RESPONSE OF THE EU STATE AID LAW ASSOCIATION TO THE COMMISSION CONSULTATION ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON FOREIGN SUBSIDIES DISTORTING THE INTERNAL MARKET

This response is submitted by the EU State Aid Law Association ("ESALA")[1] in response to the consultation on the proposal for a Regulation on Foreign subsidies distorting the internal market launched by the Commission on 7th May 2021 ("Proposal") with the publication of the following documents:

- Proposal for a regulation - COM(2021)223
- Impact assessment report - SWD(2021)99
- Summary of the impact assessment report - SWD(2021)100
- Opinion on impact assessment - SEC(2021)182

ESALA is a new forum of leading practitioners in State aid law from law firms across Europe, as well as scholars specializing in State aid law.

ESALA welcomes the opportunity to respond to this Proposal. For further information on ESALA or in relation to this response please contact Cees Dekker (cees.dekker@nysingh.nl), or Massimo Merola (massimo.merola@belex.com)

Comments on the Proposal:

We have structured our comments below by reference to four themes.

1. The definition of foreign subsidy

1.1 The concept of 'foreign subsidy' is defined in Article 2 paragraph 1 of the Proposal as an intervention that meets three cumulative conditions: it must be a financial contribution of a third country, it must confer a benefit to an undertaking, and this benefit must be selective. It is noteworthy that the proposal seems to consider that the distortion of competition is not a necessary pre-condition for the existence of a foreign subsidy. In line with recital 12, the Commission need only assess whether it distorts the internal market once the existence of a foreign subsidy has been established (see also 1.9 below).

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1.2 The definition of *foreign subsidy* in the Proposal is similar to the definition of State aid[2] laid down in Article 107(1) TFEU but it is even closer to the definition of subsidy in Articles 3 and 4 of Regulation (EU)2016/1037, the EU Basic Anti-Subsidy Regulation, which is based on the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement). If the purpose of the Proposal is to create a level playing field with EU domestic undertakings, we suggest, however, using a definition which is closer to that of State aid, and/or a clarifying that the key elements of both concepts should be interpreted in the same way. Aligning the definitions and concepts more closely with State aid rules might also allow to reduce the risk of an interference with the WTO members' restrictions to act against "subsidies" (Article 32.1 of the SCM Agreement). Similar concerns arise regarding the possible impact that the development of this new regulatory tool may have on State aid law. Whilst the Proposal must be welcomed in its objective of creating a level playing field, the use of the notion of subsidy in the context of the internal market could result in the widening of the definition of state aid, jeopardizing its strictness and objective nature. The use of two different notions for the purpose of achieving a level playing field in the internal market appears counterintuitive. Considering the importance of the notion of State aid for the application of the State aid control rules, ESALA would welcome future guidance issued by the Commission specific on foreign subsidies, making sure that no detrimental deviation from fundamental key elements of the notion on State aid weakens the State aid regime through the introduction of this new regulatory tool.

1.3 It is noteworthy that the precondition for the State aid rules to be applicable, namely that the beneficiary is an undertaking (within the meaning of Article 107(1) TFEU), has been adequately addressed in Article 2 of the Proposal by directly mentioning that the benefit must concern an undertaking engaged in an economic activity in the internal market. In case of "mixed entities", state support granted for non-economic activities, but used to cross-subsidize economic activities, would need to be covered as well, in order to achieve an alignment with State aid rules and ensure a level playing field. It needs to be borne in mind, however, that the financial flows between governments and companies (some of which are not even legally independent, but part of the public administration) are not necessarily transparent, which may render this task quite challenging.

1.4 In the opinion of ESALA, the establishment of the relevant benchmark to determine the existence and amount of an advantage ("benefit") may be a challenging exercise and the amount of the subsidy constitutes one of the basic indicators laid down in Article 3 for the assessment of the distortions on the internal market. It is not clear whether benchmarks such as the investment practice of private investors, rates for financing, or the comparable adequate remuneration will be established based on parameters valid within the third country having granted the support or within the Member State in which the foreign subsidy will be used for the subsidized operation. The result of using one or the other scenario may be very different.

[2] If we refer to State aid, State aid law, State aid rules, etc. we mean State aid in the sense of the TFEU and EU State aid law, EU State aid rules etc.

1.5 Similarly, as under State aid rules, the selectivity requirement means that the benefit must be limited "in law or in fact" to an individual undertaking or industry or to several undertakings or industries. This is one of the most difficult criteria of the definition of State aid in Article 107(1) TFEU to assess. This is particularly the case in relation to fiscal measures, also due to the fact that the identification of the relevant reference system often depends on choices made at national law level. A significant number of cases have been reviewed by the European Courts developing an extensive corpus of jurisprudence. ESALA would like to draw the Commission's attention to the importance of aligning its assessment of selectivity in the context of foreign subsidies to that established by the case law for State aid and invites the Commission to take into account any possible evolution in the interpretation of this criterion in the State aid discipline to avoid detrimental spill-over effects of diverging notions. Thus, ESALA would like to stress the importance of maintaining the independence of both control mechanisms, the one regarding State aid granted by Member States and the one concerning foreign subsidies awarded by third countries.

1.6 Beyond the potential spillover effects that a diverging interpretation of the notion of foreign subsidy under the Proposal and the notion of State aid under Article 107(1) TFEU may create, the question arises as to whether the definition of foreign subsidy will allow in practice the objective of extending the level playing field for European companies into foreign interventions that have been distortive for the internal market for decades now.

1.7 ESALA welcomes the broad scope of the notion of foreign subsidy which, in line with State aid rules, covers not only direct but also indirect subsidies, including not only interventions of foreign public entities but also those funds made available through private entities in as far as their actions can be attributed to the third country (Article 2(2)(b)(iii)). Recent case law of the European Courts has confirmed that the corresponding concepts of state resources and state imputability should not be overstretched.[3] This clarification should also be reflected in the interpretation of the notion of foreign subsidy.

1.8 The thresholds for the two notification-based instruments refer to the *financial contributions*, rather than to the *foreign subsidies* received in the last three years (Articles 18(3)(b) and 28 of the Proposal). Accordingly, the Commission would have the exclusive competence to assess whether a third country financial contribution actually involves a foreign subsidy. At the same time, the notification requirement may be triggered in a significant number of cases without any subsidy relevance. Indeed, the concept of financial contribution also covers transactions with state entities at market terms (e.g. the purchase of electricity from a state-owned company), and/or non-selective tax benefits (e.g. tax exemptions that apply to all undertakings). In practice, this would mean that nearly every (!) company which is also active outside the EU would be obliged to notify each tender offer in a public procurement procedure within the meaning of Art. 27 (2) of the Proposal. ESALA doubts whether such a far-reaching scope of the notification requirement is justified or intended and suggests that the Commission reconsiders whether the financial contribution criterion, as currently defined, is appropriate to identify transactions worth to be investigated under a standstill obligation.

[3] See e.g. C-425/19 P - *Commission/Italy*, 2 March 2021.

1.9 In this regard, the following alternatives may be considered:

(i) A re-formulation of Articles 18 and Articles 27/28 of the Proposal, to ensure that the mere existence of a financial contribution (without any selective benefit, i.e. without qualifying the "financial benefit" as a "foreign subsidy") does not trigger the mandatory notification requirement for transactions and public procurement procedures.

(ii) The creation of an exemption in the Proposal to cover all at arm's-length investments which pose no risk of competitive distortion – this could be done by either a per se or individually granted exemption mechanism. At least we think it should be considered to exempt well-defined forms of financial contributions as a trigger for the obligation to notify.

(iii) An amendment to Article 44(1)(b) to allow the exemption of certain categories of undertakings from the obligation to notify, to occur in a shorter time frame than the currently drafted five years after the application of the Regulation.

(iv) An amendment to the ex-ante obligations to notify, replacing it by a voluntary notification and an ex-post control for a transitional period, in order to assess what the impact of an obligation to notify will entail.

1.10 Unlike under State aid law, there is no reference to the effect on trade and competition in the foreign subsidy definition. Strictly speaking, the question whether the measure distorts the internal market only comes into play once the existence of a foreign subsidy has been established (recital 10 and Articles 3, 4 of the Proposal). In practice, it is likely that both aspects will be investigated in parallel (cf. scope of preliminary review, Article 8). Including the requirement of a distortion in the foreign subsidy definition in Article 2 (and replacing the reference to "subsidies" in Articles 3 and 4 with "benefit") would lead, from a technical perspective, to a further alignment with the concept of state aid. The conceptual differences would however remain, since, unlike in State aid law, the identification of a distortion on the internal market is of key importance in order to assess whether an intervention of the Commission is justified. Against that background, ESALA regrets that the Proposal only provides very limited guidance as to how the Commission may want to apply this criterion.

1.11 Under Article 3, the distortion on the internal market is defined in very broad terms. Despite some additional clarifications in relation to the notification-based tools (Articles 17 and 26), the indicators mentioned in paragraph 1 (in a non-exhaustive manner) remain extremely vague. Besides "de minimis" subsidies (paragraph 2: EUR 5 million in three years) and certain types of generally distortive subsidies (Article 4), the Proposal leaves a large margin of discretion to the Commission. This makes it almost impossible for an undertaking to anticipate what will be the outcome of the Commission's assessment. ESALA urges the Commission to provide further clarity on how the criteria will be applied and what "theories of harm" it intends to consider. Since beneficiaries of foreign subsidies should not be treated worse than those receiving State aid, ESALA is of the view that it should be clarified that measures which would be compatible with the internal market if they were granted by a Member State are considered not to involve a distortion of competition or to fulfill the balancing test (Article 5).

1.12 In light of the broad definition of foreign subsidy, it is very likely that the Commission will receive a high number of complaints from other market participants. The Commission will find itself in a similar situation as under State aid law, where it is obliged to prioritise cases based on criteria that are not always transparent. The wide discretion of the Commission under the "ex officio" tool (chapter 2) inevitably raises questions about potential discriminations and political motives. ESALA recommends that the Commission reconsiders its extensive approach to the notion of State aid, which would also allow it to narrow down the foreign subsidy notion. Otherwise, the "de minimis" threshold in Art. 3 (2) of the Proposal should be further increased, or the Commission should issue clear ex ante guidance on how it intends to prioritise cases under Article 7.

2. The positive and negative effects of the balancing exercise

2.1 Foreign subsidies may sometimes contribute to the development of economic activities that the EU equally supports. For this reason, a key provision of the proposal is the "balancing test", which enables the Commission to weigh the positive and negative effects of a foreign subsidy in order to assess the need to impose redressive measures.

2.2 Foreign subsidies that are found to be distortive, i.e. that put a company active in the EU in a competitive advantage, will not automatically be subject to a redressive measure. Article 5 of the Proposal stipulates that "the Commission shall, where warranted, balance the negative effects of a foreign subsidy in terms of distortion on the internal market with positive effects on the development of the relevant economic activity." Distortive foreign subsidies are thus subject to a substantive assessment by the Commission "where warranted", that is when the party involved brings forward evidence of the positive effects of the received subsidy.

2.3 The introduction of a balancing test to give the Commission a degree of flexibility is, in ESALA's view, necessary. Its (current) formulation may, however, be problematic.

2.4 Article 5 does not provide much detail as to which positive effects should be considered by the Commission. In the White Paper, the Commission proposed an "EU interest test" to balance the negative effects of the distortion against the "possible positive impact that the supported economic activity or investment might have within the EU or on public policy interests recognised by the EU". This test took into account the EU's public policy objectives such as creating jobs, achieving climate neutrality and protecting the environment, digital transformation, security, public order and public safety and resilience, and the need to protect consumers.

2.5 The consultation process that followed the White Paper showed demand for additional clarity as regards the applicable assessment criteria. Some Member States and stakeholders suggested that the benchmark be aligned with the compatibility assessment under State aid rules, since the concept of EU interest carries a political dimension and may bring too much discretion into the assessment. The balancing test is similar to the assessment criteria of Article 107(3) in that in both cases the positive effects of the grant/aid are weighed against its negative effects, but it seems that it leaves out the assessment of proportionality, necessity and distortion of trade.

2.6 During the public consultation preceding the adoption of the Proposal, Member States and stakeholders emphasised the need to establish clear and objective criteria for the substantive assessment of foreign subsidies. However, Article 5 still creates considerable legal uncertainty. While the Commission has drawn a parallel with Article 107(3)(c) TFEU, it provides no details as to the relevant assessment criteria. It remains unclear how the positive effect will be evaluated, whether these will be limited to purely economic effects or whether they will be extended to sustainability or other public interest grounds as originally included in the White Paper.

2.7 In particular, Article 5's new legal standard - '*distortion on the internal market'* - might be excessively all encompassing as compared to the State Aid law '*distortion of competition*' criteria (see also 1.10 et seq. above). As the Proposal refers to Art.114 TFEU as one of its legal bases, the higher standard imposed by the Court case law that requires EU measures adopted under Art 114 TFEU, to contribute to remove an "*appreciable distortions of competition"* should be relevant in this context. [4]

2.8 The wording of Article 5 seems also excessively vague when considering the wide (almost unlimited) spectrum of EU goals that could inform such test, ranging from consumers' welfare, creating jobs, achieving carbon neutrality, speeding up the digital transformation, etc. For instance, a foreign subsidy that, among others, helps reducing carbon emissions may be "compatible" even if it distorts competition by driving out of business EU competitors in the short run and reducing choice for EU consumers in the long run. As such, it would be necessary to include in the final text a more detailed methodology that the Commission will follow in its analysis under Article 5 given the heterogeneity of policy objectives (sometimes even conflicting objectives) that could theoretically influence its application.

2.9 The '*distortion on the internal market*' standard seems problematic also from an Article 5(2) perspective, as a remedy must be adequate and proportional to redress a specific violation. In merger control, for instance, the presence of a specific competition distortion informs the design of the remedy deemed necessary to restore a sufficient level of competition. Under Article 5(2) new '*distortion on the internal market*' standard, however, it is unclear how such breach-remedy link could be preserved. For example, it may be difficult to identify which asset(s) should be divested to address the problem that an acquisition was subsidised by a non-EU country. Similar concerns may also arise with reference to 'behavioral remedies' (expressly allowed by Recital 17), as the conducts that should be forbidden to neutralise the distortion on the internal market of a foreign subsidy may not be easily identifiable.

2.10 Article 5 is also unclear on whether the balancing exercise described in Paragraph 1 applies to Paragraph 2 scenarios as well. Given the different purposes pursued by Article 5(1) and (2), it is questionable whether the balancing test should remain identical in both circumstances. One thing is deciding whether a foreign subsidy is distortive on the internal market, another is designing/accepting the most reasonable and proportionate remedy.

[4] Judgment of the Court of 5 October 2000. *Federal Republic of Germany v European Parliament and Council of the European Union* Case C-376/98. ECLI *2000 I-08419.*

2.11 In conclusion, if the objective of Proposal is 'levelling the playing field', it seems appropriate to partially redraft Article 5 (and related provisions) as to reduce the existing gap with State aid rules. The vagueness of the provision leaves significant discretion to the Commission. Considering the Commission's reluctance to recognise efficiencies under the EU Merger Regulation,[5] the balancing test in the Proposal does not guarantee that non-harmful foreign subsidies are cleared without (important) redressive measures. On the other hand, the vague formulation combined with third country interests creates the risk of intense lobbying and politically driven recognition of positive effects. What is more, the Commission has explained that the Proposal will only be applied when the distortion caused by a foreign subsidy cannot be remedied bilaterally under a trade agreement.[6] This suggests an unequal treatment of foreign subsidies and an important lack of transparency.

2.12 In order to avoid discrimination and legal uncertainty, the balancing test should be based onentirely clear and transparent assessment criteria. This could be achieved by adopting (sector-specific) guidelines in line with those existing under the State aid framework and/or trade law, or explicitly introducing the Proposal within those frameworks. State aid rules benefit from extensive Commission practice and case law of the Court of Justice, which, in our view, should be incorporated into the balancing test in order to level the playing field with foreign subsidies. However, subjecting foreign subsidies to the level of detail provided in the General Block Exemption Regulation for instance may be a step foo far. It is thus paramount for the Commission to clearly establish how it will interpret the balancing test.

2.13 In any event, it would be advisable to address the ambiguities of Article 5 highlighted above. The Commission could: (i) reduce the heterogeneity of (potentially conflicting) policy objectives that can be taken into account under Article 5, by exhaustively specifying them (see by analogy Art 114 TFEU paras 3 and 4) (ii) designate whether the Article 5 balancing test should only consider the 'likelihood' or also the 'magnitude' of the expected public policy benefits/harms; (iii) specify the relevant 'timeframe' to conduct the balancing test *ex* Article 5 and clarify whether such 'timeframe' should be identical for both the positive and negative effects to be counterbalanced; **(**iv) specify whether the positive effects need to occur in the internal market geographically in order to be taken into account; (v) indicate whether the balancing test *ex* Article 5(1) equally applies in Article 5(2) scenarios.

2.14 The Commission's introduction of a substantive assessment of foreign subsidies in the form of a balancing test is a step towards aligning the regulation of foreign subsidies and State aid measures. However, the Commission needs to clearly define the criteria and method applied in order to provide legal certainty for undertakings concerned and avoid discrimination.

3. Redressive measures

[5] Few cases have successfully turned on the recognition of efficiencies (and UPS/TNT is not an illustrative example as the case was closed by a prohibition decision even if certain network efficiencies were recognised in some markets).
[6] Webinar: The EU Foreign Subsidies Proposal, Concurrences, 8 July 2021. See also Art. 40(7) of the Proposal, where this point seems to be addressed.

3.1 The Commission has included in its proposal the possibility of taking redressive measures in cases where companies receive a subsidy from a third country. We appreciate that redressive measures may contribute to neutralising the effect of the subsidy.

3.2 The Commission notes that the redressive measures in the proposal are based on measures applied in State aid control to remove the distortive effect of State aid. It is stated that as the potentially distortive impact of foreign subsidies on the internal market is similar to that of State aid, the State aid toolbox of remedies provides an efficient set of measures to remedy distortions caused by foreign subsidies.

3.3 We do not actually see that the instrument of redressive measures is based on the current toolbox of State aid law. Indeed, the only specific remedy available under State aid provisions is the repayment of the aid; while the ancillary remedies are either the result of creative jurisprudence (as in the *Deggendorf* doctrine) or ensue from the application of the EU general sanctioning system (the system of penalties under Article 260 TFUE) to the field of unlawful State aid.

3.4 While it is true that Regulation (EU) 2019/712 provides for the possibility of imposing redressive measures, and that Articles 8 and 9 of Regulation 2016/1035 provide for similar possibilities in case of third country subsidies in the aviation and shipping sectors, a general power to impose redressive measures other than the repayment of aid (whereby the obligation to repay is imposed on the State that granted the aid, rather than on the undertaking that received the aid) is not available in the area of State aid law. On the contrary, the Proposal provides for functional and targeted remedies for the effects of foreign subsidies, which, contrary to the State aid field, are not only directed to the State concerned, but also to the beneficiary itself. This means that the Commission may count on a wide toolbox of remedies, which are necessary due to (i) the great variety of situations that it might run into and (ii) the difficulty to cooperate with third countries rather than with Member States.

3.5 If a subsidy has a distortive effect (and the positive effects do not outweigh the negative effects), counteracting the negative effects would imply repaying the subsidy received to the third country concerned. This is the most direct correction of the distortion caused according to State aid practice. We understand that, in practice, imposing recovery of subsidies on a third country that has granted them will often be fruitless. Apart from that, monitoring effective subsidy recovery seems to be difficult. Therefore, the Union will indeed have to consider whether the use of other means of inter-governmental enforcement (e.g. sanctions) is warranted to enforce the new regime – and it should be transparent upfront about such use.

3.6 In themselves, the measures mentioned in Article 6(3) of the proposal may neutralise the negative effect of a subsidy, but we think that the Commission's powers should be delineated. Article 6 currently gives the Commission a very wide discretion to balance the effects of redressive measures against the negative effects of subsidies. Article 6(2) of the proposal states that the redressive measures shall fully and effectively remedy the distortion caused by the foreign subsidy in the internal market. Disproportionate measures may meet that requirement as well (or, more to the point, are likely to do so). Therefore, in our opinion, it should also be provided that the Commission has to substantiate that the measures to be imposed are quantitatively balanced with the subsidy granted. In the absence of such a specification, the legal uncertainty as to what

a subsidised company can expect will be considerable. On the other hand, however, EU-based companies which are adversely affected by the third country subsidy must also have some idea of what they can expect in terms of redressive measures.

3.7 Bearing in mind that the assessment of the effectiveness of the measures requires a complex economic assessment in any event, and that judicial review is limited to the verification of compliance with the rules of procedure and statement of reasons, as well as the material accuracy of the facts, the absence of a manifest error of assessment of the facts and misuse of powers, it is of great importance that the framework against which the Court of Justice can review Commission decisions is clear. In our view, that framework is not clear at present. This also means, in our opinion, that legal protection for both companies that are adversely affected by third-country subsidies and companies that receive these subsidies will be insufficient.

3.8 We therefore believe that, although alternative redressive measures are necessary in the case of third country subsidies in order to maintain the level playing field, the framing of the power to impose redressive measures should be reconsidered and certainly better framed and clarified.

4. Powers of inspection

4.1 According to the Proposal, the Commission will be solely responsible for the enforcement of the rules relating to foreign subsidies, and in particular those mentioned in Chapter 1 of the Proposal.

4.2 In the White Paper, the Commission had presented three options: a foreign subsidy could be investigated by (i) one single national supervisory authority, (ii) several national supervisory authorities acting in parallel or (iii) the Commission. The majority of contributors to the public consultation on the White Paper considered that the Commission should be exclusively responsible for the enforcement of the rules on foreign subsidies, at least where it concerns the ex officio review. This may have compelled the Commission to choose for option (iii), although Member States and their officials can according to the Proposal be requested to actually carry out investigations and inspections.

4.3 ESALA welcomes the decision of the Commission to take up the role of sole enforcer. With a view to ensuring as level a playing field as possible, it seems appropriate and useful to entrust one and the same authority with both the enforcement of the State aid rules and the rules on foreign subsidies. Enforcement at a national level, be it on the basis of a shared responsibility or not, would have involved a certain risk of political and politicized decision-making and divergence of enforcement levels between the Member States. This ultimately could have undermined the objectives of the Proposal.

4.4 The flipside is that the administrative burden of enforcement will rest entirely on the Commission. ESALA recalls that the Commissions has struggled with the workload relating to the enforcement of State aid rules and that the State aid Modernisation package has also been adopted to alleviate the pressure on its services. The fact that the Commission only launched an average of 13 investigations on the basis of the Regulation 2016/2036 (anti-dumping) and Regulation

2016/2037 (anti-subsidy) in the period between 2014 and 2018 illustrates that the resources and capacity of the Commission are also fairly limited in this related field of work (Trade defence instruments (europa.eu)).

4.5 Against this background, ESALA encourages the Commission to clearly communicate on how it intends to make available sufficient (human) resources in order for the new instrument on foreign subsidies to be as effective as possible and which department / DG within the Commission will enforce the new instrument.

4.6 With respect to Article 12 (Inspections within the Union), Article 13 (Inspections outside the Union) and Article 14 (Non-cooperation), ESALA makes the following observations.

4.7 The powers of inspections as mentioned in Article 12 are similar to those of the Commission in the context of cartel investigations on the basis of Regulation 1/2003. The Commission will have the right, amongst others, to enter any premises and land of the undertaking concerns, examine books, ask for explanations and seal any business premises.

4.8 A refusal to cooperate or provide incomplete or false information or to submit to an inspection can lead to the imposition to pay fines on the basis of Article 15 of the Proposal.

4.9 The powers of investigations in the Proposal are thus more substantial and far-reaching than the powers attributed the Commission on the basis of Regulation 2015/1589.

4.10 Although ESALA advocates the alignment of the concepts and notions used in the Proposal with those developed in State aid, it acknowledges that more extensive powers of investigation are required to ensure that the foreign subsidy instrument will be as effective and credible as possible. The State aid tool box would probably not be fit for this purpose.

4.11 According to Article 13 of the Proposal, the Commission will essentially have the same powers of investigation in the event of an inspection outside the Union, be it that the undertaking concerned and the government of the third country in question will have to agree to the use of these powers.

4.12 A clear incentive for an undertaking established outside the Union is provided in Article 14 (1) of the Proposal according to which the Commission can adopt decisions on the facts available if such an undertaking, or the government of the third country involved, refuses to submit to the inspection.

4.13 This rule is likely to coerce undertakings outside the Union to submit to announced inspections conducted by the Commission. In anti-dumping and anti-subsidy investigations, similar principles have been applied and have proven to be quite effective.

4.14 According to Article 14 (3) and (4) of the Proposal, which appear to apply both to undertakings within and outside the Union, an undertaking concerned may be deemed to have received a

benefit if it fails to provide the necessary information to determine whether a financial contribution confers a benefit to it. When applying the facts available, the result of the procedure may be less favorable to the undertaking concerned than if it had cooperated.

4.15 The European Courts have endorsed the use of these measures, at least in the field of State aid. They are likely to further incentivize undertakings concerned outside the Union to submit to inspections.

4.16 Note that it will nevertheless be much easier for the Commission to investigate suspected beneficiaries of the foreign subsidies who are established in the Union, i.e. that have a branch or a subsidiary in one or more Member States, than those undertakings that do not. This potentially means that some undertakings are more likely to be targeted than others. The Proposal thus appears to have a potential element of unequal treatment in it where it concerns inspections to be conducted.

4.17 In ESALA's view, the set of powers of inspections provided for in the Proposal are likely to contribute to the effectiveness of the rules on foreign subsidies and can therefore be embraced, assuming that the substantive rules to be adopted on foreign subsidies are fair, proportionate and sufficiently clear. Reference is made to the concerns raised in relation to themes 1, 2 and 3.