Comments on the Commission White Paper on levelling the playing field as regards foreign subsidies

ABOUT AEGIS EUROPE

AEGIS Europe is an industry alliance that brings together more than 20 European manufacturing associations committed to free and fair international trade ensured by an effective international level-playing field.

Our members account for more than €500 billion in annual turnover, as well as for millions of jobs across the EU.

AEGIS Members include the following European industry sector associations:

- Association of European ferro-alloy producers (EUROALLIAGES)
- Association of European Wheel Manufacturers (EUWA)
- European Aluminium
- European Association of Technical Fabrics Producers (TECH-FAB Europe)
- European Bicycle Manufacturers Association (EBMA)
- European Ceramic Industry Association (Cerame-Unie)
- European Container Glass Federation (FEVE)
- European Domestic Glass (EDG)
- European Federation of Rope, Twine & Netting Industries (EUROCORD)
- European Federation of Steel Wire Rope Industries (EWRIS)
- European Glass Fibre Producers Association (GLASS FIBRE EUROPE)
- European Industrial Fasteners Institute (EIFI)
- European Man-made Fibres Association (CIRFS)
- European Non-ferrous Metals Association (Eurometaux)
- European Organisation of the Sawmill Industry (EOS)
- European Producers Union of Renewable Ethanol (ePURE)
- European Rail Industry (UNIFE)
- European Steel Association (EUROFER)
- European Steel Tube Association (ESTA)
- Fertilizers Europe
- European Shipbuilding and Maritime Equipment Manufacturers (SEAEUROPE)
- Medicines for Europe
- Sustainable Solar Energy Initiative (EU PRO SUN)

AEGIS Europe is increasingly concerned by the absence of a level playing field and fair reciprocity between EU and third country competitors on the EU internal market. In large part, this problem results from distortions caused by non-EU government subsidies.

The expansion overseas of State-Owned Enterprises (SOEs), in particular from Asia, has been an explicit government objective in official strategy and action plans. As an example, in 2015, the Chinese government launched 'Made in China 2025', a national industrial strategy aiming at transforming China into a technology-driven country by 2025 and ultimately turning the nation into a leading manufacturing power by 2049. While this policy explicitly mentions ten sectors (e.g. railway equipment and high-tech ships), it is much broader and distortions are experienced across both upstream and downstream industries. Other governments are less explicit about their industrial strategy, but are acting in similar ways.

Some EU instruments (e.g. Trade Defence Instruments) already exist and have been used in order to address unfair trade practices. However, besides the fact that these instruments do not cover all trade in goods (e.g. goods which are not cleared for free circulation in the EU), there are clear regulatory gaps in the tools at the disposal of the EU. In particular, the EU mechanism on Foreign Direct Investment screening is only a first step but it does not deal with the distortive effects of subsidies. The current EU public procurement framework does not provide clear rules and obligations related to abnormally low tenders.

Covid-19 and related government measures have made EU industry even more vulnerable. In addition to government support which is limited in time, targeted and proportional, and only aims to ensure the survival of certain sectors, the current context makes it even more urgent to have robust legislative tools to address the distortions caused by foreign subsidies.

Against this background, AEGIS Europe appreciates very much the Commission initiative to publish a White Paper acknowledging a 'regulatory gap' in EU law with regard to foreign subsidies which distort financial flows that facilitate acquisitions of EU companies, distort bidding in public procurement procedures or in applications for EU financial support, or simply distort normal competition on the EU market. **The future instrument on foreign subsidies represents a one-time opportunity for the EU to achieve a more effective level playing field for the years to come.**

AEGIS Europe would like to stress the following general points:

- The Commission's proposal needs to be as ambitious as possible in its scope and in the redressive measures it proposes;
- Many aspects should be clarified and strengthened, in particular on the operational aspects and competences, for each of the three Modules;
- A stronger trade dimension, and the introduction of reciprocity principles on the question of EU funding, would be strongly supported;
- The instrument will need to be adopted and implemented as quickly as possible.
- The design of each Module should be carefully formulated in the framework of, and in complementarity with, existing instruments, in particular EU competition law, Trade Defence Instruments (TDIs) and the International Procurement Instrument (IPI). It is of course essential to address potential overlaps and ensure that no contradictions are created with other EU tools.

In order to assist the Commission in designing an effective tool to address the many distortions caused by foreign subsidies, AEGIS Europe offers the following comments and suggestions.

Module 1 – General market scrutiny instrument (Annex II: 7 questions)

We believe that the first "module", a general market scrutiny instrument intended to cover all possible market situations in which foreign subsidies may cause distortions in the EU market, has great potential, but that its usefulness will greatly depend on the manner in which it is designed and applied.

The way a new Module 1 tool addresses the following issues will have a major impact on the extent to which the tool will be of use in countering the distortive impact of foreign subsidies:

1) Definition of subsidies covered needs to be sufficiently broad

The definition of "foreign subsidies" set out in Annex 1 essentially takes over the definition of subsidies set out in the EU anti-subsidy regulation, which in turn is based on the rules in the WTO Agreement on Subsidies and Countervailing Measures (ASCM). However, that definition was predicated on an obligation of WTO Members to declare their subsidy regimes to the WTO, an obligation that very few WTO Members have actually complied with. It would therefore be appropriate to start from a broader base, particularly in relation to benefits derived from bodies which are not clearly private and acting independently of government policy, especially in relation to countries where the economy is subject to significant distortions in general.

Along the same lines, it would be appropriate to have a basic – rebuttable – presumption that all subsidies to producers of upstream inputs are passed through to downstream operators, whether those operators are manufacturers or suppliers of services (or both).

Also, for a given group of companies, the tool must cover all subsidies granted by non-EU sources, including those granted by more than one non-EU government to that group.

The definition of a subsidy should make it clear that the absence of similar levels of regulatory requirements, or ones which are lower than those in effect in the EU, can be considered a subsidy.

2) Coverage needs to extend to non-EU recipients of any subsidies distorting EU market

The White Paper speaks of covering benefits provided to "an undertaking established in the EU", and then goes on to say that consideration should also be given to covering benefits to "certain undertakings that benefit from foreign subsidies and are otherwise active in the EU". Annex 1 limits consideration to subsidies benefiting an undertaking established in the EU or one related to an entity established in the EU, except in relation to acquisitions of EU undertakings or participation in EU public procurement procedures.

However, if the new tool aims at having a meaningful impact on distortions in the internal market, and not be easily circumvented by companies established offshore, it is essential that the focus be the fact that distortive activities are taking place in the EU internal market rather than the place of establishment of the recipient. In other words, **the tool must cover all subsidies granted to any undertaking – wherever established – which facilitate any activity that distorts the internal market**.

To achieve this, which would effectively be a consistent application of the "qualified effects" principle already recognised in EU competition law (including effects which are "probable", i.e. not yet actual), the following modifications of the definition of subsidies in Annex I are needed:

1. The entire second paragraph should be replaced with a single sentence:

   "*Foreign subsidies would fall under any new legal instrument insofar as they directly or indirectly cause distortions within the single market*."

2. The last sentence of the penultimate paragraph should be deleted.

3) Coverage needs to extend to all subsidies, regardless of sector

Footnotes 24 and 25 of the White Paper expressly exclude from Module 1 foreign subsidies provided for goods and agricultural products imported into the EU on the grounds that they are covered by the EU trade defence instrument. This is too simplistic an approach and does not recognise the many ways in which subsidies distort the EU market, for example in relation to services and intellectual property in sectors which produce and sell goods, ways that the trade defence instrument does not cover.

There is also the fact that the trade defence instrument does not cover all trade in goods. For example, goods which are not cleared for free circulation in the EU (e.g. goods which are brought into EU territory under an inward processing regime or a temporary import regime) are generally not covered by the EU trade defence instrument. By way of illustration, existing Trade defence instruments do not effectively apply to trade in shipbuilding products since ships are rarely "imported into the EU" in the sense of "cleared for free circulation". Yet subsidies related to those goods can result in major distortions on the EU market.

In addition, when the market in downstream sectors is distorted due to subsidisation of an imported upstream input for certain EU market operators, there may or may not be an upstream EU industry able or willing to bring a trade defence complaint against those imports.

There is also the aspect of timing which limits the applicability of the trade defence instrument. Indeed, a complaint requires imports which have already taken place in sufficient volumes to cause or threaten to cause injury to the EU producers of that product. However, there are sectors where foreign subsidies may cause major distortions of the EU market already at the time sales contracts are entered into, which may be long before imports actually take place.

In sum, to be effective, a new tool to address distortions of the EU internal market caused by foreign subsidies must be considered to apply in principle to all sectors regardless of whether imports of individual products may or may not be covered by trade defence instruments. To the extent there would be a concern of overlapping remedies that can be addressed in the determination of the appropriate remedy under the new tool.

4) Definition of "distortions in the internal market" needs to be sufficiently flexible and recognise cases of *per se* distortive effects

The White Paper suggests that a *de minimis* threshold of EUR 200.000 (over a consecutive period of three years) be applied in relation to the amount of the subsidy in order to identify subsidies that "are deemed unproblematic". However, especially in the light of difficulties in assembling and verifying information about the existence and amount of foreign subsidies, the tool must consider all quantifiable and even non-quantifiable benefits, at least to the extent it is possible to quantify a distortive impact where the latter meets the threshold requirements. In this regard, the lower limit of EUR 200.000 could be considered *de minimis* in principle but there needs still to be the possibility of showing in a specific case that foreign subsidies which are not quantifiable to the extent of the threshold still have a significant distortive impact on the EU internal market.

In any event, it is important to recognise the distortive impact which occurs in some situations even before an entity is fully entitled to the subsidy (e.g. where the subsidy is conditional on winning a tender).

To the extent a group has operations fully subject to EU jurisdiction and fully cooperates in providing verifiable information that the foreign subsidies which it receives impact only its operations outside of the EU, they could benefit from a (rebuttable) presumption that those subsidies do not distort the EU internal market.

In addition, certain foreign subsidies should be considered distortive *per se*. These would include, inter alia, all those the White Paper lists in section 4.1.3.1 ("Categories of subsidies considered likely to distort the internal market"), except that the first item listed there should be extended to include **all** export financing subsidies granted by countries which are not signatories to the OECD arrangement on

officially supported export credits. Additional subsidies which should be considered distortive *per se* are:

- subsidies to beneficiaries active in sectors characterised by structural excess capacity;
- subsidies to beneficiaries active in sectors featuring high-tech and/or dual-use products to a significant extent; and,
- subsidies to beneficiaries active in sectors designated as strategic by the government providing the subsidies.

5) EU interest test must start from presumption of interest in removing distortions

Once it is established that a foreign subsidy is capable of distorting the internal market, the White Paper suggests that there should be an assessment of the "possible positive impact" of the supported economic activity or investment in the EU, and that if on balance, the positive impact "sufficiently mitigates" the distortion on the internal market, "the ongoing investigation would not need to be pursued further".

Based on experience with a similar type of test in the context of trade defence proceedings, it would be critical for the effectiveness of a new Module 1 tool that there be:

1. **a baseline premise that there is a fundamental and strong EU interest in favour of removing the distortions caused by foreign subsidies**;
2. a recognition that even when the supported economic activity or investment appears to be furthering EU public policy objectives in the very short term, the impact of the distortions may easily be such that in the medium term those public policy objectives would be less likely to be realised if measures are not taken.

In relation to EU public policy objectives, there needs to be a recognition that **a strong EU industrial base with sustainable and diversified supply chains is itself a public policy objective of primary importance, and that there is an even stronger premise in favour of removing distortions which endanger that objective**.

To the extent that public policy objectives might be considered to "mitigate" distortions caused by foreign subsidies, that may justify limiting the redressive measures, but it would not justify an absence of redressive measures, at least not where the distortions cause material harm to EU operators.

In any event, it would be crucial that there is an adequately transparent and coherent analysis of both short- and medium-term impacts of the distortions in question, as well as a full and timely consultation of relevant EU industries and consideration of their input.

The burden on the interested parties should be equal and balanced. The parties claiming the non-imposition of redressive measures should provide substantial economical justifications backing their claims, which should be subject to verification: simple letters by associations or companies without detailed information should be disregarded. In trade cases, there is a major problem with lack of transparency and predictability: the Union Interest allows a lot of discretion to the Commission, while the complaining industry has to file massive and detailed submissions integrating technical, economic and legal arguments and proof.

6) Redressive measures need to be sufficiently effective and dissuasive

We would strongly favour providing the supervisory authority with a variety of alternative redressive measures from which to choose. That said, the authority must start from the basic principle that **structural or other non-financial remedies would be the most appropriate base measure, at least when major subsidies, strategic and/or sensitive sectors, and/or State-owned or directed companies are involved**. The redressive measures would need to be sufficiently effective and dissuasive, and in this regard, financial and other penalties should be possible **in addition to** structural remedies.

Furthermore, given the difficulties in establishing that a foreign subsidy is actually and irreversibly paid back to the third country, it should be recognised as a fundamental basic principle that payments to

the third country or countries would never constitute an appropriate redressive measure, at least with regard to countries which are not subject to the jurisdiction of the European Court of Justice or the EFTA Court in State aid matters.

We also strongly agree with the White Paper statement that it will be critical to ensure that thorough reporting and transparency obligations are imposed whenever redressive measures are applied, as well as effective and dissuasive measures to address non-compliance.

With regard to the choice of redressive measures, as well as commitments to mitigate the distortion(s), it will be essential that the supervisory authority consult in a timely manner with the affected EU industry and allow effective input from that industry, especially into the assessment of whether or not commitments (and which ones) should be accepted. Moreover, if the competent supervisory authority accepts these commitments, their implementation should be monitored with the possibility to impose redressive measures if commitments are breached.

Recognising that the receipt of subsidies can take place long after their initial impact and *vice versa*, the limitation period of 10 years for redressive measures against foreign subsidies should begin only upon the later of the end of the distortive impact of a given foreign subsidy and its receipt by the beneficiary entity.

In any case where there are Commission findings of distortive foreign subsidies, and regardless of the redressive measures finally imposed, there needs to be the right of private parties to undertake legal action with a view to obtaining compensation for damages for injury caused to them by those distortions.

7) Procedural and burden of proof issues

To respect principles of good administration and to provide timely relief to affected EU industries, it is essential that there be deadlines for action by the supervisory authority and the possibility of an administrative appeal of any decision not to pursue an investigation, either initially or beyond the preliminary stage.

Also, in terms of the proof of subsidies needed to justify the opening of the preliminary review, the supervisory authority must *inter alia* accept as sufficient evidence. DG Trade findings of sectoral subsidies made in recent TDI investigations as well as country reports on significant distortions

There should also be the possibility for the authority to impose provisional interim and/or conservatory redressive measures, ideally from the start of the preliminary review but at least by the end of the preliminary review, to ensure that an effective remedy can be imposed once a final assessment is reached.

In the introduction to Module 1, the White Paper states that the supervisory authority would close the case at the end of the preliminary review *inter alia* if "the case is not a priority". This sounds like a summary application of the "EU interest test" and is not appropriate at the state of the preliminary review, which should be focused only on the existence of foreign subsidies causing material distortions in the EU internal market. In this regard, it should be expressly provided that an examination of the EU interest is to take place as part of the in-depth investigation, with full respect for the procedural rights of the relevant EU industries, and is not a ground for termination of the preliminary review without further action. For example, a stricter approach should be taken for:

- countries and sectors where the Commission has already found significant distortions in the framework of an anti-dumping/anti-subsidy investigations,
- sectors that are targeted by national strategic plans (such as Made in China 2025) or that involved in big infrastructural projects financed by third countries (such as the BRI),
- sectors affected by structural excess capacities and/or the presence of State-Owned Enterprises.

It will also be essential to clarify that as a general matter, partial non-cooperation is sufficient to allow the supervisory authority to ignore information provided by the party in question and to proceed on the basis of facts available, at least when major subsidies, strategic and/or sensitive sectors, and/or State-owned or directed companies are involved.

In this respect, the Union industry should also be able to appeal the decision of the supervisory authority, whenever it considers that a case is not a priority. Whenever, in the framework of a trade defence case, the Commission identifies a foreign subsidy that is distorting the EU market, this should be promptly communicated to the relevant supervisory authority/the relevant Directorate General within the Commission to ensure the complementarity of the TDI and the foreign subsidies instrument

8) Competent authority: Commission should have exclusive competence

Given the Commission's powers and experience with investigating foreign subsidies in the international trade context, the need for a harmonised EU approach to the existence of foreign subsidies and their distortive effects, and the need for the Commission to act as guarantor of the EU interest in addressing distortions caused by foreign subsidies, AEGIS Europe believes it is essential that the Commission has exclusive competence for investigations under Modules 1 and 2.

In any event, it should at least be clarified that **in any case involving distortions affecting activities in more than one Member State, the Commission must have exclusive responsibility**, whether acting *ex officio*, at the request of a Member State or at the request of EU operators which can demonstrate that they are directly impacted by distortions resulting from the subsidy in question and represent a significant portion of an affected EU industry.

Further, the White Paper would have the Member States bound in any event by the Commission's view on whether the EU interest test is met. To the extent Member States would have any competence for investigations under Modules 1 or 2, AEGIS Europe believes it also essential that any negative Member State determinations as to the existence of foreign subsidies and/or the existence of distortions on the internal market be subject to a binding review by the Commission upon the request of affected EU operators, especially in order to ensure a harmonised EU approach to these essential issues.

As to the competence within the Commission for investigations under Modules 1 and 2, AEGIS Europe believes the considerations highlighted above also dictate that it would be most appropriate for DG Trade to carry out investigations of foreign subsidies and their distortive effects on the internal market. DG Competition clearly has relevant experience and could provide input on both the existence of distortive effects (e.g., in relation to subsidised acquisitions) and appropriate redressive measures, but AEGIS Europe believes that these instruments should be seen fundamentally as implementing a key aspect of the common commercial policy, i.e. ensuring a level playing field vis-à-vis third country governments whose actions have a significant distortive impact on the EU internal market.

Module 2 – Acquisitions (Annex II: 7 questions)

1) Concept and procedural set-up

In general, the system proposed by Module 2 seeks to address distortions of the internal market through foreign subsidies that facilitate the acquisition of undertakings established in the EU. There is need for such an instrument at EU level, as can be seen in recent examples of successful acquisitions by foreign subsidised companies (e.g. acquisition of Vossloh Locomotives by CRRC, providing CRRC with a share of 25% in the European diesel locomotive market[1]). It should be also noted that in some third countries oversea expansion of domestic companies is an explicit objective of State-led industrial strategies which aim to accelerate indigenous technology development and innovation in order to acquire market presence in high-tech segments[2]. Given the current economic crisis, it is crucial to adopt an instrument quickly so as to prevent foreign subsidised companies from exploiting the opportunities to take over COVID-19 weakened operations in Europe.

The *ex-ante* notification system is appropriate as the competent supervisory authority could ultimately decide on whether to allow or unwind the transaction. The 2-step procedural set-up (preliminary review, in-depth investigation) seems balanced and reasonable, and coherence is ensured as it mirrors Module 1.

To avoid circumvention, it is crucial for the competent supervisory authority to be able to review *ex officio* an acquisition which should have been notified by the acquirer but was not, including after it is completed. The EU industry should also be able to file a complaint/to inform competent authorities on the suspected existence of unfair foreign subsidies.

The White Paper foresees a two-phase notification system similar to that envisaged by the Merger Regulation (phase 1, phase 2, stop the clock and extensions) which seems appropriate. Coordination with EUMR provisions is essential. In the event that the operation is subject to a double notification obligation (pursuant to the EUMR and the legislation on foreign subsidies), one procedure must not create delays / obstacles in terms of the timing of the other.

2) Definitions and threshold

Regarding the definition of what is to be considered an acquisition, it is crucial to cover acquisition of both direct or indirect control, but also of at least a certain percentage of the shares or voting rights or otherwise of "material influence" in an undertaking. Indeed, minority shareholdings can confer material influence over a firm, without the necessity of taking full control.

It seems appropriate therefore to:

1. introduce a definition of "substantial influence", taking into account the notion of "decisive influence" envisaged by Regulation 139/2004 (the EU Merger Regulation) which is configurable on the basis of certain rights or contracts recognized to the parties to the operation;[3]
2. determine a specific percentage requiring notification, for example 25%.

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[1] https://www.railjournal.com/financial/germany-approves-crrcs-vossloh-locomotive-acquisition/

[2] By way of example, see China's NDRC et al., 2016.（2016–2020） [Action Plan to Deepen and Accelerate the Transformation and Upgrading of the Shipbuilding Industry]. See also, J. Holslag *The Silk Road Trap – How China's Trade Ambitions Challenge Europe*, Polity Press, 2019.

[3] Article 3(2) of the EUMR provides: *Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regards to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by (a) ownership of the right to use all or part of the assets of an undertaking; b) rights or contracts with confer decisive influence on the composition, voting or decisions of the organs of an undertaking.*

On this last point, inspiration could be taken from the German and Austrian regulations which require notification of acquisitions of 25% of the shares or voting rights of a target, and/or the UK requiring notification with acquisitions of 25-30% of the shares and, on a case by case basis de facto control.

Joint venture arrangements should also be covered by Module 2, at least to the extent they allow joint control of EU activities and/or involve technology or other significant know-how transfers.

Regarding the definition of what is considered an EU target, AEGIS Europe agrees with the proposed quantitative threshold set at EUR 100 million, in order to focus on the most significant transactions. However, AEGIS Europe supports a qualitative threshold in parallel to examine smaller transactions of a strategic nature that might affect companies with important critical assets, high growth or technology development prospects.

AEGIS Europe supports a notification obligation for potentially subsidised acquisitions (i.e. planned acquisitions of an EU target where a party has received a financial contribution by any third country government) only, as a notification obligation for all acquisitions would create a significant administrative burden for companies (and for the competent supervisory authority) and could have a deterrent effect on foreign direct investment, which is needed by the EU economy.

The self-assessment by undertakings could carry a risk of circumvention, but the ability to act *ex officio* to unwind a takeover or to sanction non-disclosure of the subsidies could counterbalance that risk. In general, the involvement of a foreign State-owned enterprise should lead to the presumption that there are financial contributions of a distortive nature, and the burden of proof should then be on the State-owned enterprise to show it is not subsidised.

In compliance with the principle of "guaranteeing the balance between efficacy and efficiency", it might be appropriate to adopt a single threshold system which provides:

1. a quantitative threshold based on turnover, set at 100 million euros;
2. a qualitative threshold aimed at identifying those companies that are reasonably destined to produce a large turnover in the EU.

This second threshold could be structured taking into account the value of the transaction, which can represent an index of the target's growth prospects. In the latter case, a value of 200 million euros (as required by the Austrian merger control legislation) or 400 million euros (as required by the German merger control legislation) could be applied.

3) Substantive assessment criteria

AEGIS Europe agrees that foreign subsidies may facilitate an acquisition directly or *de facto* (i.e. in cases where foreign subsidies reinforce the financial strength of the acquirer), and therefore both aspects should be covered by Module 2 to avoid circumvention.

AEGIS Europe agrees with most of the indicators proposed by the Commission but does not support, as an indicator, the situation on the market concerned ('*level of activity in the market of the beneficiary*'): there are many sectors where the still limited presence of a subsidised foreign entity can evolve quite quickly to the detriment of EU players. This is especially true when it comes to public procurement for large projects, as a single actor can capture significant market shares in a limited time span. In addition, a distortive foreign subsidy may result from a third country's industrial strategy to penetrate a new market in which the beneficiary of the subsidy was not yet active.

It is crucial to consider privileged access to/dominance on the domestic market as a full criterion[4] (i.e. market access conditions for EU companies in the subsidising third country), as it is clear from our experience that the dominant position of a single player on a domestic market enables it to leverage

[4] The White Paper states that '*consideration will 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*'.

its position worldwide, including in the EU. Finally, the strategic nature and economic or geographical importance of an acquisition should be more clearly emphasized and be part of the assessment – this is particularly true in relation to State-led strategies such as Made in China 2025, or projects related to China's Belt and Road Initiative (BRI).

Guidelines could be adopted to evaluate both direct and *de facto* acquisitions, by applying indicators on the basis of those proposed by the Commission, namely: (i) relative size of the grant, (ii) beneficiary's situation, (iii) situation of the beneficiary market or markets concerned, (iv) level of activity of the interested parties and (v) any privileged access of the beneficiary to his national market.

4) Redressive measures

AEGIS Europe supports the focus on structural remedies due to the nature of Module 2. AEGIS Europe also insists on the need for sufficiently deterrent measures that match the distortions caused on the Single Market; in particular, a decision prohibiting the proposed transaction should be adopted if foreign subsidies create distortions that cannot be remedied with commitments. It should also be defined more clearly under what circumstances the commitments taken by the beneficiary of a foreign subsidy would be considered satisfactory in order to avoid diverging outcomes.

Furthermore, in case of failure to timely supply the information requested or for supplying incomplete, incorrect or misleading information, strong financial and other sanctions have to be taken. Inspiration could be taken from article 14 of the EC Merger Regulation[5].

5) EU interest test

As a general matter, there would be no need for the application of an EU interest test in any case where either there is no danger of the target company failing (in the absence of an acquisition) or there is at least one other *bona fide* offer – and not benefiting from foreign subsidies – for acquiring the EU company. In other words, the application of the EU interest test in the acquisition context could be limited to those cases where a firm is failing and the only way of having a reasonable chance to maintain the company is if the acquisition were to go through.

Even in these latter cases, and based on AEGIS Europe' experience with a similar type of Union Interest Test in the context of trade defence proceedings, it is critical that there be:

1. a premise that distortions caused by foreign subsidies should be eliminated (i.e. allowed only in exceptional circumstances);
2. a recognition that even when the supported economic activity or investment appears to be furthering EU public policy objectives in the very short term, the impact of the distortions may easily be such that in the medium term those public policy objectives would be less likely to be realised if measures are not taken.

To the extent that public policy objectives would be considered to "mitigate" distortions caused by foreign subsidies, it would be crucial that there is an adequately transparent and coherent analysis of both short- and medium-term impacts of the distortions in question.

The EU interest should also integrate industry inputs and acknowledge the need for a strong EU industrial base with sustainable and diversified supply chains.

6) Enforcement responsibility

AEGIS Europe agrees that the Commission should be made exclusively responsible for enforcing Module 2. Due to the *ex-ante* system based on notifications, a system centralised at Commission level would lead to lower overall costs and increased legal certainty (i.e. one-stop-shop) for companies. It

[5] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

will also guarantee more efficiency in the process and a true assessment at European level without economic considerations at the level of the Member State(s) concerned.

Guidance could be taken from the Merger Regulation on the administration of the new instrument.

Module 3 – Public procurement (Annex II: 4 questions)

1) Why it is needed

AEGIS Europe strongly supports a module tackling the specific distortions caused by foreign subsidies in public procurement procedures. A dedicated instrument is needed for several reasons:

- the importance of public procurement in Europe (every year, over 250.000 public authorities in the EU spend around 14% of GDP i.e. around €2 trillion per year on the purchase of services, works and supplies);
- its specific nature compared to traditional flows of goods or services (project-based approach through procedures for which public authorities are responsible, e.g. in rail transport);
- the absence of disciplines on foreign subsidies, and their subsequent treatment in specific tendering procedures, in the EU public procurement framework[6].

Module 3 is vital to concretely assessing whether foreign subsidies have been received by an economic operator and if these subsidies have distorted the specific procurement process, with potential decisions on the possibility for the beneficiary to keep participating in EU tenders. At the same time, this Module could have a far-reaching impact on public procurement procedures, both for contracting authorities and for economic operators. Therefore, a right balance between effectiveness and burden is essential.

As Module 3 and Module 1 should be complementary, it is important to clearly define the scope and operational details for both modules.

More generally, it will also be important to pursue the adoption of the International Procurement Instrument (IPI). Its objective is clearly different (i.e. to open third country procurement markets) and complementary to the instrument on foreign subsidies, but the redressive measures may overlap (i.e. exclusion of third country economic operators) and coherence should therefore be ensured.

2) The proposed framework needs to be improved

While AEGIS Europe believes that the system proposed by Module 3 could address distortions of the internal market caused by foreign subsidies in public procurement procedures, we would like to raise concerns about the practical feasibility of such a system, which bears the risk of adding considerable burden for companies (including European ones) while potentially disrupting specific procurement procedures (i.e. suspension during the investigation).

AEGIS Europe therefore proposes a double-sided system:

1. **For general procurement above agreed thresholds, the *ex-ante* notification system should be shifted to an investigation launched before the final award of the contract**. This would enable action to be taken in the framework of a specific procedure, but not automatically and without adding further burden on European companies.
2. **For EU-funded projects**, which call for a close scrutiny and have a particular importance since it is EU taxpayers' money**, the *ex-ante* notification system should be maintained**.

The functioning of the alternative system (i.e. outside EU-funded projects) during the 'standstill period' before the final award would be as follows:

- In accordance with Article 41 of Directive 2004/18/EC, when the evaluation process is completed, all tenderers need to be notified of the outcome. This information must be sent as

[6] p. 11 of the White Paper: '*In contract, Article 69 of Directive 2014/24/EU contains no corresponding provision for foreign subsidies that enable bidders to submit low offers*'.

soon as the decision to award the contract has been made and at least 10 days before the contract is signed with the preferred bidder (the so-called 'standstill' period).

- After the bidders have received that information, i.e. during the 'standstill' period, competitors should have the possibility to inform the competent authority of the distortive foreign subsidies that the preferred bidder may have benefitted from. That authority could be the national supervisory authority as it is also the authority in charge of potential litigation related to public procurement. The investigation could lead to the elimination of the economic operator from the ongoing procedure and from future procurement by the same contracting authority for a certain period of time.
- The major advantage of this system is that it is attached to a specific procurement procedure, but potentially disrupts it only at the end of the process – which coincides with the timing when other litigation is brought to national authorities already today. Furthermore, this system might be efficient for 'one-offs' types of distortions in sectors where foreign subsidised players are not so established.

3) Other improvement suggestions

Initiation of the procedure

In case an *ex-ante* notification system is maintained, only economic operators that have received a financial contribution within the meaning of Annex I within the last 3 years preceding the participation in the procedure and/or during the execution of the contract should notify to the contracting authority when submitting their bid. This would avoid the burden and legal uncertainty for other economic operators to systematically report that they have not received such financial contribution. This obligation should apply to other members of the consortium in combined tenders as well in order to avoid circumvention.

AEGIS Europe supports a system whereby the notification obligation could be limited to the main subcontractors and suppliers, for which clear criteria will need to be defined. Indeed, the system could add a significant layer of complexity and would require to collect the information from the whole supply chain upfront (i.e. when bidding), which can be extremely challenging in practice.

Thresholds and additional conditions for review

Thresholds and additional conditions for review should focus on foreign subsidies that might cause distortions of the procurement procedure, and enable to limit the administrative burden for public buyers and competent supervisory authorities.

In order to ensure coherence with Modules 1 and 2, the relevant subsidy period could be limited to a period of three calendar years prior to the date of the notification and including the year following the expected completion of the contract.

A threshold higher than the thresholds for the application of the Public Procurement Directives could indeed be defined.

In any case, it would probably be easier to define such a threshold than to decide on notification only above a certain foreign financial contribution value (which would rely on self-assessment and therefore be more subject to circumvention).

Investigation

The two-step approach (preliminary review and in-depth investigation) ensures coherence with other Modules.

In case an *ex-ante* notification system is maintained, it is also important to have a swift first step (maximum of 15 working days) to ensure the shortest delay possible in the public procurement procedure. Although the 3 months proposed for the in-depth investigation would disrupt the

procedure significantly should the economic operator to whom the contract is to be awarded be under investigation, it seems a difficult to shorten that procedure given the complexity of establishing the existence of distortive foreign subsidies.

Furthermore, sectoral reports could be drafted by the European Commission to already highlight risks related to a number of entities ('watch list') and facilitate investigations; these reports could propose, at least in some pre-identified sectors, that a significant price difference of a tender under an evaluation dominated by a price criterion should automatically lead to an investigation. Existing trade defence cases linked to companies participating to the tender could also be considered in the drafting of the watch list.

As stressed in the White Paper, any *ex-ante* notification process relies on self-assessment by economic operators, which bears a clear risk of circumvention. AEGIS Europe therefore welcomes the possibility for competitors to inform the contracting authority with *prima facie* evidence that a notification should have been made (or that competition has been distorted in AEGIS Europe's alternative proposals). There should also be a remedy system to give the possibility for the European Commission to oppose the assessment of a competent supervisory authority.

Redressive measures

Exclusion from the ongoing procedure should be automatic, whatever the competent supervisory authority is. Regarding the potential exclusion for a certain period of time, the White Paper remains vague as to whether this would only concern the contracting authority concerned by the investigation under Module 3 or whether it would be across the EU.

As already stressed, the system needs to be credible and, therefore, redressive measures deterrent enough. Exclusion from procedures of a specific contracting authority for a period of maximum 3 years alone is not sufficient, as in some sectors there will not be any new tender by the same contracting authority in that timespan. Furthermore, it would be extremely cumbersome for other contracting authorities and economic operators to suffer the delays in various procurement procedures linked to subsequent investigations when ultimately the problematic bidder might always be the same.

Therefore:

- Exclusion from a procurement procedure should be automatic (including for other members of the consortium and for related companies) and applicable to the contracting authority for a sufficient long period of time, following the assessment of the competent supervisory authority (Member State or Commission depending on the cases);
- Any economic operator that has been excluded from a procurement procedure following an investigation will have to prove that it does not benefit from distortive foreign subsidies when bidding on other projects for that same period of time.
- Transferability of results from a closed case to a new one must be ensured, and any relevant Commission findings under Module 1 should be sufficient to justify stronger and EU-wide measures (exclusion from all EU future procurement procedures for the same product category (according to HS codes) for a maximum of 3 years, following the assessment of the European Commission).

Finally, in case of failure to timely supply the information requested or for supplying incomplete, incorrect or misleading information, strong financial and other sanctions have to be available to the competent authority. This is also appropriate where third countries refuse to cooperate for fact finding visits, which should lead to immediate exclusion from EU procurement for the enterprises concerned. Inspiration could be taken from art. 14(1) of the EC Merger Regulation[7].

[7] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

4) Enforcement responsibility

Public procurement is mostly organised at the Member State level, and therefore a clear national dimension has to be acknowledged. At the same time, contracting authorities might not have sufficient resources to fully participate in the investigation and '*may also have a short-term economic incentive to award contracts to such bidders, even if the low prices offered result from the existence of foreign subsidies.*' Without sufficiently strong disciplines indeed, the system will simply be inefficient.

AEGIS Europe supports a shared management of responsibilities between the Commission and Member States, but asks how in practical and concrete terms the Commission would be involved in national investigations. If it is decided that a Member State alone can carry out an investigation until the end, it is crucial to ensure that the Commission can challenge the assessment and that appropriate remedies are in place for the industry; indeed, it might not be in the interest of Member States to exclude certain bidders or even to launch a proper investigation, especially for fear of political pressure or retaliation. In general, it will be crucial to guarantee full transparency and neutrality in the investigation process, which the Commission can help enhance.

AEGIS Europe suggests an exclusive competence of the Commission in the following cases:

- Foreign subsidies in procurement pursuant to intergovernmental agreements;
- Use of EU funds (e.g. Structural Funds) in the procurement procedure[8];
- Subsequent investigation under Module 3 on the same entity in more than one Member State, or investigation under Module 3 following a more general Module 1 finding showing structural distortions. Exclusion across all EU procurement procedures for a specific product would also have to be decided by the Commission, and not by the national competent authority.

Finally, **AEGIS Europe does not support the proposed interplay between the contracting authorities and the supervisory authorities**. The White Paper suggests that the supervising authority will determine whether there is a subsidy but the contracting authority will determine whether the subsidy has distorted the public procurement procedure (with a guidance '*to ensure a uniform practice of assessment of distortion throughout the EU*'). As highlighted before, contracting authorities may have limited incentive to exclude a (low price) bidder from a procurement procedure, and therefore to conclude that the foreign subsidies were distortive. Furthermore, it would make contracting authorities responsible for a critical part of the investigation whereas many contracting authorities lack professionalisation and resources. In sum, the competent supervisory authority should be responsible for the whole investigation, and the contracting authority should only enforce redressive measures. A guidance would however be useful for national competent authorities to guarantee a uniform practice of assessment of distortion across the EU, but the Commission should also bring in its expertise and knowledge in the investigation.

5) Issues that are not addressed

In parallel to the White Paper and future Instrument on foreign subsidies, it is crucial to strengthen the rules on abnormally low tenders in the EU public procurement framework (Article 84, Directive 2014/25 and Article 69, Directive 2014/24). Indeed, the European public procurement market is increasingly confronted with abnormally low bids, in particular from non-European State-owned enterprises shielded from normal market competition. These bids distort competition and can have disastrous long-term effects on companies and jobs in Europe, and although they may appear to be attractive for contracting authorities, they often result in cost increases, low quality and contract delays.

The EU public procurement framework provides for a mechanism allowing contracting authorities to reject, under specific conditions, abnormally low tenders. However, this tool is left unexploited by EU Member States and contracting authorities, and the level of protection of European suppliers facing unfair competition on costs in EU tenders is currently insufficient. First of all, Directive 2014/25 does

[8] See section on foreign subsidies in the context of EU funding.

not provide a definition of an abnormally low tender, but only a list of possible explanations for the low prices. Furthermore, rejection of abnormally low tenders is only mandatory whereby the abnormally low price or costs proposed results from non-compliance with mandatory EU law or national law in the fields of social, labour or environmental law or international labour law provisions. Finally, there is no specific mentioning of third country subsidies, the focus being on state aids as defined by Article 107 TFEU (i.e. EU Member States' State aids).

As per its September 2019 position paper on public procurement, AEGIS Europe therefore calls on European institutions to revise Directive 2014/25 in order to:

- Provide a definition of abnormally low tenders, in order to streamline the situation at EU level. Inspiration could be taken from the Luxemburg law on public procurement and its implementing Regulation from April 2018[9];
- Strengthen obligations of contracting authorities to check fully and transparently the reasons for low price with bidders. There should be a specific provision and treatment related to subsidies from non-EU state aids: When a company fails to solidly establish that it has not benefited from these, the tender shall be automatically rejected by the contracting authority[10];
- European institutions to place the burden of proof on: (i) the bidding candidate whose offer has been rejected as abnormally low (according to the newly-established definition of abnormally low tenders); or on (ii) the winning bidder, whose offer is alleged to be abnormally low by other bidding candidates;
- The European Commission to support Member States in their understanding and evaluation of abnormally low bids, so that Member States can raise awareness of their contracting authorities. Guidelines could be published on the model of the World Bank[11].

Furthermore, the promotion of Most Economically Advantageous Tender (MEAT – understood here as banning the possibility to award funds on the basis of price only) and of EU localisation content to foster growth and jobs in the EU should also be addressed. They will be tackled in the section on foreign subsidies in the context of EU funding.

Finally, AEGIS Europe reaffirms the need to adopt as soon as possible the International Procurement Instrument (IPI) as it is a complementary tool aiming at opening up public procurement markets in third countries.

[9] Article 88 of the implementing Regulation of 8 April 2018 (http://legilux.public.lu/eli/etat/leg/rgd/2018/04/08/a244/jo) states the following: '*La remise d'une analyse de prix doit être demandée par le pouvoir adjudicateur aux soumissionnaires dont les offres sont de plus de 15 pour cent inférieures à la moyenne arithmétique des prix de toutes les offres conformes aux exigences formelles de la procédure de passation reçues, y non compris l'offre la plus chère et l'offre la moins chère.*'

[10] Article 38, para (4) (and 146 §4) of the Luxemburgish Law of 8 April 2018 on Public Procurement (http://legilux.public.lu/eli/etat/leg/loi/2018/04/08/a243/jo)

[11] http://pubdocs.worldbank.org/en/780841478724671583/Guidance-on-ALB-FINAL.pdf

Interplay between Modules 1, 2 and 3

In general, the existence of each of the three Modules is fully justified on its own, and each of them is an essential tool to level the playing field as regards the distortive impact of foreign subsidies on the Single Market.

AEGIS Europe believes that they should operate in parallel in a coordinated manner, so as to best address foreign subsidies in an effective and coherent manner, and to address circumvention most effectively.

It is important to clarify in which cases Modules 2 and 3 would be applicable vis-à-vis Module 1, for example:

- **Interplay Module 1-Module 2:**
  Under Module 1, Member States could examine acquisitions *ex officio* below the thresholds set up in Module 2 (as can be seen today with EU merger control).
  Also, Commission findings under Module 1 would automatically apply as relevant in any Module 2 investigation of acquisitions by the same entities or of other entities in relation to the same country.
- **Interplay Module 1-Module 3:**
  Under Module 1, the Commission could examine distortions caused by foreign subsidies to an economic operator outside of a specific procurement procedure covered in Module 3, or below the thresholds set up in Module 3, and propose EU-wide sanctions in this framework. The advantage of addressing the issue independently of specific procurement procedures would be that the findings of an investigation under Module 1 could lead to a 'watch list' to which contracting authorities would be obliged to refer. In addition, a Module 1 tool could tackle distortions caused by foreign subsidies in relation to private procurement (e.g. leasing of rolling stock by private rail operators).

The competent authority in any subsequent case involving a given economic operator or sector would need to be able to make use of findings of any prior investigation involving that operator or sector, regardless of the ultimate form of redressive measures.

Also, redressive measures in those subsequent cases would need to be significantly stronger than in other cases, both in order to compensate the cumulative administrative burden for authorities and companies of recurrent cases involving the same economic operator and/or sector, and to act as a deterrent for the receipt of further foreign subsidies distorting the EU market.

The White Paper focuses, in all three modules, on the actions of economic operators in specific transactions or markets. There is insufficient focus on the accumulated impact of subsidies from the same source distorting the EU market though different economic operators. Redressive measures under each of the Modules must take adequately into account the situation where a single country repeatedly subsidises different enterprises in different market segments.

EU funding (Annex II: 2 questions)

1) Why a tool to address foreign subsidies is needed in this area

Examples of EU funds benefiting non-European companies on the Single Market (and elsewhere) abound, in particular for large-scale projects which show a clear acceleration of a trend to award contracts to foreign entities benefiting from subsidies and proposing significantly lower prices.

Only in the recent months, the following projects can be reported:

Rail supply • In June 2020, CRRC in a consortium was confirmed as winning bidder for the purchase of 100 trams (with an estimated tender value of EUR 173 million) by Bucharest City Hall, with the support of the EU Cohesion Fund[12]; • In December 2019, CRRC won a tender valued at EUR 56 million to supply 18 light rail vehicles to the Metro of Porto, while the extension of the network supported by the EU Cohesion Fund[13]; • In September 2019, CRRC in a consortium was selected best bidder for a major rolling stock tender (40 to 80 electric regional trains for EUR 357-957 millions) in Romania, with the support of the EU Cohesion Fund[14]; • In February 2019, Hyundai-Rotem won an order of 213 new trams in Warsaw, with the support of EU Cohesion Fund[15].
Construction • In December 2017, a State-owned Chinese construction firm, the China Road and Bridge Corporation, won a tender valued at EUR 420 million to build the new Peljesac bridge in southern Croatia (designed to link two physically separated regions of the country), with EUR 357 million of the funding (i.e. 85%) coming from the EU Cohesion Fund[16].The awarding of the tender triggered a legal challenge by one of the losing parties, the Austrian firm Strabag, which accused the Chinese firm of charging a price lower than the value of the project, which is part of China's global Belt and Road Initiative for infrastructure and trade. A Croatian court dismissed the complaint[17].
Shipbuilding • In December 2019, a Chinese-led consortium signed a public tender valued at 290-million EUR for the construction of a liquefied natural gas (LNG) terminal in Cyprus[18]. The consortium includes Hudong-Zhonghua Shipbuilding Co., Ltd, a wholly owned subsidiary of China State Shipbuilding Corporation, CSSC, the country's biggest state-owned shipbuilding conglomerate (and the largest in the world). The contract included the construction of a floating storage and regasification unit (FSRU), i.e. special type of ship used for LNG transfer, and related infrastructure. The project will be financed by a 101-million EUR grant from the European Union (Connecting Euro Facility) with additional financing support (150 million EUR) from international

[12] https://www.railwaypro.com/wp/astra-vagoane-crrc-consortium-wins-bucharest-tram-tender/
[13] https://www.railwaygazette.com/modes/metro-do-porto-selects-crrc-to-supply-light-rail-vehicles/55362.article
[14] https://www.railwaypro.com/wp/crrc-astra-consortium-ranks-first-for-romanian-emu-tender/
[15] https://www.railwaypro.com/wp/controversial-warsaw-tender-concluded-hyundai-rotem-selected-to-deliver-the-213-new-trams/
[16] https://www.euronews.com/2019/07/30/much-delayed-420m-bridge-to-connect-croatia-back-on-track
[17] https://www.reuters.com/article/us-china-cee/china-says-won-disputed-croatia-bridge-project-with-fair-tender-idUSKCN1RN23A
[18] http://www.xinhuanet.com/english/2019-12/14/c_138629509.htm

lenders, such as the European Investment Bank and the European Bank for Reconstruction and Development[19].

On top of the fact that these distortions are not addressed, non-EU companies benefit from EU funds (i.e. EU taxpayers' money) while European manufacturers cannot always equally access these third countries' markets and thus benefit from local funding.

This situation confirms the need for additional measures proposed to address potential distortions of the internal market arising from subsidies granted by non-EU authorities in the specific context of EU funding.

As we witness an ever-increasing proportion of International Financial Institutions (IFIs) contracts awarded to Chinese subsidies companies and Chinese-financed infrastructure projects falling under 'government to government procurement' rules, it is urgent to also question the use of EU funds beyond the mere aspect of subsidies. In the current crisis recovery context and debate on strategic autonomy, EU funds and EU-supported IFIs should play a greater role in supporting EU companies who want to do business in the EU or abroad.

In this regard, the cases of EU co-funding granted to EU Companies which carry out their projects in third countries not offering reciprocal market access, and thus ultimately benefitting oversea manufacturers (who may already access significant volumes of domestic state support and cheap financing), is equally a source of great concern[20].

In sum, European taxpayer's money should focus on projects of real European added value, especially in terms of EU employment and investments, ultimately favouring EU-grown technology development (rather than oversea competitors); these efforts will contribute to boost EU's long-term growth in competitiveness. In this respect, AEGIS Europe supports additional new rules making the Most Economically Advantageous Tender (MEAT) principle[21] mandatory and also requiring a certain share of participation of EU companies in projects.

2) Proposed framework

In general, AEGIS Europe supports an alignment of actions along the lines of Module 3, as a significant part of EU funds go through public procurement procedures (e.g. Cohesion Policy). However, the proposed framework should be reinforced and the Commission's powers in particular should be strengthened as there is EU money involved.

It will also be important to strengthen the role of the European Union's Anti-Fraud Office (OLAF) to protect the Union's financial interests when EU funds are involved. The main objective would be to conduct in full independence investigations to fight fraud affecting the EU budget and to avoid circumvention of measures, as it has been seen in previous trade defence cases.

- **Direct management**

The White Paper suggests an approach based on Module 3. At the same time, the approach for EU funding should also be linked to Module 1, given that this tool can play an important role in addressing systemic/structural problems in specific procurement markets via *ex officio* investigations.

The White Paper does not address a broader stake of reciprocity, which goes beyond the question of whether there are distortions related to EU funding. It is not acceptable that European companies are excluded from some markets or have to put up with significant investment and public procurement barriers, with public funding inside or outside these countries (development aid) not accessible to

[19] https://www.financialmirror.com/2020/06/12/eib-approves-e150-mln-for-cyprus-lng-terminal/

[20] For instance, in the context of Connecting Europe Facility (CEF) grants, EU co-funding has been provided to European (commercial) short-sea shipping operators who ordered their newbuilt ships in China (although the ship were destined to operate solely between two EU ports).

[21] MEAT is understood here as banning the possibility to award funds on the basis of price only, while other criteria (quality, innovation, environmental performance etc.) should be sufficiently taken into account.

them, while their competitors can win contracts on the European market or elsewhere with the financial support of the European Union.

The White Paper mentions grants but not explicitly the important case of the Connecting Europe Facility, which aims at funding key infrastructure projects with a budget of EUR 30.5 billion for the years 2014 to 2020. As grant beneficiaries are public authorities (e.g. infrastructure managers), there should be a commitment on their side to award contracts only in accordance with the findings of investigations under Module 1 or Module 3. It will be essential to ensure that grant beneficiaries will follow these rules, and foresee sanctions when this is not the case.

With respect to direct management, rules similar to Module 1 or Module 3 should apply, but the Commission should be the exclusive supervisory authority as EU funds are involved.

As decisive criterion, a strict principle of reciprocity should be applied and understood in two ways: a) reciprocity in terms of access to respective markets; b) reciprocity in terms of access to funding (e.g. research funds in the third country or development aid). In other words, access to EU funding by non-EU companies should be made conditional to EU companies' access to the market and public funding of the third country.

Finally, within the EU investments co-funded by European funding programmes should be guided by stronger conditionality criteria aimed at prioritizing investments in European economy as well as rewarding projects' contribution to European employment and added value creation, including throughout the European full manufacturing value chains, as key selection parameters.

- **Shared management**

EU funds which management is shared between the Commission and the Member States represent the vast majority of the EU budget. It is therefore crucial to also find robust solutions to tackle distortions created by foreign subsidies when these funds are involved.

With respect to Cohesion Policy, AEGIS Europe supports a potential application of Module 3 rules (see alternative proposals made) following the award of a public contract by contracting authorities at national level, while compliance with potential findings under Module 1 would need to be guaranteed. As there is European money involved, the Commission should be exclusive competent supervisory authority for Module 3 in procurement procedures for projects above a threshold of EUR 50 million[22]. This system should also apply to new programmes funded from Next Generation EU and subject to shared management (e.g. Recovery and Resilience Facility).

- **Indirect management**

It is crucial to tackle as well indirect management of EU funds, by which the Commission entrusts budget implementation tasks to other entities (e.g. International Financial Institutions such as EIB or EBRD). AEGIS Europe welcomes the innovative proposals made in this respect and calls for an ambitious approach of streamlining disciplines on foreign subsidies across all projects implemented by IFIs with the support of the EU budget. In practice, this would mean that IFIs should develop rules to tackle foreign subsidies and abnormally low tenders, and exclude these while blacklisting bidders for a sufficiently deterrent period of time.

[22] This would create consistency with reinforced Commission's power in major projects (large-scale investments with a value of more than EUR 50 million each) supported by the EU's cohesion policy funding.