

# Consultation on the White Paper on Foreign Subsidies

Fields marked with \* are mandatory.

## Introduction

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

The White Paper is available in the following languages:

[BG](#) | [CS](#) | [DA](#) | [DE](#) | [EL](#) | [EN](#) | [ES](#) | [ET](#) | [FI](#) | [FR](#) | [HR](#) | [HU](#) | [IT](#) | [LT](#) | [LV](#) | [MT](#) | [NL](#) | [PL](#) | [PT](#) | [RO](#) | [SK](#) | [SL](#) | [SV](#)

## 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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\* Language of my contribution

- ☐ Bulgarian
- ☐ Croatian

- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ Gaelic
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Italian
- ☐ Latvian
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- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

\* I am giving my contribution as

- ☐ 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

Ief

\* Surname

Daems

\* Email (this won't be published)

ief.daems@inhousecompetitionlawyers.com

\* Organisation name

*255 character(s) maximum*

Association of In-house Competition Lawyers, ICLA

\* 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.

513747339430-11

\* Country of origin

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

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## Publication settings

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### \* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

#### ☐ **Anonymous**

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

☒ **Public**

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

☒ I agree with the [personal data protection provisions](#)

**\* Confidentiality of information**

The Commission will publish the responses to this public consultation. You can choose whether your contribution can be made public, or whether it will remain fully or partially confidential.

☒ **Public**

Your contribution may be published in full.

☐ **Fully confidential**

All parts of your contribution will remain confidential and will not be published.

☐ **Partially confidential**

You can select which parts of your contribution will remain confidential, the remaining parts may be published.

## QUESTIONNAIRE - Introduction

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

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The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers across Europe and in Asia. There are currently more than 450 members based in different countries around the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law. Because of their role, in-house competition lawyers have a clear interest in a simple and straightforward competition law regime that prioritises legal certainty, minimises costs, and does not represent a disproportionate demand on businesses' time and resources. This submission represents the position of ICLA, and does not necessarily represent the views of all of its individual members.

## Questions relating to the three Modules - General questions

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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*



ICLA very much appreciates the Commission's efforts in addressing the harmful impact of foreign subsidies on the EU internal market to ensure that all companies compete on equal footing. We agree that there is a gap in the available tools.

While we agree with the need to intervene and broadly support the framework under Module 1, we have a number of concerns related to Modules 2 and 3. We include details below, but in general, we are concerned that the current proposals are not proportionate to the goals that the Commission aims to achieve. They risk jeopardizing foreign investments in the EU. Reducing legal uncertainties for both European and foreign companies is of paramount importance. Any procedures should include reasonable timelines and a clear institutional set-up that ensures effective enforcement mechanisms and redressive measures.

In addition, the Commission could consider how the relevant concerns can be addressed through the review of public procurement rules.

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*

Module 2 is casting the net too widely in terms of potentially notifiable transactions and creating significant predictability and legal certainty concerns. The EC should only seek to capture transactions that are material enough to have a distortive effect that is appreciable in the internal market. ICLA has not been able to come to a view whether an ex ante mandatory system under Module 2 vs. a Module 1 investigation for relevant transactions is preferable. See below. The EC should carefully reflect and engage with stakeholders re next steps.

The Module 3 framework risks overburdening individual procurement procedures. It will be difficult for national contracting/supervisory authorities to apply the framework, given their limited resources to effectively assess foreign subsidies (and their potentially different incentives). Concerns re foreign subsidies in public procurement should be assessed under Module 1 with the EC acting as the sole and central supervisory authority.

## Module 1

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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*

ICLA agrees that the Commission should have a tool that allows to assess and remedy foreign subsidies that distort competitiveness in the EU.

The scope of the tool should include companies 'active in the EU', and not be limited to companies 'established in the EU', to include companies headquartered outside the EU but active within the single market.

We support the possibility for the EC to launch ex-officio investigations. At the same time, companies should also be able to inform the EC of suspected behavior and ask the EC to investigate.

When assessing whether a company received foreign subsidies, the EC should also consider how best to capture subsidies that have been provided prior to the last three years and that still have a distortive effect on the internal market today.

The EC may also want to foresee the possibility of settlement procedures, to allow both the EC and the relevant parties to come to a mutually satisfactory resolution within a potentially shorter time.

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*

Having a two-step procedure does make sense in our view, as it may allow to come to quicker resolutions, at least for those cases where it is unclear if there is a foreign subsidy. For the sake of legal certainty, it would be important to clearly describe the procedure and timelines. Throughout the process, it is important to ensure the rights of defense are guaranteed and that appropriate checks and balances are in place. The Commission should also foresee that third parties can provide input into the various considerations at different times in the process.

As far as information gathering is concerned, we agree with the Commission that it may be hard in some instances to obtain the relevant factual evidence. It would be important to explore further how this could be facilitated.

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*

To ensure predictability and consistency, the Commission should make sure to further specify and clarify the substantive assessment criteria, and consider establishing guidelines, including examples on how and when foreign subsidies can distort competition. We agree such list should remain non-exhaustive, to allow the Commission having the flexibility to address all circumstances. Any assessments should also take into account privileged access to the domestic markets.

When it comes to the list of redressive measures, we believe the list and measures need to be specified more precisely. Some measures are not explained in the White Paper, in terms of what they would cover or how they would be executed. It is also not clear how and why a reference is inserted to 'licensing on FRAND terms', and how that would be implemented in practice. Finally, it should also be clarified under which conditions 'offered' commitments are considered sufficient.

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.

*1000 character(s) maximum*

We generally appreciate the existence of an EU interest test under the EU state aid system as well as the aim for consistency. However, we have significant concerns that an EU interest test in this framework risks politicizing the review process. If the Commission is to consider such test, it should carefully assess how to avoid being captured by political considerations and lobbying. A potential solution may be to clarify how the test would be applied, and under which limited circumstances it could outweigh a finding of distortive effects.

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*

As explained in our responses, we are very concerned about the wide net that Module 2 is casting in terms of potentially notifiable transactions, but ICLA has not been able to come to a view whether an ex ante mandatory system under Module 2 is preferable, or whether concerns should be addressed under Module 1. Any potential combination of Module 2 with Module 1 must not allow for reopening ex-post a case already cleared under Module 2 as this would lead to uncertainty and possibly decisions conflicting with one another or with decisions under existing EU law.

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*

As set out above, we consider that the Commission should focus on the cases that are most likely to be distortive and have a clear impact on European markets, to avoid an adverse impact on foreign investment into the EU and unnecessarily burdening companies with procedures and legal uncertainty. Therefore, the Commission should propose a de minimis threshold which is sufficiently high to address this goal. Also, it is important to bear in mind that under EU state aid rules, the €200,000 threshold is per Member State. Also for foreign subsidies, thresholds should be applied per non-EU government.

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*

To avoid uncertainty and a unified application of the new rules, we believe that the Commission should be responsible for enforcement. It may be wise to confer this task to a dedicated department of specialists, combining expertise including from a competition law as well as a broader trade perspective.

## Module 2

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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*

The Commission is casting the net too widely in terms of potentially notifiable transactions. This creates significant uncertainty and administrative burdens that are disproportionate to the aims the Commission is seeking to achieve. Only those transactions that are most likely to be distortive and have a clear impact on European markets should be captured.

ICLA has not been able to come to a view whether an ex ante mandatory system under Module 2 or a Module 1 investigation is preferable. We consider that it is critical to (a) avoid imposing unnecessary regulatory burdens, and (b) guaranteeing legal certainty (e.g. avoiding 'surprises' after close). An alternative to the current Module 2 or Module 1 proposals could be to limit mandatory notification requirements to entities that have been found to be distorting the market in the past or are subject to Module 1 investigations. ICLA is happy to further reflect and work on these proposals with the Commission.

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.

*1000 character(s) maximum*

See our response to Q1 (under Module 2) above regarding the procedural setup.  
Any procedure should take into account the following key principles:

- the procedure should clearly identify the obligations on the parties and relevant timelines, to cause as less disruption as possible and create procedural certainty
- it should avoid overlaps and inconsistency with merger control rules. For example, timelines should as much as possible be aligned to existing merger control procedures, to avoid unnecessary delays in the closing of the transaction
- a two-step investigation procedure seems to make sense, in particular to allow the Commission to conclude initial reviews quickly when it does not consider there are concerns

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

|  | Yes                   | No                               | Other                 |
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| 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*

The relevant rules should be limited to the acquisition of control as set out in the EU merger regulation, and not include 'material influence' (or be based on minority shareholdings or limited voting rights). This would create legal uncertainty.

Thresholds of the EU target need to be clearly identified to ensure upfront visibility and avoid capturing transactions that are not relevant. Clear quantitative thresholds have proven to be most practicable. They should not include qualitative criteria. Criteria need to be easy to assess and unambiguous.

The definition of subsidized acquisitions should be clarified, incl. when and how a foreign subsidy increases the financial strength of the acquirer. Only subsidies that have a clear link to the proposed acquisition should be taken into account. If they are future contributions, they can only be taken into account when there is a binding commitment from the granting authority, and until one year after signing (not closing) the deal.

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*

See our response to Q1 (under Module 2) above. The Commission should focus only on potentially subsidized acquisitions. The Commission should target its review to acquisitions that are most likely to be problematic and avoid as much as possible additional regulatory burdens on companies.

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*

Yes, to a large extent.

As mentioned, to ensure predictability and consistency, the Commission should specify and clarify the substantive assessment criteria, and consider establishing guidelines, including examples on how and when foreign subsidies can distort competition. We agree such list should remain non-exhaustive, to allow the Commission having the flexibility to address all circumstances.

The list of redressive measures need to be specified more precisely. Likely redressive measures to be imposed in the context of subsidized acquisitions' scrutiny should be complementary and aligned to what could be imposed in the merger review procedure, ensuring as much as possible consistency between both procedures.

Finally, it should also be clarified under which conditions 'offered' commitments are considered sufficient. And any redressive measure should be proportionate, so that the system does not have the unwanted effect of dissuading foreign investments in the EU.

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*

We generally appreciate the existence of an EU interest test under the EU state aid system, and the aim for consistency. However, we have significant concerns that an EU interest test in this framework risks politicizing the review process. If the Commission is to consider such test, it should carefully assess how to avoid being captured by political considerations and lobbying. A potential solution may be to clarify how the test would be applied, and under which limited circumstances it could outweigh a finding of distortive effects.

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*

We believe that the sole and central enforcement responsibility should be for the Commission, to ensure a consistent approach across Member States, increase legal certainty, and avoid politicization as much as possible. It may be wise to confer this task to a dedicated department of specialists. Depending on where those specialists reside within the Commission's structure, it would be important for those teams -where applicable- to coordinate closely with the merger units at DG COMP to ensure as much as possible consistency between both procedures.

In addition to the enforcement proposal under the White Paper, to address the current concerns, the Commission should modify merger control rules so that the Commission, when assessing competitive effects of a transaction, can take into account the fact that third parties already present in/entering the EU market financed by foreign subsidies may have a significant competitive impact on the internal market.

## Module 3

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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*

As mentioned above, we agree there is merit in seeking to remedy distortions in the EU single market that arise from bids submitted by companies that are funded by foreign state 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?

☐ Yes ☒ No ☐ Other

Please explain.

*1000 character(s) maximum*

We have significant concerns that the notification system under Module 3 will be very burdensome on companies, that often may not even have visibility whether its (potentially very large number of) suppliers or subcontractors received foreign subsidies. The proposal also creates significant burdens on contracting authorities. These additional administrative burdens seem disproportionate to the aim of capturing bids that cause distortion on the market.

The EC should therefore cover investigations into potentially distortive bids under Module 1, where it could investigate ex officio or following complaints from third parties.

One could consider imposing ex ante notification requirements on repeat offenders or create a watchlist for upcoming tenders.

The EC should also seek to investigate structural distortions in specific markets and determine how best to address them (incl. restricting access to EU public procurements for entities that have been found to receive foreign subsidies).

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*

See our response above.

Furthermore, a large burden seems to be played on contracting authorities, in particular if they are made responsible for receiving complaints by third parties or competitors. This brings an additional layer of complexity and subjectivity to the process. Would contracting authority have to review such complaints, or would they need to pass them on automatically? What level of appreciation would they have, and would they not have opposing incentives to wrap up the tender as quickly as possible?

As mentioned above, we believe that rather the Commission should have the ability to investigate bids that are based on foreign subsidies, either ex officio or based on complaints from third parties, as well as structural distortions that may exist in certain markets or caused by specific market participants.

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.

*1000 character(s) maximum*

Not at this stage.

## 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 checked="" type="radio"/> | <input 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.

*1000 character(s) maximum*



As mentioned, for Module 2, the Commission should carefully assess and continue its interactions with stakeholder to review what would be the best options moving forward.

The current Module 2 proposal creates significant uncertainty and administrative burdens that are disproportionate to the aims that the Commission is seeking to achieve. The Commission should only seek to capture transactions that are most likely to be distortive and have a clear impact on EU markets.

Module 3 proposes a mechanism that will be very burdensome on companies as well as contracting authorities. These burdens seem disproportionate to the aim the Commission seeks to achieve. Therefore, the Commission should cover investigations into potentially distortive bids under Module 1, where it could investigate ex officio or following complaints from market participants. It could impose ex ante notification requirements on repeat offenders or create a watchlist that could be applied to upcoming tenders.

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

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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*

Similar to the concerns raised above, we believe it would be helpful if the Commission were to make sure that EU funds are not used to benefit companies that received foreign subsidies that are distorting competitiveness on the EU internal 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?

☐ Yes ☒ No ☐ Other

Please explain

*1000 character(s) maximum*

While we agree that a tenderer that has received distortive foreign subsidies should be excluded from ongoing and future procurement procedures for a certain period of time, it is not appropriate and it is unrealistic to impose on all tenderers an obligation to provide information about whether any subcontractors or suppliers have received foreign subsidies. This information may be hard to obtain, and companies would need to rely on representations made by such subcontractors/suppliers without being able to verify those statements. At the very least, companies should not be held liable in case suppliers or subcontractors make false representations.

**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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