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Brussels, 23 September 2020

**Subject: ESF Reply to the White Paper on Foreign Subsidies**

Dear Executive Vice Presidents,

The European Services Forum is the European private sector organisation that represents the interests of the European services' industries in international trade and investment negotiations. It comprises major European service businesses and European service sector federations covering service sectors including (but not limited to) financial services, telecommunications and IT services, maritime transport, business and professional services, construction, distribution, postal and express delivery, audio-visual and education services. Our membership is formed, directly or indirectly, of businesses of all sizes and associations from all EU member states.

On 17 June 2020, the European Commission published a [White Paper](#) dealing with the distortive effects caused by foreign subsidies in the Single Market. I am writing to you to provide the views of the European Services Forum, as our contribution to the public consultation you have initiated so as to prepare the European Commission for appropriate legislative proposals in this area. Many of our members will also contribute directly to the consultation, therefore we will concentrate as far as possible our reply (see [annex](#) here below<sup>1</sup>) on the trade related aspects of the White Paper and will not respond in depth to all questions.

The ESF action is more driven by offensive issues in third countries rather than looking inward. However, the strength of the EU while negotiating with third trading partners is the attractiveness of the wealthy and stable single market. The values defended in this market have positioned the European Union as a solid and trustful partner that in return provided the Union with tremendous access to other countries' markets, which generated exports, imports and investment that created growth and millions of jobs. As for our recommendations made in the consultation of the EU Trade Policy Review, we would like to emphasise that the actions that will be undertaken by the European institutions on the basis of the White Paper on foreign subsidies will need to keep in

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<sup>1</sup> ESF has also replied to the electronic form of the questionnaire on the Commission website.

mind the necessary balance of any measures, so as to keep the EU attractive, and hence be able to remain a leader in international trade and investment. We support the message that the EU wants to establish fair level playing field for all actors in a non-discriminatory manner on its market, but such action should not put into question the level of openness of the European Union, that might trigger a reduction of investment which would be detrimental to the EU economy.

In this context, it is important to remind at this stage that, according to Eurostat, the EU is the world's biggest recipient of foreign direct investment (€8.3 trillion inward stocks at the end of 2018 – 32% of global FDI), and that nearly 8 million persons are employed in the EU-28 by foreign companies established in the EU (Inward FATS)<sup>2</sup>. A significant number of these workers are employed in services businesses, since more than 85% of all inward EU FDI stocks are invested in EU services sectors<sup>3</sup>. These foreign investments by services businesses in the EU are undertaken under different forms, like green field operations, or mergers & acquisitions, and some of them do take part to some public procurement projects.

It is also interesting to note that in the Commission's study on foreign direct investment in the EU<sup>4</sup>, the vast majority of foreign investors into the EU, in number and in amount invested, come from developed countries which do adhere to the principle of rules of law, are members of the OECD and abide by the disciplines that they have adopted either in the OECD, in the multilateral treaties like the WTO or in their bilateral investment treaties or free trade agreements. These countries are normally less inclined to provide foreign subsidies to businesses in the EU that would distort competition. It is however not a reason not to adopt legal instruments, but this state of affairs must be kept in mind when drafting the new tools, so as not to overload potential investors to the European Union.

From what we understand, with the view to ensure a level playing field in the EU single market for all economic players, the European Commission basically wants to fill the gaps left in its single market control mechanisms in the area of state aid, mergers and acquisitions, public procurement, trade defence instruments, investment screening (for security purposes) and bilateral free trade agreements. The White paper examines a set of proposals to bolster local industries, fighting back against companies established in the EU that receive aid from foreign governments, which distort competition in the single market. The plan could ban these non-EU firms from making acquisitions, or force them to divest assets, and allow for the imposition of fines. ESF can only agree with the principle of assuring a strict level of playing field in the EU single market, so as to set fair competition, a necessary condition to maintain innovation, growth and jobs creation.

Furthermore, EU competition rules, trade defence instruments and public procurement rules play an important role in ensuring fair conditions for companies in the Single Market, and hence an important role to keep the European Union attractive to foreign investors. We understand that the White Paper tackles the exceptional situation triggered in the current context of the COVID-19 crisis, where indeed EU Member States grant significant amounts of State aid to support individual undertakings and the EU economy as a whole. Such State aids, which must remain proportionate and temporary, are necessary to help the economy to recover. The European Services Forum appreciates the efforts made by the EU and the EU member states to help businesses to recover from the crisis, notably by helping the tourism, travel and transport sectors,

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<sup>2</sup> Source: [DG Trade Statistical Guide](#) – June 2018 - Eurostat ([fats\\_g1b\\_08](#)).

<sup>3</sup> Source: Foreign direct investment – stocks - Eurostat ([bop\\_fdi6\\_pos](#))

<sup>4</sup> Source: Commission SWD(2019) 108 final of 13.3.2019 - [https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc\\_157724.pdf](https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf).

who are the major EU exporters of services. At the same time, we trust that public support continues to be subject to EU State aid control also in the current situation, so as to ensuring for example its proportionality and minimising the potentially distortive effect on competition. It is of paramount importance that these rules continue to be applied, so as to not discriminate foreign companies in the EU.

Subsidies by Member States (within the Single market) have always been subject to EU State Aid rules to avoid distortions. On the contrary, subsidies granted by non-EU governments to companies in the EU are not, and they appear to have an increasing negative impact on competition in the Single Market, but fall outside EU State aid control. We take note of the Commission's assertion that there is a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU companies or distorted the investment decisions, market operations or pricing policies of their beneficiaries, or distorted bidding in public procurement, to the detriment of non-subsidised companies, including in the services sectors.

It has always been more complicated to identify and regulate foreign subsidies in the services sectors than in the secondary and primary sectors. Already in the General Agreement on Trade in Services (GATS) that entered into force in 1995, in Article XV, WTO "Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services" but were not able to find appropriate solutions. "Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. The negotiations shall also address the appropriateness of countervailing procedures", says GATS Article XV. WTO Members decided that a "future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted". However, such work programme never took delivered. There are the well-recognised and documented national subsidies in audio-visual services, and in education or health services, but they are performed in regulated frameworks and properly exempted from GATS rules through exclusions in GATS schedules or MFN exemptions, notably as a protection of the public services.

This does not mean however that such subsidies in the services sectors don't exist. The WTO Secretariat issued a Background note<sup>5</sup> in January 1998 for the attention of the WTO Working Party on GATS Rules.

It took the subsidy definition generally used for Trade Policy Reviews, that is based on the definition established by the WTO Agreement on Subsidies and Countervailing Measures (SCM - which tackle only goods). Accordingly, subsidies are deemed to involve a financial contribution by governments or public bodies which confers a benefit. The TPR reports thus cover assistance granted in the form of direct transfers of funds, including grants, loans and equity infusions; potential direct transfers of funds or liabilities, e.g. loan guarantees; government revenue foregone; supply of goods and services other than general infrastructure; purchase of goods; payments to funding mechanisms; or income and price support. The application of this definition to services producers has not appeared to pose problems in principle. However, the report assessed that "it may prove difficult in many services areas to identify the ultimate beneficiary of a subsidy, given that support may have been destined for downstream users rather than the immediate recipient. Moreover, some measures may have been intended primarily to promote public policy or infrastructural objectives." "The resulting ambiguities, in turn, could affect cross-country comparability" the report concluded.

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<sup>5</sup> [S/WPGR/W/25](#): *SUBSIDIES FOR SERVICES SECTORS: INFORMATION CONTAINED IN WTO TRADE POLICY REVIEWS – Background Note by the Secretariat*

However, the work of the WTO Secretariat has continued on that subject and the latest version was in 2015<sup>6</sup>. The long report of 173 pages clearly identifies the various forms of subsidies in services sectors in all countries around the world, that have been registered in the various Trade Policy Reviews. These subsidies take the form of direct grants, preferential credits and guarantees, equity infusions by state or public bodies, tax incentives and other forms. But there are no WTO rules or disciplines to address the possible distortions caused by foreign subsidies. The European Services Forum calls the EU to work on a global solution that might consist, when the time is ripe, in negotiating WTO disciplines for subsidies in the services sectors.

It is also interesting to recall that the White Paper also comes as the EU – alongside other advanced economies such as the United States & Japan – is trying to have the World Trade Organisation adopt more stringent rules on subsidy controls for industry in particular, though with little success so far. The Commission's White Paper makes frequent references to the WTO's Subsidies and Countervailing Measures Agreement. But, once again, these WTO instruments do not cover services sectors. A proper impact assessment should be made so as to also include services on possible rules on subsidies.

The biggest difference however with what the EU is trying to solve with the White Paper on foreign subsidies is that the registered subsidies by the WTO TPR process are essentially subsidies that are granted nationally to services providers in their own territory, while the Commission is now trying to address subsidies granted by foreign governments in whatever form to businesses that are operating in the EU single market, i.e. outside the headquarter territory of such businesses.

Moreover, the existing EU trade defence rules, like the EU Anti-subsidy Regulation as well relate only to exports of goods from third countries and thus do not address at all distortions caused by foreign subsidies related to trade in services and in relation to the establishment and operation of companies in the EU which are backed by foreign subsidies and which do not entail any trade in goods. Where foreign subsidies take the form of financial flows facilitating acquisitions of EU service businesses (through for instance a state guarantee for a loan) or where they directly support the operation of a company in the EU, or facilitate bidding in a public procurement procedure, there is clearly a regulatory gap to prevent such unfair practices. The European Services Forum encourages therefore the continuation of the monitoring of the situation, so as to propose adequate solutions and new tools to address such a regulatory void in the EU.

It is therefore with great interest that ESF will analyse the potential impact of the proposed new legal instruments on the services sectors.

ESF and its members remain at your disposal to discuss our contribution, should you find it appropriate.

Yours sincerely,



Noel Clehane  
ESF Chairman

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<sup>6</sup> [S/WPGR/W/25/Add.7/Rev.1](#) of 13 January 2015



Annex

## ESF Reply to the Questions of the Commission's White Paper on Foreign Subsidies

### 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.***

Yes, ESF believes that there is a need for new legal instruments to address distortions of the Single Market that arise from foreign subsidies, so as to ensure a level playing field for all businesses operating on that market.

There are not that many verified cases where such distortions occurred. The cases of infrastructure projects won by Chinese state-owned enterprises in the motorway or railway sector, or of high-tech businesses bought at a price higher than the marketplace by Chinese company where the final ownership is not always clear comes to mind. And clearly the EU is not legally equipped to prevent such cases to happen again.

ESF encourages the European Commission to continue to negotiate an ambitious Comprehensive Agreement on Investment (CAI) with China, with of course new market access to the Chinese market, but also with strong level playing field provisions to set clear rules for Chinese businesses to access the EU market. Such provisions might prohibit foreign subsidies to distort the market and impose transparency rules. But the implementation of such rules remains difficult as it requires the full commitment of both parties. And China might not be the only country providing such subsidies.

Furthermore, as analysed by the Commission in Section 6 of the White Paper, the existing EU legal instruments that exist (trade defense instruments, FDI Screening regulation, competition law, EU state aid rules, EU public procurement directives) or are in the making (international procurement instrument), or the international treaties like the WTO agreements, the commitments taken in BITs or FTAs do not cover foreign subsidies impact.

Therefore, the proposed modules will come in complement, with necessary unilateral legal instruments to be proposed at a later stage.

***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.***

Yes, ESF believes that the framework presented by the Commission's White Paper should provide a good basis for the adoption of legally binding instruments with the purpose to prohibit unfair foreign subsidies that would create distortion to the internal market.

However, we would need to wait for the details of these future instrument to provide a final position. As general preliminary comments, we would like to call the Commission to keep in mind

the final objective and not put into place a burdensome and heavy administrative system that would possibly discourage to invest into the EU.

Finally, ESF is of the view that the Commission should be the leading competent authority in the management of the new instruments, so as to avoid any politicization of potential cases. Inevitably, as already seen in the past, in case of major acquisitions or major infrastructure projects, some national interests of a specific Member State can be in conflict with the bigger interest of the protection of the internal market integrity. Of course, the national supervisory authorities will have to work closely with the Commission for the notifications and investigations, but the final neutral decision should remain in the hands of the Commission.

## 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?***

Yes, ESF believes that the proposed instrument will contribute to fill existing legislative gaps and could lead to a more level playing field in the European Single Market. Additional information however would be necessary.

The transparency obligation for entities under investigation is a good governance principle, and penalties should be imposed if the entity in question does not cooperate or submits incomplete, incorrect or misleading information. In return, the information requested by the competent supervisory authority will have to be clear and limited to the purpose of the investigation, and respect confidential business information.

The scope of Module 1 should not only include the undertakings “established in the EU,” but also the undertakings “active in the EU” (e.g. providing a service via GATS Mode 1 – Cross-border trade services), as suggested under 4.1.2.2. Such concept (“active in the EU”) should however be more clearly defined to avoid legal uncertainty.

We understand that the list of subsidies potentially covered by Module 1 that is provided by the Commission is non-exhaustive. A review clause should be included to regularly update such a list and avoid legal uncertainty.

### ***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)***

In principle, ESF agrees with the procedural set-up proposed in the White Paper, with the two steps investigation procedure. The time frames of each steps must be clearly defined in the instrument that will be put into place. In order to avoid possible politicization of any cases, the Commission should be the authority that will decide on which case will have to be investigated further.

When possible cases are reported by businesses that feel subject of competition distortion, ESF supports the principle where the Commission takes the initiative of launching an investigation. We would like to draw the attention on the fact that European businesses may be hesitant to report the presence of foreign subsidies in fear of having their international operations discriminated against (e.g. by their counterpart in a bidding process for a larger European company), should it come forward that they have filed a complaint. Now, the risk of being identified as the reporting party can in fact be quite high, as there are often only a small number of undertakings involved in

e.g. an acquisition or in a bidding process. The Commission should therefore consider how reporting businesses can be protected from being put in bad standing with a counterpart, in for example China, with whom they are already conducting business with in other areas.

For Module 1, it is suggested that the competent supervisory authority would have the possibility to perform “[...] fact finding visits at the EU premises of the alleged beneficiary of a foreign subsidy [...]”. To make sure that the due process of enterprises is not impeded by this practice, ESF would like to ask the Commission to define appropriate framework conditions for this new instrument. This includes, making it a legally binding requirement for the competent supervisory authority to obtain a court order before making on-site monitoring visits. Also, the decision to initiate on-site monitoring visits must take due account of the principle of proportionality, especially when it comes to small and medium-sized enterprises. In the end, on-site monitoring visits should be considered only as a last resort.

***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?***

Overall, ESF agrees with the assessment criteria and the list of redressive measures. However, the assessment criteria will need to be specified in the instrument, including the possible drafting of a list of foreign subsidies that are considered as non-distortive for the single market.

The list of redressive measures needs to be specified more precisely as well, including the duration of redressive measures. The competent authorities will have to properly monitor the decided redressive measures and legally able to redress in case of non-compliance.

A proportionate and gradual approach should be adopted to imposing redressive measures. In any case, ESF is of the view that redressive payments should not be the default, go-to redressive measure applied when a distorting foreign subsidy has been identified. Rather, companies should systematically have the opportunity to offer legally binding commitments to mitigate the distortions on equal terms with redressive payments. Furthermore, if an undertaking offers commitments to mitigate the distortion created by a foreign subsidy it received, it needs to be made clear under which circumstances such commitments are considered sufficient, to reduce legal uncertainty for the companies involved and guarantee uniform 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?***

In principle, ESF considers useful the setting-up of an “EU interest test” for public policy objectives. We understand however that the proposed instrument looks very much like the one used by the EU’s trade defence instruments. And, the feedback of the implementation of such tests has been somewhere controversial as they triggered oppositions of various interest groups. The EU interest test can indeed be assessed differently depending on the perspective. ESF encourages the Commission to clarify the evaluation criteria for the EU Interest test, so as to avoid any politicization of cases. The Commission should be the only authority to decide on the contribution of a subsidised business to EU public policy objectives (e.g. increase employment, economic growth, address climate change, support digital transformation, promote new technologies, etc.)

***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)***



No, ESF considers this possibility as a threat to the legal certainty. If acquisitions, including those not subject to a notification obligation set in Module 2, could be subject to an investigation after they have been finalised in compliance with Module 2, this will introduce an element of uncertainty that might be detrimental for mergers and acquisitions in the EU.

We would like to remind that according to our understanding, under existing competition rules, ex post investigations into acquisitions are only justified in cases where a prior notification obligation for the acquisition has been breached and, based on an ex ante perspective, the acquisition would breach EU competition rules.

***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)?***

Yes, ESF believes that there should be a “de minimis” threshold so as to focus on the more market disruptive subsidies. The proposed de minimis threshold of EUR 200.000 suggested for Module 1 seems to be a good basis but should be subject to a review clause once a certain practice will be acquired by the authorities and once the effectiveness of the new instrument will be assessed.

The authorities should find a way to avoid possible diversion of the new instrument, whereby multiple subsidies lower than the de minimis when added exceed the limit. Furthermore, we take for granted that the prohibited subsidies should not be subject to de minimis threshold.

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

No, ESF is of the view that the European Commission should be the supervisory authority under Module 1. The sharing of responsibility will likely dilute the power of decision and increase costs. The relevant competent authorities in the member states will have to work closely with the Commission, gather the information on the ground and duly report, but not share the enforcement responsibility.

Also, a neutral and depoliticized approach in the analysis of the “suspected foreign subsidies” will be essential, so as to avoid conflicts with the interests of a specific Member State. Adequate resources will have to be granted to the Commission to fulfil such a task.

## 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)?***

The proposal in Module 2 of the White Paper comes as an additional tool to the existing legislation. Indeed, the recent Foreign Investment Screening regulation applies only to national security and public order concerns. The proposed new legal framework addresses the impact of foreign subsidies on the level playing field with regards to mergers and acquisitions of businesses established in the internal market. ESF considers the Commission’s proposal as a useful instrument and would like to make the following additional comments.

***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)***

Overall, ESF can agree with the obligation for beneficiaries of foreign subsidies to notify acquisitions of European targets ex-ante. The Commission will need to provide clear guidance to businesses, with clear criteria of what exactly need to be notified. The Commission should consider whether the incentives for the beneficiaries of foreign subsidies to be transparent are sufficient. If the redressive measures are deemed too weak to motivate such behavior, the beneficiary might decide to not comply with their ex-ante notification obligations.

The two-steps investigation procedure, like the one proposed in Module 1, seems to be adequate. But it will be necessary not to create a too burdensome administrative process and keep the timeframe reasonably short, so as not to disincentivise FDI in the EU. The notion of “future financial contribution” for instance seems unclear. Indeed, as the notification of an expected/incoming future financial contribution might be made some time (significantly) before actually receiving it, a mechanism needs to be put in place, to avoid sanctioning an already notified, permitted acquisition.

***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.***

ESF would not pretend to sufficient expertise to these detailed questions. We would like however to note that as noted in section 6.7 of the White paper, an overlap with Module 2 may exist with the FDI Screening regulation if a foreign direct investment constitutes an acquisition that is facilitated by a foreign subsidy and raises concerns with regard to security and public order. ESF would be of the view that the acquisitions of EU targets in strategic sectors (according to the definitions set out in the FDI screening mechanism) would need to be systematically examined, whatever the size of the operation, if the acquirer received a foreign subsidy falling within the thresholds of Module 2.

***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)?***

Keeping in mind that the main objective is to prevent that foreign subsidies would harm the EU internal market, ESF believes that the notification obligation should be restricted to mergers and acquisitions of a significant size. ESF would hence favour a high threshold. It would save additional administrative burden on smaller projects, the larger number of them coming much likely from non-subsidised entities.

***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?***

ESF agrees with the substantive assessment criteria and the list of redressive measures presented for Module 2 in the White Paper. It would be important however to issue detailed guidelines for the attention of interested businesses.

The assessment of whether an entity under investigation has privileged access to its domestic market, providing an artificial competitive advantage leverageable within the EU internal market, should be included as an assessment criterion under module 2.

As the notification requirements will be integral part of the due diligence process by the acquirers, ESF believes that automatic sanctions should be in place for business failing to do so.

As for the redressing measures, preference should be encouraged to legally binding commitments of remediation of distorting effects over the prohibition of acquisition, which should be decided only in last recourse.

***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?***

Please see our overall comments on the EU interest test under Question 4 on Module 1.  
No, ESF does not consider useful to include an EU interest test under Module 2.

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

Yes, ESF agrees that the enforcement responsibility under Module 2 should be for the Commission. It is a logic continuation of the already existing situation in the EU Merger regulation and anti-trust rules.

### 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.***

It is difficult to assess whether some public procurements projects have effectively been won by non-EU businesses thanks to the support brought by foreign government through foreign subsidies as defined in Annex I of the White Paper. There are few examples of major infrastructure projects notably in the railway sector that can indeed raise questions. Even if such examples are probably not that numerous, there is no reason why other competitors would be put at a disadvantage. Therefore, the European Services Forum supports the Commission proposal to address these specific distortions in the area of public procurement, so as to equip the EU with a legal instrument that would allow the contracting authorities to exclude subsidised bidders from an ongoing public procurement procedure.

ESF takes note of the separate legislative work undertaken by the EU institutions related to the adoption of an International Procurement Instrument (IPI), that would look for reciprocity of access to public procurement in countries that are currently closed to European bidders. ESF will come back with a separate position on that matter and acknowledge that IPI would not tackle the lack of instrument related to foreign subsidies.

***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.***

In principle, ESF agrees that the suggested framework is a good approach to prevent distortive competition in EU public tenders. Despite our lack of expertise in public procurement procedures, ESF would like to make some comments.

We consider appropriate that the bidders, following responsible business conduct, have to notify to the contracting authority whether they (or their consortium partners) have received foreign

subsidies. More precise information will have to be provided however, so as not to overload the already burdensome process of the calls for tenders.

Regarding the preliminary review and the in-depth investigation, as for the two previous modules, strict time limits for such assessments are necessary in order to provide legal certainty to businesses and not to cause undue delays in procurement procedures. This means that, as in the public procurement directives, clear and harmonised procedures will have to be adopted so that the national contracting parties will all apply similar rules, and the Commission should be in charge of the implementation and be able to launch ex-officio investigation (for instance following a complaint by a competitor) and revert the decision taken by a national or local contracting party in order to avoid possible politization of some projects.

ESF is of the view that to make the new instrument effective, it should focus on the subsidies that effectively have a significant distortive effect on the level playing field in the internal market and hence adopt a threshold sufficiently high, so as not to engorge the system. A review clause should be set.

Furthermore, for Module 3 to be an effective instrument, it is a prerequisite that the commission makes information available about which foreign companies have been banned from participating in public procurement processes within the EU. This way, we can ensure that companies that have been rejected in one Member State do not win a public tender in another. At present, it seems unclear how this will be done in practice.

***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?***

Yes, ESF considers that the proposed communication procedure between the contracting authorities, the national supervisory authorities and the Commission is adequate. The contracting authorities cannot be the decision makers in this case, as it is too close to the project and might prefer to accept the foreign subsidies rather than a more expensive procurement. It is important notably that, whatever the decision of the national supervisory authority after a notification (and possible further investigation), and indeed prior to the communication to the contracting authority, it must inform the Commission on its draft decision. The Commission should have the power to further investigate and change the decision when necessary. Once again, this should allow any politization of cases.

***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?***

Keeping in mind the proposal for an International Procurement Instrument, when and if an identified foreign subsidy in a EU public procurement project is coming from a country that do not open its public procurement to EU bidders, this can be interpreted as double gain for the foreign beneficiary. The new instrument should take this in consideration and allow more stringent specific redressive measures in such cases. Coherence between the two instruments will have to be assured.

## 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?*

These are not easy questions. These three modules are clearly linked as tools to prevent foreign subsidies to distort EU internal market. Module 2 and Module 3 have a clear field of operations. The scope of Module 1 is more complicated to apprehend, and could lead to abuses, or put into question negative decisions reached in the framework of Module 2 or 3, and hence put into question the legal certainty, or further delay either merger/acquisitions or public procurement projects.

#### 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.*

Overall, as this is in the continuation of preventing foreign subsidies to distort the EU internal market, ESF shares the objective outlined in the White Paper of preventing European funding from reinforcing subsidised companies which would distort that Single Market.

*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.*

A detailed list of European funds and financing instruments that could be covered by the new instrument should be set up and, like for the other modules, the timelines and thresholds will need to be specified.

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