ECLF
European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS FORUM

Response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies

23 September 2020

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Part 1: Introduction and Summary

1.1 The European Competition Lawyers Forum (the "**ECLF**")[1] is grateful for the opportunity to respond to the European Commission's White Paper, which aims at addressing the distortions to the Single Market caused by foreign subsidies.[2] This response has been compiled by the ECLF Working Group and does not purport to reflect the views of all ECLF members or of their law firms (or their clients). Also, while the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.

1.2 The ECLF regards the Commission's current consultation as a forum for collecting views and fostering debate. It should not replace a robust empirical assessment of need or a fully considered impact assessment. This response aims to provide comments on various aspects of the Commission's proposals and to answer the specific questions raised in the Commission's questionnaire. The ECLF would welcome a continued dialogue with the Commission, in light of other responses received by the Commission, to discuss in more detail the development of instruments to level the playing field as regards foreign subsidies.

1.3 In summary:

(A) **Module 1:** The ECLF is generally supportive of the proposed design and scope of Module 1. However, we consider that the instrument should be more closely aligned with the existing State aid rules, and should be widened to apply to all forms of foreign subsidies on goods or services, regardless of the subsidised undertaking's place of establishment, if the subsidy distorts the internal market. Further, to ensure that the Commission only captures substantive distortions, we suggest that the definition of "foreign subsidy" is narrowed and that the proposed *de minimis* threshold is raised. We broadly support both the proposed two-step procedure (though we seek some clarifications regarding, for example, how the stages interact), and the suggested redressive measures (though we consider that any payments made should be characterised as "level playing field adjustments" rather than fines). We consider the Commission is best placed to be the sole competent supervisory authority.

(B) **Module 2:** The ECLF is concerned that Module 2 contains potentially far-reaching (and partly novel) concepts that may have a cooling effect on M&A activity in the EU. Most acquisitions, whether involving subsidies or not, increase the value of EU assets to the benefit of the EU economy as a whole, and therefore a regime that potentially hinders foreign investment into Europe should have a clear framework that establishes the harm caused by potentially subsidised acquisitions. In particular, the ECLF recommends that clarification is provided on the concept of distortion and the substantive assessment criteria, the appropriate thresholds, and the application of a

[1] The European Competition Lawyers Forum is a group of leading practitioners in competition law from firms across the European Union. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1.

[2] These proposals are set out in the *White Paper on levelling the playing field as regards foreign subsidies*, hereafter "**White Paper**" or "**WP**", published by the European Commission (the "**Commission**") on 17 June 2020. The ECLF has responded to the Commission's Questionnaire online by providing a copy of this response.

"material influence" test. We support the two-step investigation procedure and agree that the Commission should be solely competent with regard to Module 2.

(C) **Module 3:** While potential distortions that foreign subsidies may cause to EU public procurements may need to be addressed, it should be explored whether existing mechanisms could be strengthened rather than introducing a wholesale new regime that may add complexity to already complex and lengthy public procurement processes. In addition to the resulting loss of choice between contractors, the proposal also attracts some concerns in terms of its interaction with other international obligations and trade deals and its potentially burdensome impact on procurement processes by adding delays, complexity and uncertainty. The ECLF also supports a review of the way different national and EU authorities will interact as between each other and with the courts.

Part 2: General comments and response to General Questions

General comments: definition of "foreign subsidy"

2.1 The Commission's definition of "foreign subsidy", as set out at Annex 1 to the White Paper, is very broad. It captures all "*financial contribution[s] by a government or any public body of a non-EU State, which [confer] a benefit to a recipient and which [are] limited … to an individual undertaking or industry or to a group of undertakings or industries.*"[3] Further, the Commission states that foreign subsidies can also be granted by "*a private body entrusted with functions normally vested in the government or directed by the non-EU government*".[4]

2.2 The ECLF appreciates that the above definition, and the terms therein, are based on the World Trade Organisation's ("**WTO**") Agreement on Subsidies and Countervailing Measures ("**SCM Agreement**"), in particular Article 1.1 (on the definition of a subsidy) and Article 2 (on finding the requisite specificity of a subsidy). These provisions define a specific subsidy for the purposes of WTO litigation or countervailing action by WTO members, and are also reflected in the EU trade defence instruments.[5] The ECLF contends that fundamentally *internal* market instruments, such as the proposed Modules (in most of their elements), should not be based on concepts designed for WTO litigation and international trade protection purposes. This view is consistent with the Court of Justice's ("**CJEU**") continued emphasis on the autonomy of the EU's legal order.[6]

2.3 Instead, we propose that the White Paper, and its instrumental definitions, are aligned as far as possible with EU State aid legislation, and the Modules are interpreted as aspects of an international State aid regime.[7] We would encourage a move away from the trade framework, since the WTO's SCM Agreement limits the ability of WTO members to take any action against "a subsidy", except as provided in the SCM Agreement and other WTO/General Agreement on Tariffs and Trade ("**GATT**") law.[8] The ECLF considers that an international State aid/internal

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[3] WP, Annex 1.

[4] WP, footnote 61.

[5] e.g. Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176, 30.6.2016, p. 55; see also Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004, OJ L 123, 10.5.2019, p. 4., which introduces a protection instrument in the air transport sector.

[6] See, for example, Opinion 2/13 of the Court of Justice (Full Court) of 18 December 2014 (autonomy of the EU legal order vis-à-vis the ECHR). See also in the context of the autonomy of EU law vis-à-vis WTO rules, Judgment of the Court of Justice (Grand Chamber) of 16 July 2015 in Case C-21/14 P, *Commission v Rusal Armenal ZAO*, at par.48. See also more recently, on the autonomy of EU law with regard to pre-accession bilateral investment treaties between Member States, Judgment of the Court of Justice (Grand Chamber) of 6 March 2018, Case C-284/16 *Slovak Republic v Achmea BV*, at paras. 32-33 and 35-37.

[7] Annex 2 contains further detail on our suggestions for aligning the White Paper with State aid definitions and terminology.

[8] Article 32(1), SCM Agreement, referred to in the White Paper at 6.6. This provision could potentially be interpreted more broadly than envisaging only those subsidies defined in Articles 1 and 2 of the SCM Agreement. There are also some prohibitions in the SCM Agreement (Article 3), such as export-contingent subsidies to exported goods or local content requirement-contingent subsidies that reduce demand for import content goods. However, these prohibitions can only be enforced through the WTO dispute settlement mechanism (and if they were enforced through Module 1, this would potentially be inconsistent with Article 32(1) of the SCM Agreement).

market instrument would not be limited under the SCM Agreement, and would allow effective EU enforcement.

2.4 We appreciate that this proposal may require the Commission to use an alternative legal basis and legislative procedure to that provided by Article 207 TFEU (common commercial policy), in ensuring the functioning of, and competition in, the internal market when proposing the contemplated measures. Such legal basis could be Article 108[9] or Article 114 TFEU, or Article 352 TFEU as a last resort.[10] While pursuing such internal market legislative procedures might seem burdensome, the risks described in the White Paper will likely unite the interests of the Member States. Moreover, the choice of an 'internal market' legal basis would preserve the autonomy of the EU legal order and would avoid unnecessary inconsistencies with the WTO framework.

1. Do you think there is a need for new legal instruments to address distortions of the internal market arising from subsidies granted by non-EU authorities ('foreign subsidies')? Please explain and also add examples of past distortions arising from foreign subsidies.

2.5 The ECLF understands the Commission's concerns that European companies can be disadvantaged if their competitors are in receipt of foreign subsidies, and that such subsidies might have a distorting effect on the single market. The ECLF therefore generally supports the introduction of new legal instruments to address these concerns and ensure a level playing field in the single market. However the ECLF suggests the Commission limit the instruments to capture only those foreign subsidies that might cause substantive distortions within the internal market. Otherwise there is a risk that the Commission might take an overly interventionist approach which could increase the administrative burden for businesses – and the Commission – in a range of situations, as well as potentially chilling M&A activity in Europe. To mitigate against this, the ECLF suggests a range of limitations, as set out in detail below, including narrowing the broad conceptualisation of "foreign subsidies" and/or substantially raising the relevant *de minimis* thresholds. Further, in the context of the public procurement regime (Module 3) the ECLF considers it may be more appropriate for the Commission to strengthen the available existing mechanisms rather than to introduce a complex new regime wholesale.

2. Do you think the framework presented in the White Paper adequately addresses the distortions caused by foreign subsidies in the internal market? Please explain.

2.6 The ECLF is generally supportive of the framework presented in the White Paper, though there are some aspects which we consider require further thought and clarification. Please see below for the ECLF's detailed assessment of the framework: in particular, please see the response to Question 1 of Part 3 and Part 4, and Question 2 of Part 5.

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[9] The second sentence of Article 108(1) is potentially very broad: "*[The Commission] shall propose to [the Member States i.e. the Council] any appropriate measures required by the progressive development or by the functioning of the internal market*." However, Article 108 would need to be interpreted as referring to aid granted by third States as well as Member States to be used as a legal basis for the proposed internal market instrument, which may not be feasible.

[10] Article 352 is used for internal market instruments when the Treaties do not provide the EU with the necessary powers and requires the unanimity of Member States.

Part 3: Module 1

3.1 The ECLF is generally supportive of the proposed design and scope of Module 1, and welcomes this *"general instrument to address foreign subsidies that cause distortions in the internal market"*.[11]

1. Do you consider that Module 1 appropriately addresses distortions of the internal market through foreign subsidies when granted to undertakings in the EU?

3.2 The expansive definition of foreign subsidies in the White Paper may pose practical difficulties regarding enforcement of Module 1. In particular, it is not clear to us how the Commission would be able to gather evidence on the existence of some foreign subsidies, especially where the granting body is uncooperative during investigations, or otherwise seeks to evade detection. Furthermore, gathering sufficient evidence is less feasible for subsidies granted by third countries, and enforcement on the basis of limited evidence could be perceived as discriminatory or unduly protectionist.

3.3 The White Paper suggests following the evidential approach of using the 'facts available' in circumstances where the subsidised parties do not provide the requested information in a timely manner.[12] While this approach is effective in EU trade defence investigations, it may not be appropriate for internal market instruments enforced against undertakings established in the EU / the regulation of the proper functioning of the internal market. If the Commission accepts our suggestion of moving away from an international trade framework and toward an 'internal market' model, then the recipient undertaking (established in or otherwise active in the EU) would be under an obligation to provide information to the Commission, as in EU competition law e.g. antitrust investigations. Furthermore, the 'facts available' approach puts undue onus on the recipient undertaking to defend itself, since the 'facts' are likely to be provided by competitors/complainants, who might overstate the negative aspects of the subsidy. Therefore the ECLF suggests, in line with the broader move away from an international trade framework that this paper advocates for, that the Commission should not use the 'facts available' approach in Module 1 investigations.

3.4 Moreover, the broad conceptualisation of foreign subsidies could cause the Commission to be overwhelmed by insignificant cases, as outlined at paragraph 3.45(i) below.

Overlap with trade defence instruments

3.5 The ECLF notes that there is a potential overlap in practice between the proposed scope of Module 1 and the existing WTO and EU trade defence instruments ("**TDIs**"), such as anti-dumping and anti-subsidy rules.

3.6 As regards anti-dumping measures, when a foreign company exports a product to the EU at a lower price than the product's normal value in its home market, this may be because:

[11] WP, para. 4.1.1.

[12] WP, para 4.1.5.

(i) The product's normal value is unreliable due to a 'particular market situation' or a 'significant distortion' caused by a foreign government;[13] and/or

(ii) The product's export price is suppressed (subsidised or distorted) by a foreign government.

Foreign governments may influence the pricing behaviour of exporters and effectively subsidise them through practices such as domestic or export price controls; non-selective indirect tax measures; or domestic sales restrictions. The General Court has upheld such interpretations applied by the Commission in a number of anti-dumping investigations.[14]

3.7 As regards anti-subsidy measures, the existing EU rules allow the EU to react to unfair competition where goods that benefit from countervailable subsidies, provided by foreign governments or public bodies, are imported into the EU. A subsidy is countervailable in cases where the subsidy is limited to certain enterprises or industries or is contingent on exports or on use of local content, and where a financial contribution confers a benefit on a recipient, reflected as a subsidy margin in the price of the exported product.[15]

3.8 The ECLF agrees with the distinction made in the Commission's gap analysis: that while the EU anti-dumping and anti-subsidy rules apply to the import of goods into the EU, they "*do not cover trade in services, investment or other financial flows in relation to the establishment and operation of undertakings in the EU"*.[16] The existing TDIs have limitations, and Module 1 goes further by addressing *all* foreign subsidies affecting the internal market.

3.9 However, it is our view that when competition in the internal market is being distorted by a foreign subsidy, the exact source and scope of effects of the subsidy is often not initially known, and it may therefore be difficult to determine whether at the outset the subsidy is one which is covered by the existing TDIs. This could cause an investigative delay, and may also lead to uncertainty around conflicting jurisdictions and responsible authorities. In particular, we are concerned that there may be an issue with identifying the right instrument at the right stage, leading to concurrent investigations.

3.10 The White Paper suggests that foreign subsidies provided for goods imported into the EU should be carved out of Module 1, since they fall under the existing TDIs.[17] The ECLF does not agree with this approach, and instead recommends that, during the preliminary review stage

[13] Article 2(3) and Article 2(6a) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, as amended by Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017, OJ L 338, 19.12.2017, p.1. In a Declaration on transition annexed to the latter, the Commission has stated that *"[it] recalls that the purpose of the new methodology is to maintain the continued protection of the Union industry against unfair trade practices, in particular those arising from significant market distortions*."

[14] For example, see Judgment of the General Court of 7 February 2013, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v Council of the EU***,** at recitals 62-67.

[15] Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, as subsequently amended.

[16] White Paper, para. 3.2.

[17] WP, footnote 24.

and subsequent investigation stage, where triggered, Module 1 should cover all subsidies, including those that could potentially fall under the existing WTO/EU TDIs. This would allow the competent supervisory authority to consider the extent to which the existing TDIs address the foreign subsidy under investigation. If considered appropriate once the nature and impact of the subsidy are known, an *ex officio* anti-dumping or anti-subsidy proceeding could be triggered at the remedies stage, as a redressive measure.

3.11 Although the definition of "foreign subsidy" generally seems to be based on the definition in the SCM Agreement, in respect of tax subsidies the definition appears to be wider than that in the SCM Agreement and to be more like the approach taken in EU State aid cases. The SCM Agreement refers to situations where "*government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)*"; whereas the White Paper's definition includes a financial contribution consisting in "*foregone or not collected public revenue, such as preferential tax treatment or fiscal incentives such as tax credits*".

3.12 Given the examples of tax-related foreign subsidies given in section 2.2 of the White Paper, we assume that the omission of tax "otherwise due" and the inclusion of "preferential tax treatment" in the White Paper's definition of "foreign subsidy" is deliberate and intended to capture a broader set of tax-related foreign subsidies than conventional "tax credits".

3.13 However, although the result of including any "preferential tax treatment" might be similar to the EU's existing approach to tax and State aid, it does not import all the normal concepts in State aid cases. As such, it is not clear exactly what is meant by "preferential tax treatment" and this may be difficult to apply in practice. In line with the approach recommended above, in our view alignment of the tax aspects of the definition of "foreign subsidy" with EU State aid legislation and principles would give a clearer framework for applying the proposed foreign subsidies regime to tax matters.

3.14 We also note that a significant amount of work and information goes into a case against a specific tax regime or tax ruling in a State aid context in the EU. Typically that requires significant co-operation from taxpayers and tax authorities. Forcing foreign tax authorities to comply with such an in-depth investigation into their tax regimes may prove difficult. Simplifying the scope of "foreign subsidies" in respect of tax matters would likely assist in limiting the scope of information that would be required in such an investigation.

3.15 We would also recommend a more detailed consideration of what the scope of a tax-related "foreign subsidy" should be. Section 2.2 of the White Paper gives three examples:

(i) corporate tax regimes with selective incentives for parent companies;

(ii) dedicated tax rebates supporting outward investment; and

(iii) investments through offshore financial centres which may offer special tax conditions.

3.16 As drafted, the definition of "foreign subsidy" would likely only cover the first two examples. For most offshore financial centres, the tax incentive will be a 0% or very low corporate tax rate that is, in most cases, available to all companies and so not "*limited… to an individual undertaking or industry or to a group of undertakings or industries*". There is also no clear answer to what

the "foregone or not collected public revenue" would be in such cases. Absent, for example, OECD agreement on a minimum tax rate, there is no clear way of determining that the tax rate should have been higher and so an amount of tax has in fact been foregone or not collected.

3.17 "Foreign subsidies" are, therefore, much more likely to be relevant to more sophisticated tax regimes that might have selective elements for certain types of companies than for offshore finance. That does not entirely reflect all the examples given in section 2.2 of the White Paper and so we recommend that more consideration is given to the scope of tax subsidies that the proposed regime is intended to apply to.

Scope of application

Foreign subsidies benefitting an undertaking in the EU

3.18 The White Paper outlines that Module 1 could exclusively apply to undertakings "*established in the EU*" that benefit from foreign subsidies, but it also considers that the instrument could additionally cover certain undertakings otherwise active in the EU that benefit from foreign subsidies.[18]

3.19 An undertaking is considered "*established in the EU*" for the purposes of the White paper if "*one of its entities is established in the EU"*.[19] The ECLF notes that this is a tautological definition, and would like to confirm that the Commission intends to import an accepted meaning of "established" from EU law, for example from case law on the freedom of establishment in the *Treaty on the Functioning of the European Union*. The Commission should offer a precise definition of "*established in the EU*" for the purposes of Module 1.

3.20 The ECLF recommends that Module 1 should cover both those undertakings established in the EU *and* undertakings active in the EU. The ECLF considers that this should include subsidies granted to undertakings potentially active in the EU, to capture non-EU undertakings seeking to make a subsidised acquisition of an EU business that has not yet completed. This would be in line with the White Paper's proposal that "*both actual and potential distortions are considered*".[20]

3.21 Moreover, the scope of this instrument's application should be taken further than the 'potential acquisition' scenario specifically envisaged in the White Paper,[21] and should apply to all forms of foreign subsidies on goods or services, regardless of place of establishment, if that subsidy distorts the internal market. We welcome the broad material scope of Module 1, which allows the competent authority to address distortive foreign subsidies in "*all market situations*", irrespective of whether the subsidy benefits the production of goods, services or investments

[18] WP, para. 4.1.2.2.

[19] WP, para 4.1.2.2: "*An undertaking is considered established in the EU if one of its entities is established in the EU. Where the subsidy is granted to an entity established outside the EU, it would need to be established to what extent the benefit of the foreign subsidy can be allocated to the entity established in the EU, having regard to relevant criteria such as the purpose and conditions attached to the foreign subsidy or the actual use of the funds (as evidenced e.g. through the accounts of the undertaking in question)."*

[20] WP, para. 4.1.3.

[21] WP, para. 4.1.2.2: "…*certain undertakings that benefit from foreign subsidies and are otherwise active in the EU, such as when an undertaking established outside the EU seeks to acquire an EU target."* (emphasis added).

in the EU.[22] In particular, the new instrument should cover subsidised services, since they are not covered by the existing TDIs and represent a significant part of the EU economy.

Date from which the granting of a subsidy is made

3.22 Finally, the ECLF urges the Commission to provide clear guidance on how "*the moment the beneficiary has an entitlement to receive the subsidy*" will be ascertained in practice.[23]

2. Do you agree with the procedural set-up presented in the White Paper, i.e., 2-step investigation procedure, the fact-finding tools of the competent authority, etc.? (See section 4.1.5. of the White Paper)

3.23 The ECLF supports the two-step investigation procedure as outlined by the Commission in the White Paper.

3.24 However, we urge the Commission to clarify:

(i) The standard of proof that will apply at each of the preliminary review and in-depth review stages, and with whom the burden of proof lies. For example, in cases where a foreign subsidy falls within those categories identified within the White Paper as considered likely to distort the internal market, is the burden of proof on the undertaking concerned to prove that it does not, or is the burden on the competent supervisory authority to prove that it does, distort the internal market?

(ii) The rights of the undertaking concerned during each stage. In particular, it is not clear from the White Paper the extent to which the undertaking concerned (and the third country concerned) will be able to present their views on the potential positive benefits of the subsidy during the preliminary review stage, as well as during the in-depth investigation stage.

(iii) The interaction between the two stages. We recommend that the undertakings concerned are given the opportunity to give commitments to the competent supervisory authority at the end of the preliminary review stage (as well as at the end of the in-depth review stage), in order to avoid an in-depth investigation.

3. Do you agree with the substantive assessment criteria (section 4.1.3) and the list of redressive measures (section 4.1.6) presented in the White Paper?

Substantive assessment

3.25 The ECLF considers that the Commission's proposed list of indicators against which to assess whether a subsidy would actually or potentially distort the level playing field in the internal market is sensible.[24] However, we think the proposal would benefit from some further clarity on

[22] WP, para. 4.1.2.1 and footnote 25.

[23] WP, para. 4.1.2.3.

[24] WP, para. 4.1.3.2.

how these indicators would be applied in practice, and would therefore suggest that the Commission provides some guidance on this point, such as by way of worked examples.

3.26 Further, the ECLF seeks clarification on whether the foreign subsidy has to actually cause distortions in the internal market in order for redressive measures to be imposed, or whether it is sufficient that it is merely capable of causing such distortions. Although the White Paper states that *"[b]oth actual and potential distortions are considered"* by the instrument,[25] the actual/potential formulation is applied inconsistently throughout section 4 of the Paper, for example:

(i) "*...the distortions caused by foreign subsidies provided to an economic operator in the EU market…*".[26]

(ii) "*…the investigation would be closed if … after a balancing exercise, the possible distortion that the subsidy may bring is mitigated by the positive impact that the supported economic activity or investment might have…*".[27]

(iii) "*…the competent authorities would only have the possibility to take action if the subsidy causes distortions in the internal market.*"[28]

(iv) "*Certain categories of foreign subsidies … are likely to create distortions … because of their nature and form."*[29]

(v) Discussion around "*quantify[ing] the impact of specific foreign subsidies on the internal market"* (indicative that an actual distortion is required).[30]

3.27 For legal certainty, the ECLF urges the Commission to clarify whether an actual distortion has to be proved, or whether a potential distortion will suffice as consistent with EU State aid rules,[31] and what standard of proof is required in both cases.

Redressive measures

3.28 The ECLF generally agrees with the menu of redressive measures proposed in the White Paper. As detailed at paragraph 3.10 above, we would recommend adding an *ex officio* anti-dumping or anti-subsidy (countervailing duty) investigation to the list of available redressive measures.

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[25] WP, para. 4.1.3, emphasis added.

[26] WP, introduction to section 4, emphasis added.

[27] WP, para. 4.1.1., emphasis added.

[28] WP, para.4.1.2.2., emphasis added.

[29] WP, para. 4.1.3.1., emphasis added.

[30] WP, para. 4.1.3.2., emphasis added.

[31] Section 6.2 of the Commission's Notice on the Notion of Aid states that it is sufficient that a measure "*threatens to distort*" competition.

3.29 The ECLF appreciates the practical difficulty of an undertaking that has unfairly benefitted from a foreign subsidy reimbursing this payment to the third country benefactor, as is the case under the EU State aid rules. The ECLF generally supports the proposed suite of redressive measures set out in the White Paper in lieu of a redressive payment to the third country, where such payment is not suitable or feasible.

3.30 However, the ECLF does not agree with the suggestion in the White Paper that "redressive payments" could instead be made to the EU or Member States, since governments are unlikely to suffer any loss as a result of the distortive foreign subsidy. Furthermore, the foreign subsidies covered by the White Paper are not prohibited under international trade law. Therefore, it may be inconsistent with the international legal framework to "fine" companies in receipt of such foreign subsidies or for these companies to compensate private parties for the loss they have suffered as a result of a foreign subsidy.

3.31 Instead, the redressive payments should be understood as part of an international State aid regime, and payments made to government agencies/the Commission by recipient companies active/established in the EU should be re-characterised as "level playing field adjustments", to recognise the distorting effect such subsidies have on the internal market and to deter other entities from accepting potentially distorting foreign subsidies. This payment is similar to the duties paid to governments on imported goods under the TDIs.

3.32 Separately, the ECLF proposes, on the condition that the proposed measures would be adopted as internal market instruments as set out at paragraph 2.3 above, that EU undertakings which consider they have been adversely affected by the presence of an unfair foreign subsidy/ foreign State aid could make a claim for a compensatory payment, in recognition of the loss they have suffered.

3.33 Ultimately, the measures should put companies in receipt of a foreign subsidy in the same position as a company which has received an EU subsidy / State aid under the State aid regime, in accordance with the EU law principle of equal treatment and the WTO's principle of national treatment.

4. Do you consider it useful to include an EU interest test for public policy objectives (section 4.1.4) and what should, in your view, be included as criteria in this test?

Issue with public policy objectives

3.34 The White Paper states that the EU interest test would take into account the EU's public policy objectives, such as creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience.[32] This broad range of policy objectives, in addition to the need to factor in various players' interests (including consumers' interests) would, in our view, lead to a number of conflicting interests across and within different Member States due to multiform experiences of benefit and harm by different parties.

3.35 It is also not clear how a competent supervisory authority could balance a distortion of competition affecting the entire internal market or a number of Member States with benefits that

32 WP, para. 4.1.4.

accrue in only one/some Member State(s). For example, a foreign subsidy may have the positive effect of creating jobs in one Member State, but the market in which competition takes place (and which is distorted by the subsidy) may be wider than national. We urge the Commission to provide guidance in this area.

Linking analysis to EU State aid rules

3.36 The ECLF recommends that a mechanism is introduced to link the EU interest analysis to EU State aid rules. That is, if the foreign subsidy would be permissible under EU State aid rules because it falls under one of the categories in the General Block Exemption Regulation (GBER),[33] such as providing environmental protection, making good the damage caused by natural disasters, or culture and heritage conservation, then that would balance the subsidy's otherwise distortive effects. Depending on the exemption relied upon, the benefit may need to either accrue in Europe, or at least flow to/be felt by European consumers, in order to be automatically permissible.

3.37 As a matter of principle it would be inconsistent and possibly discriminatory to penalise companies that are being subsidised by their governments under schemes that would be permitted under EU State aid rules; therefore the analysis in Module 1 should be aligned with the existing State aid considerations as far as possible.

3.38 We note that drawing from the EU State aid rules in this way would be consistent with the spirit of the White Paper, which takes inspiration from the EU State aid rules on a number of key points, for example in Module 1 the *de minimis* threshold,[34] and the redressive measures of divestment of certain assets and third party access.[35,36] Further, aligning the instrument with existing State aid rules would also ease the administrative burden for undertakings, as they (and their advisers) could draw on their experience of self-assessing under the State aid regime, rather than needing to review a new list of substantive public policy objectives.

5. Do you think that Module 1 should also cover subsidised acquisitions (e.g. the ones below the threshold set under Module 2)? (section 4.1.2)

3.39 The ECLF considers that Module 1 could also cover subsidised acquisitions where, for example, during an open investigation of distortive foreign subsidies, the company in receipt of the foreign subsidy begins an acquisition.

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33 Council Regulation No 994/98 of 7 May 1998, amended by Council Regulation No 733/2013 of 22 July 2013.

34 WP, para. 4.1.3: "*This amount* [EUR 200,000] *would align with the* de minimis *threshold laid down in EU State aid rules*." (Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1).

35 WP, para. 4.1.6: "*Divestment of certain assets, reducing capacity or market presence, which might limit possible distortions in the internal market, in particular linked to foreign subsidies which are specifically granted for promoting activities in the internal market, drawing inspiration for example from the Rescue and Restructuring guidelines*" (Communication from the Commission - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, p. 1).

36 WP, para. 4.1.6: "*Third party access, for example to mobility apps for providers of transportation services or drawing inspiration from the EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks* (Communication from the Commission - EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25, 26.01.2013, p. 1).

3.40 We would recommend that, if assessment of a potential acquisition is required, then the supervisory authority should have the same power to impose a standstill period under Module 1 as under Module 2, during which time an acquisition could not be completed.[37]

3.41 More generally, the ECLF considers it essential that the scope of each Module is clearly defined. In particular, we urge the Commission to clearly outline the circumstances in which an acquisition that falls below the Module 2 thresholds could be investigated under Module 1. The Commission should propose a transparent procedure for the competent supervisory authority to follow in such circumstances, in order that a timely review of the acquisition can be instigated, consistent with the Module 2 timelines.[38]

6. Do you think there should be a minimum (*de minimis*) threshold for the investigation of foreign subsidies under Module 1 and if so, do you agree with the way it is presented in the White Paper (section 4.1.3)?

3.42 The ECLF agrees that there should be a *de minimis* threshold for investigation under Module 1. However, we consider the proposed EUR 200,000 is too low to be practical since it would cause the Commission to be overwhelmed by minor subsidy cases. Instead, we propose that the *de minimis* threshold should be set at a more realistic level, in the order of several million Euros.

3.43 Furthermore, since the White Paper states that foreign subsidies falling below the *de minimis* threshold "*should be presumed to not be able to distort the correct functioning of the internal market"*, we suggest that the Commission should clarify in what circumstances, if any, this presumption can be rebutted so that a low-value subsidy can be held to be distortive in effect.

EU State aid regime as a point of comparison

3.44 The ECLF recommends that the Commission reviews DG COMP's experience with complaints under the EU State aid rules in relation to setting a *de minimis* threshold**.**

3.45 Given the very broad definition of State aid and low *de minimis* threshold, DG COMP receives a very high number of complaints, and has developed a practice according to which certain cases are prioritised. The criteria by which DG COMP assesses different cases, and decides whether or not to take action, are not always transparent. Informed by our experience with the State aid regime, the ECLF envisages the following problems:

(i) Given the broad definition of "foreign subsidy" in the White Paper (see paragraph 2 *et seq*.) a low *de minimis* threshold would cause the Commission to be flooded by a large number of complaints, with many being small or inconsequential. Therefore, the ECLF recommends that the definition of "foreign subsidy" is made narrower and/or the *de minimis* threshold is raised significantly, so that only substantive distortions that the Commission would realistically seek to control are captured by the instrument.

[37] WP, para. 4.2.5.

[38] WP, para. 4.2.5 – exact timeline not yet finalised.

(ii) Further to (i), if the parameters of Module 1 are kept very broad, then it seems the Commission intends to reserve a right to "pick and choose" certain foreign subsidy cases.[39] Such a wide discretionary power, if based on similarly opaque criteria, inevitably raises concerns about equal treatment, and the political motives behind the Commission's decision to pursue certain schemes and not others. If the Commission anticipates a high case load, which could not feasibly be processed by the supervisory authority's resources, then the ECLF suggests that the Commission should be clear about its enforcement rationale.

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

3.46 The ECLF recommends that the European Commission should be the sole competent supervisory authority for Module 1, building on its experience in applying trade defence instruments as well as State aid rules. Since the various Member States do not currently have the competence to review foreign subsidies in the comprehensive way envisaged by Module 1, national level enforcement would require not only designating competent units within all 27 Member States, but also developing the appropriate "coordinating mechanisms" to give the "shared system of review".[40] This would clearly take great time and expense.

3.47 We appreciate the rationale for the dual approach proposed by the Commission in the White Paper ("*shared competences among multiple enforcer provides the best assurance that the most distortive foreign subsidies are detected and effectively dealt with*").[41] However, we believe that national authorities are no better placed to detect and process such foreign subsidies, and could report any distortions to the Commission as appropriate. Such input from Member States is already envisaged by the White Paper in relation to the EU interest test ("*Member States may provide input at the Commission's request, or at their own initiative"*).[42]

3.48 Instead, the European Commission should set up a unit which would be "*competent for any foreign subsidy benefitting an undertaking in the EU, irrespective of whether it concerns the territory of one or more than one EU Member State"*.[43]

[39] WP, para. 4.1.1: "*If … the case is not a priority, the competent supervisory authority would close the case*".

[40] WP, para. 4.1.7 and 4.1.1.

[41] WP, para. 4.1.7.

[42] WP, para. 4.1.7.

[43] WP, para. 4.1.7.

Part 4: Module 2

1. Do you consider that Module 2 appropriately addresses distortions of the internal market through foreign subsidies that facilitate the acquisition of undertakings established in the EU (EU targets)?

4.1 The ECLF is concerned that Module 2 contains potentially far-reaching (and partly novel) concepts that may have a cooling effect on M&A activity in the EU, in particular by decreasing deal certainty and, as a result, deal appetite. Most acquisitions, whether involving subsidies or not, increase the value of EU assets to the benefit of the EU economy as a whole, and therefore a regime that potentially hinders foreign investment into Europe, should have a clear framework that establishes the harm caused by potentially subsidised acquisitions. The ECLF urges the Commission to clarify and limit the relevant Module 2 concepts, as explained in more detail below.

Distortion concept unclear

4.2 The White Paper appears to cover two types of distortions: (i) distortions with regard to EU investment opportunities and (ii) distortions relating to the activities of the EU target. It is however unclear how the distortion assessment would be carried out, what the precise criteria would be depending on the type of distortion, or the required standard of proof.

Distortions relating to EU investment opportunities

4.3 According to the White Paper, Module 2 "*aims to ensure that foreign subsidies do not give an unfair advantage to their recipients when acquiring (stakes in) other undertakings*"[44] and that subsidised acquisitions may distort the level playing field with regard to "*investment opportunities*" in the internal market.[45] By way of example the White Paper mentions as a distortion the "*possibility*" for a subsidised acquirer to outbid competitors for the acquisition of an undertaking. According to the White Paper, "*such outbidding distorts the allocation of capital and undermines the possible benefits of the acquisition for example in terms of efficiency gains*".[46]

4.4 The ECLF conceptually agrees with this "theory of harm". However, the ability to offer a higher (inflated) purchase price during a bidding process does not automatically mean the acquirer will ultimately be successful. Sellers typically consider a range of factors when choosing a buyer including non-price related aspects such as deal certainty, timing to closing and strategic business plans of the buyer. The Commission should therefore re-consider whether the "*possibility*" to outbid others can already be sufficient to assume a distortion of competition. It should also be assumed that a distortion of investment opportunities is not possible if the foreign subsidised acquirer is the only bidder for an EU target or asset.

44 WP, para. 4.2.1.

45 WP, para. 4.2.3.

46 WP, para. 4.2.3.

4.5 In addition, according to the White Paper direct foreign subsidies are "*normally*" seen as harmful and therefore distortive of competition. The Commission should clarify whether this is meant as a legal presumption and, if so, whether it can be rebutted.

4.6 Finally, the "*indicators*" included in the distortion assessment section[47] largely relate to activities of the target, e.g. whether it is a high tech company, active on highly concentrated markets or in an industry with structural overcapacity. They provide very little guidance on how a distortion relating to investment opportunities would be determined.

Distortions on the markets where EU target is active

4.7 Other than the list of relevant indicators, Module 2 of the White Paper does not explain what the "theory of harm" would be with regard to distortions on target markets. Presumably it would be that the EU target would somehow benefit from the financial strength of the subsidised acquirer, as a consequence allowing it, for instance, to offer its products at artificially low prices? This needs to be clarified.

4.8 It is also unclear from the White Paper what the precise requirements for establishing this type of distortion would be. In this regard it needs to be borne in mind what a foreign subsidies regime would aim to achieve: ensuring a level playing field in the internal market between firms who have received financial support under EU State aid rules and those companies benefiting from foreign subsidies. The ECLF recognises that the legal test and standards for Module 2 foreign subsidies are not meant to be the same as under EU State aid rules and merger control. However, in order not to go beyond the objective of wanting to ensure a level playing field, recipients of foreign subsidies should not be treated worse than those receiving support covered by EU State aid, in particular as beneficiaries of EU State aid and foreign subsidies can in both cases be either EU or non-EU companies. In other words, an acquisition involving foreign subsidies should not be prohibited (or require remedies) if a transaction involving EU State aid would not be prohibited (or require remedies). When designing the regime this should be borne in mind as a limiting principle.

4.9 More specifically, on the substantive criteria outlined in respect of Module 2, the ECLF notes the following:

(i) As mentioned, the White Paper assumes that direct foreign subsidies "*normally*" distort the internal market. Such subsidy may provide the acquirer with a strategic advantage when attempting to acquire a target, but it is unclear whether it would necessarily have effects on competition in the target market.[48]

(ii) In addition, according to the White Paper, foreign subsidies can also be financial contributions received by the acquirer that *de facto* facilitate acquisitions. It is conceivable that *de facto* foreign subsidies may give the acquirer a strategic advantage over other potential purchasers when competing for the same target. The Commission should however have to establish a direct

[47] WP, para. 4.2.3.

[48] In the *RJB Mining* case involving possible EU State aid, the General Court held that the Commission needs to assess the effects of the increased financial strength of the merged entity in its merger analysis, see judgment of CFI (now: General Court) on 31 January 2001, *RJB Mining/Commission*, T-156/98, ECR, p. II-137, paras. 114, 125.

and significant link between the acquirer's financial strength and distortions on the market where the target is active. In *STX/Aker Yards*,[49] for instance, the Commission found that non-EU government subsidies did not have to be assessed, including for the reason that they were not directly linked to the merger.[50]

(iii) Further clarity should also be provided on how the competent authority can establish a direct link between a foreign subsidy and an acquisition leading to a distortion (particularly given the lack of transparency in relation to foreign subsidies) and also how the authority will assess whether a foreign subsidy reinforces the financial strength of the acquirer (for example, will the authority consider financial indicators such as global turnover, EBITDA, etc., which are used in *STX/Aker Yards* and other merger cases assessing the effect of State aid?).

(iv) Furthermore, *potential* distortions are sufficient according to the White Paper – the Commission would need to clarify whether this would also apply to distortions on markets where the target is active, as distortions seem less obvious here.

(v) It is unclear whether the assessment principles in the White Paper apply categorically in combination in all instances. For instance, in case of a *de facto* facilitation, can a potential distortion of competition on the target markets be sufficient in order to prohibit the acquisition or require remedies?

(vi) As a final overarching point the Commission should clarify that minority investments are generally less likely to lead to distortions of competition.

Appropriate filing thresholds required

4.10 The ECLF welcomes the Commission's proposal that a filing would only be triggered if the financial contribution from third party authorities exceeds a certain amount or a given percentage of the acquisition price.[51] This amount would however have to be sufficiently high in order to limit the regime to those foreign subsidies that will likely lead to distortions of the internal market, also given that the White Paper contemplates far-reaching concepts (e.g. *de facto* facilitation, potential distortions, target market distortions). It would have to be materially above the very low *de minimis* threshold contemplated by the White Paper for foreign subsidies in Module 1.[52]

[49] Case No COMP/M.4956 - STX/ Aker Yards (5 May 2008).

[50] For completeness, the Commission nevertheless undertook an assessment of whether the increased financial strength of the merged entity would have raised competition concerns (and concluded that this would not have been the case), see paras. 87 et seqq.

[51] WP, para. 4.2.2.3.

[52] WP, para. 4.1.3.

4.11 The ECLF should also consider exempting certain categories of financial contributions altogether, e.g. contributions that have to be used for a certain purpose (for instance for R&D) that cannot be acquisition related.

"Material influence" test

4.12 The White Paper suggests that Module 2 would not only be triggered in the case of a control acquisition, but also in the case of acquisitions of minority shareholdings or the acquisition of "*material influence*". The White Paper acknowledges that "*material influence*" would have to be properly defined in order to avoid "*confusion*" and unnecessary filings.[53]

4.13 The ECLF is opposed to an introduction of a "*material influence*" test given that this is not a known concept in EU merger control and somewhat of an anomaly by international merger control standards. The experience in the UK and Germany has not always been positive given that the authorities have - at times - interpreted the *"material influence*" test expansively. In particular, recent UK practice has been controversial (for example, in *Amazon/Deliveroo*,[54] the CMA found that the acquisition of a 16% stake conferred material influence).[55] There are also controversial cases in Germany: in *Edeka / Budnikowsky*,[56] for instance, the Bundeskartellamt departed from its established practice that the creation of a corporate link going beyond the acquisition of the mere shareholding acquisition is necessary to meet the material influence test.

4.14 Should the Commission decide to introduce a "*material influence*" test, detailed guidance would be needed on (1) the elements that constitute "*material influence*" and (2) what types of corporate governance rights would confer such influence (e.g. the right to appoint a board member). For instance, the German "*material influence*" test requires the parties to be competitors (or the existence of vertical relationships). Based on the White Paper, this part of the test would not seem relevant for Module 2.

2. Do you agree with the procedural set-up for Module 2, i.e. ex ante obligatory notification system, 2-step investigation procedure, the fact-finding tools of the competent authority, etc. (See section 4.2.5 of the White Paper)?

4.15 In principle, the ECLF agrees with the proposed two-step investigation procedure, but would suggest the following:

(i) Clarity is required on the precise legal test for allowing the competent authority to initiate an in-depth investigation. The White Paper merely mentions that an in-depth investigation would be carried out if there is "*sufficient evidence*

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53 WP, para. 4.2.2.1, footnote 37.

54 *Amazon/Deliveroo*, Final Report, 4 August 2020.

55 Another recent example is RWE's acquisition of a 16.67% stake in E.ON (2019).

56 Cleared on 19 May 2017, Case No. B2-25/17.

tending to show that the acquiring company could have benefitted from foreign subsidies facilitating the acquisition".[57]

(ii) The filing should provide the acquirer with an opportunity to explain: (i) why the financial contribution is not a foreign subsidy; (ii) why any given foreign subsidy would not facilitate the acquisition; and (iii) why there is no distortion of the internal market.

(iii) The White Paper states that the question of whether a Module 2 filing obligation is triggered will require a degree of self-assessment.[58] Given the novelty of the regime, the ECLF suggests that the competent authority provides informal guidance on notifiability if need be.

(iv) Close coordination will be required with merger control reviews given that there may be an overlap between remedies required to address a significant impediment of effective competition (SIEC) and redressive measures addressing distortions of the internal market. The Commission should provide guidance on this.

3. Do you agree with the scope of Module 2 (section 4.2.2) in terms of

- **definition of acquisition**
- **definition and thresholds of the EU target (4.2.2.3)**
- **definition of potentially subsidised acquisition**

As regards threshold, please provide your views on appropriate thresholds.

Acquisition

4.16 The ECLF agrees with the use of the EUMR notion of "control" as a trigger for subsidised acquisitions given that this is a well-established concept in EU merger control.

4.17 The ECLF questions whether there is a need for an additional percentage threshold. It seems worth noting that a few years ago Commissioner Vestager abandoned plans to expand the Commission's competences to allow for a review of non-controlling minority shareholding acquisitions in merger cases, as the burden for companies would have likely been excessive.[59] In any event, the ECLF agrees that acquisitions of non-controlling minority rights or shareholdings would need to be "*significant*".[60] One option would be to rely on established

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57 WP, para. 4.2.5.

58 WP, para. 4.2.2.2.

59 Speech, 2016 ABA Spring Meeting.

60 WP, para. 4.2.2.1.

minority shareholding thresholds used in Member States merger regimes (Germany, Austria - 25%).

4.18 As stated at paragraph 4.13 above, the ECLF opposes the introduction of a "*material influence"* test in addition to a control and minority shareholding threshold.

EU target thresholds

4.19 The ECLF supports applying a quantitative turnover threshold and would suggest relying on established turnover principles set out in the Commission's Jurisdictional Notice[61] to the extent possible.

4.20 With regard to qualitative thresholds, Germany and Austria have introduced transaction value based thresholds in the area of merger control. Whilst Commissioner Vestager recently announced that such thresholds would not be proposed at EU level for now,[62] the ECLF acknowledges that EU companies with currently little or no turnover in pharmaceutical, medical research and digital spaces may be particularly valuable (and attractive for foreign investors) and that it would be in the EU's strategic interest that acquisitions of such targets are scrutinised. However, the German and Austrian experience shows that clear guidance would be needed given that such a test would likely have to have certain "soft" criteria[63]. The German-Austrian guidance paper on transaction value based thresholds[64] has been a helpful guide for companies and practitioners.

Potentially subsidised acquisition

4.21 The White Paper suggests defining potentially subsidised acquisitions as "*planned acquisitions of an EU target where a party has received a financial contribution by any third country government*".[65] The relevant period for having received such financial contributions would be three calendar years prior to notification and up until one year following the closing of the acquisition (in case the financial contribution is granted later).

4.22 The ECLF suggests shortening the relevant time period (e.g. to two years), but welcomes that the White Paper suggests that a filing obligation would only triggered if the financial contribution exceeds a certain amount or a given percentage of the acquisition price. As mentioned in response to Question 1, this amount needs to be sufficiently high given the broad concepts contemplated for Module 1.

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61 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

62 See: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

63 E.g. under German/Austrian rules the target needs to have "significant domestic activities".

64 Available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

65 WP, para. 4.2.2.1.

4. Do you consider that Module 2 should include a notification obligation for all acquisitions of EU targets or only for potentially subsidised acquisitions (section 4.2.2.2)?

4.23 It would seem excessive to ask investors to notify acquisitions of all EU targets given that the White Paper already includes broad concepts, such as minority positions, a "*material influence*" test, non-direct foreign subsidies and a broad (and somewhat unclear) notion of distortion.

4.24 Even when limiting the concepts outlined in the paper appropriately, there may still be an impact on deal certainty or appetite if an M&A related foreign subsidies regime is introduced. It is worth noting that not only would the subsidised acquirer have to file the transaction under foreign subsidies rules, but possibly also under EU or national merger rules and Member States foreign direct investment (FDI) rules.

5. Do you agree with the substantive assessment criteria under Module 2 (section 4.2.3) and the list of redressive measures (section 4.2.6) presented in the White Paper?

Substantive assessment criteria

4.25 As stated at paragraphs 4.2-4.9 above, a number of clarifications are required, in particular with regard to distortions relating to activities of the target.

Redressive measures

4.26 The Commission should clarify why Module 2 redressive payments "*may in practice be less likely to be effective*" than under Module 1.[66] In addition, the White Paper mentions a preference for structural remedies in Module 2 proceedings. For digital mergers, Commissioner Vestager has however indicated that behavioural remedies (e.g. access commitments) may be more appropriate.[67] A more flexible and open approach towards remedies for digital and fast-moving markets should therefore be considered by the Commission for Module 2.

6. Do you consider it useful to include an interest test for public policy objectives (section 4.2.4) and what should, in your view, be included as criteria in this test?

4.27 The concerns raised by the ECLF with regard to the EU interest test in Module 1 apply also here (reference is made to paragraphs 3.34-3.35 above). The outcome of the Module 2 review needs to remain predictable for companies and advisers. The Commission should therefore provide guidance on the list of public policy objectives that will be considered and how the different public policy considerations would be weighed/balanced against one another (as well as practical examples on how the balancing test would be applied).[68]

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[66] WP, para. 4.2.6.

[67] Speech by Commissioner Vestager "Dealing with mergers in a digital age", ULB Competition Law Tuesdays, Brussels, 18 June 2019.

[68] Practical examples included in some of the Commission guidance papers, e.g. the Horizontal Cooperation Guidelines, have been very valuable for companies and practitioners.

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

4.28 The ECLF agrees that the Commission should be solely competent for Module 2 for the reasons mentioned in the White Paper.

4.29 In addition, given that the subsidised acquirer may also have to notify the transaction to Member States' competition authorities and under national FDI rules, an EU "one stop shop" would help limit the burden for companies.

Part 5: Module 3 and Questions relating to foreign subsidies in the context of EU funding

1. Do you think there is a need to address specifically distortions caused by foreign subsidies in the specific context of public procurement procedures? Please explain.

5.1 One of the features of EU public procurement rules is that they are agnostic when it comes to the origin of contractors, not requiring them to be established or primarily based in the EU or the EEA. This provides contracting authorities and entities with the widest choice of contractors, and ensures genuine competition for the selection of the most economically advantageous offer for a particular contract. More competition brings benefits to public authorities as it reduces public spend, ensuring the lowest price for the best quality products, works and services. However, unfair competition could lead to driving players out of the market with potential long-term negative effects. This would be the case, for example, if a highly subsidised contractor can undercut its competitors and win a series of public contracts disadvantaging other bidders who may not benefit from public support.

5.2 There are, however, a number of risks in the Commission's proposals, and these need to be thought through before any implementation which could have the potential consequence of increasing costs for public contracts within the EU due to loss of choice between contractors.

5.3 On balance, while there may be a need to address potential distortions that foreign subsidies may cause to EU public procurements, we consider that it should be explored whether existing mechanisms could be strengthened rather than introducing a wholesale new regime that may add complexity to already complex and lengthy public procurement processes (see our response to Question 2 below).

Reducing costs to public authorities vs maintaining a level playing field

5.4 We recognise that there is a risk that foreign subsidies may allow companies to underbid for public contracts in the EU, thus displacing non-subsidised players (whether EU-based or not) from those opportunities and reducing competition in the longer term. However, the current EU procurement rules have a process in place to question and address abnormally low tenders – which could be amended to address some of these concerns.

5.5 Similarly, the proposals will need to factor in what treatment will be given to non-approved State aid within the EU. Given the Commission has in recent years pursued State aid cases against tax rulings granted by Member States, there could potentially be a number of EU based players who may have benefitted from unlawful and potentially incompatible State aid and which are currently unknown. For example, we note that Apple, Fiat, Amazon and Starbucks all were subject to findings of incompatible State aid. Under the current proposals, if a true level playing field was to be targeted, this would have meant that they may have had to report the benefit of tax rulings at a time where it was not clear that these were State aid.

5.6 We see there are some risks therefore with implementation and applying different standards for foreign subsidies and EU State aid. Similarly, the fact that the Commission may approve and declare State aid compatible (e.g. to rescue and restructure a firm in difficulty) does not necessarily mean that a level playing field may be ensured. The assumption that foreign governments would not restrict their intervention in accordance with value for money and other principles cannot be made.

Interaction with other international obligations and trade deals

5.7 The EU is party to a number of international trade agreements and the WTO regime on subsidies and countervailing measures. It therefore already has some tools to take action against subsidies (at least in goods), by imposing anti-subsidy duties.

5.8 It will be important to assess the potential impact that establishing a regime to monitor foreign subsidies and potentially exclude contractors from EU procurements would have on those international arrangements. There is also the possibility that third countries may introduce similar restrictions or requirements on companies who may have benefitted from EU-approved (or non-approved) State aid, and a full cost benefit analysis will need to be conducted before any specific restrictions are introduced.

5.9 It is, for example, important to note that in the context of Covid-19 a lot of businesses across the EU (e.g. in a range of sectors) have benefitted from approved State support. If the proposals in the White Paper were to be implemented by third countries, this would mean that a lot of EU based companies could be excluded from public contracts in those countries.

5.10 In practice, this may be mitigated by having suitable thresholds for both the procurements for which the regime would apply and the value of the subsidies in question. But this highlights that a cost benefit analysis assessing potential retaliation and reaction by trade partners, will be needed.

2. Do you think the framework proposed for public procurement in the White Paper appropriately addresses the distortions caused by foreign subsidies in public procurement procedures? Please explain.

5.11 In general, the proposed framework can appropriately address the distortions caused by foreign subsidies in public procurement. However, it is also important that this framework is not in itself a distortion to the public procurement process. In particular, we note that the proposed framework may entail:

(i) Costs and added complexity for public procurement authorities. In all procurement processes, public authorities would need to consider - in addition to the key aspects of the process itself - whether any foreign subsidy concern arises. This may not be immediately evident in most cases, and therefore even before a reference is made to the supervising authority, the public procurement body would need to incur an expense to investigate this issue. In procurement processes where foreign subsidy concerns arise, the public authority would have to assume a significant delay until the supervising authority makes a determination on the existence of a foreign subsidy, and then it would have to dedicate resources to make a determination on whether this subsidy distorts the procurement process.

(ii) Costs and added complexity for all companies. In all procurement processes, companies would assume additional reporting obligations regardless of whether they have received foreign subsidies. Note that it may be difficult to properly discharge this reporting obligation in the case of companies with businesses in various countries and / or various industries, as it may require

significant internal consultations. In procurement processes where foreign subsidy concerns arise, the procedural delay is imposed on all companies participating in the tender (regardless of whether the concern refers to them or to another participant). The company which attracts the foreign subsidy concern is also subject to the legal expense related to the foreign subsidy investigation and the subsequent determination of whether the subsidy distorts competition in the tender.

(iii) Increased litigation. This is true both as regards companies which receive the foreign subsidies (that reasonably may want to contest in Court either the finding that a foreign subsidy exists or that such a subsidy distorts any particular procurement procedure) and as regards other companies which may want to strategically use this exclusion ground to avoid increased competition in a tender.

5.12 The proposed framework, therefore, should be designed to minimise these costs, delays and procedural complexities to the minimum necessary to effectively control the effect of foreign subsidies. In addition, the proposed framework should exclude the cases where the control imposed on public entities and companies becomes disproportionate with the benefits that it could confer (or, in any case, be condensed to a more restrained version).

5.13 This is especially true as there is a great diversity in contracting authorities (from Ministries with very experienced staff in complex procurement processes to small municipalities with no dedicated staff and moderate budgets). There is also great diversity in public procurement processes: the bulk of them refer to every-day projects of small to medium amounts, and only few of them refer to big projects for relevant amounts or of strategic importance. With this in mind, we provide the following comments on the thresholds, process, substantive test for distortion and remedies proposed in the White Paper:

Thresholds

5.14 The inclusion of thresholds, as proposed in the White Paper,[69] is necessary to ensure that the system is administrable and focused on the cases where there may be foreign subsidies concerns.

5.15 The thresholds proposed in the White Paper are therefore to be commended. In particular, we would encourage the establishment of ambitious thresholds. This is because it is unlikely that the bulk of low or medium value public contracts are affected by foreign subsidies and in these cases the administrative burden can easily overcome any potential benefit. In any event, if there were any foreign subsidy concerns in procurement processes or companies falling below the applicable thresholds, the general tool in Module 1 could be used to address these cases.

[69] WP, para. 4.3.3.1.

Process

5.16 The majority of public procurement processes are time-constrained. Therefore, the proposal to include tight time limits for the process (15 working days for a preliminary analysis and 3 months for the in-depth review) should be supported.[70]

5.17 Depending on the case, however, the proposed temporal framework – coupled with a standstill obligation – may be too long, and there should be flexibility to adapt it. For example, in emergency procedures (an indispensable tool for governments in times of crisis, as the COVID-19 crisis has shown) it is essential to award contracts in very short periods. In these cases, it is essential that (i) either the foreign subsidy review is streamlined to a days-long process, or (ii) the standstill obligation is easily lifted. In the latter cases (where the standstill obligation is lifted), Module 1 could be used as an *ex post* tool to address any potential shortcoming.

5.18 In addition, the White Paper also seems to imply a merger control style 'completeness'-qualifier in that these deadlines would only begin after the contracting authority has *"examined the completeness of the notification…*" and "*Upon receipt of a complete notification…*".[71] To be able to accurately consider the timing implications for procurement procedures, the European Commission should make clear to what extent the contracting authority and/or the national supervisory authority decides when the notification is complete and thus when the clock starts ticking (including any 'stop the clock' options). If 'completeness' can be delayed at the discretion of the reviewing authorities similar to merger control pre-notification, the delay may go significantly beyond the formal deadline of 3 months.

5.19 Finally, the system should allow the possibility of companies proactively approaching the supervisory authorities to obtain an advance foreign subsidy decision. This way, once the public procurement process starts, there is no need to pause the public procurement process to obtain a decision from the supervisory authority. If the advance decision is positive (i.e. it finds that there is a public subsidy), the public procurement authority can directly consider whether the subsidy distorts the public procurement procedure without needing to ask the supervisory authority. This may be much more efficient for those companies which are repeat players in public procurement processes and avoid duplication of processes for each tender. When the company operates in various Member States, it should be possible to approach the EU supervisory authority under a one-stop-shop principle.

Substantive test for distortion

5.20 In the cases where the supervisory authority has found that a company has received foreign subsidies, it is for the public procurement authority to decide whether the subsidies distort the procurement process.[72]

5.21 The White Paper does not suggest what the substantive test is to determine whether such distortion occurs. We would therefore encourage the Commission to clearly lay out the

[70] WP, para. 4.3.3.2.

[71] WP, para. 4.3.3.1.

[72] WP, para. 4.3.3.3.

applicable criteria for distortion in legislation to ensure legal certainty, thereby excluding a wide discretion of public contracting authorities.

Remedies

5.22 Where the supervisory authority finds a foreign subsidy, and the public contracting authority finds a distortion in the public procurement process, the White Paper envisages only one remedy: exclusion from the procurement process.[73]

5.23 From a general point of view, the mandatory exclusion grounds in the Procurement Directives are generally limited to specific cases of wrong-doing on the basis of a final judgment/administrative decision. Checking for mandatory exclusion is therefore supposed to be a quick and simple, 'box ticking'-type exercise. Conversely, 'receiving distortive foreign subsidy' as a new ground for exclusion can require extensive economic assessment potentially comparable to the most complex State aid and merger control cases. On the face of it, it therefore does not lend itself very well to serve as an exclusion ground, and it will undoubtedly have very significant impacts on timing for public contracts.

5.24 In addition, we suggest that alternative remedies other than exclusion from the public procurement process should be considered in Module 3, as they are considered in Module 1. For example, the company could be required to create a stand-alone subsidiary to participate in the public procurement process, while a "hold-separate" order avoids that this subsidiary obtains any benefit from the foreign subsidy (the complexity of such a remedy would have to be balanced against the expected benefit from having an additional participant in the tender).

5.25 A remedy where the subsidised company is forced to offer a higher price to compete on equal conditions to the rest of its competitors, however, is not appropriate: either the forced increment is so high that it has the same effect as excluding the company from the contract, or the subsidised company obtains double the benefit (the subsidy and the forced increment).

3. Do you consider the foreseen interplay between the contracting authorities and the supervisory authorities adequate e.g. as regards determination of whether the foreign subsidy distorts the relevant public procurement procedure?

5.26 The White Paper proposes a review dedicated to distortions in the public procurement procedure based on the assessment of whether the foreign subsidy facilitates the participation of the operator in the public procurement procedure, to the detriment of unsubsidized undertakings. The Commission explains that in cases where the foreign subsidy enables the recipient to submit an offer that would otherwise be economically less sustainable, especially in cases of bidding significantly below market price or below cost, a distortion may be presumed.

5.27 The review is based on a mandatory notification procedure, where economic operators will notify when submitting their bids if they, or their consortium members, subcontractors or suppliers, have received a foreign financial contribution within the last three years or whether they are expected to receive such contribution during the execution of the contract.

[73] WP, para. 4.3.3.3.

5.28 It is then the competent supervisory authority - the national authority designated by the Member State and in charge of the regulation of foreign subsidies within the national territory – that investigates the information and assesses the existence of a foreign subsidy. According to its findings, the supervisory authority may choose to follow an in-depth investigation. The contracting authority may not award the contract to the operator that is being investigated as long as the investigation is on-going.

(i) If the supervisory authority reaches the conclusion that there is no foreign subsidy in the procurement procedure, it will communicate this conclusion to the contracting authority by decision. In this case, the economic operator concerned will not be excluded from the public procurement procedure by the contracting authority (unless the contracting authority finds another ground for exclusion, different from the existence of a distortive foreign subsidy, under the EU public procurement legislation).

(ii) In cases where the supervisory authority decides that the economic operator has received a foreign subsidy, it comes to the contracting authority to determine whether the subsidy has distorted the public procurement procedure in question on the basis of the findings of the supervisory authority. In such cases the contracting authority imposes redressive measures on the subsidised operator. The redressive measures for procurement procedures consist of the exclusion of the subsidised bidder from the ongoing public procurement procedure and potentially also the exclusion of the subsidised bidder from future public procurement procedures before that authority for a certain time.

5.29 The interplay between the national supervisory authority and the contracting authority may entail the following challenges:

(i) Timing. As explained above, it is undeniable that the proposed procedure adds significant layers to the existing public procurement procedure which may create obstacles to the efficient and practicable carrying out of a tender. The proposed process whereby the contracting authority has to conduct its own analysis as to whether the subsidy has distorted the procurement procedure after the national supervisory authority has concluded that there is a foreign subsidy, adds yet one additional layer of delay to the entire procedure.

(ii) Legal certainty. According to the described procedure the contracting authority, having received the conclusions of the national supervisory authority will have a margin of discretion to decide whether the foreign subsidy is distortive within the context of the specific tender procedure. The logic behind that provision is understandable, as it may be the case that even with the foreign subsidy the specific bid may be either the only one that fulfils all the conditions of the tender, or the most appropriate one taking into account the characteristics of all bidders. However, this raises issues of legal certainty and it may even undermine the entire Module 3 system. More specifically, it effectively means that the conclusions of the national supervisory authority that a subsidy has a distortive effect may be overturned by the *in concreto* analysis of the

contracting authority, thus raising issues of uniformity and legal certainty as to the application of the specific Module.

(iii) Competence/Appropriateness. While the carrying out of the investigation on the existence of the foreign subsidy by a specialized regulatory entity is justified, due to the requirement for technical and economic data and competency for such an assessment that this entity would possess, the assessment of the existence of a distortion by a contracting authority may be less appropriate because this contracting authority is most likely not to possess the necessary data and competency required to carry out such an analysis. It should be borne in mind that the existing system of public procurement as carried out by contracting authorities does not take such considerations into account, which means that contracting authorities are not equipped to deal with such issues. Indeed, the Commission notes in the White Paper that a uniform methodology will be provided in guidance with regard to the assessment of the distortion. However, this methodology should consist of a precise list of conditions and criteria under which the contracting authority may carry out its assessment.

(iv) Judicial review. The described procedure may also lead to situations where the different approaches to be adopted by the supervisory authority and the contracting authority may give rise to an increase in the number of applications for the annulment of tenders by third parties (unsuccessful bidders) and may in general lead to diminishing the credibility of the supervisory authority's assessment, thus undermining the entire process as set out in Module 3.

(v) Role of the European Commission in national procedures. The White Paper suggests that the national supervisory authority is required only to consult with the European Commission:

"[P]rior to communicating this conclusion to the contracting authority, the national supervisory authority informs the Commission on a draft decision, thus ensuring that the national authority's decision is reached in close cooperation with the Commission."[74]

In order to ensure the uniform application of the various legal concepts across the EU, the Commission should have the final say or, alternatively, the undertakings under investigation should have some kind of direct recourse to the Commission or EU courts beyond simply trying to persuade a local Member State court to refer questions to the ECJ for a preliminary ruling. Particularly when it comes to substantial public contracts and concessions, it is important for some jurisdictions that there are sufficient 'checks' in place at EU level to ensure that the instrument is applied soundly and correctly.

[74] WP, para 4.3.3.2.

4. Do you think other issues should be addressed in the context of public procurement and foreign subsidies than those contained in this White paper?

Interface between State aid and Foreign Subsidies – Need for a more concrete proposal on how to safeguard non-discrimination and equal treatment

5.30 This issue has been recognised in the White Paper, however no concrete examples/proposals have been put forward of how to deal with it.

5.31 The White paper mentions that Article 69 of Directive 2014/24/EU16 provides the contracting authorities with the possibility to reject offers they consider to be abnormally low in situations where the explanations and evidence supplied by the bidder do not sufficiently account for the low price offered. Where, as part of that assessment, it can be established that a bidder has obtained EU State aid incompatible with the TFEU, enabling it to make a low offer, the tender may – under additional conditions - be rejected on that ground alone. In contrast, Article 69 of Directive 2014/24/EU contains no corresponding provision for foreign subsidies that enable bidders to submit low offers. We understand that Module 3 attempts to close this regulatory gap, but at the same time the legislator should be aware of the fact that the parallel application of the rules on State aid and foreign subsidies, both of which seem to have the same goal of avoiding the success of distortive subsidised bids, should be aligned in order not to lead to discriminatory results between EU and non-EU subsidised bids.

5.32 Although the White Paper specifically mentions that the introduction of this exclusion ground aims at ensuring a level playing field between tenderers profiting from State aid and those profiting from foreign subsidies, the current public procurement framework does not contain a specific exclusion ground for the recipients of State aid that are incompatible with EU rules (the current EU rules are limited to the possibility of rejection of an abnormally low tender in situations where the low price is due to State aid). The White Paper should specifically and in detail consider how it will be possible to ensure non-discrimination and equal treatment in that respect.

National Supervisory Authorities

5.33 Although the White Paper extensively refers to the national supervisory authorities, there are still significant gaps relating to the conditions of their operation, the limits and scope of their competence as well as their formation.

Questions relating to foreign subsidies in the context of EU funding

1. **Do you think think there is a need for any additional measures to address potential distortions of the internal market arising from subsidies granted by non-EU authorities in the specific context of EU funding? Please explain.**

2. **Do you think the framework for EU funding presented in the White Paper appropriately addresses the potential distortions caused by foreign subsidies in this context? Please explain.**

5.34 In relation to EU funding, we support the proposed framework as it applies Module 3 on an equal footing with public procurement. Since the issues that arise in this area are similar or equal to those arising under public procurement, we refer to our previous comments which should also apply in the context of EU funding *mutatis mutandis*.

Part 6: Interplay between Modules 1, 2 and 3

1. Do you consider that:

a. **Module 1 should operate as stand-alone module;**

b. **Module 2 should operate as stand-alone module;**

c. **Module 3 should operate as stand-alone module;**

d. **Modules 1, 2 and 3 should be combined and operate together**?

6.1 The ECLF notes there is some overlap between the three modules such that it would be possible to combine them together. For example in an M&A context, Module 1 could be used to review any foreign subsidy that had not been notified under Module 2, either because the recipient undertaking inaccurately carried out the self-assessment or because the subsidy fell below the relevant threshold (but was still potentially distortive). In a procurement context, the outcome of a Module 1 review of a certain foreign subsidy could be used if the subsidised undertaking were to participate in a procurement process.

6.2 The ECLF considers that whether the three Modules operate as stand-alone or are combined under the general instrument of Module 1, it is critical that their scope is clearly defined. For example, to the extent that Module 1 were to function as a general sweeper to catch subsidies falling beneath the thresholds set in Module 2 or Module 3, it would be essential for the Commission to clearly outline the appropriate procedure to be followed.

Annex 1: Members of the ECLF working group

- British Institute of International and Comparative Law: Dr Liza Lovdahl Gormsen
- Baker McKenzie: Gavin Bushell, Werner Berg
- Gibson, Dunn & Crutcher LLP: Attila Borsos
- Gleiss Lutz Hootz Hirsch: Dr Ulrich Soltész
- Kirkland & Ellis International LLP: Dr Thomas Wilson (co-chair)
- Linklaters LLP: Nicole Kar, Natura Gracia, Bogdan Evtimov
- Szecskay Attorneys at Law: Andras Szecskay, Aniko Keller, Sam Baldwin
- Slaughter and May: Philippe Chappatte (co-chair); Lisa Wright
- Uría Menéndez Abogados S.L.P.: Edurne Navarro Varona

Annex 2: Aligning the White Paper with State aid definitions and terminology

1. The ECLF urges the Commission to reconsider the use of WTO legal terms, including the key term 'subsidy', and proposes that key definitions and terminology are instead aligned with the State aid regime. Some examples of such realignment are set out below:

- *"government or any public body of a non-EU State"* to be understood and applied in the same way as the notion of *"State origin"* under the State aid rules i.e. the State aid criteria of *"imputability"* and *"State resources"*.[75] For example, under the EU State aid regime, a measure adopted by a state-owned company can be attributable to the Member State itself – and thus constitute State aid in favour of a beneficiary – even when the Member State has not specifically incited the company to adopt the measure in question.[76] In the same vein, the ECLF recommends clarifying when a company owned by a third-country government can equally qualify as a "*public body of a non-EU State*" – and thus the grantor of a foreign subsidy – even in cases where there is no evidence that the third-country government has instructed the company to carry out the measure.

- "*benefit*" to be understood and applied in the same way as the notion of an "*advantage*" under the State aid rules. In particular – and as the White Paper seems to suggest in Annex I and in the reference to the Commission's Notice on the Notion of Aid in footnote 65 – it is important to understand whether any and all commercial transactions contain a *"benefit"* if the transaction in question does not pass the Market Economy Operator ("**MEO**") test.

- *"Limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries"* to be understood and applied in the same way as the notion of *"selectivity"* under the State aid rules. In particular, the ECLF notes that the exercise of applying the selectivity criteria to statutory tax measures can be very difficult even within the EU, cf. the three-step analysis in para. 128 in the Commission's Notice on the Notion of Aid. Applying the same test to third-country statutory tax schemes would seem all the more difficult where neither the third-country government nor the beneficiary is under a duty to cooperate with the Commission with respect to understanding the idiosyncrasies of the tax system. A possible solution could be for the Commission to have the legal basis to appoint individuals that are experts in the legal systems of the foreign jurisdiction. Such individuals could be appointed on a permanent or an *ad hoc* basis and would issue opinions informing the Commission of its assessment.

[75] See Section 3 in Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01) (hereinafter: the **"Commission's Notice on the Notion of Aid"**).

[76] Para. 41-43 of the Commission's Notice on the Notion of Aid.