Summary of the responses to the public consultation on the White Paper on levelling the playing field as regards foreign subsidies

General

The Commission received 150 submissions to the public consultation:

- 17 from public authorities of Member States;
- 24 submissions from third country stakeholders and governments;
- around 100 submissions from business and industry associations and individual companies;
- the remainder from law firms, academic institutions, trade unions, NGOs, other public authorities and individual citizens.

Submission by type of contributor	
Academic/research institution	2
Business association	52
Company/business organisation	52
EU citizen	5
Non-EU citizen	1
Non-governmental organisation (NGO)	3
Other	12
Public authority	19
Trade union	4
Grand Total	**150**

Submissions by country of origin			
Austria	6	Malta	2
Belgium	35	Mozambique	1
Canada	2	Netherlands	5
China	4	Norway	1
Czechia	2	Poland	6
Denmark	4	Portugal	2
Finland	4	Romania	1
France	13	Serbia	2
Germany	19	Singapore	2
Hungary	1	South Korea	1
Ireland	1	Spain	7
Italy	8	Sweden	5
Latvia	1	United Arab Emirates	1
Lithuania	1	United Kingdom	7
Luxembourg	3	United States	3
Grand Total	**150**		

Member State contributions

Almost all Member States are generally in favour of legislative action to tackle the distortive impact of foreign subsidies, with some nuances in the degree of support and alignment, though.

Individual Member States ask for more evidence or support the White Paper as a basis for further discussions, but are not yet convinced about the need for a new instrument.

A large number of Member States agree with the proposed material scope of the legislative action. Individual Member States consider that the subsidy definition may not cover certain cases of fiscal support or that lower labour law or environmental protection standards in third countries should also be considered equivalent to subsidies.

A number of Member States point to difficulties with detecting foreign subsidies, in particular when it comes to state-owned enterprises.

Member States generally agree with the proposed redressive measures, which they often see as a non-exhaustive list. However, they make various comments, among other on the ineffectiveness of redressive payments / the reimbursement of the subsidy, structural remedies being seen as too far-reaching or having to be used with caution, asking for an indication if and how redressive measures can be appealed.

Several Member States refer to potential negative impacts on Foreign Direct Investment, administrative burden and stress that the new instrument should not be stricter than EU competition/State aid law. The majority of Member States highlight the importance of coherence with other instruments, in particular with the EU Merger Regulation, the Public Procurement Directives, the planned International Procurement Instrument, the Foreign Direct Investment screening Regulation and Trade Defence Instruments.

Certain Member States advocate that foreign subsidies should be taken into account in the context of EU funding and are overall in favour of legislative action. The Member States focused their reply on shared management and submitted few individual and diverse observations.

Other EU stakeholders' contributions

Almost all contributors welcome the initiative and consider that there is a real need for the new tool. Many point to sector specific issues or indicate industry sectors which they see as heavily subsidised by foreign governments. A large number of respondents also highlight that transparency is one of the big issues that needs to be tackled in a new instrument.

Several respondents call for the intervention to be targeted and proportionate in order not to stifle foreign investment. Various submissions highlight the necessity to coordinate the new instrument with the existing ones (Public Procurement Directive, Merger Regulation, IPI, TDI, FDI screening). A number of respondents also consider that a thorough impact assessment is necessary to prepare a legislative proposal.

As regards the overall scope of a new instrument, the majority of the respondents generally agree, but provide various comments and precisions. Various business contributors emphasise that key concepts (foreign subsidies, distortion, redressive measures, EU interest) need to be more clearly defined and that the assessment criteria need to be specified. Some suggest that the Commission should publish guidelines.

Many contributors support a broad definition of subsidies and applying the tool to businesses active (not just established) in the EU. They often mention among others protected domestic markets (but also domestic subsidy assessment frameworks), negative presumptions for State-owned Enterprises and lower standards than in the EU as an element to consider.

Several contributors suggest an exclusive or at least very prominent coordination/supervisory role for the Commission, to ensure consistent practice. Many contributors also suggest the introduction of a complaint procedure.

A few associations call for a sector-specific approach, e.g. based on the revision of existing sector-specific Regulations.

Non-EU contributions

As a general rule, while acknowledging the possibility that foreign subsidies might distort the internal EU market, the contributions submitted by third country-based respondents are generally critical of any form of regulation on top of the existing rules.

Most contributions from third countries advocate no new regulation or as little as possible. In that regard, the contributions vary in their openness to a new instrument or whether a particular country should be exempted from its application. Subsequently, only some contributions deal with the substance of the White Paper.

As far as these remaining submissions are concerned, several respondents indicate that the proposed instrument creates overlaps and could be built into existing rules. Indeed, some contributors state that the instrument is not necessary. Others suggest integrating Modules 2 into merger control, Module 3 in the Public Procurement Directives and EU Funding in the EU Financial Regulation or alternatively incorporating Modules 2 and 3 under Module 1.

Several respondents also question whether the new instrument would not violate international obligations by imposing a different standard on foreign companies compared to EU companies, and criticise additional administrative burden.

Module 1

Member State contributions

Member States generally agree on the proposed 2-step approach for Module 1, but some raise questions as to the potential delays that it may cause.

Individual Member States consider that Module 1 is sufficient to address all situations including acquisitions and public procurement.

Some Member States raise the difficulty of gathering information or even proposes a reversal of burden of proof when access to information is too difficult.

As to the substantive criteria, individual Member States point out that the size of the undertaking is not always an adequate criterion or that categories of subsidies likely to be distortive need to be detailed further.

Individual Member States favour adding a specific redressive measure for public procurement, i.e. excluding a subsidised company from Public Procurement procedures and doubt that reimbursement of the subsidy is an effective remedy. Another one, on the contrary, views redressive payments as the best remedy.

In relation to enforcement, some Member States argue that sharing responsibilities between Member States and the Commission should e.g. be based on thresholds. Others ask for the sole enforcement of this module by the Commission.

The EU interest test is supported by several Member States. Certain criteria are brought forward or are particularly stressed in this context, such as:

(i) Effects on innovation, sustainability, competitiveness of EU economy;

(ii) quality, production in EU and jobs in EU;
(iii) public order and public security and resilience, climate impact, environmental impact.

Other Member States state that the test should be based on clear and objective criteria and better defined or that the definition of strategic Union interest used in the context of IPCEI projects should be considered.

Several Member States agree with the de minimis threshold aligned with State aid rules as proposed in the White Paper. Individual Member States argue that the de minimis threshold in Module 1 should be aligned with the one under Module 3 or, that the proposed €200 000 is relatively low and should be set higher because (i) it may discourage Foreign Direct Investment; (ii) enforcement should focus on the most distortive subsidies or (iii) in view of the administrative burden. Individual Member States ask to determine the threshold only after an in-depth market analysis and not to set it so high as to miss problematic cases.

Other EU stakeholders' contributions

A large majority of contributors consider that Module 1 adequately addresses distortions caused by foreign subsidies. A large proportion considers that Module 1 should apply also to companies "active in the EU" and that it should allow for complaints.

In terms of assessment, some contributors indicate that more detail/guidance is needed, others advise against using an exhaustive list of substantive criteria and yet others suggest adding a few criteria to cover several market issues, subsidy-specific issues and the effects on the market. Certain contributors indicate that assessment under Module 1 should be aligned with the assessment under EU State aid rules. Some respondents highlight that the burden of proof should be reversed when it comes to the distortion caused by subsidies in sectors with overcapacity or when it comes to the existence of a subsidy (in particular for State-owned enterprises).

The respondents generally view favorably the proposed redressive measures, but indicate that they should be clarified, among others in relation to their duration and in terms of respect of fundamental rights of those concerned. Several respondents call for strong redressive measures and sanctions for non-compliance. In contrast, a few others voiced the concerns that redressive payments to foreign or EU states may lead to political tension and/or that it may be difficult to establish if the subsidy was effectively paid back in a third country.

Certain respondents suggest to allow voluntary notification for legal certainty or propose a State aid Compliance certification that would be required for non-EU State-owned Enterprises before allowing them to be active and operate in the EU.

The majority of contributors consider that the Commission should be exclusively responsible for the enforcement of Module 1. In case of shared enforcement responsibilities, they advocate for strong leadership by the Commission.

The views on the necessity of a *de minimis* threshold are mixed. Some respondents agree with a threshold in line with the one under State aid rules, some consider that it should be higher or there should be no threshold at all, others yet believe that the threshold should be lower or sector-based and set following an impact assessment.

Views on whether Module 1 should also cover subsidised acquisitions which are outside the scope of Module 2 vary.

The views on whether there should be an EU interest are varied. Some respondents consider an EU interest test to be relevant, but are in favour of applying it narrowly. Some point in this context to the balancing test under EU State aid law or the interest test that is undertaken as part of Trade Defence Instruments. They also mention the need for clarity as to when and how it is applied, and stress that its application should not result in absence of redressive measures. Other contributors

either do not see the need for an EU interest test or oppose it, because of the political dimension and/or discretion it would bring into the assessment.

Non-EU contributions

Most contributions from third countries advocate no new regulation or as little as possible.

A number of respondents raise the issue that the subsidy definition is too broad and vague, the concept of distortion unclear and that it leaves too much discretion to the authorities. In this context, some point out that there should not be any presumption about State-owned Enterprises and caution against a reversed burden of proof. Moreover, they plead for assessment at the level of undertaking, not group and are in favour of (higher) *de minimis* thresholds. Individual respondents argue that in Module 3, the bidder might not know whether the suppliers/contractors have been subsidised.

As to the procedure, some contributors propose that the investigation should only be initiated upon a written complaint with sufficient evidence.

Several contributors are critical of redressive payments to the Commission or Member States, as there would be no legal basis, or stress that redressive measures should not discriminate against non-EU companies.

Several contributors are in favour of an EU interest test to balance the distortion with positive impacts some investments may have. Criteria for such a test should be clear and as measureable as possible. It is proposed that a potential benchmark could be the compatibility assessment under EU state aid rules.

Module 2:

Member State contributions

General need and scope of module 2

Most Member States support Module 2. Others are more cautious and support it, but indicate that duration of the procedure and administrative burden should be considered. Individual Member States request an assessment of the expected number of notifications.

Some Member States oppose the introduction of Module 2, for fear of creating overlaps with Merger control and Foreign Direct Investment screening, in view of the administrative burden, or because they favour dealing with acquisitions under Module 1.

Individual Member States propose that the definition of acquisition under Module 2 should be the same as under the Merger Regulation or raise questions in relation to potentially subsidised acquisitions, as they may not always distort the internal market and involve self-assessment by the undertakings. Some Member States raise the question of appeal and/or review of negative decisions under Module 2.

Competent authority

Several Member States oppose to the Commission being the sole competent authority and want shared enforcement powers also for Module 2.

Notification requirement

As concerns the notification requirement, Member States propose a variety of criteria. Several Member States consider that only subsidised acquisitions should be notified, and some of them plead for only having quantitative criteria for notification or suggest to limit the notification to certain sectors or only when a Trade Defence Instrument notification is compulsory.

Individual Member States question whether turnover thresholds and notification obligation contribute to the effectiveness and proportionality of the proposed instrument or state that the proposed turnover thresholds for Module 2 are quite high. While this limits the administrative burden on the Commission, it means that very few investments in, and acquisitions of, for example, innovative start-ups and scale-ups would fall within the scope of this module. It could also be argued that the notification obligation places too high an administrative burden on both market operators and supervisory authorities. In their view, the Commission could launch investigations into specific investments and acquisitions on its own initiative.

Individual Member States generally support the proposed thresholds but ask for special attention for innovative and specialised companies that are still in the scale-up phase or that are smaller (SMEs) and hence more prone to being taken over, or they state that EU target thresholds should not be too high if that would mean that we miss certain problematic cases.

Other Member States consider that all acquisitions should be notified. Among those, individual Member States propose that the follow-up procedure should only apply where foreign subsidies exceed a certain threshold and the EU target is active in sectors that do not fall under Foreign Direct Investment Screening Regulation.

Other points

Some Member States request further discussion on the subject, potentially underpinned by studies.

Several Member States specifically advocate the use of EU interest also under Module 2.

Other EU stakeholders' contributions

A large majority of contributors is supportive of Module 2 in terms of scope and procedural set-up. A minority of respondents, on the other hand, cautions that Module 2 should not be applied too broadly, e.g. in relation to the concept of de facto facilitation or certain types of investments (e.g. portfolio or passive financial investments). Some respondents indicate that there are some ambiguities in terms of procedure, assessment criteria and definitions. Several contributions call for alignment of Module 2 with the EU Merger Regulation, e.g. in relation to legal deadlines.

In terms of notification criteria, most respondents consider that only subsidised acquisitions should be notified under Module 2. Most respondents also agree with quantitative thresholds, but without consensus on the right level of the threshold. Some respondents propose to introduce a qualitative threshold in parallel to examine smaller transactions of a strategic nature. Others propose to use the impact assessment to calibrate Module 2.

The majority of contributors agree with exclusive Commission power for this Module.

Non-EU contributions

Most contributions from third countries advocate no new regulation or as little as possible.

Individual contributors indicate that if Module 2 is established, only State-owned Enterprises or previously distortive companies should be required to notify.

Several contributors are critical of redressive payments to the Commission or Member States, as there would be no legal basis, or stress that redressive measures should not discriminate against non-EU companies.

Module 3

Member State contributions

The majority of Member States who replied agree with legal action in the area of public procurement but not necessarily with the proposed framework of module 3. These Member States consider that the White Paper rightly identifies the problem (risks associated with the participation in public procurement procedures by subsidised bidders) and agree broadly with the gap analysis. Several Member States are opposed or sceptical about the need for a dedicated legal instrument to tackle the distortive effects of foreign subsidies in public procurement. Some of these Member States disagree with the premise in the White Paper that foreign subsidies have a negative effect on public procurement. Others consider that the issue could be addressed, or at least partially addressed, by recurring to the existing rules on abnormally low tenders in the PP Directives: either by issuing guidance on existing rules or by a modification of these rules and integrating some of the features of Module 3 (e.g. notification obligation, review procedure, adding an exclusion ground).

Sharing of enforcement powers

A majority of Member States expressed their concern about the proposals in the WP on the sharing of responsibilities between contracting authorities and supervisory authorities with regard to the assessment of distortions caused by foreign subsidies. Member States broadly agree that contracting authorities should not be responsible for assessing whether a foreign subsidy distorts the public procurement procedure, and that this task should instead be incumbent on the national supervisory authority or the Commission. A number of reasons are presented for this view: lack of capacity (contracting authorities lack the necessary expertise, information and manpower, and to assess distortions would unduly increase the already heavy administrative burden), lack of impartiality (contracting authorities may be susceptible to award tenders to subsidised bidders offering low prices) and lack of efficiency (if contracting authorities are ill-equipped for the assessment of foreign subsidies, this will negatively impact the procedure and accessibility of procurement markets).

In addition, some Member States express the view that the Commission should have exclusive powers for assessing whether a foreign subsidy is distortive, in the interest of consistency and legal certainty.

Other points

Furthermore, a number of issues are raised in relation to Module 3, by both Member States in favour and against the proposal:

(i) Some Member States are concerned that a separate Module 3 addressing distortions of a single public procurement procedure risks being administratively heavy;
(ii) some Member States indicate that the relationship between Module 3, the Public Procurement Directives and the International Procurement Instrument should be clarified;
(iii) some Member States ask whether the proposal cannot be implemented by adapting the Public Procurement Directives, in particular the rules on abnormally low tenders;
(iv) Member States welcome the strict deadlines for public procurement procedures foreseen in the White Paper but raise doubts whether they are realistic in practice;
(v) exact criteria and guidance for an in-depth investigation should be worked out in detail;
(vi) need for uniform methodology to decrease the risk of diverging decisions if a subsidised entity participates in Public Procurement in several Member States;
(vii) some Member States are critical as to the termination of closed contracts;
(viii) issues with reliability of information received or lack of information on subsidies.

Individual Member States state that the EU interest test should also apply in Module 3.

Other EU stakeholders' contributions

Not all of the other contributors address public procurement specifically in their reply. Of those that do, a large part generally agree with the gap analysis in the White Paper and support legal action to tackle distortions caused by foreign subsidies in public procurement. A vast majority of business respondents stress that a new instrument must not lead to additional administrative burden on bidders and must not cause delays to public procurement procedures. The majority of respondents also argues that competent supervisory authority should be responsible for the whole investigation and contracting authorities should only enforce redressive measures in the respective tender procedure.

A number of respondents are also sceptical about the need for a dedicated instrument in the field of public procurement, arguing that current rules (Public Procurement Directives, particularly on abnormally low bids) could be used or adapted to tackle the issue of foreign subsidies.

Regarding practicalities, some contributors propose that an ex-ante notification obligation should only apply to main/first-rank suppliers of tenderers. As regards competence sharing, there is a clear call by businesses for the Commission to have a strong coordination/guiding role in order to guarantee a uniform assessment methodology. Most contributors agree that contracting authorities are unable to make the assessment of a distortion, for the same reasons as those given by Member States. Several contributors argue that, consequently, this assessment should be done by the national supervisory authority, possibly in cooperation with the Commission. Some also suggest the Commission should be able to overrule Member States supervisory authorities and to take on cases where it deems the participation of subsidised bidders to be particularly problematic. Furthermore, as regards procedure, some respondents argue in favour of a complaints-based system: instead of an ex-ante-notification obligation foreseen in the White Paper, investigations into distortive foreign subsidies would only be launched in the standstill period prior to the final award decision if complainants inform the supervisory authority about potential distortions caused by foreign subsidies.

Some contributors suggest introducing foreign subsidies as an (additional) ground for appeal against the winning bid in the existing interval before the contract is actually signed. This would thus cause no further delay, and build on existing practice and procedures.

Non-EU contributions

Non-EU contributors in general do not specifically address public procurement.

Interplay between modules

Member State contributions

Member States have diverse views as regards the interplay between the proposed modules.

Several Member States consider that each module should operate on a stand-alone basis, rather than as one single instrument for all three modules. Some others argue only for Module 1 to operate on a stand-alone basis. Others yet see Module 1 as back up for subsidised acquisitions, either under thresholds if there is an effect on the internal market, or in strictly defined cases only. Some Member States indicate that it would be desirable to coordinate the use of Modules 1 and 3.

Several Member States support grouping all three Modules together in one instrument.

Individual Member States suggest addressing foreign subsidies in public procurement under the Public Procurement Directives or do not agree with Modules 2 and 3.

Individual Member States point out that the relationship between Modules and with existing instruments should be better defined.

Other EU stakeholders' contributions

The views about the interplay between different Modules are very diverse.

Some contributors consider that Modules 1, 2 and 3 should operate together, but that it is important to clarify the complementarity of Module 1 with the other two Modules. Some consider that only Module 1 should apply. Some other respondents support all three Modules, but to be applied separately.

Certain contributors agree that Module 1 is used for subsidised acquisitions not covered by Module 2, while others specifically state that Module 1 should not cover acquisitions at all. Some contributors also stress that Module 1 should function as a "safety net" for cases that are not treated Module 3.

Some respondents indicate that the application of one module to a given subsidy does not rule out the application of another module, while others take the opposite view.

Non-EU contributions

Individual respondents suggest integrating Modules 2 into merger control, Module 3 in the Public Procurement Directives and EU Funding in the EU Financial Regulation or alternatively incorporating Modules 2 and 3 under Module 1.

Interplay with other existing instruments

Some respondents (all categories taken together) mention the necessity of creating a coherent legal framework taking into account Public Procurement Directives, International Procurement Instrument, EU Merger Regulation, EU State aid rules, Trade Defence Instruments and Foreign Direct Investment screening. Some also warn of potential overlaps. A few suggest the possibility to expand Foreign Direct Investment screening rather than implementing the new tool.

EU Funding

Nearly all respondents who replied on this issue support action on foreign subsidies in access to EU funding.

Member State contributions

Individual Member States are concerned that the solution proposed in the White Paper for shared management might make tenders more burdensome and delay their award. Within that context, some refer to their observations to Module 3.

Some Member States advocate for a greater supervisory role for the Commission, in order to ensure coherence in the assessment of distortive foreign subsidies, or call for an 'EU interest test' to assess whether certain companies that have received foreign subsidies can receive EU funding.

Few Member States add no specific comments to the solutions proposed or submit that further steps might be considered based on an in-depth analysis of the issue, also in relation to financial instruments.

Individual Member States note respectively that (i) the EU funding section does not consider subsidies/tenders in the context of EUROPAID, (ii) foreign companies should not be treated more strictly than European companies, (iii) social, labour, innovation-related and environmental criteria may play a role for the award of EU funding under shared management.

Other EU stakeholders' contributions

The contributors agree overall with the approach proposed for EU funding. Most of them advocate for more reciprocity, stating that foreign companies should not receive EU funding if their procurement markets are not open to European companies. Some also ask for a wider use of the Most Economically Advantageous Tender criteria across the board, to take into account qualitative, technical and other aspects to award funding, instead of recurring to the cheapest bid/lower cost.

As regards direct management, the contributors call on the Commission to identify the EU funding to be affected by the proposed solution, to set out clear measures and to take into account some strategic sectors, such as research (Horizon) and transport (Connecting Europe). Some respondents explicitly ask for the possibility to rearrange consortia applying for EU funding, in case a member was to be found in receipt of distorting foreign subsidies. Some also requested to establish a system based on notifications from applicants/bidders coupled with *ex officio* investigative powers of the Commission. The majority agree that undertakings having received distortive foreign subsidies should not access EU funding for a number of years.

As regards shared management, the contributors consider that national contracting authorities and bidders should not have an excessive burden and the Commission should be the only supervisory authority for distorting foreign subsidies – or be in charge for projects worth more than EUR 50 million.

As regards indirect management, the contributors advocate for foreign entities and international financial institutions to align their standards to those of the Union. Some asked the Union to stop blending funds or to attribute funds to other institutions, in case those are not able to apply measures similar to those proposed in the White Paper.

Non-EU contributions

The non-EU contributors oppose the measures set out in the White Paper.