applied alternatively on a stand-alone basis, or in combination.

In the following, the respective Modules are explained in more detail, starting with setting out the basic features of each Module and their respective scope of application, the possible criteria that could guide the assessment of the competent supervisory authority to determine the existence of a foreign subsidy distorting the internal market, the procedure and the possible redressive measures.

For the purposes of this White Paper, the term ‘foreign subsidy’ is defined in Annex I.

4.1 General instrument to capture foreign subsidies (Module 1)

4.1.1 Basic features

Module 1 is intended as a general instrument to address foreign subsidies that cause distortions in the internal market and are provided to a beneficiary that is established or, in some instances, active in the EU.²⁴

Under this Module, the competent supervisory authorities (the Commission and the relevant Member State authorities that will exercise their respective enforcement powers under a shared system of review to avoid duplications) may act upon any elements it considers relevant indicating the granting of a foreign subsidy to a beneficiary active in the EU. Information could e.g. stem from market operators or Member States. A case would start with a preliminary review to examine whether there is a foreign subsidy that may distort the internal market. If there is no concern at the end of the preliminary review, because either there is no foreign subsidy, or there are no indications of a distortion in the internal market, or the case is not a priority, the competent supervisory authority would close the case.

If there is evidence tending to show that a foreign subsidy may distort the proper functioning of the internal market, an in-depth investigation would follow, during which the competent

²⁴ Foreign subsidies provided for goods and agricultural products imported into the EU fall under the EU trade defence instrument and would thus not be covered by Module 1.

supervisory authority would need to confirm its preliminary finding that there is a foreign subsidy that distorts the internal market.

At the end of that in-depth investigation, if confirmed that the proper functioning of the internal market may have been or may be distorted through the foreign subsidy, the competent supervisory authority would have the possibility of imposing measures to redress those distortions in the internal market ('redressive measures'). In contrast, the investigation would be closed if the existence of a foreign subsidy is not confirmed, if there is no indication of a distortion, or if, after a balancing exercise, the possible distortion that the subsidy may bring is mitigated by the positive impact that the supported economic activity or investment might have within the EU or on a public policy interest recognised by the EU.

4.1.2 *Scope of Module 1*

4.1.2.1 General considerations

Module 1 has a broad material scope and would allow to address distortive foreign subsidies in all market situations.²⁵ This means that Module 1 would also include the possibility to review acquisitions facilitated by foreign subsidies and/or market behaviour by a subsidised bidder in public procurement.

4.1.2.2 Foreign subsidies benefitting an undertaking in the EU

The purpose of Module 1 is to address distortions caused by foreign subsidies in the EU. For this purpose, Module 1 would apply to undertakings established in the EU that benefit from foreign subsidies. Separately, it could be considered that Module 1 also covers certain undertakings otherwise active in the EU that benefit from foreign subsidies. The two options are considered below. In both options, the competent authorities would only have the possibility to take action if the subsidy causes distortions in the internal market.

- Undertakings established in the EU

A foreign subsidy would be covered under the present option if it provides a benefit to an undertaking²⁶ established in the EU. An undertaking is considered established in the EU if one of its entities is established in the EU. Where the subsidy is granted to an entity established outside the EU, it would need to be established to what extent the benefit of the foreign subsidy can be allocated to the entity established in the EU, having regard to relevant criteria

²⁵ "In all market situations" refers to undertakings in the EU, irrespective of whether the subsidy benefits the production of goods, services or investments in the EU. It is however suggested to exclude foreign subsidies provided for goods and agricultural products imported into the EU, which fall in the scope of the EU Anti-subsidy Regulation, from Module 1.

²⁶ The Court of Justice has consistently defined undertakings as entities engaged in an economic activity and held that several separate legal entities may be considered to form one economic unit, which is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links to be relevant. Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraphs 107, 112.

such as the purpose and conditions attached to the foreign subsidy or the actual use of the funds (as evidenced e.g. through the accounts of the undertaking in question).

- Undertakings active in the EU

Consideration should be given to the possibility of applying Module 1 not only to the undertakings established in the EU, but also, to certain undertakings that benefit from foreign subsidies and are otherwise active in the EU, such as when an undertaking established outside the EU seeks to acquire an EU target.

4.1.2.3 Date from which the granting of a subsidy is made

A foreign subsidy would be considered to fall under Module 1 from the moment the beneficiary has an entitlement to receive the subsidy. The actual payment of the subsidy is not a necessary condition for bringing a subsidy within the scope of Module 1. The payment is however relevant when determining the adequate remedy as will be discussed below.

4.1.3 *Assessment of distortions in the internal market*

Once the existence of a foreign subsidy is established, the competent supervisory authority assesses whether such subsidy causes a distortion in the internal market. Both actual and potential distortions are considered. Certain categories of foreign subsidies would be considered to most likely cause distortions in the internal market. All other foreign subsidies would require a more detailed assessment according to indicators that help to determine whether a foreign subsidy actually or potentially causes a distortion of the proper functioning of the internal market. In any event, the concerned undertaking may also show that the foreign subsidy in question is not capable of distorting the internal market in the specific circumstances of the case.

Generally, it is suggested that foreign subsidies below a certain threshold are deemed unproblematic as they are unlikely to cause distortions of the proper functioning of the internal market. Foreign subsidies up to that threshold should be presumed to not be able to distort the correct functioning of the internal market. The threshold could be set at an amount of EUR 200 000 granted over a consecutive period of three years. This amount would align with the de minimis threshold laid down in EU State aid rules.²⁷

4.1.3.1 Categories of foreign subsidies considered likely to distort the internal market

Certain categories of foreign subsidies, like certain types of State aid, are likely to create distortions in the internal market because of their nature and form. These categories of foreign subsidies could be found to create distortions in the internal market, and could include the following:

- Subsidies in the form of export financing, unless the export financing is provided in line with the OECD Arrangement on officially supported export credits.

²⁷ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.

- Subsidies (such as debt forgiveness) to ailing undertakings, i.e. undertakings unable to obtain long-term financing or investment from independent commercial sources, unless there is a restructuring plan leading to the long-term viability of the beneficiary and including a significant own contribution by the beneficiary.²⁸ Subsidies granted to remedy a serious national or global disturbance of the economy do not fall in this category, if they are limited in time and proportionate to remedy the respective disturbance.
- Subsidies whereby a government guarantees debts or liabilities of certain undertakings without any limitation as to the amount of those debts and liabilities or the duration of such guarantee.
- Operating subsidies in the form of tax reliefs, outside general measures.
- Foreign subsidies directly facilitating an acquisition.

4.1.3.2 Assessment of all other foreign subsidies according to indicators

Foreign subsidies not falling under any of the categories outlined above may still cause distortions in the internal market. Such foreign subsidies may allow less efficient operators to grow and increase market share in the internal market at the expense of more efficient operators that do not receive such subsidies. Operators receiving foreign subsidies may also be able to produce more cheaply and ultimately offer their products and services on the internal market at lower prices to the detriment of competitors that do not receive such subsidies. Foreign subsidies may also allow their beneficiaries to outbid other operators that may be more efficient when it comes to the purchase of goods or the acquisition of undertakings.

In such cases outside the pre-set categories of distortive subsidies, foreign subsidies have to be examined in more detail to assess whether they would actually or potentially distort the level playing field in the internal market.

The general lack of transparency about foreign subsidies and the complexity of the commercial reality make it difficult to unequivocally identify or even quantify the impact of specific foreign subsidies on the internal market. To determine such impact, it appears therefore necessary to use a collection of indicators related to the subsidies and the relevant market situation. A non-exhaustive list of relevant indicators could include the following criteria:

- The relative size of the subsidy in question: the higher the amount of a subsidy in relative terms, the more likely it is to have a negative impact on the internal market; e.g. for an investment subsidy, the size of the subsidy may be compared to the size of the investment.
- The situation of the beneficiary: e.g. the larger a beneficiary, the more likely that the subsidy causes distortions. Generally, subsidies to small and medium-sized

²⁸ If the beneficiary operates in a sector or industry in overcapacity, it is unlikely that a restructuring plan leads to long-term viability of the beneficiary.

undertakings may be considered less likely to cause distortions.²⁹ The more production capacity of the beneficiary is unutilised, the more likely a subsidy causes distortions.

- The situation on the market concerned: e.g. subsidies to beneficiaries active in markets with structural excess capacity are more likely to cause distortions than others. Subsidies to beneficiaries active in markets with a high degree of concentration are more likely to cause distortions than others. Likewise, subsidies in fast growing high tech markets may be more likely to cause distortions.
- The market conduct in question, e.g. outbidding in acquisitions or distortive bidding in procurement procedures.
- The level of activity in the internal market of the beneficiary: subsidies granted to undertakings with limited activity in the internal market are less likely to cause distortions in the internal market.

Furthermore, consideration will also be given to the possibility that the competent supervisory authority could take into account whether the beneficiary has privileged access to its domestic market (through measures equivalent to special or exclusive rights) leading to an artificial competitive advantage that could be leveraged in the EU internal market and thereby exacerbates the distortive effect of any subsidy.

4.1.4 EU interest test

Once it is established that a foreign subsidy is capable of distorting the internal market, and where there is evidence of a possible positive impact that the supported economic activity or investment might have within the EU or on public policy interests recognised by the EU, the distortion should be weighed up against such possible positive impact.

In this assessment, the EU's public policy objectives, such as creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience, would be taken into account. When balancing these considerations against the distortion, the degree of distortion would play a role. Moreover, the balancing needs to be based on an appreciation of the various interests, including the need to protect consumers' interest. If on balance, the distortion on the internal market caused by the foreign subsidy is sufficiently mitigated by the positive impact of the supported economic activity or investment, the ongoing investigation would not need to be pursued further.

4.1.5 Procedure

It is suggested that the procedure in Module 1 consists of a two-step system, namely a preliminary review of a possible distortion on the internal market arising from the existence of a foreign subsidy and an in-depth investigation.

²⁹ For a distinction between small, medium and large undertakings, see Annex I of the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 26.6.2014, p. 1.

The competent supervisory authority may under this Module be faced with difficulties in obtaining the necessary information in particular because the authorities granting the foreign subsidies are located outside the EU and so may be the entities through which the subsidies might be channelled.

In this regard, adequate investigative tools and the possibility of seeking information from market players in the form of market information will be crucial for allowing the competent supervisory authority to act.

In addition, both during the preliminary review and the in-depth investigation, there would be mechanisms available to gather the relevant information. The competent supervisory authority could impose fines and periodic penalty payments for failure to timely supply the information requested or for supplying incomplete, incorrect or misleading information. If the information is not provided despite such sanctions, it would have the possibility to make decisions on the basis of the facts available, similar to the procedure under the EU trade defence instruments and State aid. Furthermore, the competent supervisory authority could have the possibility to make fact finding visits at the EU premises of the alleged beneficiary of a foreign subsidy, as well as in third countries, if the third country agrees.

4.1.5.1 Preliminary review of a possible foreign subsidy

The objective of the preliminary review is to examine whether there is a foreign subsidy to an undertaking established, or in certain cases active in the EU that may distort the internal market.

If the competent supervisory authority – at the end of the preliminary review – has the suspicion that there is a foreign subsidy that may distort the internal market, it may start an in-depth investigation to confirm its preliminary view that there is a foreign subsidy which is capable of distorting the proper functioning of the internal market. The competent supervisory authority will inform the undertaking concerned, the third country allegedly granting the subsidy, and the case being, the Commission, as well as the competent supervisory authorities of the other Member States of the launch of an in-depth investigation.

If there is no concern at the end of the preliminary review, either because there is no foreign subsidy, or because there are no indications of a distortion in the internal market, the preliminary review is closed, and the undertaking concerned as well as the Commission and all EU Member States are informed thereof.

4.1.5.2 In-depth investigation of a foreign subsidy

During the in-depth investigation, interested parties are invited to present their views in writing and submit information on the existence of a foreign subsidy and its potential distortive effect in the internal market.

If the undertaking concerned does not supply the information requested by the competent supervisory authority, or otherwise does not cooperate to the best of its abilities, the competent supervisory authority can take a decision on the basis of the facts available. At the end of the in-depth investigation, the competent supervisory authority adopts a decision:

- If it finds a foreign subsidy creating a distortion, the competent supervisory authority imposes redressive measures on the undertaking in question (“decision with redressive measures”).
- If it finds a foreign subsidy creating a distortion, and the undertaking concerned offers commitments, which the competent supervisory authority deems appropriate and sufficient to mitigate the distortion, it binds the undertaking by decision to these commitments (“decision with commitments”).

If there is no foreign subsidy, or if there are no indications of possible or actual distortions in the internal market on a scale justifying intervention, it closes the case, and informs the undertaking concerned and the interested parties that took part in the proceeding, as well as all Member States and the Commission, if the Commission is not the competent supervisory authority. If the Commission as competent supervisory authority finds that a distortion is mitigated by the positive impact of the supported economic activity or investment, it closes the case by the same token.

4.1.6 *Redressive measures*

Redressive measures could be imposed to remedy the distortions caused by the foreign subsidy. Under EU State aid rules, State aid granted and not in line with EU State aid rules has to be reimbursed with interest to the Member State that granted it. This principle applied to the situation of foreign subsidies would mean that the financial benefit of such subsidies should be eliminated through redressive payments to the third country. In the case of foreign subsidies, however, it may be difficult in practice to establish that the foreign subsidy is actually and irreversibly paid back to the third country.

It may therefore be necessary to consider giving the competent supervisory authority a variety of alternative redressive measures. These could range from structural remedies and behavioural measures to redressive payments to the EU or the Member States. When determining the appropriate redressive measures, the specific features of the foreign subsidy and its distortive effect on the internal market would have to be taken into account. If for example a foreign subsidy facilitated an acquisition, structural remedies might be more appropriate than redressive payments.

Possible redressive measures, in the event that redressive payments to the third country are not suitable or feasible, include the following:

- Divestment of certain assets, reducing capacity or market presence, which might limit possible distortions in the internal market, in particular linked to foreign subsidies which are specifically granted for promoting activities in the internal market, drawing inspiration for example from the Rescue and Restructuring guidelines;³⁰
- Prohibition of certain investments; this might in particular be relevant if a foreign subsidy was granted for a specific investment;

³⁰ Communication from the Commission - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, p. 1.

- Prohibition of the subsidised acquisition;
- Third party access, for example to mobility apps for providers of transportation services or drawing inspiration from the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks;³¹
- Licensing on fair, reasonable and non-discriminatory (FRAND) terms. If e.g. an undertaking receives subsidies and obtains telecom frequencies or provide access to networks using such frequencies, the undertaking could be obliged to licence those frequencies to other undertakings;
- Prohibition of a specific market conduct linked to the foreign subsidy;
- Publication of certain R&D results, in a way that allows other undertakings to reproduce them, for instance drawing inspiration from the requirements for important projects of common European interest³², or set out in the Block Exemption Regulation 651/2014;³³
- Redressive payments to the EU or to Member States.

As the lack of transparency generally is a crucial issue, and in particular as regards the financial relations between third countries and public undertakings, reporting and transparency obligations for the future would apply in any case in which redressive measures are imposed. Such reporting and transparency obligations could e.g. draw inspiration from the Transparency Directive 2006/111/EC. Improved transparency can contribute to avoiding distortions in the future.

The undertaking concerned may also offer commitments to mitigate the distortion. If the competent supervisory authority considers those commitments sufficient, it could make them binding on the undertaking.

If an undertaking does not comply with the redressive measures imposed by the competent supervisory authority or with the commitments made binding upon it, the competent supervisory authority could, as a sanction for non-compliance, impose fines and periodic penalty payments.

The powers of the competent supervisory authorities to impose redressive measures would be subject to a limitation period of ten years, beginning on the day on which a subsidy is granted. Any action taken by the competent supervisory authority with regard to a foreign subsidy would interrupt the limitation period. After each interruption, the limitation period would start to run afresh.

³¹ Communication from the Commission - EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25, 26.01.2013, p. 1.

³² Communication from the Commission — Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.6.2014, p. 4.

³³ Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, last amended through Commission Regulation (EU) 2017/1084 of 14 June 2017, OJ L 156, 20.6.2017, p. 1.

4.1.7 *Supervisory authorities*

It is suggested that both the Commission and Member States designate supervisory authorities. Coordination mechanisms would be provided between the Commission and the competent national supervisory authority to ensure coherence and effectiveness of their respective enforcement actions. For a system such as that described in this module, shared competences among multiple enforcers provides the best assurance that the most distortive foreign subsidies are detected and effectively dealt with. Indeed, this would allow both the Commission and Member States to make use of their respective strengths to ensure that distortions caused by foreign subsidies are properly scrutinised within the EU.

Member States can draw from their direct knowledge of the operation of their domestic markets. However, in certain circumstances, foreign subsidies may have an impact on more than one Member State. In such cases, the Commission would be better placed to enforce Module 1, so as to ensure a coherent application of the rules across the EU, building on its experience in applying trade defence instruments as well as State aid rules.

Each national supervisory authority would be empowered to enforce Module 1 in its jurisdiction, defined as the territory of the respective Member State. The Commission would be competent for any foreign subsidy benefitting an undertaking in the EU, irrespective of whether it concerns the territory of one or more than one EU Member State. The Commission would also be exclusively competent to apply the EU interest test. Member States may provide input at the Commission's request, or at their own initiative. The Commission and Member States retain discretion, however, in deciding whether to investigate an individual case of a potentially distortive foreign subsidy.

This means that a foreign subsidy can be investigated by

- one single national supervisory authority; or
- several national supervisory authorities acting in parallel (if a foreign subsidy benefits economic activities in more than one Member State); or
- the Commission.

Cooperation and coordination mechanism

A system of shared enforcement would require effective cooperation mechanisms among the multiple enforcers. Cooperation between the Commission and national supervisory authorities could work similarly to the existing cooperation in antitrust, as set out in Regulation 1/2003.³⁴ This would be combined with a coordination mechanism between Member States and the Commission that allows for coherence and coordination in relation to the existence of a subsidy where necessary. More specifically with regard to the existence of a subsidy, national supervisory authorities would coordinate with the Commission during the preliminary review and the ensuing in depth investigation in order to ensure coherence in the implementation of the subsidy discipline.

³⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

It is suggested that as long as the Commission does not start an in-depth investigation, the national supervisory authorities remain empowered to continue their cases. However, as soon as the Commission would start an in-depth investigation of a foreign subsidy, it would obtain the exclusive power for it, and national supervisory authorities would need to suspend their cases. The national supervisory authorities could only continue their cases if the Commission closes its in-depth investigation administratively.

In order to ensure efficient enforcement, national supervisory authorities could ask the Commission to initiate a case; the latter would retain the power to accept or reject such a request. It may also be desirable to transfer a case from one or several national supervisory authorities to the Commission or vice versa. In particular, where two or more national supervisory authorities pursue a case concerning the same foreign subsidy³⁵, the Commission seems better placed to deal with the case. Such transfer could happen as long as a case is pending, and only if both the requesting and the requested authority agree.

The Commission and national supervisory authorities would also inform each other at the start of a preliminary review, as well as at the start of an in-depth investigation. They could share relevant documents with each other, including confidential information. During an in-depth investigation, the acting national supervisory authority has to seek the opinion of the Commission on whether the EU interest test is met. The Member State is bound to the Commission's view. Prior to adopting a decision with redressive measures or a decision with commitments following an in-depth investigation, the acting national supervisory authority consults the Commission and informs all other national supervisory authorities. In turn, the Commission involves national supervisory authorities in its decision making by giving them the possibility to issue an opinion on a draft decision (following an in-depth investigation). If the Commission or the national supervisory authorities have no concerns as regards the distortion of competition caused by a foreign subsidy and thus close a case, they inform each other. Such closure will not affect the competence of any of the supervisory authorities to continue or open the same case and come to a different conclusion. In this context, national supervisory authorities should ensure that their conclusion is reached in close cooperation with the Commission.

4.2 Foreign subsidies facilitating the acquisition of EU targets (Module 2)

4.2.1 Basic features

Module 2 is intended to specifically address distortions caused by foreign subsidies facilitating the acquisition of EU targets (as defined below in section 4.2.2.1). In short, it aims to ensure that foreign subsidies do not give an unfair advantage to their recipients when acquiring (stakes in) other undertakings and it is therefore narrower in scope than Module 1.

Foreign subsidies may give rise to a distortion of the internal market by facilitating the acquisition of EU targets. This could happen either (1) directly by providing a subsidy explicitly linked to a given acquisition to an undertaking or (2) indirectly by *de facto* increasing the financial strength of the acquirer, which in turn would facilitate an acquisition.

³⁵ E.g. if subsidy is granted to a parent company outside the EU, which has subsidiaries in Austria and Germany, in principle, both subsidiaries could have benefitted.

Under this Module, the competent supervisory authority would *ex ante* review planned acquisitions involving possible foreign subsidies under a compulsory notification mechanism. The review process would happen in two steps: a preliminary review phase and, where relevant, an in-depth investigation.

If the competent supervisory authority has, on the basis of a preliminary review, sufficient evidence that the acquiring company benefits from foreign subsidies facilitating the acquisition, it would be able to launch an in-depth investigation. If there are no sufficient elements justifying the initiation of the investigation in relation to the acquisition, the competent supervisory authority would not act further and close the case administratively.

If, at the end of the in-depth investigation, the competent supervisory authority finds that an acquisition is facilitated by foreign subsidies and distorts the internal market, it would have the following two possibilities: accept commitments by the notifying party which effectively remedy the distortion; or, as a last resort, prohibit the acquisition.

To ensure effective implementation, the competent supervisory authority would also have the right to *ex officio* review an acquisition which should have been notified by the acquirer but was not, including after it is completed. This review could ultimately result in the prohibition of the acquisition or, if it is already completed, in its unwinding.

4.2.2 Scope of Module 2

The purpose of Module 2 is to address distortions caused by foreign subsidies facilitating the acquisition of EU targets.

Section 4.2.2.1 defines the concepts of ‘acquisition’, ‘EU target’ and ‘potentially subsidised acquisitions’ for the purpose of Module 2. Section 4.2.2.2 describes the two potential triggers for the compulsory prior notification. Finally, section 4.2.2.3 presents thresholds intended to tailor the scope of Module 2 to the most problematic acquisitions.

4.2.2.1 Definitions

Acquisition

For the purpose of this Module, an 'acquisition' would be defined as the:

- Acquisition – directly or indirectly – of control of an undertaking,³⁶ or the
- Acquisition – directly or indirectly – of at least [a specific percentage] % of the shares or voting rights or otherwise of “material influence” in an undertaking.³⁷

³⁶ Guidance on the notion of “control” can be found in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, p. 1.

³⁷ The purpose of this second option is to cover the acquisition of participations, which may confer material influence over a firm, without having to conclude on the existence of control. However, it would have to be ensured to properly define “material influence” to avoid confusion about the need to notify. In that regard, there may be a number of “precautionary” notifications by firms wishing to have legal certainty.

Module 2 therefore includes the acquisition of significant but possibly non-controlling minority rights or shareholdings.

EU target

It is proposed to define as ‘EU target’ any undertaking established in the EU and meeting a certain turnover threshold in the EU, but other criteria could also be considered (see section 4.2.2.3).

Potentially subsidised acquisition

Potentially subsidised acquisitions would be defined as planned acquisitions of an EU target where a party has received a financial contribution by any third country government (as detailed in the definition of foreign subsidies in the Annex I).

It is proposed to limit the relevant period for having received such a financial contribution to the last [three] calendar years prior to the notification and financial contributions granted after notification and up until one year following the closing of the acquisition in case the financial contribution is granted later. An example of the latter situation is a situation where there is a political commitment to provide such a financial contribution in the coming months.

4.2.2.2 *Ex ante* notification obligation

The notification requirement would cover potentially subsidised acquisitions, i.e. where a notifying party has received a financial contribution by any third-country authority in the past three years or expects such contribution in the coming year (as defined above).

The notifications would therefore focus on the potentially problematic acquisitions, namely where a financial contribution from a third-country authority facilitates an acquisition.

At the same time, limiting the scope of the notification obligation to potentially subsidised acquisitions would rely on a degree of self-assessment by undertakings. They would need to determine to what extent they have received financial contributions from third-country authorities in order to know if they need to notify an acquisition. This would carry the risk of error or circumvention to the extent that undertakings may not be aware of such public support or willing to disclose it.

However, in contrast to the definition of ‘foreign subsidy’, the notion of ‘financial contribution’ from third-country authorities (provided in Annex I as part of the definition of foreign subsidies) should be more objective and less controversial as it leaves the judgement of whether the contribution qualifies as subsidy open. The definition is also aligned with other commonly used concepts which also refer to financial contributions (for instance under WTO rules and EU State aid rules). It seems therefore reasonable to assume that the parties would be aware if they have received any form of financial contribution from a third-country authority in the last three years (or would do so in the coming year).

Moreover, the competent supervisory authority would have strict (and thus deterrent) tools to deal with cases where acquirers would fail to notify notifiable acquisitions. In particular, acquirers failing to notify would risk significant fines and the obligation to unwind the transaction.

4.2.2.3 Thresholds

The framework described above may include thresholds to better target the potentially problematic cases of subsidised acquisitions. The actual value of such thresholds would depend in particular on the options chosen regarding the EU target, the trigger for notification and the appropriate competent supervisory authorities (section 4.2.7).

First, the EU target - any undertaking established in the EU – could be defined by reference to various thresholds to ensure that all acquisitions of interest are caught (i.e. a transaction satisfying any of the thresholds would be examined):

- a qualitative threshold referring to all assets likely to generate a significant EU turnover in the future³⁸ and/or a quantitative threshold set with reference to the value of the transaction,
- a quantitative threshold based on turnover, which could be set at for example EUR 100 million, but other values, thresholds or alternative approaches could also be envisaged. In general terms, a lower turnover threshold widens the scope of any new instrument and risks covering a higher number of small, potentially less relevant acquisitions. Conversely, a higher turnover threshold reduces the administrative burden of a prior notification system but may no longer cover potentially relevant acquisitions.

Whatever threshold is chosen will have to meet the balance between effectiveness and efficiency.

Second, the trigger of potentially subsidised acquisitions could be limited to acquisitions facilitated by a certain volume of financial contribution from third-country authorities. This could for instance be the case where the total amount of financial contribution received by the acquiring undertaking in the three calendar years prior to the notification is in excess of a certain amount or of a given percentage of the acquisition price. Being a triggering event, these criteria need to be clearly defined.³⁹

Finally, the value of each of these thresholds is likely to depend on the supervisory authority entrusted with the implementation of Module 2. The thresholds mentioned above could apply if the Commission were exclusively competent to implement Module 2. However, lower thresholds may be more appropriate in the case where competence would be shared with or exclusive to Member States (see section 4.2.7), as a reflection of the smaller sizes of Member State economies compared with the overall EU economy.

³⁸ This could be set having regard to the interest in examining transactions affecting companies with critical assets or with low turnover but high growth or technology development prospects, which may be of particular economic or strategic interest.

³⁹ As above, the purpose of this threshold of financial contribution would be to adapt the scope of the instrument. In particular, a lower financial contribution threshold would ensure that the scope of the instrument is sufficiently broad to cover all possibly problematic subsidised acquisitions. Conversely, a higher financial contribution threshold for Module 2 would ensure that the administrative burden of a prior notification system is limited to those few potentially subsidised acquisitions which would be most likely to be problematic.

In addition to the above quantitative thresholds, certain qualitative criteria might be added to allow better balance between capturing potential distortions and limiting the burden on the companies and supervisory authorities.

4.2.3 Assessment of distortions related to subsidised acquisitions

Subsidised acquisitions may distort the level playing field with regard to investment opportunities in the internal market. An example of such a distortion is the possibility for a subsidised acquirer to outbid competitors for the acquisition of an undertaking. Such outbidding distorts the allocation of capital and undermines the possible benefits of the acquisition for example in terms of efficiency gains.

The legal standard under which the competent supervisory authority would assess the acquisition would be the distortion of the internal market through the facilitation of an acquisition by foreign subsidies. In other words, a competent supervisory authority would need to show that an acquisition would be facilitated by a foreign subsidy as well as the resulting distortion of the internal market.

Foreign subsidies may facilitate an acquisition either directly or de facto. Subsidies directly facilitating the acquisition are subsidies provided for the acquisition (where the link to the acquisition can be established). In view of the serious harm they cause to the level playing field for investments, foreign subsidies directly facilitating acquisitions would normally be considered to distort the internal market.

A de facto facilitation would arise in cases where foreign subsidies reinforce the financial strength of the acquirer. In case of de facto facilitation, subsidised acquisitions have to be examined in more detail to assess whether they actually or potentially distort the level playing field in the internal market.

The general lack of transparency about foreign subsidies and the complexity of commercial reality may make it difficult to unequivocally identify the distortion due to specific subsidised acquisitions. To determine such distortion, it appears therefore necessary to use a collection of indicators related to the subsidised acquisition and the relevant market situation. A non-exhaustive list of relevant indicators could include the following criteria:

- The relative size of the subsidy in question: the higher the amount of a subsidy in relative terms, the more likely it is to have a negative impact on the internal market.
- The situation of the beneficiary: e.g. the larger the EU target or the acquirer, the more likely that the subsidised acquisition is distortive. Similarly, the more production capacity of the EU target or the acquirer is unutilised, the more likely a subsidised acquisition creates distortions.
- The situation on the market(s) concerned: e.g. subsidised acquisitions where the EU target is active in markets with structural excess capacity are more likely to cause distortions than others. Similarly, subsidised acquisitions where the EU target is active in markets with a high degree of concentration are more likely to cause distortions than others. Likewise, subsidies in fast growing high tech markets may be more likely to cause distortions. The existence of competing offers is one aspect of the assessment

of whether there is distortion in the internal market, without in itself being determinative.

- The level of activity in the internal market of the parties concerned: subsidised acquisitions where the parties, notably the target company, have limited activities in the internal market in comparison with their global activities are less likely to distort the internal market.

Furthermore, consideration will also be given to the possibility that the competent supervisory authority could take into account whether the beneficiary has privileged access to its domestic market (through measures equivalent to special or exclusive rights) leading to an artificial competitive advantage that could be leveraged in the EU internal market and thereby exacerbates the distortive effect of any subsidy. If the competent supervisory authority establishes that an acquisition has directly or de facto been facilitated by foreign subsidies and distorted the internal market, it may impose redressive measures as explained below (see section 4.2.6).

4.2.4 *EU interest test*

As under Module 1, the established distortion would be balanced against the positive impact that the investment might have within the EU or on public policy interests recognised by the EU (see section 4.1.4).

4.2.5 *Procedure*

Module 2 establishes a two-step notification system.

In a first step, acquirers would be obliged to file a short information notice with the competent supervisory authority. This notice would contain the basic information needed for the competent supervisory authority to identify possibly problematic operations involving foreign subsidies. This could for instance include, for each of the acquiring and target undertakings, some or all of the below elements:

- legal information, including ownership and governance;
- information on financing;
- turnover information for the last three years (in the EU and worldwide);
- description of the business (in the EU and worldwide);
- financing of the transaction;
- main sources of overall financing of the acquirer;
- financial contributions from third-country authorities received for the purpose of the transaction;
- any financial contribution from third-country authorities received in the past three years;
- information on alternative prospective acquirers of the target in the last three years, including any bid that has been received as part of the sale process of the target.

A brief summary of the proposed acquisition could be published for stakeholders to comment upon within a set timeline.

In the context of a prior notification system, there would be a so-called standstill period: acquirers would not be able to close the transaction for [x] working days after receipt of the complete notification by the competent supervisory authority. To preserve the integrity of the investigation and prior notification system, the standstill period could be extended as needed to the extent the parties would not provide accurate information in a timely manner.

During that time, the competent supervisory authority would review the information and could decide, in a second step, to open an in-depth investigation, if it had sufficient evidence tending to show that the acquiring company could have benefitted from foreign subsidies facilitating the acquisition.

If the competent supervisory authority does not open an in-depth investigation, the parties would be allowed to close the transaction at the end of the initial post-notification standstill period, without prejudice to other legal obligations (such as EU merger control or FDI screening, if applicable). Moreover, at the duly justified request of the acquirer, the initial standstill period could be waived – or the acquirer allowed to close the transaction without having to wait for the end of the period – by the competent supervisory authority.

If the competent supervisory authority opens an in-depth investigation, the standstill period would be prolonged: the parties would not be able to close the transaction until [x] working days after receipt of complete information by the competent supervisory authority. As in the preliminary phase, the standstill period could be extended as needed to preserve the integrity of the investigation and prior notification system.

Following the in-depth investigation, three outcomes would be possible:

- Firstly, the competent supervisory authority could conclude that there is no distortion (through facilitation of an acquisition) and decide not to object to an acquisition.
- Secondly, the competent supervisory authority could adopt a conditional clearance decision making the commitments offered by the acquirer legally binding. Such remedies would need to effectively remedy the distortion arising from the facilitated acquisition.
- Thirdly, the competent supervisory authority could adopt a decision prohibiting the proposed transaction, if it finds that foreign subsidies facilitate the acquisition and give rise to a distortion of the internal market that cannot be remedied with commitments.

In order to ensure the effectiveness of the compulsory prior notification system and to avoid circumvention, the competent supervisory authority could, if the acquirer does not notify a notifiable acquisition, open an *ex officio* investigation of an acquisition falling in the scope of Module 2.

The competent supervisory authority could also start an administrative procedure for violation of procedural rules, for instance if there are indications that the parties' submissions included misleading or incomplete information, if there are indications that binding commitments were not correctly implemented or in case a transaction was not notified, but should have been. The sanctions for a procedural infringement should have a deterrent effect.⁴⁰

⁴⁰ These fines are penalties for procedural infringements and their amount may thus exceed the determined amount of subsidisation.

The procedure would therefore establish the necessary mechanisms to gather the relevant information, in the form of strict sanctions for supplying incomplete or incorrect information, and the standstill obligation preventing the acquisition from being implemented before the Commission makes a decision.

4.2.6 *Redressive measures*

The acquirer may offer adequate commitments to remedy the distortions caused by the foreign subsidies, which the competent supervisory authority would make binding on the acquirer in its decision if it considers them effective.

In this respect, section 4.1.6 on the redressive measures under Module 1 would in principle apply *mutatis mutandis*. There may however be some differences between the two modules in this respect. Redressive payments and transparency obligations may in practice be less likely to be effective redressive measures under Module 2. For that reason, the focus of commitments is likely to be on structural remedies.

4.2.7 *Supervisory authorities*

The present section considers the institutional framework to address the impact of foreign subsidies in the internal market. It is discussed to what extent the competences may be placed at EU level or at Member State level or shared between the two levels.

An ex ante enforcement system for acquisitions based on notifications, is more complex to share across multiple enforcers than systems such as the one set up under Module 1, notably due to significant time constraints. It would require to set up multiple administrative mechanisms to deal with notifications in short deadlines, to define appropriate thresholds for each enforcer and to establish complex referral systems to operate when the thresholds do not lead to appropriate case allocation. Consistency among enforcers may also become more difficult to achieve.

In view of the above, it is suggested that the Commission could be made exclusively responsible for enforcing Module 2 with prior notification of acquisitions. Such a centralised system at EU level would lead to lower overall enforcement costs, both for public authorities and companies, and increased legal certainty. Notably, such a system would ensure a one-stop-shop control across the EU for acquisitions above certain thresholds and avoid that for a single subsidised acquisition companies may have to deal with several Member State authorities at the same time. It would also avoid that Member States would need to reproduce 27 similar centralised ex ante administrative settings, in particular when there is not yet sufficient experience to determine how many acquisitions would prove to be negatively affected by foreign subsidies. Member States would be involved through an information mechanism at the start and during the Commission procedure and would be consulted on final decisions, following in-depth investigations.

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, ensuring an effective system of foreign subsidy control with overall limited administrative public enforcement costs.

4.3 Foreign subsidies in public procurement (Module 3)

4.3.1 Introduction

The establishment of a single market for public procurement is one of the key achievements of the internal market. EU-wide publication of tenders ensures transparency and creates market opportunities for EU and non-EU companies alike. The EU public procurement rules safeguard fair conditions for all economic operators competing for projects in the EU procurement market, and ensure a level playing field for the access to public contracts.

In the public procurement procedure, award criteria, for example social or environmental criteria, technical specifications and/or contract performance conditions can contribute to ensuring a level playing field.

The public procurement framework relies on other EU instruments to counter any distortion of competition and maintain the level playing field in practice. So, for example, State aid control ensures that bidders do not benefit from State aid that is incompatible with the EU internal market and that might distort competition in a specific procurement procedure.

This module, to be implemented by an appropriate legal instrument (see section 4.3.3.3), ensures that foreign subsidies can be addressed in individual public procurement procedures. EU public buyers would be required to exclude from public procurement procedures those economic operators that have received distortive foreign subsidies. This new ground for exclusion could apply both to the procedure in question but may also lead to exclusion from subsequent procurement procedures, provided that certain conditions are met. The scope of this ground for exclusion will be defined in the light of the EU's international obligations under the WTO Government Procurement Agreement (GPA) and various bilateral agreements providing for access to the EU procurement market.

4.3.2 Distortions by foreign subsidies in the context of public procurement procedures

A review specifically dedicated to distortions in public procurement would aim at preserving the level playing field in that specific area. Therefore, while the existence of the foreign subsidy (the existence of the financial contribution and benefit) would be determined pursuant to the same principles as those described in Annex I to this paper, the absence or presence of the effect of the foreign subsidy would be assessed in relation to a specific procurement procedure. It is necessary to determine whether the foreign subsidy facilitates the participation in the public procurement procedure, i.e. whether it enables the economic operator benefitting from the subsidy to participate in the procedure, to the detriment of unsubsidised undertakings. Thus, foreign subsidies in procurement may give rise to a distortion of the procurement procedure either directly, by explicitly making a link between the subsidy and a given procurement project or indirectly, by *de facto* increasing the financial strength of the recipient. Where this enables the recipient to submit an offer that would otherwise – without the subsidy – be economically less sustainable, especially in case of bidding significantly below market price or below cost, a distortion may be presumed. In other cases, the distortion may be examined according to the principles and criteria outlined in section 4.1.3 to the extent

they are relevant and capable of demonstrating that the foreign subsidy facilitates the participation in the public procurement procedure.⁴¹

4.3.3 Procedure

4.3.3.1 Initiation of the procedure

Economic operators participating in public procurement procedures, would have to notify to the contracting authority when submitting their bid whether they, including any of their consortium members, or subcontractors and suppliers have received a financial contribution within the meaning of Annex I within the last three years preceding the participation in the procedure and whether such a financial contribution is expected to be received during the execution of the contract.

In order to address only those foreign subsidies in public procurement that might cause distortions of the procurement procedure, and to limit the administrative burden for public buyers and the competent supervisory authorities, thresholds and additional conditions for notifications could be introduced, e.g.:

- The relevant subsidy period could be limited, e.g. 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.
- Notification could be required only above a certain foreign financial contribution value.
- A threshold could be defined that is higher than the thresholds for the application of the Public Procurement Directives.

The purpose of introducing those conditions and thresholds would be to focus the instrument on the most relevant cases. In general terms, a lower notification threshold and the absence of the conditions listed above would widen the scope of the instrument and risk covering a higher number of potentially less relevant participations in public procurement procedures. Conversely, a higher notification threshold including the conditions listed above reduces the administrative burden of a prior notification system but may no longer cover all potentially relevant procedures. For subsidised bidding in public procurement procedures falling outside the scope of Module 3, the possibility remains to address this conduct under Module 1 to the extent that it causes distortions in the internal market.

In general, the notification should contain the necessary information to assess whether the economic operator benefits from foreign subsidies in the procurement procedure. A complete notification will have to contain at least the following elements:

- legal information, including ownership and governance of the tenderer, any consortium member and those subcontractors and suppliers having received foreign financial contributions;
- main sources of overall financing of the tender;
- total amount of foreign financial contributions received in the past 3 years;

⁴¹ In order to ensure a uniform practice of assessment of distortion by the contracting authorities, a uniform methodology/guidance to the contracting authorities is envisaged.

- foreign financial contributions received specifically for the purpose of participation in the public procurement procedure;
- foreign financial contributions that will be received during the expected execution of the contract.

Having examined the completeness of the notification, the contracting authority would transmit the notification to the competent supervisory authority (see below section 4.3.3.2), to investigate the information and assess the existence of a foreign subsidy. For transparency reasons the notifications would be published.

Strict and deterrent tools should be put in place to deal with cases where economic operators fail to comply with the notification obligation or where they submit incorrect information. In particular, failure to comply with the notification obligation could be sanctioned by the contracting authority with significant fines and in extremis an exclusion from the procurement procedure or a termination of an ongoing contract.

A prior notification obligation in case of subsidised participations in public procurement procedures would require a degree of self-assessment by economic operators. They will need to determine to what extent they are beneficiaries of foreign financial contributions in order to ascertain whether there is a requirement to notify the submission of the bid, which involves a financial contribution. Such a self-assessment carries a significant risk of error and of deliberate circumvention by economic operators, as they may not be aware of the existence of a financial contribution or unwilling to disclose their existence to the contracting authorities.

Third parties and competitors are therefore entitled to inform the contracting authority that a notification should have been made in the procedure. These submissions have to be substantiated and provide *prima facie* evidence for the necessity of notification.

4.3.3.2 Investigation by the competent supervisory authority and interplay with the ongoing procurement procedure

It is suggested similar to Module 1 that both the Commission and the national authorities are granted powers and that the system also provides for coordination in order to ensure coherence. Cooperation between the Commission and national supervisory authorities could work similarly to the existing cooperation in antitrust pursuant to Regulation 1/2003.⁴²

Upon receipt of a complete notification, the contracting authority transmits the notification to the competent supervisory authority at Member State level to investigate the information and assess the existence of a foreign subsidy. It may also alert the national supervisory authority in situations where it has sufficiently plausible indications that a tenderer received a foreign subsidy which it did not notify.

The investigation will be in 2 steps with a preliminary review and an in-depth investigation. In a preliminary review, the national supervisory authority will seek to obtain the necessary information about the existence of a foreign subsidy and the conditions upon which it has been granted. If, in the context of the preliminary review, the national supervisory authority

⁴² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

concludes that no foreign subsidy exists, it informs the contracting authority of this conclusion and that it does not intend to start an in-depth investigation. If, however, the national supervisory authority concludes in the preliminary review phase that a foreign subsidy may exist, it opens an in-depth investigation to confirm the existence of a foreign subsidy. In both cases, the national supervisory authority informs the Commission, the contracting authority as well as all the competent supervisory authorities of the other Member States thereof through a summary notice.

At the end of the in-depth procedure, the national supervisory authority can either arrive to the conclusion that there is no foreign subsidy in the procurement procedure or it can decide that a foreign subsidy exists (see section 4.3.3.3). However, in both cases and prior to communicating this conclusion to the contracting authority, the national supervisory authority informs the Commission on a draft decision, thus ensuring that the national authority's decision is reached in close cooperation with the Commission.

The review has to ensure that public procurement procedures are delayed as little as possible. Therefore, strict time limits would be introduced, such as a maximum of [15] working days for the preliminary review by the national supervisory authority and [no more than 3 months] for an in-depth review. If the Commission, when informed on the final decision, disagrees with the assessment of the national supervisory authority, the deadline for the in-depth review is extended.

During the investigation, the contracting authority is barred from awarding the contract to the investigated economic operator⁴³. Otherwise the procurement procedure is pursued. This has the following consequences:

- Upon notification and its transmission to the competent supervisory authority the contracting authority should pursue the evaluation of the offers.
- It can establish the economic operator to whom the contract would be awarded on the basis of the evaluation not taking into account a possible distorting foreign subsidy.
- Should this economic operator not be an economic operator under investigation, the contracting authority can award the contract and conclude the procurement procedure. In this case it informs the competent supervisory authority.
- Should the economic operator to whom the contract is to be awarded be an economic operator under investigation, the procurement procedure will have to be suspended until the competent supervisory authority has conducted its review of the foreign subsidy and transmitted its opinion to the contracting authority.

4.3.3.3 Redressive measures

If the supervisory authority in its review confirms that the economic operator has received a foreign subsidy, the contracting authority would determine whether that subsidy has distorted

⁴³ It could be envisaged to lift the suspension under specific, clearly defined circumstances, allowing the contracting authority to continue the procurement procedure despite the ongoing review. Special circumstances could be linked, in particular, to situations of urgency or to financial risks linked to necessary funding for a project. In such cases, the interests of the investigation will have to be weighed against the risks associated with potential consequences, financial or otherwise, caused by the delays in the procedure. Guidelines could be issued detailing clear rules for lifting the suspension.

the public procurement procedure. If so, it will exclude this economic operator from the ongoing procurement procedure.

It may also be envisaged to introduce an exclusion of such economic operator from future procurement procedures for a maximum of [3] years. During that period, the economic operator will have the opportunity demonstrate that it no longer benefits from a distortive foreign subsidy when participating in a public procurement procedure and in this case it can participate in future procurement procedures.

More specifically:

- If the supervisory authority reaches the conclusion that there is no foreign subsidy in the procurement procedure, it will communicate this conclusion to the contracting authority by decision. In this case, the economic operator concerned will not be excluded from the public procurement procedure by the contracting authority (unless the contracting authority finds another ground for exclusion, different from the existence of a distortive foreign subsidy, under the EU public procurement legislation).
- On the other hand, if the supervisory authority reaches the conclusion that there is a foreign subsidy, it will communicate this conclusion to the contracting authority, which then determines, on the basis of a uniform methodology,⁴⁴ whether that subsidy has distorted the public procurement procedure and, if so, imposes redressive measures on the subsidised operator. The redressive measures for procurement procedures consist of the exclusion of the subsidised bidder from the ongoing public procurement procedure and potentially also the exclusion of the subsidised bidder from future public procurement procedures before that authority for a certain time.

The introduction of this exclusion ground aims at ensuring a level playing field between tenderers profiting from State aid and those profiting from foreign subsidies. The current public procurement framework does not contain a specific exclusion ground for the recipients of State aid incompatible with EU rules.⁴⁵ In order to ensure a non-discriminatory and equal treatment the effects of this exclusion ground for undertakings subject to State aid procedures will have to be considered.

The decision would be subject to remedies.

4.3.4 Foreign subsidies in procurement pursuant to intergovernmental agreements

Certain procurements, especially for large infrastructure projects, might be organised under intergovernmental agreements with countries that are not subject to the EU procurement regime. Tender procedures under such agreements are exempted from EU public procurement

⁴⁴ Such a methodology could be set out in guidance designed to ensure a uniform practice of assessment of distortion throughout the EU.

⁴⁵ As noted in section 3.3, the current EU rules are limited to the possibility of rejection of an abnormally low tender in situations where the low price is due to State aid.

legislation under the conditions laid down in Article 9 of Directive 2014/24/EU.⁴⁶ The intergovernmental agreement must be intended for the joint implementation or exploitation of a project by their signatories, and the procurement regime of the agreement has to be compatible with the EU Treaty. As for procurements covered by the procurement directives, there is no specific scrutiny of foreign subsidies and their distortive effect on the procurement under such agreements. To ensure a level playing field also for procurements under such agreements it is advisable to apply the suggested approach also to procurements under those agreements. Due to the specific nature of such agreements, the competent supervisory authority in these cases should be the Commission.

5 FOREIGN SUBSIDIES IN THE CONTEXT OF EU FUNDING

5.1 Problem definition

Economic operators should compete for EU financial support on an equal footing across the different Union instruments (concerning internal and external policies) and implementation modes. EU funding should not contribute to favour companies that have received distorting foreign subsidies vis-à-vis other companies.

Under shared management, some Member States and tenderers have brought to the attention of the Commission particularly low-price offers submitted by non-EU companies in procurement procedures. The issues raised in the context of public procurement procedures as outlined in sections 3.3 and 4.3 are also relevant in shared management.

The appropriate means to address the possible distortion of the level playing field for EU funding through foreign subsidies in award processes needs to be carefully assessed depending on the specific nature of the instrument and of the underlying costs compared to the expected impact of the measures.

In the field of procurement, the contracting authority seeks offers for goods and services from economic operators on the market. Foreign subsidies favouring certain bidders may distort the procurement process. Beyond the actual award, if affected by foreign subsidies, any funding disbursed through procurement might distort competition and undermine the level playing field in the internal market.

Economic operators established in the EU that are owned or ultimately controlled by a non-EU company or a foreign government are entitled to participate in EU funding procedures (unless they are in an exclusion situation). Undertakings established outside the EU also have the right to participate in the procurement procedures launched by the EU Institutions if an agreement with that third country in the field of public procurement grants them the right to do so.

In both scenarios, due to foreign subsidies, those economic operators may either submit an abnormally low bid or have the possibility anyway to underbid other bidders, thereby

⁴⁶ And Article 20 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.

obstructing opportunities for competitors. The risk that foreign subsidies may distort procurement processes, therefore, is present irrespective of the place of establishment of the economic operator.

In contrast to procurement, in grant award procedures the Union contributes to a project or a programme that implements the Union policy objectives. These activities generally concern support to NGOs, public or quasi-public authorities, basic research and development activities, etc. via a contribution designed to partially reimburse costs incurred by entities active in non-market or pre-market activities. For EU funds implemented under indirect management the EU entrusts the budget implementation to a variety of partners, amongst which are third country public law bodies and international organizations including international finance institutions. While the objective should be that all means of disbursement of Union funds should be subject to equivalent measures to avoid the distortive effects of foreign subsidies, some entrusted entities are subject to certain governance constraints and may therefore be unable to fully implement EU-specific policies.

Therefore, at this stage the outline of possible measures is most developed as regards procurement, where the issue of effects on fair competition is most acute and where considerable common ground exists with general procurement considerations (Module 3 above).

Stakeholders are also invited to comment on how the considerations relating to foreign subsidies as provided for in this White Paper could potentially be addressed as regards grants (in any management mode) or indirect management.

5.2 Framework and measures to fill the gap

5.2.1 Direct management

5.2.1.1 Procurement

The rules on access to procurement set out in the Financial Regulation apply to all the EU Institutions implementing the EU budget.⁴⁷

Where the multilateral Agreement on Government Procurement ('GPA') concluded within the World Trade Organization applies, a procurement procedure will be open to the economic operators established in the countries that have ratified said agreement, under the conditions laid out therein. The GPA grants access to certain procurement procedures launched by the Commission, the European External Action Service and the Council on their own account.

Entities established in certain third countries may be granted access to EU funding through special or bilateral agreements.⁴⁸ Economic operators established in the countries under the European Economic Agreement (EEA) benefit from full access to EU procurement.

⁴⁷ These rules are also reflected in the model tender specifications published on budgweb to be used by all Commission services.

⁴⁸ Pursuant to Article 176(1) of the Financial Regulation, 'participation in procurement procedures shall be open on equal terms to all natural and legal persons within the scope of the Treaties and to all natural and legal persons established in a third country which has a special agreement with the Union in the field of public

The EU budget should be spent in accordance with the principle of sound financial management: each economic operator should have the possibility to make the best offer for the EU budget and compete for EU funding on an equal footing.

For EU procurement in direct management, the Financial Regulation provides that the same standards as those imposed on contracting authorities covered by the Procurement Directives apply. A legal instrument adopted to specifically address the issue of distortive foreign subsidies would also be mirrored for procurements by EU institutions or be replicated in the Financial Regulation. Some deviations to the above (e.g. regarding rules on nationality and origin) apply to procurement in EU external action.

The issue of foreign subsidies should be addressed by adapting the exclusion grounds within the revised legal framework applicable to the EU Institutions. As a consequence, a tenderer having received distortive foreign subsidies should be excluded from ongoing and future procurement procedures for a certain period of time. A system of prior notification obligation should be implemented for specific type of contracts (e.g. above certain thresholds or in specific sectors – see below). When submitting their bid, all tenderers would have to notify along with their offer, whether they, including any consortia members, subcontractors or suppliers, have received a financial contribution within the meaning of Annex I within the last three years preceding the participation in the procedure and whether such a financial contribution is expected to be received during the execution of the contract. As a general rule, the procedural steps should be appropriately adapted to those foreseen for procurement by national contracting authorities in section 4.3 above.

Where a foreign subsidy is found to exist, it will then be assessed whether the foreign subsidy distorts the procurement procedure, in which case the tenderer is excluded from the procedure.

Furthermore, in the case of substantial expenditure, high-tech, capital-intensive or fast-growing markets, contracting authorities may conduct preliminary market consultations. The tool is already provided for by the Financial Regulation⁴⁹ and should be used to collect information about the markets and its key players. That would in turn allow the contracting authority to tailor the procedure and prevent potential distortions that foreign subsidies may bring about.

5.2.1.2 Grants

Grants are direct financial contributions from the EU budget awarded to a third party engaged in activities that serve Union policies.

Depending on the nature of the programme, rules for grants usually contain conditions for the participation of third country entities. For example, eligibility for funding is regularly subject to establishment in an EEA/EFTA country or in a country that has concluded a specific agreement with the EU.

procurement under the conditions laid down in such an agreement. It shall also be open to international organisations’.

⁴⁹ See Article 166(1) of the Financial Regulation.

Thus, applicants established in the EU and in third countries, where applicable, compete for grants.

Issues stemming from foreign subsidies may be tackled through the exclusion criteria in a manner consistent with what is provided for procurement under section 5.2.1.1. When submitting their proposal, applicants should notify the granting authority if they have received a foreign subsidy. Thresholds similar to those under consideration in section 4.3.3.1 could apply⁵⁰.

The authorising officer in charge of the procedure should transmit the notification to the supervisory authority to assess the existence of a foreign subsidy. Procedural time-limits will be necessary to ensure the efficiency of the process. In case the supervisory authority has issued a decision on the existence of a distorting foreign subsidy, the question whether the foreign subsidy distorts or is likely to distort the grant procedure would need to be addressed.

By way of example, at the moment of their application for a EU grant, applicants submitting budgets with costs should declare whether they have received a financial contribution within the meaning of Annex I in the previous three years preceding the participation in the procedure and whether such a financial contribution is expected to be received during the execution of the contract. Where a foreign subsidy is found to exist, it will then be assessed whether the foreign subsidy distorts the award procedure, in which case the applicant is excluded from the procedure.

Adaptations to the system outlined above could be considered for scenarios affecting grant awards, such as to research consortia with a majority of EU participants.

5.2.2 *Shared management*

5.2.2.1 Procurement

Under shared management, the responsibility for the implementation of the EU budget is shared between the Commission and the Member States.

The biggest funds are currently the funds for the common agriculture policy (European Agricultural Guarantee Fund and European Agricultural Fund for Rural Development⁵¹) and the European Structural and Investment Funds ('ESI Funds').

The ESI Funds are the key investment tool of the EU, with some EUR 350 billion available for the period 2014-2020 under Cohesion Policy (from the European Regional Development Fund 'ERDF', the Cohesion Fund and the European Social Fund) to support economic catching up and competitiveness in a social, inclusive and environmentally-friendly way.

The use of the ESI Funds in the current programming period is governed by the Common Provisions Regulation⁵² ('CPR') and related Fund-specific regulations. Similar programmes

⁵⁰ The below conditions are applied mutatis mutandis from the procurement section in the White Paper. However, grants are subject to the co-financing principle, which require financial contributions from third parties in a number of cases. In such cases, subsidies need to be assessed taking into account this specific requirement in the award procedure.

⁵¹ EAFRD is a part of ESI Funds.

are foreseen for the next Multi-annual Financial Framework period 2021-27; in addition, the European recovery from the economic crisis provoked by the COVID-19 pandemic will be supported by new programmes funded from Next Generation EU and subject to shared management (the Recovery and Resilience Facility, and REACT EU).⁵³

Under shared management, the participation of companies profiting from foreign subsidies to projects co-financed e.g. by the ERDF or the Cohesion Fund, mostly comes up in the context of public procurement procedures, where a public authority which is the beneficiary of the EU funding launches a tender e.g. for a major infrastructure investment. Such procedures are subject to Member States public procurement rules implementing the Directive 2014/24/EU. Around half of the cohesion policy Funds, representing more than EUR 200 billion (with national co-financing) in the current financing period, are deployed by national and regional authorities via public procurement procedures.

The issues raised in the context of such public procurement procedures conducted by national authorities are those outlined in sections 3.3 and 4.3 and the measures put in place to address foreign subsidies under the generally applicable public procurement rules should equally apply to prevent that EU funding deployed through procurement contributes to distortions in the internal market.

5.2.2.2 Grants

The same principles as in section 5.2.1.2 would apply *mutatis mutandis* to grants awarded under shared management.

5.2.3 *Indirect management*

For EU funds implemented under indirect management the EU entrusts the budget implementation to various Implementing Partners, amongst which are third country public law bodies and international organizations including international finance institutions, provided that they ensure a verified equivalent level of protection of the EU budget. An increasing amount of EU funding is distributed via budgetary guarantees to mobilise private investment (e.g. EFSI, InvestEU, EFSD). The recovery package further enhances these instruments and, under InvestEU, proposes to invest in key value chains crucial for Europe's future resilience and strategic autonomy. Relevant governance bodies and secondary legislation will set any necessary requirements relating to the control of intermediaries (funds, special purpose vehicles and others), in full respect of the legal framework. Such requirements could potentially include the issues related to the receipt of foreign subsidies.

There is strong interest to ensure that when it comes to external funding (outside of the EU) the rules of international financial institutions that implement projects supported by the EU

⁵² Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p. 320.

⁵³ Cf. Commission Communication 'Europe's moment: Repair and Prepare for the Next Generation', https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940.

budget, like EIB or EBRD, mirror the approach to foreign subsidies outlined in this White Paper.

In cases where implementing partners benefit from EU financial support, they could be called to enhance their procurement policies in order to deal with abnormally low bids, that may result from foreign subsidies and to regularly report to the European Commission on how they address in practice such cases. In parallel to the public consultation triggered by this White Paper, the Commission will enter into dialogue with such partners to this effect. The implementation of EU policy objectives by some entrusted entities may require specific arrangements given their governance constraints.

6 INTERPLAY WITH OTHER EU AND INTERNATIONAL INSTRUMENTS

As described in the gap analysis, existing EU and international instruments, on the one hand, and the new measures on foreign subsidies, on the other, may overlap. It is therefore important to determine the relation and interaction between the different instruments.

The legal basis of any proposal for legal instruments on foreign subsidies will depend on their purpose and specific content. Any new instrument would in any event be subject to the full respect of the Treaties (in particular compliance with fundamental Treaty freedoms, such as the freedom of establishment where the undertaking is established in the EU – Articles 49 and 54 TFEU – and the free movement of capital between Member States and third countries, protected by Article 63 TFEU). It will also comply with the EU's international obligations (in particular, those contained in the WTO General Agreement on Trade in Services (GATS), the WTO Government Procurement Agreement (GPA), the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and the free trade agreements (FTAs) concluded by the European Union with a large number of countries.

6.1 EU Merger Regulation

The EU has a system of merger control enshrined in Council Regulation 139/2004,⁵⁴ which sets up a system of prior notification and approval for changes of control over undertakings above certain EU turnover thresholds. Concentrations are declared compatible with the internal market only to the extent that they do not significantly impede effective competition. While subsidies may be taken into account when assessing for instance the financial strength of the merged entity relative to its rivals, the focus of the analysis of the significant impediment to effective competition is on the structure of competition in a given market, not on the existence or effects of foreign subsidies as such. A new instrument would therefore with its different objective complement the Merger Regulation. If a given acquisition has to be notified under both such a new instrument and the Merger Regulation, the notification and possible assessment would be dealt with in parallel, but separately from each other under the respective instruments.

⁵⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

6.2 EU antitrust rules

The EU has a system of antitrust rules enshrined in Articles 101 and 102 TFEU, which prohibits concerted practices of undertakings having the object or effect of distorting competition in the internal market, as well as abuses of dominant positions. Exceptions may be granted to the prohibition of concerted practices when, under certain conditions, they contribute to improving the production or distribution of goods or to promoting technical or economic progress. While antitrust rules address all types of anticompetitive market conduct they do not take into account whether the market conduct is related to subsidies either granted by a Member State or by a non-EU government. A new instrument would therefore complement current EU antitrust rules with a specific focus on distortions caused by foreign subsidies.⁵⁵

6.3 EU State aid rules

The EU has a system of State aid control enshrined in Articles 107 and 108 TFEU which applies when financial support is granted by an EU Member State to an undertaking or a group of undertakings which leads to the existence of an advantage distorting competition and affecting trade between Member States. A new instrument would therefore be separate from the EU State aid rules as it would only apply if the financial support in the form of a subsidy is granted by non-EU countries.

6.4 EU public procurement rules

The existing EU public procurement framework does not contain specific rules regarding the participation of economic operators benefitting from foreign subsidies. This White Paper proposes a specific module relative to distortions in public procurement. The aim is a targeted legal instrument that ensures a level playing field within the internal market. With this specific aim, it complements the existing EU public procurement framework.

A legal instrument would introduce the possibility of an exclusion of subsidised bidders from an ongoing public procurement procedure. For this purpose, a new statutory exclusion ground would be introduced, complementing the exclusion grounds enumerated in the procurement Directives. Exclusion by the contracting authority would be subject to review under the national rules, in accordance with the provisions of the Remedies Directives 89/665/EEC and 92/13/EEC.⁵⁶

6.5 The WTO Agreement on Subsidies and Countervailing Measures

The definition of a subsidy according to the SCM Agreement by and large coincides with the definition of a subsidy set out in the annex and which could be incorporated in a new instrument. One exception is a financial contribution in the form of a purchase of services. However, the SCM Agreement only covers subsidised imports of goods from third countries.

⁵⁵ A new instrument on foreign subsidies would be without prejudice to the current rules on antitrust and mergers.

⁵⁶ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p. 31.

It therefore does not apply to subsidies related to trade in services and in relation to the establishment and operation of undertakings in the EU which are backed by foreign subsidies and which do not entail any trade in goods.

6.6 Trade defence instruments – protection against subsidised imports

EU legislation on subsidies and countervailing measures is based on the rules provided for in the SCM Agreement. In the event that goods are imported into the EU, and there is sufficient evidence tending to show that they benefit from foreign countervailable subsidies, it is possible to launch an anti-subsidy investigation.⁵⁷

As a general rule, investigations are triggered by a complaint lodged by the EU industry producing the same product as the one imported into the EU. In special circumstances the Commission has however also the option to launch an investigation *ex officio*.⁵⁸ The investigation will determine (i) the existence of subsidies benefiting the imports from a third country; (ii) actual injury or threat thereof to a EU industry competing with the imports (iii) a causal link between the subsidised imports and the injury; and (iv) whether the adoption of remedial measures is in the interest of the EU. If the above conditions are met, the Commission imposes countervailing measures, normally at the level of the amount of subsidisation established for imports.

The appropriate proposals for legal instruments, which will be drawn up in line with the obligations stemming from the SCM Agreement, and in particular its Article 32(1), would be complementary to the EU trade defence instruments. The EU Anti-subsidy Regulation allows the EU to act against subsidised imports of goods from a third country but not against subsidies related to trade in services and in relation to the establishment and operation of companies in the EU which are backed by foreign subsidies and which do not entail any trade in goods. In contrast, a new instrument would cover the subsidisation of an undertakings causing distortions within the internal market. The Commission could, however, use the experience gained in a trade defence case in order to guide its assessment, for instance, whether a foreign subsidy exists in the context of such a new instrument.

6.7 FDI Screening Regulation

The FDI Screening Regulation applies to any foreign direct investment into the EU likely to affect security or public order. An investigation is either triggered through a notification by a Member State that a foreign direct investment is undergoing screening under a national screening mechanism, or by the Commission or a Member State making an *ex officio* request for information in relation to a foreign direct investment not undergoing screening.

The assessment should aim at determining whether a foreign direct investment is likely to affect security or public order. The FDI Screening Regulation outlines a non-exhaustive list of factors that may be considered, such as the potential effects on critical infrastructure, critical technologies, supply of critical inputs, access to sensitive information, and the freedom and

⁵⁷ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55.

⁵⁸ Although this does not happen in practice as the evidence in relation to injury caused to a domestic industry in the Union is usually not available to the Commission.

pluralism of the media. It is also possible to take additional elements into account, such as whether the investor is directly or indirectly controlled by a foreign government, previous involvement of the investor in activities affecting security or public order in a Member State, or the serious risk that the foreign investor engages in illegal or criminal activities. The assessment whether an investor is controlled by a foreign government may be based on a variety of indicators, one of them being the fact that the investor benefited of significant funding. However, this is only one of the possible indicators to take into account and is not tantamount to introducing a control of foreign subsidies under the FDI Screening Regulation as the appropriate proposal for legal instruments would do.

Such a new legal regime would be complementary to the FDI Screening Regulation. Firstly, while the FDI Screening Regulation allows for the assessment of threats to security and public order, any new instrument assesses the potential distortions in the internal market. Secondly, while the FDI Screening Regulation focuses on critical assets, such as critical infrastructure, critical technologies or supply of critical inputs (which is the consequence of the Regulation's focus on investments likely to affect security or public order), a new instrument would in principle not be limited to those. Thirdly, while the FDI Screening Regulation targets all types of foreign direct investment, the trigger of any new instrument is foreign subsidies which may or may not be linked to an investment.

An overlap with Module 2 (and possibly Module 1) may exist if a foreign direct investment constitutes an acquisition that is facilitated by a foreign subsidy and raises concerns with regard to security and public order. This may lead to parallel procedures where a foreign-backed acquisition is notified to the relevant public authorities under both an FDI screening mechanism and under a new instrument relative to foreign subsidies. The application of the FDI Screening Regulation and a new instrument in parallel would be independent, as they aim at different objectives.

6.8 Bilateral trade agreements

The EU has various free trade agreements (FTAs) in place. They range from trade agreements that mainly aim at removing or limiting tariffs for goods to custom union agreements and even to agreements that provide wide access to the internal market. In the context of enlargement, the EU has concluded Stabilisation and Association Agreements. In its international agreements, the EU broadly applies two different approaches to subsidies: the “WTO+ approach” (SCM Agreement with an additional prohibition of the most harmful subsidies, transparency obligations and bilateral consultation) and the “State aid approach” (rules similar to the EU State aid rules).

In both approaches, and depending on the respective agreement, overlaps with a new instrument are possible. The “WTO+ approach” in principle allows to capture subsidies with a negative effect on trade and investment between the contracting parties. A subsidy falling under one of the agreements with a WTO+ approach could therefore in principle also fall under a new instrument (e.g. foreign state grants subsidy to domestic company; with the help of this subsidy, the foreign company acquires an EU target; the subsidy would in principle be covered by both, the trade agreement and a new instrument). Also in the “State aid approach”, such overlaps are possible, as the respective agreements allow to capture State aid with an effect on trade between the two contracting parties (e.g. foreign state grants State aid to foreign service provider; the foreign service provider also has an establishment in the EU; the

State aid would in principle be covered by both, the trade agreement and a new instrument). In the case of such overlaps, if during any action under a new instrument it appears more appropriate to address the distortion created by the foreign subsidy under the dispute settlement or consultation provisions of the respective trade agreement, the action under such a new instrument could be suspended. The action could be resumed to impose redressive measures or adopt commitments in two alternative scenarios: (1) the dispute settlement under the trade agreement has been concluded and has led to the finding that there is an infringement, but the infringing party does not take corrective actions; (2) within 12 months from the suspension of the action, the distortion caused by the foreign subsidy has not been eliminated.

6.9 The Agreement on Government Procurement and procurement chapters in FTAs

The Agreement on Government Procurement (GPA) concluded in the World Trade Organization (WTO) framework allows operators from the 19 other participating WTO partners to bid for certain public contracts in the EU, and EU companies to bid for contracts of 19 other WTO partners. In addition several FTAs contain specific procurement chapters. The GPA and government procurement chapters of FTAs do not automatically apply to all government procurement of the parties. Coverage schedules determine which public entities have to comply with the rules of the agreements and to which extent their procurement is open to participation of economic operators of the other GPA parties and FTA partners. Only procurements exceeding the specified threshold values indicated in each party's coverage schedules, are covered. The exclusion of bidders under the proposed instrument on procurement will have to ensure compatibility with the EU's commitments for covered procurement, esp. Art. VIII of the GPA and similar FTA provisions.

6.10 Sectorial rules: safeguarding competition in air and maritime transport⁵⁹

Regulation 2019/712 allows the Commission to conduct investigations and adopt redressive measures if it finds practices that distort competition through discrimination or through subsidies between EU air carriers and third-country air carriers and that cause, or threaten to cause, injury to EU air carriers.

The investigation is triggered when there is *prima facie* evidence of the existence of a practice distorting competition, causing an injury or threat of injury to EU carriers. The determination of "injury" involves the examination of (i) the situation of the EU air carriers concerned; and (ii) the general situation on the affected air transport services markets.

It is suggested to exclude situations falling within the scope of application of Regulation 2019/712 from the scope of any new instrument.

⁵⁹ In terms of sectorial rules, Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels, OJ L 176, 30.6.2016, p. 1, allows action to be taken by the Union against any injuriously priced vessels whose sale at less than normal value causes injury to the Union industry. While this Regulation has formally entered into force, it has never been applied as its application is conditional on the ratification of the OECD Shipbuilding Agreement by the US.

Regulation 4057/86⁶⁰ allows the Commission to conduct an investigation and adopt redressive measures if it finds practices that distort competition in maritime transport through non-commercial advantages granted to third country ship owners by a non-EU state.

The investigation is triggered either by a complaint or when a Member State is in possession of evidence both of unfair pricing practices and of injury resulting therefrom. The examination of injury covers the pricing offered by competitors of EU ship owners and the effect of this pricing analysed through different economic indicators.

It is suggested to exclude situations falling within the scope of application of Regulation 4057/86 from the scope of any new instrument.

7 PUBLIC CONSULTATION

The Commission invites for comments on the proposals set out in the White Paper through an open public consultation available at https://ec.europa.eu/info/consultations_en. For the purpose of structuring the submissions from stakeholders, Annex II includes a questionnaire that stakeholders are invited to respond.

The consultation is open for comments until 23 September 2020. It is standard practice for the Commission to publish submissions received in response to a public consultation. However, it is possible to request that submissions, or parts thereof, remain confidential. Should this be the case, please indicate clearly on the front page of your submission that it should not be made public and also send a non-confidential version of your submission to the Commission for publication.

⁶⁰ Council Regulation No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport, OJ L 378, 31.12.1986, p. 14.

ANNEX I: DEFINITION OF FOREIGN SUBSIDY

For the purposes of this White Paper, a “foreign subsidy” refers to a financial contribution by a government or any public body of a non-EU State,⁶¹ which confers a benefit to a recipient⁶² and which is limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries.

Foreign subsidies would fall under any new legal instrument only insofar as they directly or indirectly cause distortions within the internal market. Thus, the current definition covers (i) foreign subsidies granted directly to undertakings established in the EU; (ii) foreign subsidies granted to an undertaking established in a third country where such subsidy is used by a related party established in the EU; and (iii) foreign subsidies granted to an undertaking established in a third country where such a subsidy is used to facilitate an acquisition of an EU undertaking or participate in public procurement procedures.

The financial contribution can take various forms. For example, it can consist in

- the transfer of funds or liabilities (capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness or rescheduling);
- foregone or not collected public revenue, such as preferential tax treatment or fiscal incentives such as tax credits;
- the provision of goods or services or the purchase of goods and services.

In determining whether a financial contribution confers a benefit to an undertaking or industry, depending on the form of the financial contribution, the following should be taken into account: usual investment practice of private investors, rates for financing obtainable on the market⁶³, the adequate remuneration for a given good or service. If there are no directly comparable benchmarks available, adjustments of existing benchmarks⁶⁴ are possible or market conditions can be established based on generally accepted assessment methods.⁶⁵ For the purposes of this White Paper it is presumed that foreign subsidies below a threshold of EUR 200.000 to an undertaking over a period of three years do not create distortions in the internal market.

⁶¹ According to this definition, a private body entrusted with functions normally vested in the government or directed by the non-EU government can also grant a “foreign subsidy”.

⁶² The recipient may be an undertaking established in the EU or in a third country.

⁶³ Financing provided to a EU undertaking in EUR should be compared to benchmarks on the EU market relevant for financing in EUR Financing provided to an undertaking in a third country should be compared to appropriate benchmarks on that market.

⁶⁴ For example: if there is an existing benchmark available for financing which has a shorter maturity, this existing benchmark can be still used as a starting point while adjusting for the maturity of the loan.

⁶⁵ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1.

The suggested notion of "foreign subsidies" builds on the subsidy definition set out in the EU Anti-subsidy Regulation⁶⁶ and in the EU Regulation on safeguarding competition in the air transport sector⁶⁷. Those definitions also rely on the subsidy definition set out in the relevant WTO rules, in particular in the SCM Agreement, while acknowledging that a subsidy can be granted directly or indirectly to an undertaking active in the EU. The main difference is that a foreign subsidy is a financial contribution benefitting directly or indirectly an undertaking in the EU, offering goods or services, or engaging in investments, whereas subsidies under the two Regulations and the SCM Agreement are normally granted to beneficiaries outside the EU.

The definition also allows the Commission to draw from findings in trade defence instruments under the EU Anti-subsidy Regulation and the EU Regulation on safeguarding competition in the air transport (for details, see section 6, interplay with other EU instruments).

⁶⁶ Regulation 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55.

⁶⁷ Regulation 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004, OJ L 123, 10.5.2019, p. 4.

ANNEX II: QUESTIONNAIRE

The below questions should be answered through the dedicated public consultation on this White Paper on the [EU survey website](#).

Introduction

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

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.
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.

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

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)?
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)

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.

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

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.
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.
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?
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?

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?

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.
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.