Freshfields Bruckhaus Deringer

22 September 2020

QUESTIONNAIRE

Annex II to the European Commission White Paper on levelling the playing field as regards foreign subsidies

Given that our answers in some cases exceed the 1,000 characters limit we have answered them not through the on-line questionnaire but rather in this separate document.

Introduction

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

1.1. Freshfields Bruckhaus Deringer is a global law firm with significant expertise in law and practice in the fields of antitrust, competition and trade, including State aid, within the European Union and across the world, as well as cross-border M&A and other areas of law.

1.2. Freshfields Bruckhaus Deringer represents an extensive range of clients of different ownership, nationality and sectoral focus across the globe. Against this background we welcome the opportunity to participate in the public consultation on the European Commission's (the ***Commission***) White Paper on levelling the playing field as regards foreign subsidies, dated 17 June 2020 (the ***White Paper***).

1.3. Our comments are based on our experience and expertise as a global law firm, advising a diverse range of clients from around the world. The comments contained in this response are submitted on behalf of Freshfields Bruckhaus Deringer. They do not necessarily represent the views of any of our individual clients. Likewise, this submission does not necessarily represent the personal views of all Freshfields Bruckhaus Deringer lawyers.

Questions relating to the three Modules

General questions

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

1.1. We appreciate the fact that the Commission has taken the initiative to consider whether there is a need for new legal instruments to address distortions of the internal market arising from foreign subsidies.

1.2. However, the Commission argues the need for a new – far reaching – instrument as a result of a gap analysis without considering any alternatives as to how this perceived gap might be closed in a less intrusive way, e.g. through better enforcement of existing instruments such as anti-subsidy and WTO procedures. Furthermore, it is in the interest of all undertakings operating in the internal market that any new legal instrument is limited to the minimum necessary to fill

such gap. However, the Commission proposal seems to go well beyond such minimum necessary, thus increasing administrative burdens on undertakings. That carries the risk of a chilling effect on much needed foreign investment in the EU internal market.

1.3. Any new rules should be clear-cut, provide legal certainty and minimise compliance costs. Furthermore, to create a truly level playing field any new rules need to be conceived and implemented in a fair and non-discriminatory manner as between EU and non-EU undertakings.

1.4. These key factors need to be considered to meet the goal of establishing a true level playing field within the internal market and not discourage foreign investment in Europe.

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.

2.1. Independent of the question whether such new legal instruments are necessary, they can only adequately address potential distortions in the internal market if they ensure legal certainty and predictability for the undertakings concerned. Any new legal instruments on foreign subsidies need to be applied on a coherent and non-discriminatory basis to achieve the goal of levelling the playing field within the internal market. There is also a clear need to consider the additional administrative burden such new legal instruments would impose on undertakings affected by the new regime, i.e. those that may have received foreign subsidies, and European undertakings that engage in business activities with them, for example as the seller in an M&A scenario.

2.2. We will address the different instruments considered by the White Paper under the specific questions for each of Modules 1, 2 and 3 below in detail. However, our general comments can be summarised as follows:

2.3. In order to ensure legal certainty and transparency, all thresholds, requirements and other terms should be clearly defined. Where possible and appropriate, it is desirable to draw from existing rules and practical experience in EU State aid and trade regimes. In particular:

- A clear definition of what constitutes a foreign subsidy is necessary to enable undertakings to self-assess whether a notification is required in the case of a planned acquisition (Module 2) or participation in a public procurement procedure (Module 3), or, where other market conduct is concerned, whether there is a risk of an ex officio investigation under Module 1. The definition of a foreign subsidy as currently set out in the White Paper is very broad and unspecific.

- Filing and de minimis thresholds need to be clear-cut. Definition and calculation of thresholds should follow EU merger control and/or EU State aid rules, where appropriate.

- Where the legal test refers to specific types of subsidies that are likely to cause a distortion in the internal market (e.g. "hardcore foreign subsidies"; see section 4.1.3.1 of the White Paper) these need to be clearly defined and where appropriate they should be in line with EU State aid rules (including the limitations on the notion of aid such as imputability, State resources, MEO principle, selectivity, as described in the Commission Notice on the notion of State aid[1]).

- In terms of possible redressive measures, undertakings need clarity on what types of measures they would face in a worst-case scenario. Against this background, it is useful that the White Paper provides a list of potential redressive measures in section 4.1.6. But the fact that authorities can also take other types of measures leaves undertakings concerned with a high degree of uncertainty.

2.4. The procedure should be clearly set up, limiting the administrative burden to what is absolutely necessary. In particular:

- Thresholds should be set sufficiently high that only material foreign contributions are captured. This would allow authorities to focus on those cases in which a distortion of competition in the internal market is realistically possible.

- Review periods need to be reasonably short to provide legal certainty to undertakings as quickly as possible. For Module 1, review periods should broadly follow the EU State aid rules. For Module 2, review periods should be aligned with merger control and foreign investment proceedings to ensure parallel review in M&A scenarios. For Module 3, review periods should be sufficiently short to keep disturbance of the public tender process to a minimum.

- For Module 1, we consider the limitation period too long. The possibility of redressive measures (potentially beyond the EU State aid equivalent of recovery) being imposed up to ten years after the granting of a subsidy would cause fundamental deal and market uncertainty.

- For Module 2, there should either be a voluntary notification system, or, if a mandatory notification system is implemented, there should be a fast track procedure for cases that clearly do not raise any issues e.g. for undertakings with no track record of receiving foreign subsidies. Module 2 should only apply to transactions that bring about acquisition of control.

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

- The rules on the division of enforcement powers and cooperation between the various authorities need to be clear. This is of particular relevance where enforcement powers will be shared between the Commission and national authorities, as currently provided in Module 1 (see section 4.1.7 of the White Paper).

2.5. The new regime should be limited to addressing potential distortions in the internal market that are directly linked to foreign subsidies. In particular:

- The substantive assessment should be limited to whether there is a foreign subsidy and, if so, any effects directly linked to the subsidy, in order to avoid overlaps with competition law assessments under Art. 101 TFEU or the EUMR.

- If an EU interest test is introduced the relevant criteria need to be clearly defined and the test should be applied in a very cautious manner. As currently drafted, it is open to politicization and could thus result in arbitrary application and discrimination against certain undertakings and/or sectors.

- Any redressive measures need to be limited to remedying any negative effects of a foreign subsidy. For example, where the White Paper suggests alternative remedies if the repayment of the subsidy is not suitable or feasible, such as divestments, prohibition of certain investments or prohibition of the subsidised acquisition (section 4.1.6 of the White Paper), such extreme measures should be applied very cautiously, and any over-compensation should be avoided.

- There need to be clear rules on the interplay with other legal instruments such as antitrust and merger control rules, foreign direct investment rules and trade regimes (WTO) in order to avoid double enforcement. This is directly linked to the first bullet point above: where the new legal instruments on foreign subsidies apply alongside other regulatory instruments such as merger control, the competent authorities will need to be in a position to respect the boundaries of the respective legal instruments.

2.6. The legal instruments proposed by the White Paper are very complex and pose a lot of practical questions. As suggested above, the new regime should follow established rules and practices in EU State aid law wherever possible. While the White Paper indeed refers to EU State aid rules in some places, it is not clear whether the intention is to apply the entire tool box of EU State aid law, including sector regulation, guidance papers, and other soft law as part of the foreign subsidy regime. This should be confirmed in order to minimise uncertainty and ensure a level playing field with undertakings subsidised by EU Member States.

2.7. At the same time, the new regime should allow for a degree of flexibility when identifying and intervening in potential distortions, to take into consideration the

diverse circumstances in which undertakings in different jurisdictions have to operate (they may be subject to different financial, tax, and other treatment by relevant national and local governments), so as not to capture "false positives", especially in connection with the very broad definition of a foreign subsidy as set out in Annex I of the White Paper. For example, in certain developing countries, local governments provide incentives to attract undertakings to domicile or build factories within their territory. This is regardless of the nationality of the undertakings and can capture all sorts of undertakings large or small, resulting in a large number of undertakings being technically captured by the new EU regime. Therefore a screening mechanism to identify the subsidies with actual distortive effects will be important in ensuring the success of the regime within the multijurisdictional setting.

2.8. One specific area where the broad definition of what may constitute a foreign subsidy is likely to be too broad are tax measures. The White Paper defines a foreign subsidy in Annex I as "*a financial contribution by a government or any public body of a non-EU State, which confers a benefit to a recipient and which is limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries.*" Further, Annex I mentions as an example of a financial contribution: "*foregone or not collected public revenue, such as preferential tax treatment or fiscal incentives such as tax credits*", i.e. a description that is very broad in scope. Moreover, it follows from the definition in Annex I that the proposed tools would cover (tax) measures in relation to an "*industry*" or "*group of undertakings or industries*". It is unclear whether this is intended to be broader than the 'selective advantage' criterion used in the context of the EU State aid regime. No other criteria are mentioned as to which kind of tax measures would or would not be captured. The White Paper thus proposes a very broad definition of 'foreign subsidies', which covers a wide range of tax measures, and which may affect a very broad and not well-defined group of undertakings or industries.

2.9. In addition, "*operating subsidies in the form of tax reliefs, outside general measures*" are presumed 'hardcore restrictions' under section 4.1.3.1, which means that no detailed assessment of the actual or potential distortion of the internal market would be needed. Rather, a distortion is presumed, and an undertaking could only provide evidence to demonstrate that there was no distortion in the specific instance. Under EU State aid rules, no presumption of a distortion of competition exists, meaning that the scope of the foreign subsidies instruments in the context of tax measures is again broader. There is also no reference to the criteria developed in the decisional practice of the Commission and the jurisprudence of the European Courts with respect to tax measures that may infringe EU State aid rules. In this respect, the White Paper therefore goes beyond ensuring a level playing field and suggests that the foreign subsidies instruments potentially apply much more broadly in relation to tax measures adopted by non-EU Member States – compared to how the EU State aid regime applies to tax measures adopted by EU Member States.

2.10. The risk of an application that is too broad, and results in over-enforcement compared to how the EU State aid regime is applied to tax measures, is exacerbated by the fact that Modules 1 and 3 can be enforced by all EU Member

States, while the EU State aid regime is exclusively enforced by the Commission. Therefore, there is a much greater risk of divergence in interpretation and application. This reinforces the need to have clearly defined criteria with respect to tax measures that may fall within the scope of the foreign subsidies instruments, instead of the very general and broad descriptions cited above.

2.11. As currently proposed, there is a material risk that the foreign subsidies instruments envisaged would capture a range of tax measures that would not be treated as State aid if taken by EU Member States. At the very least, this would result in significant legal uncertainty, and it risks exposing undertakings to investigations from multiple (national) authorities, putting them at a competitive disadvantage. Even if the result of an investigation is that no foreign subsidy is identified, the consequences of (a credible risk of) an investigation occurring can be significant for the undertaking involved. For example, in the context of an M&A process, a seller may prefer another bidder simply to exclude the regulatory risk associated with an investigation (or potential investigation) and its potential outcome. The same may occur in the context of public procurement procedures.

2.12. By way of example, based on the current drafting there would be legal uncertainty as to whether the foreign taxation regimes applicable to pension funds can result in different outcomes, depending on whether the tax measures are assessed under the foreign subsidies instruments, or under the existing EU State aid framework. Pension funds are subject to different tax regimes in different jurisdictions. For example, a State may choose when to tax a pension fund:

(a) When contributions are made to the pension fund;

(b) When a pension fund receives income from its investments; and/or

(c) When retired members of the fund receive their pension benefits.

2.13. When a State chooses to apply the so-called "EET-model" to pension funds, it will only levy taxes when retired members of the fund receive their pension benefits, i.e. when the pension is paid out. This EET-model is used in many EU Member States[2] and is not caught by the EU State aid regime.

2.14. It cannot be excluded that the EET-model may be perceived as a foreign subsidy under the current very broad drafting of Annex I if applied by a foreign State, inter alia as the definition of a foreign subsidy can apply to tax measures in relation to a "group of undertakings or industries" (e.g. a group of pension funds or a complete pension industry).[3]

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[2] E.g. Austria, Finland, Germany, Ireland, the Netherlands and Luxembourg have adopted such a tax regime.

[3] For similar reasons, an exemption from taxation on investment income arising in one State and received by a pension fund located in another State, pursuant to the terms of a double taxation treaty between the two States, may be perceived as a foreign subsidy.

2.15. Another example relates to the principle of international law known as "sovereign immunity", whereby one sovereign State does not seek to apply its domestic laws over another sovereign State. There is a lack of consistency among EU Member States regarding how and when this principle is applied, including in relation to tax matters.[4] For instance, the current UK practice is to regard as immune from direct taxes all income and gains which are beneficially owned by the head of State and the government of a foreign State recognised by the UK. Such practice could, after the end of the Brexit transition period, be caught by the foreign subsidy definition in its current form but is not caught by the EU State aid regime.

2.16. In order to focus the foreign subsidies tools on achieving a level playing field, potential applications like the examples mentioned above should clearly be excluded at the outset from the scope, and the same criteria that apply in the context of the EU State aid regime should apply.

Module 1

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

1.1 Module 1 could appropriately address distortions of the internal market through foreign subsidies, provided the regime is sufficiently supported by Commission guidance, i.e. soft law notices, guidelines, or best practice documents similar to the existing soft law framework for EU State aid rules (in particular, the Commission's Notice on the Notion of State aid[5]). While we generally agree on the need for a level playing field between *EU State funding* (regulated under Art. 107(1) TFEU) and *non-EU State funding*, the new enforcement powers proposed in the White Paper need to provide sufficient legal certainty for all undertakings concerned.

1.2 The below sets out our views on each of the Commission's consultation questions with regard to Module 1 of the White Paper. In addition, we would like to highlight two points:

- The legal test: first, the competent national authorities' and the Commission's (together referred to as ***CAs***) powers to regulate foreign subsidies require a clear definition of the legal test (that will be applied to assess whether a foreign subsidy distorts the internal market). The White

[4] "*There is no international consensus, however, on the precise limits of the sovereign immunity principle. Most States, for example, would not recognize that the principle applies to business activities and many States do not recognise any application of this principle in tax matters. There are therefore considerable differences between States as regards the extent, if any, to which that principle applies to taxation. Even among States that would recognise its possible application in tax matters, some apply it only to the extent that it has been incorporated into domestic law and others apply it as customary international law but subject to important limitations*.", ECD Committee on Fiscal Affairs, Commentary on Article 1 of the Organisation for Economic Co-operation and Development Model Tax Convention, para. 6.11, 22 July 2010.

[5] See note 1 above.

Paper lists various "indicators" (set out in section 4.1.3.2), on the basis of which the CAs shall assess whether a distortion of competition is brought about by a foreign subsidy. However, the list is non-exhaustive, leaves a wide margin of discretion to the CAs and includes non-competition related factors, such as the reciprocal "access" to the subsidy-granting authorities' "domestic market". This would make it unpredictable how individual cases would be assessed and the concept as currently set out is too broad. The lack of any EU precedents on the assessment of foreign subsidies under competition law means that a clear and concrete definition of what the CAs should consider a "distortive effect" on the internal market, similar to the one under the framework for Trade Defence Instruments (***TDIs***)[6] is essential.

- The limitation period: the possibility of redressive measures being imposed up to ten years[7] after a subsidy is granted would cause fundamental deal and market uncertainty. We believe that a comfort letter from the Commission, which could be triggered by a voluntary submission, confirming that either (i) a non-EU governmental foreign subsidy does not raise issues under Module 1; or (ii) a specific transaction falls outside the scope of Module 2 and/or Module 1, should be provided for in a Best Practices guidance document. Such a system could be modelled on regimes which successfully operate voluntary notification rules (e.g. the voluntary regime for foreign direct investment filings in Germany). The CAs would be precluded from initiating proceedings against an alleged subsidy beneficiary following the expiration of a defined time period after the aid beneficiaries' voluntary notification to the CAs.

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)

2.1 We agree with the procedural set-up presented in the White Paper, as long as the procedural rules ensure legal certainty for the undertakings concerned and strike a fair balance between efficiency and effectiveness of the system. In order to achieve these goals, we believe that the following considerations should be taken into account.

EU-wide procedural framework

2.2 We understand that the White Paper envisages a system of shared competencies under which a foreign subsidy can be investigated by both competent national authorities and the Commission.

2.3 The existence of 28 CAs risks creating 28 distinct regimes where each CA applies its own procedural rules. This would increase complexities for parties

[6] 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.55-91, recital 3.

[7] White Paper, p.20, para. 4.

subject to an investigation, especially when subject to multiple investigations across the EU.

2.4 In order to ensure an efficient review system with a clear investigation path across the EU, the procedures in all jurisdictions should be streamlined as much as possible. We believe that an EU-wide procedural framework established by the Commission for uniform implementation by all CAs (rather than each CA establishing its own procedural framework) could achieve this objective.

Pre-determined deadlines for each step of the investigation

2.5 The White Paper does not envisage a timeframe within which the CAs would conduct their investigations. This creates a risk of lengthy investigations which would not only increase market uncertainty but also undermine the efficient and effective functioning of the system, which should focus on those cases which really are detrimental to the internal market.

2.6 Therefore, as in anti-subsidy and EU State aid proceedings, legislation should impose on the CAs deadlines by which they must complete the preliminary and in-depth stages of their investigations.

Relevant parties to the procedure in both stages of the investigation

2.7 **Interested parties to be involved in the preliminary stage.** We infer from Section 4.1.5.1 of the White Paper that the parties in the preliminary phase would be limited to (i) the undertaking which allegedly benefitted from the subsidy; and (ii) the third-country government allegedly granting the subsidy.

2.8 We believe that the limited number of parties involved at this preliminary stage would contribute to the efficiency and effectiveness of the system and would be proportionate to the aim of the preliminary stage. This is because it would (i) limit the information to be processed to the minimum required for a determination of whether the undertaking concerned obtained a subsidy that may distort the internal market; and (ii) help the CAs complete the preliminary stage within a short period of time.

2.9 Should the CAs decide to involve interested third parties other than the undertaking and the third-country government, we believe that strict deadlines should be imposed on all interested third parties in order to ensure that the preliminary stage is completed swiftly.

2.10 **Interested third parties to be involved only at the in-depth stage.** The White Paper does not clearly identify the interested third parties that could be involved in the in-depth stage of the investigation. We suggest that an approach similar to that in anti-subsidy investigations be adopted, so as to include the following potential interested third parties: (i) competitors of the undertakings concerned in the EU and/or their associations; (ii) EU users of the goods and/or services concerned by the alleged distortions and/or their associations; (iii) trade unions; and (iv) consumer organisations.

2.11 We emphasise the importance of strict deadlines for all interested third parties also in in-depth investigations, in order to ensure timely completion of the investigation.

Timely publication of reasoned decisions as practical guidance to stakeholders

2.12 We welcome the White Paper's enumeration of certain categories of foreign subsidies which are likely to create distortions in the internal market because of their nature and form. However, given the broad definition of foreign subsidies, the decisional practice of the Commission will play an important role in defining the scope of the foreign subsidies concerned. Stakeholders therefore need timely access to the Commission's decisional practice. This might best be achieved at the two key moments of a two-step investigation:

(a) At the **beginning of the in-depth investigation**, the Commission should publish a public notice of initiation indicating at least (i) the type of subsidies under investigation; and (ii) why such subsidies are considered susceptible to distort the internal market.

(b) At the **end of the in-depth investigation**, the Commission should promptly publish a reasoned decision indicating at least (i) the type of subsidies investigated; (ii) why the Commission concluded that such subsidies distorted (or did not distort) the internal market; and (iii) if redressive measures are imposed, why such measures were considered appropriate to address the distortions found.

Tools of the CAs to gather information

2.13 The White Paper provides no clear description of the tools that the CAs would use to gather information. In order to ensure efficient and effective functioning of the procedure, we suggest that the tools used by the CAs should be proportionate to the aim pursued by the relevant stage of the investigation.

2.14 In the preliminary stage, the CAs would seek to determine whether the undertaking concerned obtained a subsidy that *may* distort the internal market. Succinct questionnaires addressed to the undertakings concerned (as well as to the third-country governments concerned) and designed to collect not more than what is necessary to establish a potential foreign subsidy that may distort the internal market would be sufficient to achieve that goal.

2.15 If an in-depth investigation is initiated, the CAs could send follow-up requests for information (***RFIs***) to the undertakings concerned with a view to clarifying or supplementing the responses to the questionnaires, for the purposes of the in-depth investigation. In addition, the CAs should be empowered to issue RFIs to other market participants (e.g. customers, competitors). As in antitrust proceedings, it should be possible to address RFIs to undertakings both within and outside the EU.

2.16 Most importantly, as in anti-subsidy investigations, the CAs will also require information from non-EU governmental agencies as granting authorities. It will thus be important that the CAs' information gathering tools as regards these third country authorities are aligned with the tools used in anti-subsidy investigations (i.e. sending a questionnaire to the third-country government concerned to obtain information on the subsidies concerned, meetings with the third-country government authorities concerned regarding the information

supplied, and use of available facts if the third-country government does not provide the necessary information to the CAs).

2.17 We note here that a potential hurdle to evidence gathering for the CAs could be difficulties in establishing a clear link between the non-EU governmental agency as the granting authority and the actual subsidy received by the undertaking operating in the EU. Often subsidies are not structured as direct grants but rather form part of complex intra-group transactions and financing structures, which can lead to opaque subsidisation of various group entities. The CAs would thus need to engage in detailed discussions with the third-country governments as to the nature and scope of such subsidies. Against this, it should be considered whether the Commission (which represents a much bigger interest group with 27 Member States) is in fact better placed to carry out the evidence gathering and investigation process as opposed to national authorities.

Sanctions

2.18 The White Paper envisages (i) fines and periodic penalty payments for failure to supply information promptly or for supplying incomplete, incorrect or misleading information; and (ii) the possibility to take decisions on the basis of the facts available, if information is still not provided despite those sanctions. The scope of these sanctions should be defined clearly, and they should be used only in limited circumstances.

2.19 With respect to the use of facts available, we recognise that the CAs require this tool to effectively conduct the fact-finding process. However, section 4.1.5.2 of the White Paper seems to grant the CAs a wide margin of discretion, thus creating a risk of arbitrary decisions. The legislation should therefore ensure that the use of facts available is proportionate and strictly limited to what is necessary. In other words, the information provided by the undertakings should be – to the extent possible – the primary source of the CAs' determinations, and the use of available facts should be limited to completing deficiencies in the information provided by the undertakings.

2.20 With respect to fines or other types of monetary penalties, these should be limited to cases where the undertakings concerned (i) provide false or misleading information; or (ii) do not cooperate to the best of their abilities in the investigation. This is because, in trade defence proceedings, the use of "facts available"[8] often yields unfavourable results for the parties who fail to provide information, and thus already operates as a sanction. The same is likely to occur in the context of foreign subsidy investigations, so in cases where an undertaking concerned fails despite its best efforts to supply the requested information, due to reasons beyond its control,[9] this would result in double penalisation irrespective of the undertaking's cooperation with the competent

[8] In trade defence proceedings, "facts available" may include, among others, official statistics, independent market research information, or any other reliable sources of information that can be reasonably used to fill the gaps caused by the non-cooperation of the undertakings concerned.

[9] Such circumstances may arise, for instance, due to the non-cooperation of a related company over which the undertaking concerned has no effective control.

authority. No fine or penalty should therefore be imposed on cooperating undertakings for failure to provide information despite their best efforts.

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?

3.1 We generally agree with the substantive assessment criteria and the list of redressive measures presented in the White Paper.

Substantive assessment criteria (section 4.1.3)

3.2 In general terms, it is useful that the substantive assessment criteria are broadly modelled on EU State aid rules to ensure a level playing field between EU and non-EU undertakings. Against this background, practical experience and EU case law in State aid should be taken into account by the CAs in their enforcement.

3.3 It is helpful in terms of legal certainty to provide a list of certain hardcore foreign subsidies. However, in line with the aim of achieving a level playing field, the categories of hardcore restrictions should be in line with EU State aid rules, which is not the case for certain of the listed categories.

3.4 In addition, it is not clear from the White Paper whether the beneficiary of a foreign subsidy or the granting government can rebut the presumption of a distortion in the internal market in the case of a "hardcore" subsidy. This should be clarified in the legislation.

3.5 The types of foreign subsidies that do not fall under the list of "hardcore" foreign subsidies are clearly the most complex to assess. We agree with the White Paper that the complexity of the commercial reality makes it difficult to identify and quantify the impact of specific foreign subsidies on the internal market. The list of examples of indicators provides some initial guidance on what the authorities will look at, and additional guidance could be drawn from practical experience under the EU State aid rules. Applying the same standard to foreign subsidies and EU State aid will further contribute to levelling the playing field.

Redressive measures (section 4.1.6)

3.6 With regard to redressive measures, it will be important that the scope of a remedy is limited to addressing the distortion of competition specifically caused by the foreign subsidy, so as to avoid overlaps with other regulatory instruments, specifically antitrust rules. It is useful that the primary remedy is the repayment of a foreign subsidy as this addresses the distortion caused by a foreign subsidy in the most direct way. We agree, however, with the Commission's concern that it may be difficult to establish that a foreign subsidy has indeed been paid back to the third country. Nevertheless, any of the alternative remedies listed in section 4.1.6 should in practice always address the specific features of the foreign subsidy in question and should not go beyond what is strictly necessary to remedy the distortions caused.

3.7 In relation to the specific remedies listed in section 4.1.6 we appreciate that the White Paper draws on merger control rules and decisional practice. We highlight that for the purposes of legal certainty, transparency and equal

treatment, any remedies under Module 1 should take into account the Commission's decisional practice in merger control cases.

3.8 We also agree with the basic set-up of procedural rules relating to transparency obligations, the possibility to offer commitments, fines for non-compliance, and a limitation period of ten years. This corresponds with EU State aid rules. However, there are still a number of open questions that would need to be addressed in the legislation.

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?

4.1 It may be appropriate that the assessment of any distortion be balanced against the positive impact that the investment might have within the EU. However, this can only be achieved if there is sufficient certainty as to how this test is applied. We understand that the White Paper suggests that the EU interest test forms part of the legal test (both under Module 1 and Module 2) and that the Commission has exclusive competence to apply it. While the White Paper mentions certain criteria that the Commission can take into account (e.g. climate neutrality, digital transformation, public order) it leaves open how and when in the procedure these criteria shall be assessed.

4.2 As so far formulated, the EU interest test would create legal uncertainty. In particular, it remains unclear how an EU interest will be assessed with respect to the EU's public policy objectives and what exactly may constitute a sufficiently "positive impact of a supported economic activity". Both limbs of this test seem prone to politicization and could thus result in arbitrary application and discrimination against certain undertakings and/or sectors. Accordingly, the current iteration of the EU interest test may not "level the playing field". On the contrary, the lack of predictability as regards its application may make EU economic activity by potential beneficiaries of foreign subsidies much less attractive. There are also no similar, broad discretionary powers extending to non-competition related policy objectives in EU State aid rules.

4.3 If there is to be an EU interest test, objective and clear measurable criteria for the assessment are essential. It is essential that the new framework adopts equivalent guidance for the compatibility of foreign subsidies with the internal market as those which exist for State aid measures on a sector-basis (i.e. specific rules for the Commission's assessment of the compatibility of aid/a foreign subsidy within individual sectors, such as energy, transportation, financial institutions). Adopting sector-specific guidelines would also allow the Commission to draw from existing (EU State aid) precedents for its assessment of a foreign subsidy's "positive impact" within the EU.

4.4 Finally, it remains unclear whether the EU interest test will be applied against the backdrop of a full proportionality test, when balancing the EU public policy objectives (positive impact) with the distortive effects (negative impact). This would mean that it would have to be investigated whether the relevant public policy objective could also be achieved by other, less distorting, means.

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)

5.1 Module 1 should not be applied to subsidised acquisitions. The exemption of subsidies facilitating acquisitions from Module 1 would be in line with the aims set out in the White Paper: striking a balance between effectiveness and efficiency of the system while limiting the burden on undertakings and CAs.

5.2 For all cases of **foreign subsidies facilitating acquisitions above the threshold set under Module 2**, the distortions caused by such subsidies would likely fall within the scope of Module 1. This is because under both modules (i) there is an overlap between the indicators used to determine whether the subsidies in question would result in distortions in the internal market; and (ii) the legal test and likely remedies are the same.

5.3 For all cases of **foreign subsidies facilitating acquisitions below the threshold set under Module 2**, such subsidies could be considered unproblematic also under Module 1 given that they do not meet the thresholds set under Module 2 to catch problematic foreign subsidies in a transactional context. This is because the proposed thresholds under Module 2 are closely linked to the criteria used under Module 1 to identify the distortive foreign subsidies:

(a) The value of a transaction (and also the assets likely to generate significant EU turnover) will be linked to the size of the subsidy which is granted to facilitate those transactions; and

(b) Turnover will be relevant for determining the distortive effects of the subsidy in the internal market as it will indicate the size of the undertaking benefitting from the subsidy.

5.4 As a result, subsidies granted to facilitate acquisitions that do not trigger the thresholds under Module 2 should be considered unproblematic and so not be caught by Module 1.

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)?

6.1 There should be a *de minimis* threshold for the investigation of foreign subsidies under Module 1 in order to focus the resources of the Commission and Member States' authorities on significant cases.

6.2 The threshold needs to be clear-cut in order to avoid any uncertainties for authorities or for undertakings. The threshold needs to be sufficiently high. Setting the threshold in accordance with the *de minimis* aid amount under EU State aid rules (EUR 200,000 for 3 years) as currently envisaged and updating it in light of any changes to the *de minimis* aid amount,[10] would seem appropriate

[10] We note that some concerns have recently been voiced regarding the low level of the *de minimis* aid amount. For example, we understand that the Government of Croatia suggested to the Commission

to level the playing field between EU-funded and foreign-funded undertakings. However, this is likely to result in a large number of cases to be reviewed by the Commission. Therefore, as mentioned above, like in EU State aid, appropriate filters should be put in place to limit the number of cases that are actually reviewed (comparable to the General Block Exemption Regulation[11]).

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

7.1 Shared enforcement responsibility bears the risk of double enforcement as well as inconsistent application of the law. There is a particularly high risk of diverging interpretations and incoherent application in new areas of law, as would be the case with foreign subsidies. While shared enforcement does work in some areas, these are typically mature areas of law with extensive case law. For example, decentralisation of enforcement of EU antitrust rules remained limited until 2004, by which time many years of application of the rules by the Commission exclusively had created a solid practice for national authorities to rely on and sufficient predictability and legal certainty in the form of precedents. A similar approach could work in relation to Module 1, i.e. starting with exclusive Commission enforcement to create a consistent regime in the first place and decentralising enforcement at a later stage. In contrast, if the proposed regime were to have decentralised enforcement from the outset, it would most likely result in very different results across the EU, especially since views on foreign subsidies might diverge quite extensively across Member States.

7.2 Notwithstanding the above, if there is to be parallel enforcement, it would be useful to model the cooperation mechanism on antitrust rules, i.e. Regulation 1/2003[12]. Even taking this as a starting point, the White Paper leaves a number of open questions and issues on the division of enforcement powers and cooperation mechanisms. For example, the third paragraph of section 4.1.7 seems to suggest that the Commission has jurisdiction even if only one Member State is concerned. This would potentially go against basic principles of EU law.

7.3 We also note that the White Paper sees the need for additional cooperation compared to what is required in antitrust proceedings under Regulation 1/2003. For example, national authorities would need to seek a binding opinion of the Commission whether the EU interest test is met, while other Member States may apparently provide input on this question too. Cooperation requirements

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that the *de minimis* aid amount should be increased from EUR 200,000 to EUR 500,000 as reported by Deloitte on page 9 of its report "*COVID-19 European measures*" of 27 March 2020, available at https://www2.deloitte.com/content/dam/Deloitte/sk/Documents/about-deloitte/COVID-19_%20european_measures.pdf.

[11] Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187 26.6.2014.,

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

and consultations at various stages of the process may slow down proceedings to the detriment of the undertakings concerned.

7.4 Lastly, it must be ensured that the Commission and the Member States apply the same legal standard when assessing whether or not a foreign subsidy ultimately distorts competition in the internal market. This is more challenging in a decentralised mechanism.

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)?

1.1 We support the objective of addressing distortions caused by foreign subsidies, and a system such as that described in the White Paper may well be appropriate to prevent such distortions. However, as we have observed in relation to Module 1, any solution must feature legal certainty and minimise the administrative burden on undertakings.

1.2 It must also preserve a healthy investment climate and an efficient market for acquisitions. Enacting an additional review system in addition to that of merger control, which is in itself complex, risks of placing excessive burdens on undertakings involved in transactions. Any additional obligations on undertakings should therefore be limited to the minimum necessary for effective review.

1.3 Acquisitions, by their very nature, are time-sensitive, meaning that that parties' interest in the transaction may reduce where expected timescales are excessive. For these reasons, it is particularly important for the Commission to consider applying the one-stop-shop principle in combination and integrated with the merger control system to avoid many transactions being deterred or prevented.

1.4 Below we address some of the more sensitive issues which we believe require particular attention.

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) In order to maximize administrative efficiency, and minimise the burden on undertakings, of any proposed solution, only those transactions that are likely to produce non-negligible effects on the market should be reviewed (see further below). With regard to transactions which are likely to produce such effects, it must first be considered whether either an ex ante or ex post notification system is appropriate. The system proposed in the White Paper is one of mandatory ex ante control which resembles the existing merger control framework. Such system has the advantages of: (i) increasing legal certainty for the parties to the transaction; (ii) removing the potential cost of the reversal of a consummated operation (whose effects may be impossible to completely remove); as well as (iii) providing an avenue for the negotiation of remedies which may be

implemented at a lesser cost than ex post unwinding (and are therefore less likely to be litigated). However, it also has the disadvantages of: (iv) being based on lower quality information, given that the authority has to base its decision on prospective, rather than actual, data and analysis of the effects; and (v) the imposition of the burden of proceedings in a larger number of transactions, requiring greater resources both from the parties and the authority, given that not all transactions meeting any given thresholds would warrant an ex post investigation.

2.3 Another question is whether notification should be mandatory or voluntary. A voluntary system may be preferable to the proposed mandatory framework. It may give the parties legal certainty where necessary while also reducing costs (see point (ii) above) and reducing potentially significantly the burden of review for a large number of transactions (see point (v) above). Voluntary notification minimises cost for both undertakings and authorities.

2.4 The proposed two-step investigation procedure attempts to capture similar benefits to those of a voluntary notification system, by using the first step to filter out non-problematic transactions, thereby allowing the competent authority to focus resources on those that are prima facie more problematic. Nevertheless, it may result in a significant burden on parties and the authority, depending on what is decided with regard to: (i) the amount of information to be provided in the first-phase notification, and its nature (e.g. *"information on alternative prospective acquirers of the target in the last three years, including any bid that has been received as part of the sale process of the target"* will be hard to collect); and (ii) the duration of the standstill period, which may impact both the cost and the value of the transaction. Point (ii) will presumably depend on (i), with the review being lengthier proportionally to the amount of information required. Therefore, in any case, and especially if notification is mandatory, the amount of information to be provided for the first phase review should be limited to what is strictly necessary.

2.5 With regard to review timing, an ex post voluntary system has advantages. Indeed, economic modelling shows that, because an ex post negative decision carries a higher expected cost than a negative ex ante decision, ex post merger control has the twofold effect of incentivizing undertakings to (i) adopt fix-it-first remedies; and (ii) increase their investment in the provision of evidence. The same reasoning can be applied to the proposed foreign subsidies review.

2.6 Whichever solution is adopted for the proposed foreign subsidies review, much of the information and analysis which is useful in any given transaction may also be useful for the merger review. Indeed, insofar as the two systems overlap, i.e. where an operation is notifiable under both frameworks, consideration should be given to combining the two procedures to deduplicate the burden of notification and information provision.

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

• definition of acquisition

• definition and thresholds of the EU target (4.2.2.3)

• definition of potentially subsidised acquisition

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

3.1 Definition of acquisition: In the context of EU merger control there has been much debate over and considerable resistance to the review of investments and acquisitions which do not result in the acquisition of control. This is due to considerations of efficiency, as it appears difficult to detect relevant acquisitions without disproportionately increasing the burden on undertakings, Member States, and the Commission[13]. For purposes of merger control, only a limited number of jurisdictions currently review minority acquisitions and most of these systems use specific thresholds (e.g. the acquisition of a certain percentage of capital or voting rights in the target).

3.2 It therefore appears reasonable – contrary to what the White Paper proposes – to limit the scope of Module 2 to transactions that lead to an acquisition of control – be it *de jure* or *de facto* – as well defined in the EUMR Jurisdictional Notice and the case law. In any event, there should be a clear and well-defined trigger that allows stakeholders to analyse whether or not their transaction is subject to Module 2.

3.3 We therefore suggest: (i) eliminating the point relating to the percentage of shares or voting rights acquired; or (ii) setting a percentage relating to either shares or voting rights, as a fixed and objective parameter, leaving no room for interpretation of the concept of "material influence".

3.4 Definition and thresholds of the EU target: A large part of the burden on undertakings under a framework such as that proposed is the assessment of the need to notify, so the thresholds must be as clear and unambiguous as possible, and quantitative rather than qualitative. They should be sufficiently high that only transactions of a certain significance are caught. One possibility would be to align the thresholds with EU merger control thresholds.

3.5 Definition of potentially subsidised acquisition: Subsidies can be both financial and non-financial. The exclusion of non-financial subsidies from the scope of Module 2 might compromise – in certain cases – the effectiveness of the whole system.

3.6 Lastly, as for the relevant time period, the fact of also considering subsidies received up to one year after the notification seems irreconcilable with the adoption of an ex ante system. In a hypothetical scenario, the undertakings concerned could in fact find themselves forced to unwind a transaction concluded and previously approved by the authority itself for the sole reason that the parties were not aware of a future subsidy at the time of notification.

[13] See, for instance, "Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings" [2016] European Commission Final Report. Relevant case law includes, inter alia, Cases T-342/07 and T-411/07 Ryanair/Aer Lingus.

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)?

4.1 As described in the response to question 2 above, any notification framework must entail as limited a burden on transacting parties as possible, in order to preserve a healthy and efficient acquisitions market. A mandatory notification system already entails a heavier burden than alternatives: if opted for, it should be limited to potentially subsidized acquisitions. This would also have the advantage of significantly reducing costs and resources for the authority.

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?

5.1 As in the context of Module 1, given the limited supervisory powers over third country subsidies, it seems impossible to apply the kinds of remedies provided under EU State aid rules in these circumstances. For this reason, it is reasonable as proposed to grant the competent authorities the power to impose various redressive measures to remedy the possible distortion caused by foreign subsidies.

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

6.1 As set out above with respect to Module 1, it may be appropriate that the assessment of distortion be balanced against the positive impact that the investment might have within the EU. However, this benefit must be balanced against the cost of such a solution -– which is reduced legal certainty for the parties involved. In particular, the reduction in legal certainty is proportional to the range of policy fields covered by the test.

6.2 On the other hand, the exclusion of such test from the assessment may preclude the successful conclusion of transactions which would ultimately grant a net benefit to the internal market.

6.3 If there is to be an EU interest test, both (i) the policy fields taken into consideration; as well as (ii) objective criteria to evaluate a transaction, must be developed explicitly to provide undertakings with the tools they need to assess their transaction.

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

7.1 We agree that a centralized system entrusted to the European Commission as the only competent authority for all Member States could be the most effective and efficient solution, at least in a first stage. A one-stop-shop system would have the advantage of reducing uncertainty and building consolidated and consistent case-law over time.

Module 3

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

1.1. A specific legal instrument on public procurement should only be introduced if the Commission sees a need for such instrument in addition to existing public procurement rules and the general instrument to assess potential distortions caused by foreign subsidies as described under Module 1. If a specific legal instrument is introduced, boundaries to Module 1 and rules on the interplay with other public procurement rules need to be clearly defined.

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.

2.1. Module 3 can only appropriately address distortions caused by foreign subsidies in public procurement procedures if the established regime will ensure legal certainty for undertakings and limit the additional administrative burden for them to what is absolutely necessary.

2.2. As far as possible and appropriate, the same standards should apply to foreign subsidies as to subsidies granted by EU Member States. In this regard, it is good that the White Paper aims to define the scope of grounds for exclusion from public procurement in light of EU State aid rules, the EU's international obligations under the WTO Government Procurement Agreement (GPA) and its bilateral agreements with various governments on access to the EU procurement market. As highlighted in section 4.3.2 of the White Paper it would indeed be important for the Commission to consider whether the current EU public procurement framework should also include an exclusion ground for the recipients of State aid from EU Member States to level the playing field towards recipients of foreign subsidies granted by non-EU governments.

2.3. We welcome the suggestion in section 4.3.3.1 of the White Paper to apply certain thresholds and additional conditions, such as a limitation of the relevant subsidy period, to Module 3 as this helps authorities to focus on the most relevant cases and, at the same time, limits the additional administrative burden for undertakings.

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?

3.1. The White Paper foresees a complex process of interaction between economic operators participating in public procurement procedures, contracting authorities, the Commission and national supervisory authorities. There are a number of open questions on how this complex process would work in practice and how incoherent application of the new legal instrument can be avoided. The most relevant of these questions are addressed below.

3.2. As set out in section 4.3.3 of the White Paper, economic operators participating in public procurement procedures would, as a first step, have to notify to the contracting authority when submitting their bid if they have received a foreign subsidy. As a next step, the contracting authority would transmit the notification to the competent supervisory authority, which would then assess the existence of a foreign subsidy. In addition, third parties, including competitors, are entitled to inform the contracting authority about substantiated concerns that a notification should have been made. The contracting authority may then alert the supervisory authority where it finds the indications plausible and sufficient that a tenderer received a foreign subsidy which it did not notify.

3.3. The actual review as to the existence of a foreign subsidy would be carried out by the supervisory authority. During the investigation, the contracting authority is barred from awarding the contract to the investigated economic operator. This may cause significant delay in the public procurement process to the detriment of the contracting authority, the undertakings concerned and, ultimately, consumers. In addition, this process entails the risk that contracting authorities may be biased towards tenderers that are not under investigation for a foreign subsidy, given that the contract can still be awarded to such an undertaking while the investigation is still pending. The Commission should address this risk when further detailing the legislative proposal.

3.4. If the supervisory authority reaches the conclusion that there is a foreign subsidy it will be for the contracting authority to decide whether that subsidy has distorted the public procurement procedure and, if so, impose redressive measures on the subsidised operator. This process provides the contracting authority with a high degree of power, especially since the contracting authority can not only exclude the operator from the specific procurement process in question, but can also order the exclusion of a subsidised bidder from future public procurement procedures before that authority for a certain time. Putting this much power into the hands of contracting authorities entails the risk of incoherent application of the law. We appreciate that the White Paper foresees the issuing of a guidance paper designed to ensure uniform assessment throughout the EU (see footnote 41 of the White Paper), but such guidance might not be sufficient to achieve a level playing-field across the EU, and this would be to the detriment of all undertakings involved in public procurement procedures across the EU.

3.5. Another factor that results in additional complexity is that the White Paper currently foresees shared responsibility between the Commission and EU Member State authorities (see section 4.3.3.2 of the White Paper). It is good that the White Paper aims to model the cooperation between the Commission and national supervisory authorities on that used in antitrust cases pursuant to Regulation 1/2003. However, as mentioned above, in antitrust cases national authorities can profit from detailed decisional practice over many years to ensure a coherent application of the law between the Commission and EU Member State authorities, while the foreign subsidy regime would be a new set of rules.

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?

4.1. There are still a lot of open questions, especially on procedure, that would need to be addressed when designing any new instrument. For example, it appears from the White Paper that Module 1 is to serve as a back-up for public procurement cases not caught by Module 3, especially if a threshold is applied to Module 3. To avoid legal uncertainty the interplay between Modules 3 and 1 would need to be addressed in more detail.

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?

1.1. Independent from whether any of the three suggested Modules should operate as a stand-alone Module, the interplay between the different Modules should be clearly addressed in the relevant legislation, if more than one of the three suggested Modules enters into force.

1.2. More specifically, if Module 2 is introduced, this should be the exclusive instrument to assess foreign subsidies in an M&A context. The same should apply for Module 3 in respect of public procurement. That means Module 1 should apply neither to M&A scenarios nor to public procurement cases, independent from whether the thresholds of Modules 2 and 3 are met. This is necessary because of the particular need for legal certainty in both M&A scenarios and public procurement. If there were an ongoing risk of an ex officio proceeding under Module 1, non-EU based undertakings would face a clear disadvantage in M&A and public procurement scenarios to the detriment of non-EU based undertakings acting as bidder, seller, or tenderer.

Questions relating to foreign subsidies in the context of EU funding

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

1.1. Additional measures in the context of EU funding should only be introduced if the Commission sees a need to for such measures in addition to existing rules on EU funding (e.g., WTO GPA, EU Financial Regulation, EU Public Procurement Directives) and the general instrument to assess potential distortions caused by foreign subsidies as described under Module 1. If a specific legal instrument is introduced, boundaries to Module 1 and rules on the interplay with existing rules on EU funding need to be clearly defined.

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.

2.1. In principle, the same comments apply as to Module 3, especially where EU public procurement is concerned, as the relevant rules should mirror the ones applicable to national public procurement.