

# N O V E

## COMMISSION WHITE PAPER ON LEVELLING THE PLAYING FIELD AS REGARDS FOREIGN SUBSIDIES

17 JUNE

Today, the European Commission presented a [White Paper](#) launching a discussion on possible **policy measures to address the distortion of competition in the EU through foreign subsidies**. The communication outlines a framework to address regulatory gaps in relation to foreign subsidies distorting the internal market through:

- the general market operation of economic operators active in the EU (module 1);
- acquisitions of EU undertakings (module 2);
- public procurement procedures (module 3).

Furthermore the paper suggests measures to tackle distortions when companies benefitting from foreign subsidies seek **access to funding from the EU budget**.

The communication launches a [public consultation](#), open until **23 September 2020**, on the best way to address the challenges identified. The results will prepare the ground for choosing the most appropriate proposals for legal instruments. The consultation's questionnaire can be found in the [Annex](#).

This note aims to outline:

- [The political context of the measures](#)
- [The three complementary “modules” the Commission seeks to establish](#)
- [Foreign subsidies in the context of EU funding](#)
- [Their legal boundaries](#)
- [The interplay with existing instruments](#)

### POLITICAL CONTEXT

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EU companies have long bemoaned the fact that foreign competitors often benefit from unfair advantages in the form of state support when operating in the EU market. Similarly, Member States have voiced complaints about their companies being vulnerable to state-backed take-overs from groups outside the EU. While no specific countries are named, the activities of Chinese competitors in the EU market are the main driver behind the new measures.

The proposal delivers on a call from several Member States for the EU to become more active in dealing with market distortions through foreign subsidies. An [initiative proposed](#) by the Netherlands last year, and supported by France, Germany, Italy and Poland, called for a beefed-up competition toolbox to counter the ambitions of state-backed or subsidized foreign companies.

The White Paper is meant to work in tandem with the parallel initiatives by the Commission to increase the EU's assertiveness vis-à-vis economic partners. The upgrade of the Enforcement Regulation, the launch of the International Procurement Instrument and the appointment of a Chief Trade Enforcement Officer are cases in point. Furthermore, the EU's [trade policy review](#) launched yesterday (16 June), by which the Commission

aims to recalibrate the EU trade policy to reflect the so-called model of open strategic autonomy will also touch upon the issue of a level playing field in foreign subsidies. The [consultation](#) invites stakeholders to comment on how the EU should address coercive, distortive and unfair trading practices by third countries.

## THE THREE “MODULES” OF THE COMMISSION’S APPROACH

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The Commission’s new initiative relies on **three modules**, which can be applied on their own or in combination:

### **MODULE 1: FOREIGN SUBSIDIES IN GENERAL**

- **Ex post measure covering all market situations that may affect the functioning of the single market**
- Competent supervisory authorities: **both Commission and relevant Member State** authorities would be able to act ex officio upon any information indicating the granting of a foreign subsidy to a beneficiary active in the EU (no notification obligation)
- Process: **Preliminary review** based on criteria such as subsidy size, the situation of the beneficiary, and market situation; **followed by an in-depth investigation** if necessary. Strict sanctions if no or insufficient information is supplied.
- If distortions are confirmed: **“redressive measures”** (e.g. fines, behavioural measures such as prohibition of certain investments and acquisitions, third party access, publication of R&D results) **or a “decision with commitments” of the beneficiary**, committing to measures that level the playing field.
  - In both cases, reporting and transparency obligations would apply
  - Application limited to up to 10 years from the day on which a subsidy is granted, with any action taken by authorities interrupting the period.
- Application to entities established in the EU, but consideration of extending scope to all companies active in the EU
- **Minimum threshold** under which subsidies would not be deemed problematic would apply (proposal: 200.000€ over 3 years)
- Investigation could be suspended if a distortive subsidy passes an **“EU interest test”** and is found to be beneficial for EU policy objectives

### **MODULE 2: FOREIGN SUBSIDIES IN ACQUISITIONS**

- Narrower in scope than module 1, **ex-ante measure** focussed exclusively on **subsidies facilitating the acquisition of a certain share of voting rights** (35% were proposed in an [earlier draft](#)) **in an EU target** (although module one could also address these ex post)
- Competent supervisory authority: The **Commission proposes it should have exclusive competence**, as a more streamlined process is needed for ex ante measures and, if both measures are introduced, Member States would in any case have the opportunity of opening ex-post investigations under measure 1.
- **Ex-ante notification obligation** for subsidy recipients aiming to acquire an EU entity, ex officio action possible if subsidies are not notified. This obligation could either extend to all mergers and acquisitions or only potentially subsidized instances, with the Commission leaning towards the latter to reduce the administrative burden
- Process: like in module 1, a **preliminary investigation** based on criteria such as subsidy size, the situation of the beneficiary, and market situation, would be followed by an **in-depth review** if needed.
- During the investigation, the acquisition would be put on hold for a yet to be specified maximum time period.
- If distortions are found, authorities can either **accept legally binding commitments by the notifying party to remedy the subsidy** or **prohibit the acquisition**

- **Scope:** subsidies granted in the 3 years prior to or up to 1 year after an acquisition of an “EU target” over a specific EU turnover (proposal: >100 Mio.€), potentially with a qualitative clause to cover undertakings with an expected major future turnover in the EU.
- As with module 1, an “**EU interest test**” for alignment with EU policy aims is foreseen

### **MODULE 3: UPDATE TO PUBLIC PROCUREMENT RULES**

- When **bidding in EU/Member State public tenders**, operators would have to **disclose subsidies granted to them within the last 3 years, or expected throughout the duration of the contract**
- Competent supervisory authority: The **Commission or the national regulator** would review bids
- Procedure: **preliminary review**, followed, if needed, by an **in-depth investigation**
- **Strict time limits** would apply to ensure public procurement procedures are not delayed
- Operators might be **excluded from the procurement procedure**, and could, following the Commission’s proposal, be **barred from future public procurement procedures for a maximum of 3 years**.

### **FOREIGN SUBSIDIES IN THE CONTEXT OF EU FUNDING**

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The paper also addresses foreign subsidies in the context of access to EU funding. It argues that EU funding should not contribute to favour companies that have received distorting foreign subsidies.

- For **Public Procurement** and **Grants under direct EU management**, the issue of foreign subsidies should be addressed by adapting the exclusion grounds within the revised legal framework applicable to the EU Institutions.
- A **system of prior notification obligation** should be implemented for specific type of contracts. When submitting their bid, all tenderers would have to notify along with their offer, whether they have received a financial contribution.
- 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 to tailor the procedure and prevent potential distortions that foreign subsidies may bring about.
- For **funding under shared management** (EU and Member States) the measures put in place to address foreign subsidies under the generally applicable public procurement rules should equally apply.
- For EU funds implemented **under indirect management**, when the EU entrusts the budget implementation to various implementing partners, the latter could be called to enhance their procurement policies in order to deal with abnormally low bids, that may result from foreign subsidies
- This is particularly the case for EU funding 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.

### **LEGAL BASIS AND BOUNDARIES**

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In contrast to a leaked earlier draft, the Commission, while, did not provide in-depth details of the legal basis and boundaries of their proposal. It assures that the new instruments will be fully compliant with both the **Free movement provisions** laid out in the EU’s treaties and **WTO rules and OECD Codes of Liberalization**. As the decisive trigger for both modules is the origin of the subsidy (a third country) and not the “nationality” of the beneficiary, the Commission underlines it is **non-discriminatory**.

The instruments proposed are complementary to a number of existing policies:

- Current **competition/merger rules** do not take into account whether a merger was made possible by foreign subsidies, but just look at market concentration and its effects.
- Current **antitrust rules** do not take state subsidies into account
- EU **state aid rules** do not apply to third countries.
- Current **public procurement rules** do not contain specific rules on the participation of operators who benefit from foreign subsidies
- The **WTO Agreement on Subsidies and countervailing measures** only extends to subsidised imports of goods, and not to, for example, services and FDI
- In relation to existing **trade defence measures**, those cover subsidised imports in goods while the new regulation would affect the subsidised acquisition of an EU target or the subsidization of a target active in the EU.
- **FDI screening regulations** focus on threats to public security and order and not on market distortions, and, contrary to the proposal, focus exclusively on strategic assets.
- **Trade agreements**: if dispute settlement under a FTA seems more appropriate in individual cases, the new instrument could be suspended.

## **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
  1. 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
  - a. definition of acquisition
  - b. definition and thresholds of the EU target (4.2.2.3)
  - c. definition of potentially subsidised acquisition
4. As regards thresholds, please provide your views on appropriate thresholds.
5. 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)?
6. 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?
7. 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?
8. 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.