

Consultation on the White Paper on Foreign Subsidies

Fields marked with * are mandatory.

Introduction

The questionnaire is available in [English](#), [French](#) and [German](#).

The White Paper is available in the following languages:

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White Paper on levelling the playing field as regards foreign subsidies

Subsidies by Member States have always been subject to EU State Aid rules to avoid distortions. Subsidies granted by non-EU governments to companies in the EU appear to have an increasing negative impact on competition in the Single Market, but fall outside EU State aid control. 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.

Moreover, the existing trade defence rules relate only to exports of goods from third countries and thus do not address all distortions caused by foreign subsidies granted by non-EU countries. Where foreign subsidies take the form of financial flows facilitating acquisitions of EU companies or where they directly support the operation of a company in the EU, or facilitate bidding in a public procurement procedure, there appears to be a regulatory gap

The [White Paper on Foreign Subsidies](#), adopted by the European Commission on 17 June 2020, therefore proposes solutions and calls for new tools to address this regulatory gap. In this context, it puts forward several approaches.

General instrument to capture distortive effects of foreign subsidies (“Module 1”)

Module 1 proposes the establishment of a general market scrutiny instrument to capture all possible market situations in which foreign subsidies may cause distortions in the Single Market.

Foreign subsidies facilitating the acquisition of EU companies (“Module 2”)

Module 2 is intended to specifically address distortions caused by foreign subsidies facilitating the acquisition of EU companies. This module aims at ensuring that foreign subsidies do not confer an unfair benefit on their recipients when acquiring (stakes in) EU companies, either directly by linking a subsidy to a given acquisition or indirectly by de facto increasing the financial strength of the acquirer.

Foreign subsidies in EU public procurement procedures (“Module 3”)

Foreign subsidies could also have a harmful effect on the conduct of EU public procurement procedures. This issue is addressed under Module 3. Foreign subsidies may enable bidders to gain an unfair advantage, for example by submitting bids below market price or even below cost, allowing them to obtain public procurement contracts that they would otherwise not have obtained.

Foreign subsidies in the context of EU funding

Finally, the White Paper sets out ways to address the issue of foreign subsidies in the case of applications for EU financial support. All economic operators should compete for EU funding on an equal footing. Foreign subsidies may however distort this process by putting the beneficiaries of such subsidies in a better position to apply. The White Paper proposes options to prevent such unfair advantage. Among others, in case of funding distributed through public tenders or grants, a similar procedure would apply as the one foreseen for EU public procurement procedures.

Public consultation

The White Paper is now open for public consultation until 23 September 2020. In light of the input received, the Commission will present appropriate legislative proposals to tackle the distortive effects of foreign subsidies on the Single Market.

Respondents can provide their opinion by choosing the most appropriate answer among the ones suggested for each question or suggesting their own ideas in dedicated text boxes.

Written feedback provided in other document formats, can be uploaded through the button made available at the end of the questionnaire.

The questionnaire is available in [English](#), [French](#) and [German](#). You can submit your responses in any official EU language.

The survey will remain open until 23 September 2020.

About you

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- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Stefano

* Surname

MARMO

* Email (this won't be published)

stefano.marmo@amchameu.eu

* Organisation name

255 character(s) maximum

American Chamber of Commerce to the European Union (AmCham EU)

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

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- Laos
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- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
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- Uruguay
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Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

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QUESTIONNAIRE - Introduction

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

1000 character(s) maximum

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and U.S. positions on business matters. Aggregate U.S. investment in Europe totalled more than €3 trillion in 2019, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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')?

Yes No Other

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

1000 character(s) maximum

There is an increased interest in EU Member States to ensure that foreign subsidies do not distort competition in the internal market. In the view of AmCham EU, the concern the White Paper is seeking to address is as such legitimate. Any instrument aiming to reduce the impact of such distortions, however, should be aligned on existing legal concepts to the greatest possible extent to ensure consistency in application. Further, such an instrument should provide legal certainty and not result in unnecessary new layers of administration, prolonged procedures and discretionary outcomes. In the view of AmCham EU, the White Paper's proposal in some of its aspects, in particular Module 2 and Module 3, should be adjusted to remedy the concern the White Paper is seeking to address in a way that allows the EU to remain an attractive investment environment to the greatest possible extent.

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

Yes No Other

Please explain.

1000 character(s) maximum

The three envisaged modules seem to cover scenarios of distortive subsidies, but some of the concepts are very broad and vague, leaving room for jurisdictional and procedural overlays and discretionary decisions not capable of judicial review.

The current design of the 3-module framework could lead to significant compliance burdens for all companies, but the risk of non-compliance by targeted entities is high. The Commission might consider subsuming Modules 2 and 3 within Module 1. Only companies subject to Module 1 proceedings would be subject to the mandatory requirements under Modules 2 and 3, including remedial measures.

Generally, it would seem worthwhile to reflect whether the control of foreign subsidies cannot be aligned, as much as possible, on the EU State aid rules, including temporary derogations, both in terms of measures caught by the regime (i.e., measuring granting "selective advantage") and the substantive assessment ("compatible" = absence of distortion).

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 No Other

Please explain.

1000 character(s) maximum

Module 1 requires further fine-tuning to avoid discrimination and undue administrative burden.

The jurisdictional, procedural and substantive criteria for review should be clarified to guarantee a sufficient standard of legal certainty to foreign based companies operating in Europe, and to their European business partners. The procedural framework should be streamlined to avoid duplication of procedures and ensure a timely completion. The Commission might consider issuing block exemptions in a similar format as those applied in relation to State aid.

The proposed relatively broad definition of foreign subsidies may raise workability issues and should be narrowed.

Redressive measures should not result in discrimination against recipients of foreign subsidies relative to recipients of State aid.

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)

Yes No Other

Please explain.

1000 character(s) maximum

A 2-step procedure should allow to expedite unproblematic cases and limit in-depth reviews to problematic cases.

The EC should have sole competence but if shared, it would be important to clarify jurisdiction, both vertically (between EU and Member State) and horizontally (between Member States and when one Member State after another opens an investigation). Clear communication, strict coordination and tight deadlines would seem a must.

The competent authority should be held to a higher/clearer standard than “suspicion” of distortion to start an in-depth review.

As to the fact-finding tools, a mix of informal and formal information requests without on-site visits might provide flexibility, proportionality and effectiveness. In case of information requests, due account should be taken of the difficulty for a third country company to assess whether a subsidy has been granted.

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?

Yes No Other

Please explain.

1000 character(s) maximum

As to the substantive assessment criteria listed in Section 4.1.3 the text seems to suggest that the “pre-set” categories of subsidies listed in Section 4.1.3.1 are presumed to create distortions in the internal market, and the indicators for the other categories in Section 4.1.3.2 are too vague to allow an “effects analysis”. Indeed, some forms of subsidies such as export credits outside OECD guidelines would seem to be more easily capable than others of distorting the internal market.

The assessment under the White Paper seems to focus on distortive effects. The question is whether the body of law and guidance on the compatibility of EU State aid, including the need to determine whether a measure provides a selective advantage to the beneficiary, could serve as an approximative benchmark for finding whether a subsidy distorts the internal market.

Redressive measures should not result in discrimination against recipients of foreign subsidies relative to recipients of State aid.

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?

Yes No Other

Please explain.

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It would be useful to have a test that allows to rebut any finding/presumption that there is a foreign subsidy and that this subsidy distorts competition, if it ensures the consistency of potential anti-subsidy measures with EU policies and allows for the consideration of wider “efficiencies” (rather than being a mouthpiece to call for remedies).

Practical experience with the efficiencies test under Article 101(3) TFEU has shown that it can be difficult to demonstrate and quantify sufficient efficiencies to outweigh a restriction.

A potential benchmark for an EU interest could be the existing body of EU State aid policies. At a minimum, if the foreign aid would be compatible if granted by an EU Member State, it should be “compatible” where granted by a foreign government. The EU interest test should be depoliticized and capable of judicial review.

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)

Yes No Other

Please explain.

1000 character(s) maximum

There is a risk of regulatory overlap as the two modules currently stand. If subsidised acquisitions would fall under Module 1 as currently designed, they could be reviewed and unwound long after the acquisition process has closed.

Module 2 could be folded into Module 1 or be otherwise redesigned to make it more targeted to capture transactions that are most likely to create distortions in the internal market.

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 No Other

Please explain.

1000 character(s) maximum

It would seem reasonable to fix a 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)?

Yes No Other

Please explain.

1000 character(s) maximum

It would seem preferable to concentrate the review process to the greatest possible extent at the Commission level. Therefore, in the absence of exclusive jurisdiction the default enforcement should be at the level of the Commission (which has to rule on the EU interest anyway), unless the “distortion in the internal market” is geographically limited and has a clear centre of gravity in a particular Member State. As the stated aim of this Module is to protect the “internal market”, which suggests that a subsidy has a wider impact, it would seem logical for the Commission to handle the cross-border cases.

It would in any event seem important to “concentrate” the assessment with one singly supervising authority (possibly via a referral mechanism or an “exhaustion” principle) in order to avoid duplications of procedures with potentially contradictory outcomes, as well as a multitude of subsequent procedures over a longer period of time.

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)?

Yes No Other

Please explain.

1000 character(s) maximum

Module 2 could disadvantage foreign investors and allow strategic complainants to generate more deal uncertainty.

Module 2 raises manageability issues if inward investment is subject to three procedural layers, with potentially conflicting outcomes under merger control, FDI and foreign subsidies tools. Module 2 could be subsumed within Module 1 or the foreign subsidy assessment weaved into existing merger control rules.

While the subsidization of an acquisition may create a distortion, this may be difficult to measure. Module 2 may lead to unnecessary precautionary notifications, whilst more targeted companies might abstain from notifying. Notification criteria should be more targeted.

It may be hard to establish a causal link between the subsidy and the transaction and nearly impossible when it is indirect. There should be a nexus and a distinction should be made between a direct subsidy for an acquisition and a Module 1 scenario where the acquirer is generally subsidised.

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)

Yes No Other

Please explain.

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If a mandatory ex ante notification system is established, its first step should be very short in order to avoid delays of unproblematic cases. The information required from acquirers should be limited to the amount of information necessary to substantiate that the proceeds used to finance the acquisition is not directly attributable to distortive foreign subsidies.

A general mandatory notification obligation for all private companies would be disproportionate and it may be sufficient to limit this obligation to State-owned companies or to companies that have been found in a Module 1-procedure to have received subsidies that distort the internal market.

Alternatively, it could be envisaged and may be preferable to modify the EUMR to cover the subsidies assessment in the merger review process. AmCham EU notes in that regard that the Form CO already requires the notifying party to provide information on any financial support received from public authorities.

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

| | Yes | No | Other |
|--|-----------------------|----------------------------------|-----------------------|
| definition of acquisition | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |
| definition and thresholds of the EU target (4.2.2.3) | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |
| definition of potentially subsidised acquisition | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |

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

1000 character(s) maximum

“Material influence” is not a workable standard. The “acquisition of control”, which is the standard used in EU merger control, should also be the standard to address the concern of potentially subsidised transactions. Any definition of thresholds should be clear-cut, and ideally quantitative. Forward-looking qualitative criteria, such as “expected revenues” should not be the basis for such an assessment, as this is open to broad interpretation and will not allow for a sufficient degree of legal certainty. Other qualitative consideration such as the EU target’s assets and technology prospects also should not be the basis of such an assessment because they do not align with the White Paper’s purpose of reducing distortion specifically caused by foreign subsidies.

The concept of “potentially subsidized acquisition” looks too far back in the past, and it seems altogether disproportionate to include further subsidies in the definition.

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)?

Yes No Other

Please explain.

1000 character(s) maximum

There is already the merger review process and reviews under the Foreign Direct Investment regulations. Module 2 should be strictly limited to potentially subsidised acquisitions. Any other approach would disproportionately restrict business activities and deter investors.

More harmonized FDI rules may further reduce legal uncertainty and minimize the risk of political capture.

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?

Yes No Other

Please explain.

1000 character(s) maximum

The fact that a subsidy may directly or de facto allow a buyer to outbid competing buyers, is too broad a notion and will lead to legal uncertainty (unless the criterion is quasi automatically met in every case). Again the same applies to the indicators (section 4.2.3). As to the redressive measures, we refer to the comment above.

Remedies would need to be limited to addressing the internal market distortion identified; current proposals

add further uncertainty through the risk of disproportionate and arbitrary remedies, which would go far beyond the EU state aid sanction (recovery). This could lead to retaliation risks against EU companies by foreign countries.

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?

Yes No Other

Please explain.

1000 character(s) maximum

See above for Module 1, Question 4.

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

Yes No Other

Please explain.

1000 character(s) maximum

Enforcement responsibility should be centralised with the Commission, to the extent that only transactions above certain quantitative thresholds, with a view to a presence or revenues in the EU, are caught. In addition, State aid control is a Commission competence, of which the Modules are in a way an extension.

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?

Yes No Other

Please explain.

1000 character(s) maximum

AmCham EU supports the intention of the proposed Module 3 and the objectives it aims to achieve, but Module 3 could be subsumed within Module 1, or public procurement rule should be modified to deal with the issue.

It seems fair that both State aid by Member States and from foreign states which allow to undercut other bidders, for example, should be, and will be, caught by public procurement rules.

However, the proposed design carries significant risk of non-compliance from those companies intended in scope and on the contrary risk that companies not intended in scope will feel compelled to file self-declarations.

This creates a significant additional administrative burden on companies, but also on the contracting authorities who eventually may have no other incentive than to be able to close the tender soon and/or go for the lowest cost.

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?

Yes No Other

Please explain.

1000 character(s) maximum

Current Module 3 is broad. Bidders may not know whether suppliers/consortium members/sub-contractors received subsidies which could have the unintended consequence of requiring a notification in every case.

The framework imposes much responsibility on the bidder. It may be impossible to capture the presence of foreign subsidies in a bid. Attempting to do so will come at the expense of legal certainty and administrative burden. The broad scope of the self-declaration, i.e. inclusion of information on subcontractors/suppliers, creates a risk that due to global supply chains companies with strict compliance systems will feel compelled to file self-declarations.

At the same time, there is a risk of non-compliance. In its current form, Module 3 could lead to the perverse outcome that heavily subsidised foreign companies do not comply whilst good corporate citizens feel compelled to self-declare for subcontractors/suppliers without having a sound basis for making these assessments.

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 No Other

Please explain.

1000 character(s) maximum

Timelines for the review by the supervisory authority would have to be short but also adapted in order not to disrupt/delay the timeline of the tender process in any way.

Overall, the decentralised supervisory competence seems complex and it is unclear how it would address overlapping situations, e.g. where one Member State supervisory authority excludes a tenderer and another does not.

More practically, it is unclear whether the removal of a subsidized subcontractor/supplier is sufficient to allow an excluded bidder to continue its bid.

A modification of the public procurement rules may alleviate the subsidies issue.

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?

Yes No Other

Please explain.

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Interplay between Modules 1, 2 and 3

1. Do you consider that

| | Yes | No | Other |
|--|-----------------------|-----------------------|----------------------------------|
| a. Module 1 should operate as stand-alone module | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| b. Module 2 should operate as stand-alone module | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| c. Module 3 should operate as stand-alone module | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| d. Modules 1, 2 and 3 should be combined and operate together? | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

Please explain.

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See answers to Module 1 item 5, Module 2 item 1 and Module 3 items 1 and 3.

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?

Yes No Other

Please explain.

1000 character(s) maximum

As mentioned in section 5 of the White Paper, it is important that EU actors operate on a levelled playing field when accessing EU funding. There is no reason for EU funding to be excluded from the scope, to the contrary. As stated, the Financial Regulation allows to reduce the impact of abnormally low bids. If needed, the Financial Regulation could be modified to take this into account, but there is no need to add a procedural layer by giving jurisdiction to a new supervisory authority.

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?

Yes No Other

Please explain

1000 character(s) maximum

See above.

Thank you for your contribution to this questionnaire. In case you want to share further ideas on these topics, you can upload a document below.

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The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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