

## EU Measures Against Foreign Subsidies

### A Criticism of the Upcoming EU Legislation and Alternative Suggestions

Alessandro Gasparotti



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**The EU Commission will soon propose legislation on three instruments to tackle the negative effects of foreign subsidies in the internal market: one instrument for goods, services and direct investments; one for acquisitions of undertakings, and one for public procurement. Both the national supervisory authorities and the Commission will be put in charge.**

#### Key Propositions

- ▶ As with EU State aid rules, the EU should establish not three but a single instrument that covers all foreign subsidies with EU relevance. This will prevent overlaps in the areas of application, and thus legal uncertainty.
- ▶ Block exemptions and giving prominence to complaints from competitors may keep the number of investigations to a manageable level.
- ▶ Corrective measures to tackle distortive foreign subsidies should align with redressive measures against unlawful State aid: competitive advantages due to a foreign subsidy should be absorbed by way of repayment obligations.
- ▶ The Commission should be the only competent authority for the new instrument. This would ensure uniform application and prevent conflicts of interest, e.g. in public procurement procedures where Member States have an incentive to favour national tenderers.

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## 1 Introduction

Foreign subsidies can distort the internal market in the EU if they create an artificial competitive advantage for subsidized foreign undertakings. To shield EU undertakings from the negative effects of such subsidies the EU has trade defence instruments that are based on the World Trade Organization trade defence regime. These instruments empower the EU Commission to impose countervailing tariffs to eliminate the distortion brought about by the import of subsidised goods into the EU.

However, the EU trade defence instruments do not cover distortions caused by foreign subsidies in the trade in services, subsidised foreign direct investments or other financial flows subsidised by third countries.<sup>1</sup> Neither does the Foreign Direct Investments Screening Regulation<sup>2</sup> (cf. cepPolicyBrief No. [32/2017](#) and cepAdhoc [Foreign Investment Screening: Protectionism in Corona-times](#)) allow the EU Commission to address distortions caused by subsidized foreign direct investment, as it does not tackle this issue. It only deals with risks to security and public order brought about by foreign investments.

The lack of instruments to tackle such distortions can have negative consequences for both EU undertakings and consumers alike. An EU undertaking that is more efficient than its foreign competitor might, despite its efficiency advantage, be outcompeted if the foreign undertaking receives subsidies and both undertakings e.g. participate in public tenders. The same could happen if an EU undertaking and a foreign subsidised undertaking compete to acquire another EU undertaking. An example of this was the acquisition of the German robot-maker Kuka, which was bought in 2016 by the Chinese company Midea.<sup>3</sup> Midea received generous subsidies from the Chinese government under the “Made in China 2025” strategy,<sup>4</sup> a governmental plan to acquire technology for national development. Midea’s EU-based competitors did not have access to subsidies. This gave Midea a competitive advantage over other undertakings in the acquisition of Kuka, which might otherwise have been acquired by a different undertaking. The result is an inefficient market outcome because the undertaking that grows the fastest is not the most efficient or the most innovative but the one that has received subsidies. In some cases, the more efficient undertaking could be pushed out of the market. Thus, foreign subsidies may give rise to less competition and a loss of innovation potential in the EU.

Recognising the existence of gaps in the current EU regulatory framework, the EU Commission recently announced legislative measures to address distortions in the internal market caused by foreign subsidies and to “ensure a level playing field.”<sup>5</sup>

In order to pave the way for upcoming EU legislation, this cepInput presents the potential content of these measures, based on a previously released White Paper and on statements by EU officials (Section 2). It then discusses the rationale behind the expected Commission proposal and proposes an alternative instrument for re-establishing the level playing field in the EU internal market (Section 3).

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<sup>1</sup> Financial flows can occur for example in relation to the establishment and operation of undertakings in the EU.

<sup>2</sup> Commission Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, ELI: <http://data.europa.eu/eli/reg/2019/452/oj>.

<sup>3</sup> See for example: Handelsblatt (2017), [Article](#) of 17 December 2017, Robot Maker Kuka Feels the Squeeze.

<sup>4</sup> See for an overview: <http://english.www.gov.cn/2016special/madeinchina2025/>.

<sup>5</sup> European Commission (2020), Communication [COM\(2021\) 66](#) of 18 February 2021, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, p. 20.

## 2 Upcoming EU Legislation Targeting Foreign Subsidies

The Commission has announced the publication of two legislative proposals in the second quarter of 2021, targeting foreign subsidies in the internal market.<sup>6</sup> The two proposals will be entitled “Levelling the Playing Field” and “Public Procurement”. In a White Paper<sup>7</sup> on foreign subsidies, the Commission laid down its vision for that legislation. It seems to consist of three different instruments<sup>8</sup>: “instrument 1” aims to correct the distortive effects of foreign subsidies in the internal market; “instrument 2” aims to prevent the distortive effects of foreign subsidies on the acquisition of EU undertakings; “instrument 3” aims to prevent the distortive effects of foreign subsidies during public procurement procedures in the EU. There is therefore a major difference between instrument 1 which operates ex-post, correcting a distortion, and instruments 2 and 3 which operate ex-ante, preventing such distortion from happening. The three instruments will be described in the following sections.

### 2.1 Instrument 1: General instrument to capture foreign subsidies

Instrument 1 envisages correcting distortions of the internal market brought about by foreign subsidies that enable the undertaking to gain a competitive advantage “in all market situations”.<sup>9</sup> Such a broad scope of application covers all undertakings and all foreign subsidies, irrespective of the purpose of the subsidy. The instrument will apply to subsidies granted for the production of goods in the EU, the supply of services, and for investments. Foreign subsidies provided for goods and agricultural products imported into the EU will be excluded as they already fall under the scope of the EU Anti-Subsidy Regulation<sup>10,11</sup>. Distortions can only be corrected if the subsidy was granted no more than ten years before corrective measures would be imposed (so called “limitation period”). Subsidies granted more than 10 years before cannot be targeted under instrument 1. Under this instrument the competent authority could start an investigation – ex-officio or following a complaint from market operators or Member States – to uncover whether a foreign subsidy has been granted and whether it distorts competition in the internal market. In order to fall within the scope of instrument 1, two conditions must be met:

- The undertaking must be established or otherwise active in the EU. This covers undertakings established outside the EU but offering services in the EU.<sup>12</sup>
- The undertaking must have received foreign subsidies totalling EUR 200,000 or more within three consecutive years. Subsidies below that threshold will be deemed unproblematic as they are unlikely to distort the internal market. This threshold aligns with the “de minimis” threshold laid down in the EU state aid rules.<sup>13</sup>

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<sup>6</sup> European Commission (2020), Communication [COM\(2020\) 690](#) of 19 October 2020, Commission Work Programme 2021, [Annex 1](#), p. 2.

<sup>7</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy.

<sup>8</sup> See for example: Monopolkommission (2020), [Webinar](#) of the 4 December 2020, The reform Proposals in the EU Regarding State Capitalism and Foreign State Subsidies.

<sup>9</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 14.

<sup>10</sup> Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, ELI <http://data.europa.eu/eli/reg/2016/1037/oj>.

<sup>11</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 14, footnote 25.

<sup>12</sup> Ibid.

<sup>13</sup> Art. 3 (1) and (2) of Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, ELI: <http://data.europa.eu/eli/reg/2013/1407/oj>.

In order to ascertain whether a foreign subsidy is having a distortive effect on the internal market, such an investigation can take place in two complementary ways:<sup>14</sup>

1. Foreign subsidies falling under certain categories, e.g. debt relief, tax relief for an undertaking other than general measures<sup>15</sup>, or direct capital injections could be considered as likely to distort the internal market.
2. Other foreign subsidies may require a case-by-case analysis to ascertain whether they distort the internal market. As a lack of transparency may make such an analysis difficult, the distortive effects of the subsidies could be ascertained using certain indicators which include for example the undertaking's level of activity in the EU internal market and the relative size of the subsidy in question, e.g. the size of an investment subsidy relative to the size of the investment.

If, after conducting an investigation, the competent authority concludes that there is a distortion in the internal market brought about by the foreign subsidy, it has to investigate whether there is evidence that the subsidy might have a positive impact within the EU, or on a public policy interest recognised by the EU, e.g. if it fosters climate protection. If there is a positive impact, it must then be determined whether the positive impact outweighs the distortion (so called EU interest test).<sup>16</sup> Depending on whether there is evidence of a possible positive impact and the result of the EU interest test which then has to be carried out, there are two possible scenarios:

- Scenario 1: The positive impact of the subsidy outweighs the distortion. In such a case, the competent authority could decide to allow the foreign subsidy.
- Scenario 2: There is either no evidence of a possible positive impact of the subsidy or the positive effects of the foreign subsidy do not outweigh the distortion. In such a case, the competent authority must ensure that the distortion is eliminated, with or without cooperation from the concerned undertaking.
  - If the concerned undertaking offers commitments deemed sufficient to eliminate the distortion, the competent authority may adopt a "decision with commitment".
  - If the concerned undertaking is uncooperative or offers commitments that do not eliminate the distortion, the competent authority must impose corrective measures. These should preferably involve repayment of the subsidy to the third country that granted it. If this is not appropriate, other corrective measures could be adopted ranging from redressive payments to the EU or Member States, to structural or behavioural remedies, such as divestment of certain assets, licensing obligations, or the publication of certain R&D results.<sup>17</sup>

The upcoming legislation will probably grant competence over such an instrument to both the Commission and national supervisory authorities. The Commission considers itself to be exclusively competent to apply the EU interest test. Cooperation mechanisms could be introduced so that, as long as the Commission does not start an investigation, national supervisory authorities remain empowered to conduct an investigation. The Commission also considers that in certain situations a case will be

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<sup>14</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 15-17.

<sup>15</sup> General measures, being non-discriminatory by nature, do not constitute a subsidy.

<sup>16</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 17.

<sup>17</sup> Ibid. p. 19-20.

transferred from the national level to the Commission, e.g. if two national authorities conduct investigations of the same undertaking.

## 2.2 Instrument 2: Foreign subsidies facilitating the acquisition of EU undertakings

Instrument 2 aims to prevent distortions in the internal market that occur if, as the result of a foreign subsidy, an undertaking acquires control of, or “stakes” in, an EU undertaking – e.g. a specific percentage of the shares or voting rights or material influence.<sup>18</sup> Instrument 2 applies to undertakings that

- are established or otherwise active in the EU,<sup>19</sup> and
- have an annual turnover of at least EUR 100 million, and
- have received foreign subsidies of EUR 200,000 or more within the past three years. Subsidies below that threshold will be deemed unproblematic as they are unlikely to cause distortions of the proper functioning of the internal market. This threshold aligns with the “de minimis” threshold laid down in the EU state aid rules.<sup>20</sup>

There is also a discussion on whether to add a further threshold, so that instrument 2 only applies if the received foreign subsidy is over a given percentage of the acquisition price.<sup>21</sup> What the percentage should be is not clear yet.

Under instrument 2 the acquirer would be obliged to notify the competent authority of the planned acquisition, providing information on, e.g., ownership, turnover, financing of the planned acquisition, and the foreign subsidies it has received over the past three years. As under instrument 1, the competent authority would investigate whether the acquisition would distort the internal market. Such an investigation can take place in two complementary ways:<sup>22</sup>

1. Foreign subsidies granted directly for the purpose of the acquisition, i.e. where the link to the acquisition can be established, would be deemed likely to distort the internal market.
2. Other foreign subsidies falling under the scope of instrument 2 may require a case-by-case analysis to ascertain whether they have distortive effects on the internal market. As lack of transparency may make such an analysis difficult, the distortive effects of the subsidies could be ascertained using certain indicators which include for example the relative size of the subsidy in question, i.e. the size of the subsidy relative to the size of the acquisition.

Throughout the notification and investigation period the acquirer would not be allowed to close the transaction (so called standstill period).<sup>23</sup> If the competent authority concludes that there would be a distortion in the internal market brought about by the foreign subsidy if the acquisition were finalised, it has to investigate whether there is evidence that the subsidy might have a positive impact within the EU, or on a public policy interest recognised by the EU, e.g. if it fosters climate protection. If there is a positive impact the authority will perform the EU interest test (see Section 2.1). Depending on

<sup>18</sup> Ibid. p. 23.

<sup>19</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 14.

<sup>20</sup> Art. 3 (1) and (2) of Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, ELI: <http://data.europa.eu/eli/reg/2013/1407/oj>.

<sup>21</sup> Ibid. p. 25.

<sup>22</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 26-27.

<sup>23</sup> Ibid. p. 28.



whether there is evidence of a possible positive impact and the result of the EU interest test, there are two possible scenarios, similar to those for instrument 1:

- Scenario 1: The positive impact of the subsidy outweighs the distortion. In such a case the competent authority could decide to allow the acquisition to be finalised.
- Scenario 2: There is no evidence of a possible positive impact of the subsidy, or the positive effects of the foreign subsidy do not outweigh the distortion. In such a case, the competent authority must ensure that the distortion is eliminated or prohibit the acquisition.
  - If the concerned undertaking offers commitments deemed sufficient to eliminate the distortion, the competent authority may adopt a “decision with commitment” which allows the acquisition to take place.
  - If the concerned undertaking is uncooperative or offers commitments that do not eliminate the distortion, the competent authority must prohibit the acquisition.

The Commission proposes to be the sole competent authority for instrument 2, given the significant time constraints arising from the standstill period, and “the complexity” of sharing competences.<sup>24</sup>

### 2.3 Instrument 3: Foreign Subsidies in Public Procurement

Instrument 3, which will probably be set out in a separate piece of upcoming legislation, will target subsidies that give an advantage to subsidised tenderers in public procurement procedures, to the disadvantage of non-subsidised undertakings. Instrument 3 applies to undertakings that

- are established or otherwise active in the EU, and
- have received foreign subsidies above a certain, yet to be determined value within three years preceding the public procurement procedure,<sup>25</sup> and
- are participating in a public procurement procedure for goods or services with a monetary value above a certain threshold, that is yet to be determined. As a reference, the standard threshold of the Public Procurement Directive<sup>26</sup> is EUR 139,000.

Under instrument 3, the Commission plans to oblige tenderers to provide notification of whether they, any of their consortium members as well as subcontractors and suppliers have received a subsidy within the three years preceding participation in the procedure.<sup>27</sup> The organiser of a public procurement procedure is supposed to collect the notifications and transmit them to the national competent supervisory authority. That way, the organiser can also alert the authority about any tenderers that should have produced a notification but did not. The notification must be published for transparency reasons. Given that the notification requires self-assessment by the tenderers, which carries a significant risk of error and of deliberate circumvention, third parties and competitors will be entitled to inform the competent authority that a notification contains errors or that it should have been carried out.<sup>28</sup> As under instruments 1 and 2, the competent authority has to investigate whether the subsidy

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<sup>24</sup> Ibid. p. 29.

<sup>25</sup> Ibid. p. 31.

<sup>26</sup> Directive (EU) 2014/24 of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, ELI: <http://data.europa.eu/eli/dir/2014/24/oj>. Directive (EU) 2014/25/ of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance, ELI: <http://data.europa.eu/eli/dir/2014/25/oj>.

<sup>27</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 31.

<sup>28</sup> Ibid. p. 32.

enables the beneficiary tenderer to take part in the procedure to the disadvantage of non-subsidised undertakings. Such an investigation can take place in two complementary ways:<sup>29</sup>

1. Foreign subsidies falling under certain categories, e.g. debt relief, tax relief for an undertaking other than general measures<sup>30</sup>, or direct capital injections could be considered as likely to distort the internal market.
2. Other foreign subsidies may require a case-by-case analysis to ascertain whether they have distortive effects on the internal market. As lack of transparency may make such an analysis difficult, the distortive effects of the subsidies could be ascertained using certain indicators which include for example the relative size of the subsidy in question, e.g. the size of an interest-free loan relative to the size of the bid.

The Commission favours stringent deadlines to minimise the delay to the public procurement procedure. During the investigation it will not be possible to award the contract to the tenderer under scrutiny. However, it is possible to award it to other tenderers.

If the competent authority concludes that there would be a disadvantage for non-subsidised undertakings brought about by a foreign subsidy, the tenderer concerned must be excluded from the specific procurement procedure, and where appropriate from other contract awards, for a period of e.g. up to three years.

As under instrument 1, both the Commission and the Member States will probably act as supervisory authorities, and national authorities would be empowered to conduct investigations unless the Commission takes up a case, e.g. where the same undertaking is being investigated by different national authorities.

### **3 Assessment of the expected EU Legislation on Targeting Foreign Subsidies**

Eliminating distortions and preserving the level playing field in the EU internal market is key for the prosperity of Member States' economies. The openness of the internal market ensures competition which drives innovation and reduces prices for consumers. In such a context, it is appropriate and necessary for the Commission to strive to counteract the negative effects of foreign subsidies in the internal market.

Currently, there are regulatory gaps which allow some undertakings to benefit from competitive advantages due to foreign subsidies. Under EU rules, Member States are allowed to grant subsidies to undertakings operating in the EU internal market only under certain conditions. Foreign countries, on the other hand, can sometimes subsidise undertakings which are then able to shift such advantages to their controlled undertakings in the internal market, without being restricted by such conditions. EU rules may therefore be self-discriminatory and allow for foreign subsidised undertakings to benefit from the competitive advantages offered by the said foreign subsidies.

Nevertheless, uncovering the existence of foreign subsidies can be very challenging. Foreign governments might have an interest in avoiding transparency regarding their control of an undertaking or their subsidisation policies. Also, subsidies are often highly complex, e.g. sophisticated capital

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<sup>29</sup> Ibid. p. 30.

<sup>30</sup> General measures, being non-discriminatory by nature, do not constitute a subsidy.



injections and guarantees or financing structures also involving private partners.<sup>31</sup> In crafting any legislative proposal, it is key to acknowledge the difficulties involved in ascertaining the existence of foreign subsidies, let alone their distortive effects on the internal market. New legal instruments should therefore be targeted towards foreign undertakings whilst avoiding disproportionate burdens which could stifle foreign investment. Furthermore, new legislation should not put foreign subsidised undertakings at a disadvantage as EU undertakings may also have been granted subsidies. During the COVID-19 pandemic in particular, state aid rules have been relaxed to sustain national economies (cf. [cepInput State Aid to Mitigate the Economic Downturn Triggered by the COVID 19 Pandemic](#)).

In its upcoming legislative proposals – as presented in Section 2 – the Commission will probably propose three different instruments to tackle the negative effects of foreign subsidies. Such a multiplicity of instruments, potentially with overlapping areas of application and conflicts with other existing mechanisms, should be avoided if possible. For instance, a notification under instrument 2 may trigger further investigation into previous subsidies under instrument 1. An undertaking could therefore be subject to simultaneous investigations under instrument 1 and instrument 2, as well as merger and control rules. This would entail a considerable administrative burden for the undertaking concerned and reduce legal certainty if the investigations reached different outcomes. Moreover, as foreign investments can be screened under the Foreign Direct Investment Regulation, it is important to set clear boundaries on the application of each instrument.

#### 4 Alternative cep Proposal for Targeting Foreign Subsidies

An alternative approach to obtain the same result could be the creation of a single instrument, analogous to the EU State aid rules, covering all foreign subsidies that may affect the internal market, i.e. not just the market in one Member State. Such an instrument would require the competent authority to be notified of all foreign subsidies exceeding a certain threshold, as is the case under the State aid rules for Member States. While it is true that such a general notification obligation might easily overburden the competent authority, two safeguards could render this system viable: First, in order to limit red tape and increase both legal certainty and the effectiveness of the proposed instrument, the use of block exemptions should be expanded to include foreign subsidies. Currently, around 95% of EU State aid is granted via a block exemption,<sup>32</sup> whose rules do not require the Commission to be notified. Expanding the use of block exemptions to include foreign subsidies would take advantage of the expertise gathered from the existing system in the EU, limiting notified foreign subsidies to the most relevant cases and to those that are contrary to the political interests of the EU. Such a system would also ensure that undertakings operating in the internal market can compete on an equal footing, which is the ultimate goal of the upcoming legislation. Second, giving prominence to complaints from competitors could reduce the number of in-depth investigations. If a competitor does not consider that another undertaking is operating with an unfair advantage, it is likely that a subsidy – if one exists – is not having distortive effects in the internal market.

Thresholds, exemptions, and the subsidies to be prioritised during the investigation should be updated over time. Once the competent authority has gathered enough information on the effects of various subsidies, block exemptions could be gradually expanded to better target distortive subsidies while

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<sup>31</sup> Gleiss Lutz (2020), [EU Commission plans new competition tools: white paper on foreign subsidies](#).

<sup>32</sup> See for example: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_17\\_1342](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1342).

also slimming down the administrative burdens imposed on both the competent authority and the undertakings concerned.

The Commission should be the only competent authority for such a single instrument. This would have multiple benefits: First, a single authority could introduce a simpler and clearer procedure for undertakings to follow, as it avoids the need for an undertaking to notify multiple national authorities. This is the case if national authorities require different information, or if the notification needs to be filed in the local language, or if contact points differ between Member States. Even if the notification procedure differs only slightly between the Member States, a decentralised system of competent authorities will increase the administrative burden for all undertakings already having to adapt to the new instrument. Second, and most importantly, if Member States were to decide on the existence of distortive foreign subsidies, there could be conflicts of interest and political pressures. This would be the case if e.g. a Member State were to favour national undertakings during public procurement procedures by banning competitors on the grounds that they have received foreign subsidies. Finally, a single authority would provide for coherent outcomes in that all investigations would be assessed the same way, thereby increasing legal certainty. Member States could autonomously investigate foreign subsidies that do not meet the threshold for application of the proposed instrument or affect only one national market. That way, while subsidies that have relevance for the internal market will be dealt with coherently by a single authority, other subsidies, that could have relevance for national economies, could be investigated by the authorities of the Member State concerned, taking advantage of expertise on national markets.

The corrective measures envisaged by the Commission should be properly considered in order to avoid disproportionate retaliation against the beneficiaries of foreign subsidies. As the aim of upcoming legislation on foreign subsidies is to re-establish a level playing field, corrective measures against distortive foreign subsidies should align as much as possible with redressive measures against unlawful State aid. Competitive advantages originating from a foreign subsidy should therefore be absorbed by means of repayment obligations. The Commission rightly noticed that it can be difficult to ascertain whether the subsidy has actually been reimbursed to a foreign government.<sup>33</sup> As a solution, upcoming legislation might propose a toolbox of remedies when such reimbursements cannot be effectively proven. This solution is, however, problematic for various reasons: First, there is no clear information on which redressive measure should be applied to what case, leading to a high level of discretion in the enforcement of these measures. Such discretion and uncertainty regarding the possibility of disproportionate remedies being imposed upon an undertaking may stifle even the non-subsidised activities of foreign undertakings in the EU. Moreover, without clarification of what remedies should be imposed in different situations, the enforcement of the instrument would be prone to being politicised and used for industrial policy purposes, instead of solely for re-establishing a level playing field. Second, not all the redressive measures envisaged target the comparative advantage offered by the subsidy and may therefore be disproportionate. For example, obligations to grant licences or publish research results – as envisaged by the Commission<sup>34</sup> – blur the distinction between the contribution made by the subsidy and the contribution made by the concerned undertaking itself. Furthermore, the prohibition of an acquisition and the ban on participating in current and future public procurements – as proposed under Instruments 2 and 3 respectively – may lead to further distortions of competition. For example, if

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<sup>33</sup> European Commission (2020), White Paper [COM\(2020\) 253](#) of 17 June 2020, Levelling the playing field as regards foreign subsidy, p. 19.

<sup>34</sup> Ibid, p. 20.

an undertaking that has received a foreign subsidy would in any case have been the best tenderer, repayment of the subsidy would re-establish a level playing field, whereas banning such an undertaking would artificially make another undertaking more competitive, creating a market distortion. Third, most of the redressive measures proposed require prolonged supervision for their proper enforcement, which increases the administrative costs both for the supervisory authority and the concerned undertaking. Finally, the discretion that comes with such a wide range of remedies and the ensuing legal uncertainty could push undertakings to refuse lawful foreign subsidies for fear of an investigation that could have disproportionate consequences.

All these issues could be addressed— as in the case of competition fines<sup>35</sup> – by repayment obligations towards the EU, thus overcoming the difficulties of ascertaining the effective reimbursement of the subsidy to a foreign government. This approach would bring Member States' subsidies and foreign subsidies more into line, providing for similar remedies and thus ensuring that undertakings are treated as equally as possible. Moreover, repayment obligations towards the EU could de-incentivise the use of distortive foreign subsidies granted to undertakings operating in the EU. Where investigations uncover such subsidies, foreign governments will lose the money they have disbursed and the use of subsidies will become less attractive. Furthermore, the use of uniform repayment obligations as the main redressive measure would allow the three Instruments to be implemented as a single instrument, as previously suggested. Finally, syphoning off foreign subsidies as a redressive measure would provide the Commission with financial resources to cover any increase in administrative costs that the new instrument might entail.

## 5 Conclusions

The EU Commission's plan to tackle the negative effects of foreign subsidies in the internal market has several weaknesses. Instead, the EU should proceed along the following lines:

First, as with EU State aid rules, the EU should establish not three but a single instrument that covers all foreign subsidies with EU relevance. This will prevent overlaps in the areas of application, and thus legal uncertainty.

Second, block exemptions and giving prominence to complaints from competitors may keep the number of investigations to a manageable level.

Third, corrective measures to tackle distortive foreign subsidies should align with redressive measures against unlawful State aid: competitive advantages due to a foreign subsidy should be absorbed by means of repayment obligations.

Fourth, the Commission should be the only competent authority for the new instrument. This would ensure uniform application and prevent conflicts of interest, e.g. in public procurement procedures where Member States have an incentive to favour national tenderers.

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<sup>35</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, ELI: <http://data.europa.eu/eli/reg/2003/1/oj>, art. 5 and art. 23. Waldhoff, C., in: Calliess, C. / Ruffert, M. (eds.), EUV/AEUV, 5<sup>th</sup> ed. 2016, Art. 311 TFEU, para. 12.

**Author:**

Alessandro Gasparotti, Policy Analyst

[info@cep.eu](mailto:info@cep.eu)

**Centrum für Europäische Politik** FREIBURG | BERLIN

Kaiser-Joseph-Straße 266 | D-79098 Freiburg

Schiffbauerdamm 40 Raum 4315 | D-10117 Berlin

Tel. + 49 761 38693-0

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