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WORKING PAPER

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| From: | General Secretariat of the Council |
| To: | Working Party on Competition |
| Subject: | Proposal for a Regulation on distortive foreign subsidies |

Delegations will find in annex a presentation given by the European Commission during the Working Party meeting on Competition on 20 May 2021: Agenda item 2.



Proposal for a Regulation on foreign subsidies

Council Working Party on Competition

20 May 2021

Context

- EU is world's largest trading block with 16.4% of global trade.
- EU is world's largest FDI destination with 25% of worldwide FDI stock.
- In this intertwined global economy, foreign subsidies can distort the internal market and undermine the level playing field.

Purpose and problem definition

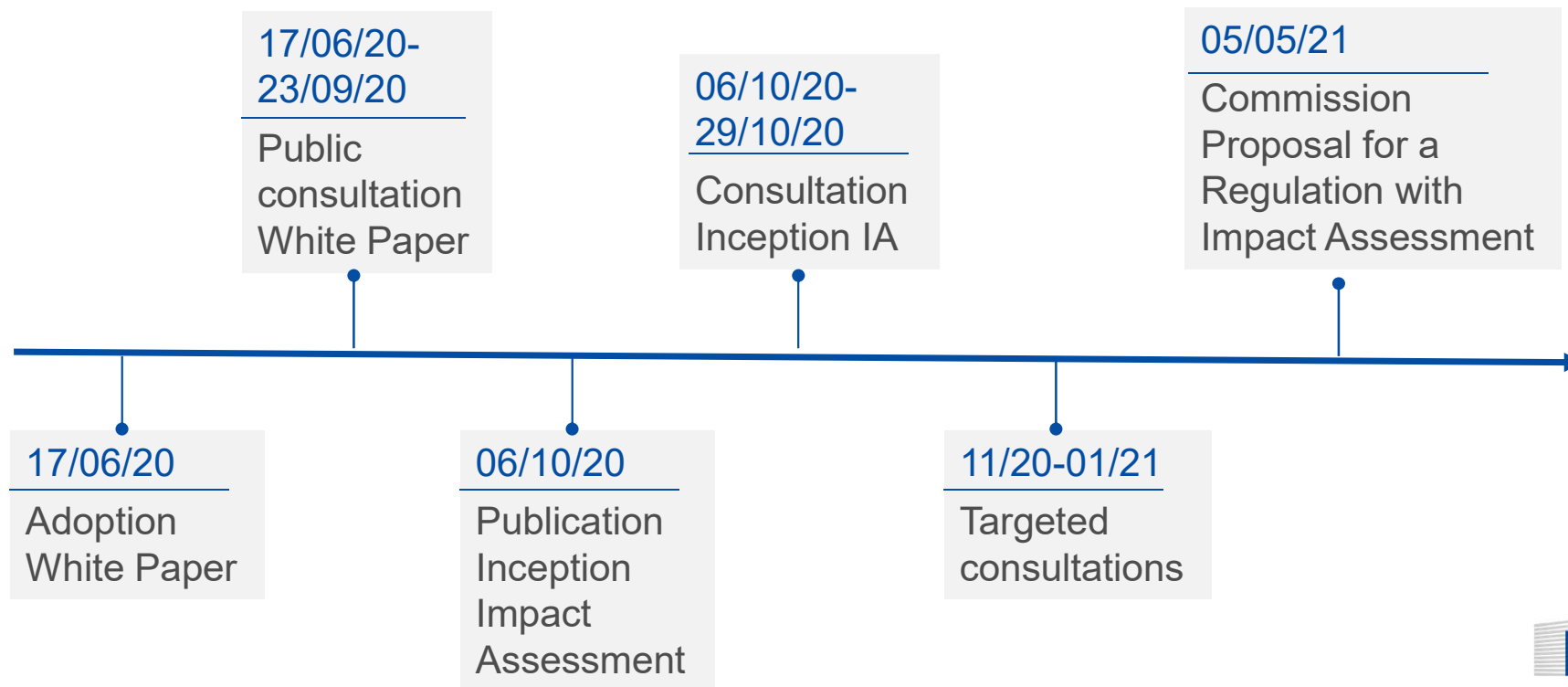
Objective: Ensure level playing field

- EU control of State aid granted by Member States, but no control of foreign subsidies
- Instances of foreign subsidies impacting the internal market

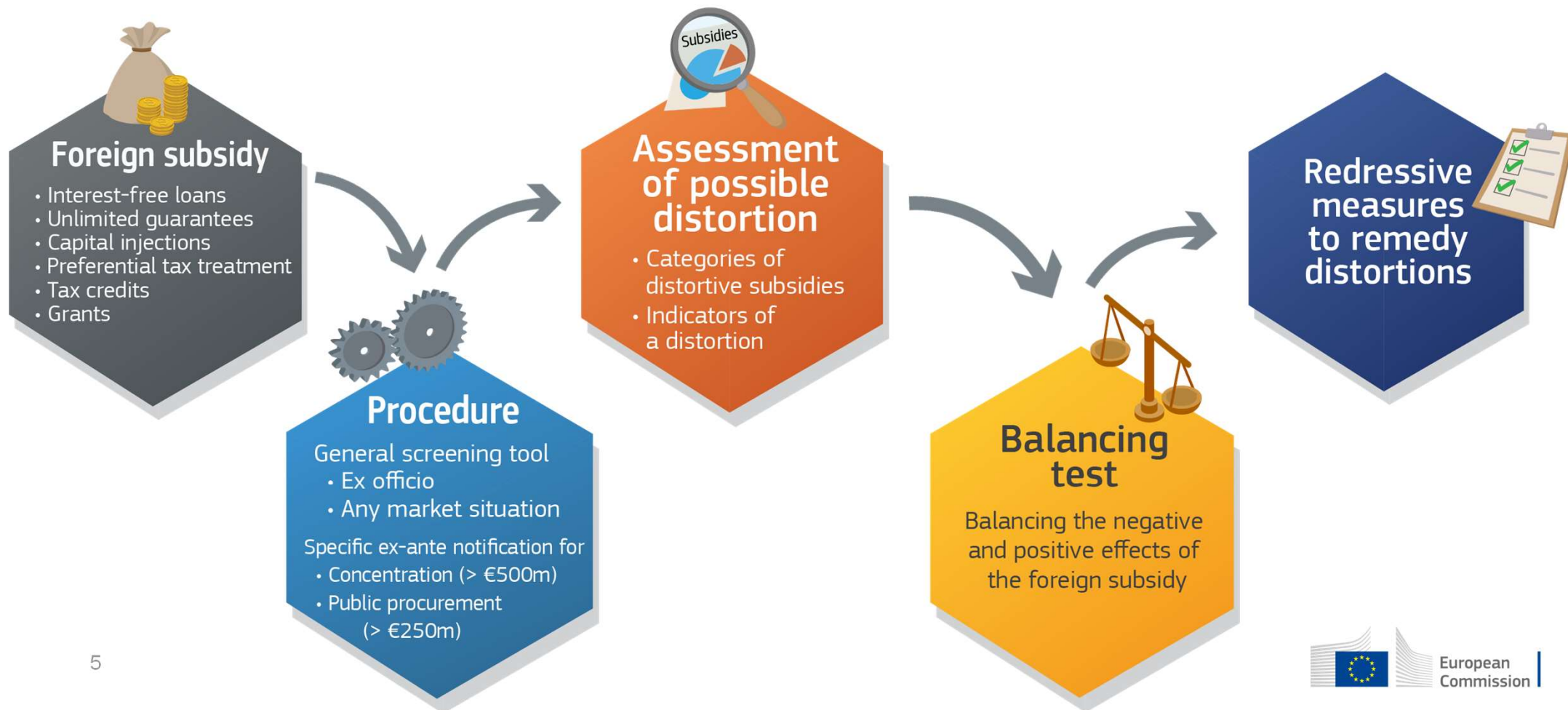
Gap analysis

- Competition instruments, trade policy and public procurement rules do not adequately tackle distortions that foreign subsidies can cause in the internal market.

Milestones



The Commission proposal at a glance



The Commission proposal: main elements

General points

- Legal basis: Articles 207 and 114 TFEU
- Commission as sole enforcer
 - Taking into account feedback on White paper, enforcement of EU anti-subsidy rules, State aid rules
 - Uniform application of the rules
 - Member States consulted before decision is adopted
- Combining ex officio and notification

Definition of foreign subsidy

Three cumulative conditions:

Financial contribution
granted by a third country

Confers a **benefit** to an undertaking(s)

it is '**selective**'



Foreign subsidy

- Interest-free loans
- Unlimited guarantees
- Capital injections
- Preferential tax treatment
- Tax credits
- Grants

Distortion on the internal market – negative effects on competition

When is a foreign subsidy distortive?

- improves the competitive position of the undertaking concerned in the internal market and where, in doing so, actually or potentially negatively affects competition on the internal market.

How to establish it? => using indicators such as:

- amount, nature, purpose of the subsidy
- situation of the undertaking or the markets concerned
- level of economic activity of the undertaking in the EU

Categories of most likely distortive FS

- subsidy to ailing undertaking without restructuring plan
- unlimited guarantee
- direct facilitation of a concentration
- submission of unduly advantageous bid



Assessment of possible distortion

- Categories of distortive subsidies
- Indicators of a distortion

Foreign subsidies below EUR 5m/3y are unlikely to be distortive

The balancing test

- **What is the balancing test?**
 - A foreign subsidy may also have positive effects
 - Balancing the negative with the positive effects
- **What are the possible outcomes of the test?**
 - Positive effects outweigh negative effects: No redressive measures
 - Otherwise, positive effects taken into account when establishing redressive measures or commitments



Remedying the distortions

Process:

- The undertaking may offer commitments which the Commission would accept if they are effective
- The Commission could also impose redressive measures

Types of redressive measures



Structural

- Divestment of assets



Behavioural

- Give access to infrastructure
- Reducing market share



Repaying the subsidy



Prohibiting the transaction

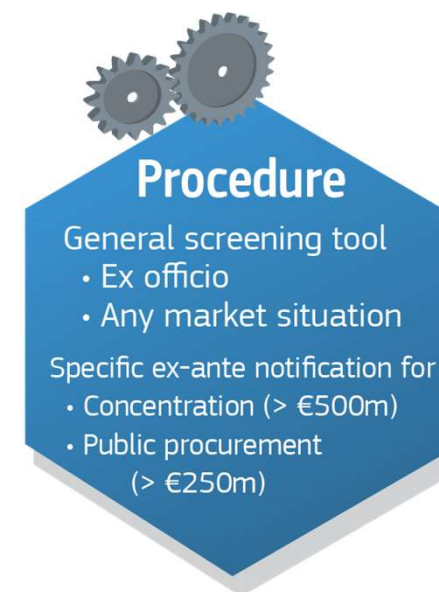
- concentration
- Public procurement

Redressive
measures
to remedy
distortions



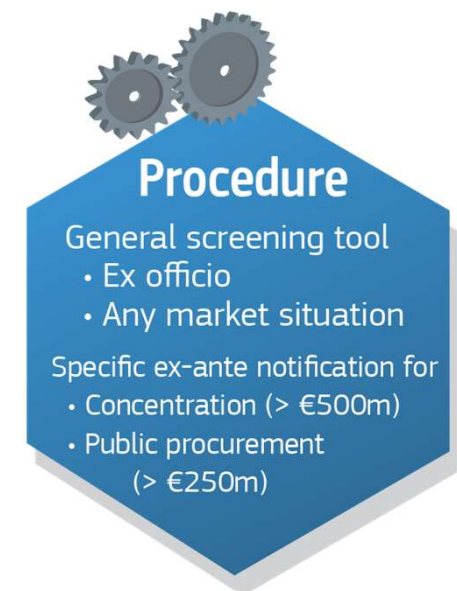
Investigative tools and procedure (1)

- Ex officio review – general screening tool
 - Scope: undertaking engaged in an economic activity
 - Gathering information
 - Information requests
 - Inspections in and outside the Union
 - Fines and penalty payments
 - Market investigations
 - Non-cooperation
 - Decision on the basis of facts available



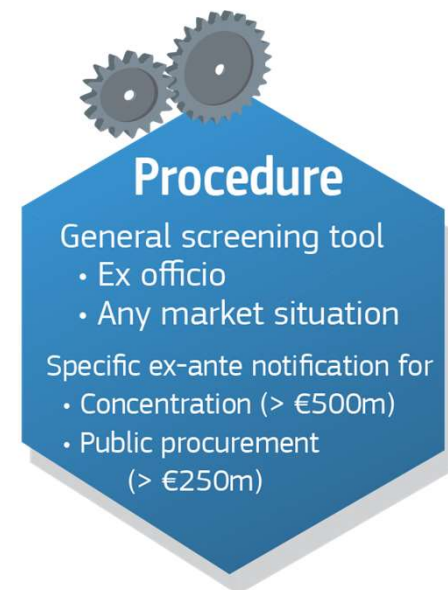
Investigative tools and procedure (2)

- Ex ante notification tools for large concentrations
 - Thresholds
 - EU turnover: at least EUR 500 million of EU target or one of the merging parties
 - Financial contribution: at least EUR 50 million in three years prior to notification
 - Ad hoc notification for concentrations below thresholds
 - Suspensive effect and time limits



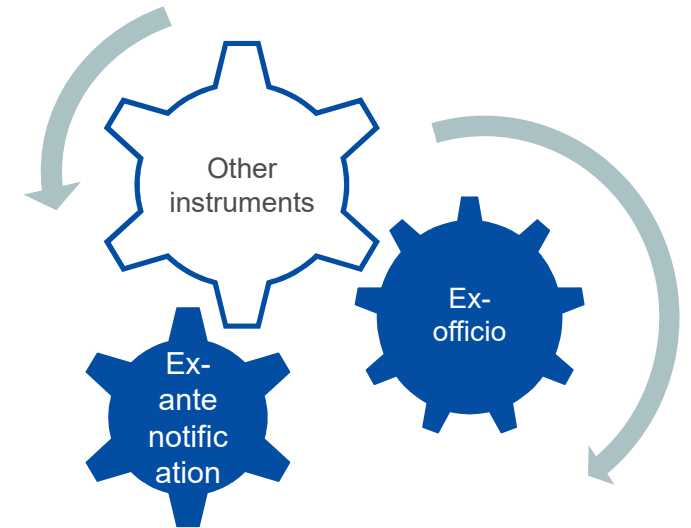
Investigative tools and procedure (3)

- Ex ante notification tools for large public procurement procedures
 - Threshold:
 - Value of procurement more than EUR 250 million
 - Ad hoc notification for public procurement procedures below thresholds
 - Suspensive effect and time limits



Proposed Regulation and relation to other instruments

- EU anti-subsidy Regulation
- FDI screening Regulation
- EU Merger Regulation
- Public procurement Directives
- Sectorial instruments



Thank you



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