

Public consultation  
on the White Paper of the European Commission on foreign subsidies

COMMENTS BY AFEP (FRENCH ASSOCIATION OF LARGE COMPANIES)

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AFEP, the French association of Large companies, has been long strongly advocating for legal initiative(s) aimed at restoring a fair competition between EU and third countries' economic operators when it comes to subsidies for good and services supply, companies acquisition and procurement, given that the EU existing anti-subsidy regulation targets only the distortive foreign subsidies to the production of industrial goods in the context of external trade .

Large French companies therefore **welcome the publication of the European Commission 's White Paper** outlining a possible framework to comprehensively handle foreign subsidies likely to distort competition on the EU internal market and **are supportive of the 3 module -approach by the European Commission** (global instrument to review and remedy market distortions in general, module 2 focused on subsidies distorting companies acquisitions and module 3 targeting subsidies distorting the competition in procurement tendering procedures) **as well as the proposed line on distortive foreign subsidies in the context of EU funding.**

Consequently, AFEP advocates that **the European Commission submits rapidly, after the present public consultation, legislative proposals reflecting this approach** to make sure that the post-Covid recovery is sustained by an improved legal framework for EU companies in the global competition.

AFEP insists that distortive effects of subsidies granted by third countries should still give way to a **comprehensive approach closely linking EU competition and State aid policy for the good functioning of the EU internal market and EU trade policy.**

Since the White paper approach is focused on correcting distortions affecting the internal market, it is important that the EU continues to **work in parallel on the tools aiming at redressing distortions at the international level affecting EU companies' capacities to compete on a fair ground with third countries' operators on third countries markets** ( WTO reform on industrial subsidies, extension to service subsidies and enforcement of competition, subsidies and State-owned enterprises chapters in the EU bilateral FTAs via a full submission to dispute settlement mechanisms for instance).

In response to the public consultation, **large French companies have the following comments:**

■ **General approach and horizontal aspects of the proposed framework**

As far as the generic notion of foreign subsidies is concerned, AFEP suggests that the legal package to be proposed retains **a definition as large as possible** in line with the approach taken in the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and its amendments proposed by the EU, the United States and Japan.

Given the diversity of subsidising practices by third countries governments and their entities (for instance described in the EC report on the Chinese economy in the context of the new methodology for

antidumping rights calculation) , it is essential that **the future EU tools have a potential scope of application coinciding as much as possible with the reach of Article 107 paragraph 1 TFUE and covers at least in addition to various forms of public fundings or equity injections, preferential loans or preferential access to public property/facilities granted by foreign government or all types of public bodies, including state-owned enterprises.**

As a matter of general approach, large French companies recommend that , with a view to ensuring a full level-playing field between EU companies and third countries operators acting on the internal market, **the assessment whether foreign subsidies are distortive takes into account the domestic framework for subsidies in the country of origin and also reflect the EU existing exemptions to State Aids regulatory framework.** As a result, subsidies that are allowed in the European Union should be excluded from the scope of these instruments. For instance, it would be indeed inappropriate to qualify generic and/or non company-specific R& D subsidies granted by third countries as distortive for a company being active on the EU internal market while these types of subsidies granted by EU Member States are deemed to be compatible with EU treaties.

Regarding substantive assessment criteria to be used for module 1 and 2, large French companies insist that standards used for market analysis in the review of EU internal merger and acquisition or state aid could in some instances **prove unable to identify certain distortive effects if applied mechanically and cumulatively** . This might be the case for the “level of activity” or the “situation of market” criteria that would leave undetected **distortive foreign subsidies used to set a foot on the sectoral market in question and pave the way for a future dominance via a dormant presence.** The same way, privileged access to domestic market for national operators should be considered as possible assessment parameter. This advocates for a flexible assessment methodology based on a logic of evidence collection (otherwise termed “faisceau d’indices” in the French legal tradition) and the issuance of **implementing guidelines**, especially when assessment criteria are to be used by national supervising authorities in the context of module 1.

In addition, AFEP supports the **introduction, across the board, of an EU interest test**, to balance possible distortive effects with other considerations of general interest such **overall welfare, consumers’ interest, public health, protection of the environment or climate change mitigation but also maintaining of a strong technological and industrial basis in the EU and the need for level-playing field and reciprocity in market access and in fair treatment.** This room of manoeuvre that proves necessary to pilot such tools should come along with **a guidance**, possibly enshrined in the legal instruments (modules 1 and 2, possibly module 3 or approach taken for EU fundings).

When it comes to the articulation between the three modules, it is important that **the proposed architecture does not create overlaps or introduce ex-post reviews where ex ante remedies is preferable for legal certainty, provided that administrative burden and negative impact on economic operations is minimised** (for instance for the review of merger and acquisition or in procurement tendering procedures). Therefore, AFEP suggests that **module 1 does not cover acquisition operations or public procurement**, these operations being then exclusively reviewed under respectively under module 2 and module 3.

#### ■ Module 1

**AFEP largely supports main lines of the approach proposed for Module 1 including on the procedural aspects and redressive measures envisaged except for the potential inclusion of acquisitions and public procurement in the scope of application of the module, even as a subsidiary tool (see above).**

On deciding over possible de minimis rules, AFEP suggests, as for substantive assessment criteria, to pay attention to possible strategy by third countries operators to set a foot in the internal market in using a lower level of subsidies that would still prove distortive in comparison with state aids being legally allocated to EU companies. **It could then be advisable to envisage lower de minimis rules than 200 000 euros for strategic emerging markets in which subsidisation can make a difference.** In Afep's views, the impact assessment carried out to prepare a future legislative initiative on the review of foreign subsidies should assess what are the relevant thresholds for these sectors.

Ultimately, large French companies insist that **the division of competences between the European Commission and national supervising authorities in operating module 1 should be as clear-cut and fully efficient as possible.** As described in the White paper, coordination rules between the review carried out by the European Commission and the one carried out by national supervisors seem too complex and could leave a possibility for inconsistencies and/or overlaps.

AFEP therefore suggests as a first best solution **only enabling the European Commission to conduct the review of foreign subsidies envisaged under module 1.**

If such approach would not be preferred, AFEP suggests that the European Commission is still entrusted with a central part in the architecture and the supervision of subsidies review under module 1.

AFEP fully supports the idea of a collaborative framework between the European Commission and national supervisors sketched out in the White paper and recommends that it is constituted in the shape of **a network set-up as the existing European Competition Network with the European Commission being designated as a pivotal authority.**

In the operations of Module 1, this pivotal function of the European Commission should **result in reserving the review of cross-border distortive effects to the European Commission.** Where national supervising authorities would detect such cross-border dimension while reviewing a case, **they would be bound to immediately refer the case to the European Commission for a review at the EU level.**

In addition, **the European Commission should also be entrusted with a monopoly on discussions and exchanges with third countries on foreign subsidies,** including at the stage of requests for legal clarifications, even in the case national supervisors are competent to review a case. In the event national authorities would be allowed to carry out such discussions, **it could give way to a fragmented approach and possible inconsistencies between national authorities or between national authorities and the European Commission.** Moreover, since DG COMP already runs structured dialogues on competition policy with several major trading partners, **the European Commission is well equipped to exercise this jurisdiction on a stand-alone basis.**

As far as the European Commission's oversight is concerned, AFEP recommends that the European Commission issues **guidelines for the exercise of foreign subsidy review by national supervisors** and that **sensitive cases dealt with at national level are systematically discussed within the collaborative network for foreign subsidies when they pose a systemic question for the review of such subsidies** and require that the European Commission returns an opinion on these cases. Regarding the launch of investigations under module 1, large French companies recommend that rules at EU level and national level allow for **both ex officio and complaint-driven procedures.** While supervising authorities should be given the possibility, based on insufficient evidences or EU interest test, not to open formal investigations following a complaint, it is important that **companies are entitled to request protection against unfair competition based on state aids.**

## ■ Module 2

AFEP largely supports main lines of the approach proposed for Module 2 including on the procedural aspects and redressive measures envisaged.

Regarding the eligibility for review of acquisitions by subsidised companies, large French companies recommend using **the notion of control as developed by the Court of Justice of the European Union and consider that the notion of material influence** could be an interesting additional parameter, especially for strategic sectors. That being said, this requires a further analysis to **avoid that module 2 would also capture an excessively large scope of minority stakeholders or voting rights holders**. The future impact assessment should therefore determine how to strike a right balance in defining the stake and/or voting rights thresholds to frame this notion.

At this stage, AFEP also advocates for the use of **quantitative thresholds to avoid legal uncertainty when closing transactions. As a uniform threshold set at a 100-million-euro turnover**, could, as explained above regarding substantive assessment criteria, leave **undetected numerous distorted transactions in strategic emerging sectors**, it is then worth considering the application of **several sector-based thresholds** in conducting the impact assessment on a legislative initiative.

As far as the enforcement of module 2 is concerned, **large French companies agree that the European Commission should be entrusted with an exclusive competence to ensure a uniform review of distorted acquisitions and should act on the basis of an ex-officio procedure**.

That being said, French companies also want to alert that this central command system might raise **coordination issues with other transaction review proceedings conducted at EU level or at Member States level such as the “regular” merger and acquisition control or foreign direct investment screening** conducted for national security reasons. To tackle potential slowdown of transactions due to successive proceedings, AFEP suggests that the European Commission explores the possibility of a maximum time frame for conducting transactions reviews under all three frameworks together (classical M&A review, FDI screening and foreign subsidy review).

More generally, the preference given for an ex-ante review (bringing less legal uncertainty than an ex-post review) should not result in increased administrative burden and the endangerment of significant merger or acquisition operations. Therefore, AFEP recommends that, in case of module 2, **the European interest test includes an assessment whether renouncing to a transaction such as transferring a non-strategic subsidiary can have a negative impact on EU companies**.

## ■ Module 3

**AFEP is fully supportive of adopting a specific legislative tool to deal with distortive foreign subsidies in the context of procurement tendering procedures** and agrees that allowing for rejecting bids or exclude bidders concerned, along with other redressive measures, could be an appropriate remedy.

However, procedures proposed in the White paper would require a legal adjustment going beyond the review of EU directives to include new cases for rejecting bids or excluding bidders and might impose new provisions in FTAs under negotiations.

More importantly, the proposed architecture would introduce a complex administrative interplay between procuring entities, national supervising authorities and the European Commission that **can deter procuring entities from using this device, especially if they remain responsible to decide whether a foreign subsidy is distortive in the context of a specific tendering procedure**. In this respect, French large companies stress the disproportion between the administrative burden imposed on procuring entities, resulting from mandatory ex-ante notification, and the limited outcome of this notification ( assessment by supervising entities whether the notified bid has benefited from a foreign subsidy but no analysis whether this subsidy proves distortive in the context of the tendering procedure in cause).

As a possible alternative, **AFEP suggests a dual approach, that could be developed both at the EU level and at the level of individual procuring entities, subject to due oversight by supervising authorities.**

On the one hand, the European Commission could be entrusted with the competence to allow for/impose redressive measures imposed on bidders benefiting from distortive foreign subsidies.

As in the framework of the new methodology for the calculation of antidumping rights, the European Commission would be tasked **with analysing procurement markets by sector in order to identify sectors in which bidders originating in third countries benefit the most from a high level of subsidisation and establishing sectoral reports collecting its findings. To make these reports fully opposable to third countries, their authorities would be allowed to comment the EU findings.**

Where documented objections by third countries could be rebutted, **the characterisation of distortive subsidies in the report could give away to a legal presumption upon which EU procuring entities would be fully entitled/bound to reject bids or exclude bidders concerned** when they would have notified a subsidy. **Undeclared subsidies would be sanctioned by an exclusion from next tendering procedures as well.**

On the other hand, a complementary decentralised approach would consist in **establishing an investigation procedure on potentially distortive foreign subsidies based on complaints by competitors** after the procuring entity has published the **so-called “award notice” in which it discloses the name of the selected bidder.**

In concrete terms, competitors would have the possibility to lodge complaints with a competent authority on potential distortive foreign subsidies that the selected bidder may have benefitted from **within the “standstill period”** provided for pre-contractual review under Directive 2007/66/EC between the publication of the award notice and the formal conclusion of the procurement contract. In case the competent authority deems that sufficient preliminary evidences have been brought forward, **it would launch an investigation with the effect to further halt the conclusion of the contract** until it has determined **whether the selected bid relies on foreign subsidies and these subsidies prove distortive**. Where such determination is reached, the procuring entities would be **bound to reject the subsidized bid/exclude the bidder or to implement any appropriate redressive measures.**

The major advantage of this decentralised system is the absence of administrative burden at the beginning of the tender and a **lesser disruption** of the contracting process since **the time frame for lodging a complaint would coincide with the time frame for challenging the award decision on another legal ground based on public procurement law.**

Both approaches would positively interact with each other. The European Commission’s sectoral reports under the EU-level tool would be **fuelled by the findings and determination made by the competent**

**supervising authority under the decentralised instrument.** Conversely, the European Commission's reports will be **used by supervising authorities under the decentralised approach to help the characterisation of distortive subsidies in their review of individual tendering procedures.** To achieve the best outcome, it could be worth considering a sequential entry into force of both tools: first, the decentralised instruments and then the EU-level mechanism.

#### ■ EU funding

AFEP welcomes the proposal by the European Commission to address the issue of distortive subsidies in the context of EU funding.

When it comes to operational terms, large French companies suggest modulating the approach depending on the different types of EU funding management.

AFEP recommends that the benefit of EU funding subject to direct management is limited to non-European companies enjoying with legal secured access to the EU market (via an EU FTA, GPA etc.).

in case of shared management, an approach based on the tools developed for Module 3 (see above) would prove efficient. In case of indirect management, rules should be developed to tackle foreign subsidies and abnormally low tenders.

#### About AFEP

Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions, and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP's core priority. Afep has around 113 members. More than 8 million people are employed by AFEP companies and their annual combined turnover amounts to €2,600 billion.

#### Contact:

Marc POULAIN, International Trade Negotiations Director/ [m.poulain@afep.com](mailto:m.poulain@afep.com)

Emmanuelle FLAMENT-MASCARET, Internal Market Director / [e.flament-mascaret@afep.com](mailto:e.flament-mascaret@afep.com)