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## White paper on levelling the playing field as regards foreign subsidies

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### Comments on behalf of the Ministry of Economic Affairs and Employment, Finland

#### Introduction

These comments are on behalf of the Ministry of Economic Affairs and Employment of Finland, which is responsible for issues related to competition and state aid policy, single market, industrial policy, regional policy as well as research and innovation. The Ministry of Foreign Affairs, responsible for trade policy issues, has also contributed to the comments below.

- 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? Please explain and also add examples of past distortions arising from foreign subsidies.***

The Commission White Paper forms an important part of the current discussion on level playing field and the importance of European businesses to maximize their value creation in global value chains and value networks.

The Ministry of Economics and Employment generally supports the aims set out in the White Paper. Distortions caused by foreign subsidies should primarily be solved through Trade Policy. However, due to the challenging geopolitical situation, the means offered by the Trade policy and rules based trading system do not necessary tackle all the situations in case of foreign subsidies. We also share the Commission's view introduced in the White Paper that although many market distortions in the Single Market can already be addressed under existing EU legislation, the means available to the EU may not fully address all situations where subsidies granted by third countries distort competition or jeopardize trade in the single market. Therefore, additional measures may be needed at EU-level to ensure the level playing field in the European markets.

The White Paper does not include concrete cases concerning the situations where foreign subsidies distort the functioning of the single market. Therefore, to better understand the seriousness of the distorting effects of foreign subsidies, we would appreciate if the Commission could point out concrete cases and examples concerning such situations. A thorough and detailed Impact Assessment is necessary, in order to provide answers, to questions such as: how much additional administrative burden and costs the planned framework would cause and what would be the ideal criteria to intervene.

In case the Commission will decide to introduce new legislation or new measures to tackle the issue, regulation at EU level should be appropriate and of a high standard. Overall, when drafting new legislation, existing regulatory measures should be reviewed critically and simplified where necessary. Unnecessary administrative burden will be avoided. encourage retaliatory measures from third countries. The EU must remain open and an attractive market for foreign investment also in the future.

We also note, that in addition to foreign subsidies, for example, the level of standards related to production of goods is often considerably higher in the EU as in many other parts of the World. This is also affects the level playing field.

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.***

The white paper forms a good basis for the discussion. However, the measures proposed in the white paper are still rather vague and it is not clear how they relate to each other and to existing EU trade, competition and state aid rules and public procurement rules. We consider it important that the relationship between the various regulatory entities and their purpose be better clarified before introducing any new EU legislation.

In line with the Commission (White Paper, footnote 12), the possible new instrument on foreign subsidies (a) should not affect the current rules on antitrust and mergers and (b) in the case of any parallel procedures with the new legal instrument, there should be a clear mechanism to address any overlap with current enforcement practices, and to ensure that all existing antitrust/merger/procurement/ECN procedures remain efficient and fully operative also in practice. In the course of the preparations of the new instrument, both these principles (a-b) should be carefully taken into account in terms of all three modules.

It is proposed in the White Paper that, in certain situations, Member States should also have competence to control aid granted by third countries. However, the division of competences is not sufficiently clear. To this end, we highlight that the division of powers between the Commission and Member States should be made extremely clear in order to create an efficient and a well-functioning regulatory framework to tackle the issue of foreign subsidies. Also, the outcome should not be, that undertakings from third countries are treated more strictly than European companies. Furthermore, the Commission should explore in more detail, whether the discussions related to the proposed framework could facilitate the WTO negotiations on services.

## **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?***

The framework under module 1 as such forms an appropriate basis for intervening foreign subsidies that distort the functioning of the Single market. However, the relationship of rules under module 1 and the other modules presented in the Commission white paper as well as its relation to existing EU rules for example in the field of competition, state aid and public procurement is still somewhat unclear and needs to be clarified. Moreover, the legislative system should only interfere with foreign subsidies that clearly and seriously distort the functioning of the single market.

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.?***

The proposed two-step procedural system under Module 1 consisting of a preliminary review and a possible in-depth investigation is well justified as long as the criteria for initiating an in-depth investigation are sufficiently strict and well defined. This is important as the possible new measures /rules should only apply where a significant amount of aid is granted by a third country which seriously distorts the functioning of the single market.

As regards the fact-finding tools introduced in the White Paper, in principle, we find them appropriate and efficient. However, as we are dealing with businesses and States from outside of the EU and Europe, it might not always be easy to implement them in practice. This due to the fact that the rules, requirements for businesses as well as the monitoring of the compliance of these rules, for example with regard to accounting, may vary considerably in different parts of the world. In addition, some of the measures, such as fact-finding visits in the premises of the alleged beneficiary located in third countries, need to be subject to the consent of the third country concerned.

According to the White Paper the final decision following the in-depth investigation can be taken on the basis of the facts available. This is logical as the fact-finding process might be challenging in terms of acquiring all the information needed for the decision. However, in order to create a reliable and credible monitoring system, the decisions of the Commission and other competent authorities must be based on strong evidence of aid that seriously distorts the functioning of the Single Market. This is of utmost importance in order to affirm to third countries and their businesses that the EU remains open and attractive for investments, also from outside of the EU. Moreover, to avoid possible retaliation by third countries, we need to make sure that the planned legislation is not seen as protectionist in nature.

**3. *Do you agree with the substantive assessment criteria and the list of redressive measures presented in the White Paper?***

***The substantive assessment criteria***

The substantive assessment criteria presented in the White Paper relate to the assessment whether a subsidy causes a distortion in the internal market. This assessment would be made by a competent supervisory authority, which is either the Commission or a competent authority of a Member State.

In the White Paper the Commission divides subsidies into two different groups: firstly, those categories of aid that are most likely to cause distortions in the internal market and secondly, all other foreign subsidies. The White paper includes an indicative list of the categories of subsidies that are considered most distortive. We find this division and the indicative list of most distortive subsidies justified and in line with the principles of the EU State aid rules provided that:

- The substantive assessment criteria are sufficiently clear and detailed and describe openly the situations where a subsidy is likely to distort the functioning of the internal market. The criteria and how they are applied, should be carefully and openly communicated to the market operators. This is necessary in order to ensure the predictability, transparency and the uniform application of the future framework.
- It would be useful if the Future Framework or the related documents provided information about the types of aids and situations, where the foreign subsidy is not likely to distort the internal market. This would make it much easier for the businesses

to plan their activities in such a way that is not detrimental to the functioning of the internal market.

- As regards the category of the most distortive types of aid, it is not sufficiently clear from the White Paper, whether such aid is automatically considered as distortive. If this is the case, it is important for the undertakings to know beforehand, what kind of evidence is required from the undertaking concerned to show that the aid does not harm the functioning of the internal market.

The White Paper also suggests that in the future framework foreign subsidies under certain threshold are deemed unproblematic. The Commission indicates that the threshold could be set at the same level as the threshold in a Commission de minimis – Regulation ie. EUR 200 000 granted over a consecutive period of three years. As regards the foreign subsidies framework, we consider that the de minimis- threshold should be set at a level which serves the objectives of the said framework without being dependent on the threshold included in the Commission de minimis - Regulation.

### **Redressive measures**

We agree with the statement in the White Paper according to which it is not likely that the recovery of aid by a third country could be an effective redressive measure in case of foreign subsidies. Therefore, the Commission proposes alternative redressive measures ranging from behavioural to structural measures as well as redressive payments to the EU or the Member States. We note that many of the structural and behavioural measures presented in the White Paper are in line with redressive measures in the fields of EU Competition and State Aid regimes.

We fully understand that situations vary and, therefore, the same types of redressive measures are not suitable for all cases. To this end, the future framework should outline very clearly which type of redressive measures are applied in each different case.

According to the White Paper (section 4.1.6.) the lack of transparency is a crucial issue, in particular as regards the financial relations between third countries and public undertakings. We agree with this concern, especially as the functioning of the future framework on foreign subsidies is heavily based on the information included in financial statements and financial reporting of companies. Moreover, the rules and requirements for businesses as well as the monitoring of the compliance of these rules, for example with regard to accounting, may significantly vary in different parts of the world.

The undertakings that do not comply with the redressive measures imposed on them, could be subject to sanctions such as fines and periodic penalty payments. This is important and justified in order for the framework to remain credible. Therefore, it is of utmost importance that the system of sanctions is efficient and ensures that the fines and penalty payments are collected in a systematic and effective way.

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

The EU-interest test in the White Paper (section 4.1.4.) means that the distortive effects of a foreign subsidy could be weighed up against its possible positive impact in the internal market or on public policy interests recognised by the EU.

In principle, we find this approach acceptable. However, the positive effects of a subsidy in an individual case should be significant, based on facts and clearly visible. This is important to be able to demonstrate to third countries, companies and the public that the aim of the Framework is to tackle distortions caused by foreign subsidies solely to ensure a level playing field in the internal market. Also in this area, the criteria for the assessing the positive and negative effects should be transparent and adequately clear (e.g. in the guidelines and frameworks on EU State aid Law) in order to ensure predictability and legal certainty for the companies.

The policy objectives mentioned in the White Paper, such as the twin transition objective and public safety, seem appropriate as there are not serious disagreements between Member States concerning these objectives. However, they should be defined very clearly in order to avoid unnecessary political misunderstandings.

It remains unclear from the White paper who is responsible for assessing the EU-interest test (national supervisory authority or the Commission). At this stage we think that the Commission is in the best position to assess the EU-interest, not Member States authorities.

**5. *Do you think that Module 1 should also cover subsidised acquisitions (eg. the ones below the threshold set under Module 2)***

The subsidised acquisitions should be primarily and as far as possible be covered by Module 2 of the White Paper. If it is decided that individual cases of subsidised acquisition can be dealt under Module 1 as well, the criteria for Module 1 investigation should be considerably high and such individual cases very carefully justified. This is due to the fact that the relationship between each module as well as proposed new and existing legislation should remain as clear as possible to ensure an effective and well-functioning legal framework. A clear relationship between different regimes is essential also from the perspective of European and foreign companies (additional costs and administrative burden).

**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?***

In principal, we support the idea of including a de minimis –threshold in the future framework. De minimis -rule would reduce costs and administrative burden and makes the system more predictable.

It is true, that the same de minimis –threshold covering EU-subsidies and foreign subsidies, as proposed in the White Paper, would make the overall regime more streamlined. However, in our opinion the future framework should focus the distortions of the most distortive subsidies. Therefore, a considerably higher de minimis –threshold would be justified.

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

The priority should be that the enforcement and application the Framework of Foreign subsidies would be as efficient and uniform as possible. Therefore, this should be the decisive criteria when deciding whether the enforcement responsibility should be shared between the Commission and the Member States. There are also several preconditions, in case if the enforcement responsibility is shared between the Commission and the Member States:

According the White Paper, the enforcement powers would be shared between the Commission and the Member States. Each Member State would appoint a competent national authority, which would not necessarily be an authority dealing with similar issues as the competent national authorities in other Member States. Therefore, efficient and uniform application and enforcement will be extremely challenging.

Moreover, it is of utmost importance that the new responsibilities of the competent national authorities related to foreign subsidies can be carried out side by side with their existing responsibilities without sacrificing the quality, current investigative resources and efficiency of their existing duties. The challenges will vary depending the type of the existing responsibilities of each competent national authority. For example, if the competent national authority for foreign subsidies would be the National Competition Authority, it is necessary to ensure that the relationship between the new framework and existing competition rules is clear and that the quality and efficiency of its current duties and responsibilities related to the existing EU-competition law enforcement are ensured.

- Overall, we take note that the determining the existence of foreign subsidy can be relatively difficult to assess since it requires establishment of market conditions based on benchmarking and other assessment methods in line with the MEOP-principle. Furthermore, the Commission has an exclusive competence to assess whether an individual aid is compatible with the EU State aid rules and in many Member States no national supervisory authorities exist in the field of State aid Against this background, efficient and uniform application and enforcement will be extremely challenging to achieve.

To this end, in order to ensure uniform enforcement across Member States authorities, the Commission should publish clear guidance on this matter. In addition, in order to ensure the conformity, the Commission should be – in all circumstances - capable of intervening in the cases treated at the national supervisory authorities.

## 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?***

The framework under Module 2 as such forms an appropriate basis to address distortions of the internal market in cases acquisitions of undertakings are facilitated by foreign subsidies. However, the relationship of rules under module 2 and the other modules presented in the Commission white paper as well as its relation to existing EU rules, especially under the current EU merger regulation and the EU framework for foreign direct investment screening, is still somewhat unclear and needs to be clarified. In our opinion the existing EU merger regulation should always take the preference if applicable to the case.

Moreover, the legislative system should only interfere those acquisitions facilitated by foreign subsidies that clearly and seriously distort the functioning of the single market. This is of utmost importance as implementing Module 2 necessarily increases costs and slows down the completion of acquisitions as the parties of the acquisition need to be prepared for two sets of merger control rules, namely the control under the current EU merger regulation and the planned Module 2 control related to foreign subsidies. This creates uncertainty and may affect negatively for the acquisitions that are considered beneficial to the functioning of the internal market.

We would appreciate the Commission to point out concrete cases where acquisitions have significantly distorted the functioning of the internal market due to foreign subsidy to acquirers.

**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.?**

In case where the Module 2 is implemented the proposed two-step procedural system is well justified subject to the following conditions:

- The second phase ie. the in-depth investigation should only take place in cases where there are clear evidence that, due to foreign subsidies, the acquisition is likely to distort the functioning of the internal market. Also, undertakings from third countries should not be treated more strictly than European companies.
- The proposed procedural system works well together with the existing procedures under the current EU merger regulation in such a way that it is always clear to the undertakings concerned which set of rules is applied to the case. Moreover, unnecessary duplicate application to individual acquisitions should be avoided. As to the costs and time constraints, please see the reply under point 1 of the Module 2.
- In order to ensure the effectiveness of the suggested procedural system and to avoid circumvention, the Commission or the competent supervisory authority should have adequate powers, which can effectively be imposed also to companies from third countries. These powers are needed to interfere in cases where the acquirer does not follow the procedure, does not provide sufficient information, provides false or misleading information etc. Furthermore, these kind of powers are necessary to ensure the credibility of the proposed system.
- Interfering acquisitions ex post should be subject to more detailed conditions, for example, in terms of time and relevance of the case from the perspective of the functioning of the internal market.
- According to the White Paper the competent supervisory authority could also adopt a decision prohibiting the proposed transaction. The appeal procedure and other safeguards of the companies in this scenario should be clarified.

Moreover, we note that many of the procedural rules under Module 2 of the White Paper are in line with the procedural rules in the current EU Merger regulation. However, it is not clear from the White Paper whether the intention under Module 2 is to apply the procedures under the EU Merger regulation more broadly than described in the White Paper. This should be better clarified.

3. ***Do you agree with the scope of Module 2 in terms of***
- ***definition of acquisition***
  - ***definition and threshold of the EU target***
  - ***definition of potentially subsidized acquisition***

Overall, it is important that criteria governing the module 2 take into account the size of the problem we are facing. The scrutiny should be put on cases which matter most for the internal market. In addition, criteria should be predictable and clear.

Acquisition: The scope would be quite wide if also the "material influence" in an undertaking and minority shareholdings would be included. Threshold of the EU target: We would prefer to have a clear and predictable quantitative threshold. The possible 100 million Euro threshold seems to be quite low compared to the turnover thresholds of the Merger Regulation.

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

We strongly support the alignment in section 4.2.2.2. of the White Paper that the notification obligation should only cover potentially subsidised acquisitions. It is of utmost importance to maintain a clear distinction between the proposed framework and the current EU Merger Regulation, even if some acquisitions with potentially distorting effects are not fully covered by the legislative framework.

5. ***Do you agree with the substantive assessment criteria and the list of redressive measures presented in the White Paper?***

The indicators seem to be relevant. Maybe it could be further examined whether the presumption of distortive effects related to direct subsidies facilitating the acquisition is necessary.

Redressive measures: it has been stated that the focus of commitments is likely to be on structural remedies. It should be noted that the structural remedies can be very far-reaching including for example divestment of business or splitting of the company. Structural remedies can also affect the protection of the property and they should be considered carefully.

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

In principle, we find this approach acceptable. However, the positive effects of a subsidy in an individual case should be significant, based on facts and clearly visible. This is important to be able to demonstrate to third countries, companies and the public that the aim of the Framework is solely to correct distortions caused by foreign subsidies and ensure a level playing field in the internal market.

Moreover, the policy objectives should be defined very transparently and clearly in order to avoid unnecessary political misunderstandings. The Commission should provide specific Guidelines to clarify the issue.

Lastly, if an EU interest test is introduced under Module 2, it must be ensured that it does not affect the application and enforcement of the EU Merger regulation.

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

We agree that the enforcement responsibility under Module 2 should be for the Commission, in particular, to ensure the uniform application of the framework as well as to guarantee that the relationship between the Module 2 framework and the current EU Merger regulation remains clear.

However, the White Paper indicates that some Module 2 transactions could be transferred to the module 1 procedure as well, for the national competent authority to deal with. These situations should be exceptional and carefully defined.

### **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.***

We share the view presented in the White Paper that there is a gap in the public procurement framework as regards subsidies granted by third countries. The existing EU and International rules do not sufficiently cover this area. Therefore, we would need to work to ensure the level playing field and the competitiveness of European businesses in the internal market by guaranteeing that the outcomes of public tenders in the EU are not distorted by foreign subsidies allowing bids that are clearly below the market price or actual costs. On the other hand, the framework should not be protectionist in nature.

It is also evident that, depending on the perspective, there are divergent views as regards to the ideas put forward in the White Paper. For example, companies and authorities prioritise different aspects and point out different problems concerning the proposals in the White Paper. Therefore, finding a right balance between the various interests and concerns is of utmost importance in order to create a well-functioning framework for Module 3.

**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.***

The main features of the proposed framework seem logical. However, the White Paper is not very detailed in this respect and many issues remain open at this stage. Clarification is needed at least as regards the following:

- The Module 3 framework should be structured in such a manner that significant delays of public procurement procedures and additional administrative burden for businesses and authorities can be avoided.
- The relationship between Module 3 framework and the existing EU Public Procurement directives is clarified in detail.

- The thresholds determining the scope of the Module 3 framework should strike the right balance between efficient control and as low administrative burden as possible. In our opinion, the level of the thresholds should be high, and much higher than the thresholds in the EU public procurement directives, in order to focus on the most significant cases involving foreign subsidies and their possible negative effects for the functioning of the internal market.
- The division of powers, on the one hand, between the Commission and national authorities and, on the other hand, between the supervising authorities and contracting authorities should be carefully assessed and explained more in detail and (see the reply under point 3 of Module 3)
- The relationship between the Module 3 framework and the International Procurement Instrument IPI should be clarified in order to avoid unnecessary duplication or conflict of application.

**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?***

According to the White Paper, the contracting authority would determine whether a subsidy has distorted the public procurement procedure and, if so, excludes the subsidised bidder from the ongoing public procurement procedure and potentially also from future public procurement procedures. We consider that it might be very challenging for contracting authorities to assess whether a subsidy has a distorting effect in the internal market and, therefore, the uniform application of rules under Module 3 may be at risk (despite the fact that the Commission will provide guidance designed to ensure uniform assessment). Also, the contracting authorities do not necessarily have the resources required for all the duties proposed in the White Paper.

In addition, the contracting authorities could sanction undertakings with significant fines in cases where undertakings fail to comply with the notification obligation. In our opinion, it would be more logical if the fines were ordered by supervisory authorities as contracting authorities do not qualify as public authorities with public enforcement powers. In Finland, for example, sanctions and fines may only be imposed by courts.

Moreover, it is not necessarily the primary interest for the contracting authorities to interfere in subsidised tenders in cases where the price and the quality of such tender is considered as a good purchase from the contracting authority's perspective.

Finally, such situations should be avoided where the actual public procurement procedure takes place in a Member State in line with the national Public Procurement legislation and, at the same time, the same case is examined in parallel under the Module 3 framework at EU level.

**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?***

In line with the White Paper, the competitors and third parties would be entitled to inform the contracting authority that a notification should have been made in the procedure. In principle, this is justified. However, for the smooth progress of the public procurement procedures, the

authorities should have the powers to declare clearly unfounded cases inadmissible. The Commission should also consider of setting some kind of time limit for notifications coming from third parties or competitors.

### **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?**

As a general comment, we state that it is difficult to assess the proposed modules completely in isolation as it is necessary to evaluate the entire framework of the White Paper in relation to existing EU-legislation especially with regard to competition, state aid and public procurement. Therefore, our comments below are indicative and dependent on the broader architecture of the above legal frameworks. Moreover, it must be ensured that the administrative burden and costs for undertakings and authorities is kept to minimum.

a.-d.

- a) Module 1 should operate as stand-alone module. It should not be complemented by Module 2 and Module 3 frameworks. This serves the objective to create a system which is as clear as possible and does not include a risk of overlapping application of different frameworks.
- b) - d)  
In our opinion, the modules 2 and 3 should primarily be applied in case of subsidised acquisitions and subsidised public procurement procedures. Module 1 should only be used as a secondary option in very strictly defined cases if at all.

### **Questions relating to foreign subsidies in the context of EU funding**

1. We agree that foreign subsidies should properly be taken into account in the context of EU-funding. It is not justified that undertakings benefitting from foreign subsidies receive EU funding at the expense of other business operators. Therefore, adequate means should be put in place to tackle the issue. This applies especially to EU public procurement procedures. Therefore, rules under Module 3 should apply accordingly to prevent distortions in the internal market which are caused by foreign subsidies.

However, we also need to make sure that undertakings from outside the EU are not treated more strictly than European companies. The system should be created in such a way that unnecessary administrative burden and additional costs can be avoided.

2. -