

Guidelines for the EU Foreign Subsidies Regulation: ASCOLA Comments for the 2025 Call for Evidence by the European Commission

This document represents the comments of the Academic Society for Competition Law (ASCOLA) to the targeted consultation questionnaire by the European Commission in its Call for Evidence of March-April 2025. ASCOLA is an independent, non-profit association composed of scholars from all continents, committed, in their scholarship, to the development of competition law, policy and the economics of competition worldwide. More information can be found on www.ascola.org.

Participation in the process of this response was open to all ASCOLA members. This document was acknowledged by the Executive Committee of ASCOLA. However, this document does not bind any member and does not represent the opinion of all ASCOLA members. The members of the Working Group are listed on the following page. They each individually declare their (lack of) conflicts of interest in accordance with the ASCOLA [Declaration of Ethics](#), in footnote. Please direct any questions to [team\[at\]ascola.org](mailto:team[at]ascola.org).

Submitted on 2 April 2025.

Contributions by:

- **Jan Blockx**, Assistant Professor, University of Antwerp, Belgium.¹
- **Sandra Marco Colino**, Associate Professor, Chinese University of Hong Kong.²
- **Lena Hornkohl**, Assistant Professor (Tenure Track) for European Law, University of Vienna, Austria.³
- **Pierfrancesco Mattiolo**, Graduate Teaching and Research Assistant, University of Antwerp, Belgium.⁴
- **Joséphine Thorson**, Research fellow at the University of Bergen, Norway.⁵
- **Anna Tzanaki**, Lecturer in Law, University of Leeds, United Kingdom.⁶
- **Thomas Weck**, Associate Professor of Public Law, Regulatory Law and Comparative Law at Frankfurt School of Finance and Management, Germany.⁷

Coordinated by: **Magali Eben**⁸ (Vice President of ASCOLA, on behalf of the Executive Committee).

¹ I have no conflicts of interest in this respect: I have not done any work related to the FSR for interested parties.

² In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.

³ Also, Postdoctoral Researcher (Habilitation), University of Heidelberg, Germany. In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.

⁴ In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.

⁵ Affiliated with Bergen Centre for Competition Law and Economics. In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.

⁶ Also, Affiliate Fellow, Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business; Senior Research Fellow, UCL Centre of Law, Economics & Society; Affiliated Scholar, Dynamic Competition Initiative. In accordance with the ASCOLA Declaration of Ethics, I declare that I have no conflict of interest to disclose.

⁷ Member of Frankfurt Competence Centre for German and Global Regulation (FCCR). I declare that the FCCR receives regular funding by companies that have been or are involved in competition proceedings at EU and/or national level although it is independent vis-à-vis funding partners.

⁸ Senior Lecturer and subject head in competition law, University of Glasgow. Deputy Director of [CREATe](#) (currently primarily AHRC funded, see funding information [on create.ac.uk website](https://www.create.ac.uk)). I have not been engaged in any work related to Foreign Subsidies Regulation nor worked for parties with interests in this consultation. In accordance with the ASCOLA Ethics Declaration, I confirm that I have no conflicts of interest.

Table of Contents

1. The application of the criteria for determining the existence of a distortion according to Article 4(1) of the FSR	4
1.1. Use of criteria and indicators... ..	4
1.2. Improvement of a competitive position... ..	5
1.3. Effect on competition.....	7
1.4. Examples of distortion.....	9
2. The application of the balancing test in accordance with Article 6 of the FSR	9
2.1. Relevant positive effects... ..	9
2.2. Alternative sources in public procurement... ..	12
2.3. How to assess positive vs negative effects.....	12
2.4. Relevant evidence and analysis... ..	14
3. The application of the Commission’s power to request the prior notification of any concentration according to Article 21(5) of the FSR or foreign financial contributions received by an economic operator in a public procurement procedure according to Article 29(8) of the FSR	15
3.1. Factors relevant to request prior notification of concentrations... ..	15
3.2. Factors foreign financial contributions in public procurement.....	16
3.3. “Suspicion” of foreign subsidies... ..	16
3.4. Impact on the union and ex-ante review... ..	16
3.5. Specific sectors prone to distortive foreign subsidies... ..	17
4. The assessment of a distortion in a public procurement procedure according to Article 27 of the FSR.....	18
5. General remarks on the FSR guidelines and the overall FSR implementation ...	18

1. The application of the criteria for determining the existence of a distortion according to Article 4(1) of the FSR

1.1. Use of criteria and indicators...

(1) Article 4(1) concerns the ‘Distortions in the internal market’ and as to its interpretation, it is valuable to draw some parallels to the EU State aid rules, both as regards content and thresholds of intervention (see Recital 9). There will nonetheless be differences flowing already from the fact that the two regimes (State aid and FS) operate by way of different mechanisms (including that one targets States and the other undertakings). As a point of departure when interpreting Article 4(1), there is no indication that the legislature intended for it to be more difficult for the Commission to qualify a distortion of competition by a foreign subsidy than under the existing EU State aid regime, which it complements with the objective of dealing effectively with distortions caused by foreign subsidies (see Recital 6).

(2) The indicators, listed in Article 4(1) of the FSR are not exhaustive. Other factors that may be considered include:

- the type of relationship the subsidised undertaking has with foreign governments and governmental entities;
- the transparency that is provided about its financing (see Recital 18 of the FSR);
- the possibility that the undertaking may receive more subsidies in the future, especially when assessing a concentration.⁹ Ultimately, subsidies arriving after the concentration may be controlled via the ex officio procedure;
- whether the undertaking concerned has a history of receiving foreign subsidies from the same or several third countries;
- the ownership and corporate structure of the undertaking (belonging to a corporate group, PE funded, sovereign wealth fund owned, state-owned or ‘benefit’ corporation etc.).

(3) The indicators for assessing a distortion should be considered collectively, so as to ensure a comprehensive and consistent assessment. This suggests itself, as the list

⁹ It is worth noting that the Commission already takes this into account to decide on commitments and redressive measures. See e& PPF Telecom Group, e& PPF Telecom Group, European Commission, Decision of 24.9.2024 (not public), FS.100011; see also CRRC/Vossloh, German Competition Authority, Decision of 27.4.2020, B4-115/19.

of indicators is not exhaustive and the indicators link to both the competitive position of the undertaking and the (potentially) negative effects of the subsidy on competition in the internal market. The collective assessment necessarily leaves the Commission with a wide margin of appreciation. Clear guidelines and effective procedural safeguards such as judicial review could enhance the transparency and consistency in the Commission's holistic assessment and the equal treatment of undertakings subject to FSR review.

(4) The likelihood of finding a distortion should be greater in the event that more indicators are fulfilled. Also, finding a distortion should be more likely the greater the intensity of a certain indicator(s) being fulfilled.

(5) The circumstances under which an indicator is used in the assessment should be determined based on whether the subsidy, considering the indicators, is likely to improve the competitive position of the recipient, and whether this may affect competition in the internal market. Regarding the degree of certainty required to consider an indicator relevant, the principles applicable to the determination of a distortion of competition under Article 107(1) TFEU may provide orientation (see there: "threatens to").¹⁰ In particular, it may be informative to compare the position of the undertaking concerned to a situation without the aid, or to the situation of competing undertakings. In any event, the Commission may want to clarify the value of the principles of State aid (e.g. of presumptions) to the review of foreign subsidies.

1.2. Improvement of a competitive position...

(6) Article 4(1) of the FSR takes up the same terminology as the one used with regard to Article 107(1) TFEU in respect of State aid – 'is liable to improve the competitive position' (see the Commission's Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, para. 187 with further references to case law from the CJEU). According to this wording, what matters is only the effect of the subsidy on the undertaking concerned. Thus, no evidence is required that the foreign country granting the subsidy intends it, e.g., to facilitate a particular concentration or to increase the recipient's chances in a particular public procurement procedure.¹¹ It is sufficient under Article 4(1) if the recipient decides autonomously to engage in a takeover or to participate in a tender.

¹⁰ Notice on the concept of State aid, OJ 2016 C 262/1, paras. 187 ff.

¹¹ However, if such evidence exists, the subsidy may fall into the categories of Art. 5(1)(d) and (e) FSR under which the subsidy is considered "most likely to distort the internal market".

(7) Consistency indicates, then, a comparable approach in the contexts of the FSR and of State aid. Given the different legal context, however, divergences in interpretation may occur. It is essential for legal certainty and coherence of decision-making that the Commission explicitly sets out which approach it intends to take and, if it intends to diverge from the interpretation under State aid, to explicitly state when and how it will do so. Under State aid law, distortion of competition is easily found, if not presumed, once it has been established that aid has been given.¹² Similarly, a detailed assessment of the indicators given in Article 4(1) FSR may not always be necessary, once it has been established that a foreign subsidy is given to an undertaking active on the internal market.¹³ Furthermore, it could be reiterated that, while the amount of the subsidy or the size of the recipient undertaking are indicators relevant to the assessment under Article 4(1) FSR, no findings pertinent to either of these indicators would in and of themselves automatically exclude a finding that a State aid distorts competition when applying Article 107(1) TFEU (provided that the Commission's Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid does not apply), where these indicators are also relevant.¹⁴

(8) At the same time, this criterion only relates to the effect of the subsidy on the “competitive position” of the undertaking concerned, not any (further) effects on competition in the market. Thus, it is sufficient in this context that the benefit (economic advantage) conferred through the subsidy strengthens its financial power and economic position in the market as a general matter compared to a counterfactual scenario absent the subsidy in question.¹⁵ It is not required at this stage of the analysis that the subsidy produces or may produce indirect effects (e.g. competitors exiting the market) that can only be determined by taking into account other characteristics of the market structure.

(9) The indicators in Article 4(1)(a) include the “situation of the undertaking (including its size)”. This means that subsidies to large undertakings may potentially be more

¹² See the Commission's notice, para. 187 with further references to case law from the CJEU.

¹³ Paragraph 187 of Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50: “A measure granted by the State is considered to distort or threaten to distort competition **when it is liable to improve the competitive position** of the recipient compared to other undertakings with which it competes. **For all practical purposes, a distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition**” (footnotes omitted and own emphasis added).

¹⁴ See Commission's Notice on the notion of State aid, para. 189 with further references to case law from the CJEU.

¹⁵ See Commission Decision, 05/05/2008, M.4956 - STX/Aker Yards, paras. 76 ff. (on State aid in a merger context).

distortive than those for small and medium-sized enterprises (SMEs; see recital 19). Similarly, the size of the subsidy *relative to* the size of the undertaking concerned may determine how distortive the impact of the subsidy might be in improving the undertaking's competitive position in the market.

(10) To assess whether a foreign subsidy could potentially be used in the internal market, the Commission should consider and monitor the relationship between the beneficiary of the subsidy and its subsidiaries or affiliate companies active in the EU. This assessment could be particularly relevant in the case of transnational groups involving majority-owned EU subsidiaries. However, structural links in the form of minority shareholdings or persistent economic links such as interlocking directorates or long-term contractual relationships could be relevant factors in assessing the relationship between the foreign company receiving the subsidy that may not be directly active in the EU and companies active in the EU to which it is affiliated. Moreover, the Commission should clarify whether it considers that the concept of an undertaking (i.e. single economic entity) used in competition law and State aid law applies under the FSR.

1.3. Effect on competition...

(11) With this criterion, the FSR diverges from Article 107 TFEU because a “measure granted by the State is considered to distort or threaten to distort competition [already] when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes” (emphasis added)¹⁶. Thus, in the context of Article 107 TFEU, it is not necessary to assess the effect on competition separately.

(12) The FSR does not state that the strengthening of a competitive position of an undertaking in the internal market can be presumed to actually or potentially negatively affect competition in the internal market. As noted above, clarification on the existence or not of a presumption would be welcome. In conducting this assessment regarding the effect on competition, Recital 19 states that “the characteristics of the market, and *in particular the competitive conditions* on the market”¹⁷ should be taken into account, such as barriers to market entry and the existing overcapacities in the market in which the subsidy is granted or future capacity expansions that would not otherwise be sustainable. However, the FSR does not make explicit against what objective and under what ‘harm to competition’ standard(s) these factors should be taken into account. That is, the FSR does not clarify whether the distortive subsidy shall affect (i) the level playing

¹⁶ Notice on the concept of State aid, OJ 2016 C 262/1, para. 187.

¹⁷ Own emphasis.

field, (ii) consumer welfare, (iii) the competitive position of competitors, (iv) the competitive process, or (v) any other elements; and, if multiple objectives or elements are to be considered, the relative importance to be attributed to each of those assessment benchmarks. This question relates to the general discussion of what the objectives of EU competition policy are or should be, and it is a point that could be clarified in the Guidelines.

(13) The FSR Guidelines are not an adequate legal document to decide this question conclusively. However, this is probably also not necessary: The criterion is justified already by the fact that the FSR is about distortions from subsidies not granted by an EU Member State. Thus, the criterion allows the Commission to take into account the (likely) reactions of other market participants if they perceive that the subsidised undertaking is or may be used to implement the political-strategic objectives of a third country.

(14) As hinted by the Draghi Report,¹⁸ the FSR is a key tool to ensure the competitiveness of the EU. There can be conceptual disagreement about both the usefulness and the scope of 'competitiveness'. Restoring the level playing field and protecting the competitive process, as well as (directly or as a result of the previous two) safeguarding the competitive position of competitors, can all fall under the new prism of competitiveness. The Commission may consider such goals in its enforcement of the FSR, using them to primarily guide its assessment on the subsidy's effect on competition in the internal market.

(15) Other elements with a potential impact on EU competitiveness may be the strategic or innovative nature of the economic activity performed by the subsidised undertaking, as the subsidy may affect more deeply (and not necessarily in a negative way) the competitive landscape and dynamics of the internal market in the long term. For instance, as a positive effect, the subsidy may allow companies in the EU to catch up with non-EU competitors or to reduce dependencies from foreign supplies. In terms of negative effects, however, the subsidised activity may also lead to strategic dependencies from foreign countries that may expose the European economy to risks, in the long term.

(16) The consumer welfare paradigm poses particular questions when used for the FSR. A foreign subsidy may indeed make the product cheaper for European consumers or reduce the cost of a public tender for the taxpayer. The first FSR cases on electric trains and solar panels demonstrate this dilemma well. The Commission may consider

¹⁸ The Future of European Competitiveness — Part B, pp. 302-304.

consumer welfare in light of its assessment on how the distortion affects competitiveness. Here, the long-term effect on consumer welfare and dependencies should be considered. Therefore, in the context of the FSR, a broader view on consumer welfare could be usefully considered in the assessment of effects on competition, however this criterion may often be at the service of wider EU interests and objectives.

(17) If and to the extent consumer welfare and other objectives (e.g. sustainability) relevant to competition law analysis are considered relevant to the assessment of ‘effect on competition’ under the FSR (see point (12) above), inspiration may be drawn from other Commission competition law guidelines on when competition is negatively affected. However, the Commission should clarify if it aims to take an effects-based approach where finding actual or potential negative effects on competition is necessary.

1.4. Examples of distortion...

(18) It should be noted that distortions may be caused by subsidies granted to undertakings both in the EU and in a foreign domestic market, since a position of power in the latter can also give the undertaking concerned more room to manoeuvre in the EU. Regardless of where the subsidy is granted, relevant distortions include the ability to enter the market with products at an earlier time than without the subsidy, better credit conditions by banks, and an increased need for Member States to subsidise in order to put domestic firms on par with the undertaking concerned (i.e. a subsidy race).

2. The application of the balancing test in accordance with Article 6 of the FSR

2.1. Relevant positive effects...

(19) The Commission could clarify how it assesses, on the one hand, ‘the positive effects on the development of the relevant subsidised economic activity’ and, on the other, the ‘other positive effects [...]’. Since the FSR’s balancing test is different from the EU interest test originally envisioned in the White Paper,¹⁹ the former should have the priority in the Commission’s assessment.

¹⁹ White Paper on Levelling the Playing Field as regards Foreign Subsidies, para. 4.1.4, 4.2.4; Hornkohl, L. (2023). The EU Foreign Subsidy Regulation: Why, What and How?. In: Hillebrand Pohl, J., Papadopoulos, T., Wiesenthal, J., Warchol, J. (eds) Weaponising Investments. Springer Studies in Law & Geoeconomics, vol 2. Springer, Cham, pp. 12-13. https://doi.org/10.1007/17280_2023_15.

(20) The current formulation of Article 6(1) is already quite broad and flexible, with the potential to address different positive effects – economic, environmental, and social. The Commission could clarify the role of policy objectives that are not ‘those of the Union’, for example if the foreign subsidy was granted by a third country to pursue a meritorious goal, domestic or international (e.g., to support the green transition). This relates to the criteria and indicators to be considered.

(21) The Commission should clarify whether the existence of a subsidy control system (e.g. such as the one established in the UK²⁰) in the country of the foreign subsidy giving entity, and the fact whether such a subsidy control procedure has been carried out in respect of the foreign subsidy assessed, can be considered as a positive effect in the balancing test or on the distortion level.

(22) The Commission should clarify if a distortion that negatively affects competition *in* the internal market can be outbalanced with positive effects outside of the internal market (out-of-internal market effects).²¹

(23) The balancing test requires a broad determination of positive effects. Under Article 6(1) FSR, this includes positive effects on the development of the relevant subsidised economic activity on the internal market and other positive effects, including effects relating to policy objectives, in particular those of the Union. Hence, it would be advisable for the Commission to clarify what Union objectives it may pursue and, where relevant, to distinguish:²²

- the effects on the subsidised activity as such: e.g., does the subsidy allow to start or expand a business activity that benefits consumers in the EU?; does the subsidy spur innovation, encourage entry and growth in the EU?;
- other positive effects on the internal market, e.g., if it is necessary to consider those effects to avoid discrimination (see Recital 21); (it may be that a holistic assessment of positive effects is needed beyond any positive effects on the subsidised activity as such, so as to avoid that the beneficiary undertaking under scrutiny is left worse off compared to if the balancing test had not been applied);
- a positive impact in relation to the relevant policy objectives of the Union. This includes the objectives pursued in recognised projects of common European

²⁰ UK Subsidy Control Act 2022.

²¹ For a similar discussion within the context of competition law, see Horizontal Cooperation Guidelines on sustainability effects outside of the EU.

²² Reinhold/Weck in: Bungenberg/Heinrich, European State Aid Law, Handbook, forthcoming, § 14 paras 57 ff.

interest,²³ but also other internal policy objectives recognised under the Treaties such as environmental protection, social standards, the promotion of research and development (Recital 21) or EU competitiveness and innovation²⁴ as well as all objectives of the EU's external action²⁵ and, thus, in particular the objectives of the Common Commercial Policy (CCP)²⁶;

- political objectives pursued in individual Member States, provided that this pursuit does not violate EU law. This is relevant for objectives recognised as legitimate in Articles 107(2), (3), 346 TFEU and other objectives remaining in the competence of Member States according to the principle of conferral;²⁷ and
- political objectives of third countries to the extent that they align with Union interests recognised in the Treaties.

(24) The relevant internal EU policy objectives may include both economic and non-economic objectives. Internal objectives may include a high level of environmental protection and social standards, as well as the promotion of research and development (Recital 21). The external action objectives may likewise include economic and non-economic objectives. Moreover, in accordance with the Common Commercial Policy (CCP) objectives, economic advantages arising outside the EU internal market may be relevant if the generation of these advantages is in the Union's interest. The Union's policy objectives could also include security and public order.²⁸

(25) In addition to a clarification on balancing in generally, it would be helpful if the guidelines clarified the interplay, if any, between the FSR and Foreign Direct Investment control that involves an assessment of security and public order effects.

(26) It should also be clarified how the Commission is intending to consider objectives that Member States may pursue legitimately under the principle of conferral. If Member States engage in competition-distorting activities to pursue their own industrial policy interests, they should not be incompatible with EU law.

²³ Communication – Criteria for the assessment of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2021 C 528/10.

²⁴ 'The future of European competitiveness' (September 2024) Report by Mario Draghi; Ursula von der Leyen, Mission Letter to Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just and Competitive Transition (17 September 2024).

²⁵ Article 21 TEU, Article 205 ff. TFEU.

²⁶ Article 206 TFEU.

²⁷ Article 5 TEU.

²⁸ Article 1 (1) of the Screening Regulation (EU) 2019/452.

(27) The Commission should clarify if the balancing test is performed with a sole methodology across the three FSR procedures or if the specialised procedures follow a different approach. For instance, it could be useful to clarify to what extent the Commission may or should consider that the positive effects flowing from the subsidy cannot be achieved via other less restrictive means (e.g. by “alternative sources of supply” that are not subsidised as suggested under question 2.2 of the FSR consultation’s questionnaire) under all procedures.

2.2. Alternative sources in public procurement...

(28) According to Recital 21, the Commission may consider the availability of alternative sources of supply for the goods and services concerned in public-procurement procedures. This makes sense as the positive effects may be achievable even without accepting the negative effects of the subsidy. However, in relevant cases, it will be necessary to balance the potentially higher cost of avoiding an award to a subsidised and distortive bid to the benefit of keeping the market open to alternative suppliers in the event of an award to another bidder.

2.3. How to assess positive vs negative effects...

(29) The balancing test under Article 6(1) requires the Commission to consider:

- on the one hand, the distortive economic effects on the internal market identified under Articles 4 and 5, as they are potentially mitigated by countervailing aspects under Article 4(2)–(4) and countervailing evidence under Article 5(2); and
- on the other hand, the positive economic and non-economic effects of the subsidy.

(30) In view of the internal market-related objective of the FSR (Article 1(1)) and the requirement of balancing within the framework of Article 6(1) the negative and positive effects must be related to each other.²⁹ That is to say, the positive effects must help – in a very wide sense – to outweigh the negative effects.

(31) However, this relatedness can also exist if foreign subsidies enable EU undertakings to develop environmentally friendly technologies, regardless of where these technologies are used eventually.

(32) A foreign subsidy may strengthen the internal market in the long term, e.g., by facilitating the use and development of environmentally friendly technologies by

²⁹ Reinhold/Weck in: Bungenberg/Heinrich, European State Aid Law, Handbook, forthcoming, § 14 para. 64.

undertakings active in the EU, or by boosting their competitiveness. These positive effects may balance the negative ones.

(33) It is unclear to what extent the Commission has discretion as to whether or not (“if”) it carries out a balancing exercise in accordance with Article 6(1), as the Commission’s assessment may lead to limitations of the right of the undertaking concerned to be active in the internal market.³⁰ In any case, this discretion is limited by the explicit requirement in Article 6(2) to engage in a balancing exercise when deciding to impose redressive measures or accept commitments. Discretion may be narrowed additionally by the guidelines the Commission adopts. Moreover, while the FSR explicitly grants the Commission procedural discretion on whether or not it will open an ex officio investigation, the rules on the substantive assessment require the Commission to generally block foreign subsidies distorting the internal market.³¹ Hence, the Commission could usefully clarify the conditions under which its discretion is limited and the factors influencing its discretion to engage in a balancing exercise.

(34) However, the Commission certainly has discretion as to “how” it carries the balancing “test” and which objectives it takes into account. This follows from the wording of Article 6(1) (“may”) and the fact that the balancing requires a weighing of policy objectives before determining whether the beneficial effects of the subsidy in view of those policy objectives indeed outweigh the distortive effects of the subsidy and the associated harm to competition. Article 6(1) allows the Commission to take into account a wide range of positive effects (see Recital 21).³²

(35) The discretion is additionally guided by Article 5(1) and Recital 21 regarding the categories of cases mentioned there (“should”). A foreign subsidy, hence, appears problematic the more it benefits the undertaking concerned and solidifies its position to the exclusion of alternative suppliers and general public interests. Consequently, it may be justified to prioritise the characteristics of the undertaking concerned (financial structure, business plan, sector, etc.) before examining the market where the undertaking operates and any wider economic and non-economic aspects.

(36) Based on the letter of Article 6(1) (*‘The Commission may [...] balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5’*), it may be easier to balance the negative effects of the ‘general’

³⁰ Reinhold/Weck in: Bungenberg/Heinrich, European State Aid Law, Handbook, forthcoming, § 14 para. 67.

³¹ See Article 11(2), Article 25(3) (1)(c) and Article 31(2) FSR.

³² See also the White Paper on Levelling the Playing Field as regards Foreign Subsidies COM (2020) 253 final.

distortive subsidies, as indicated by Article 4(1), with their positive effects, in comparison to the negative effects produced by the most likely distortive subsidies defined by Article 5(1). In addition, it may be easier to find that the positive effects outweigh the negative effects of ‘general’ rather than the most likely distortive subsidies.

(37) The Commission’s discretion on how to balance the positive and negative effects of the subsidy is also in line with the European Court of Justice’s case law on Article 107(3) TFEU.³³

(38) The Commission’s application of State aid law may, insofar as relevant, provide guidance to the application of Article 6(1) FSR. When balancing positive and negative effects of a foreign subsidy, regard may be had to whether similar measures would be approved under State aid law, to the extent relevant. In that context, account could be taken of the current state-of-affairs in State aid law, including the (partial) continued application of TCTF and the Commission’s measures to facilitate the green transition during its mandate 2025-2029.

2.4. Relevant evidence and analysis...

(39) Article 6(1) FSR provides that the balancing test takes place “on the basis of the information received”. In that context, it should be noted that the “Member States as well as any natural or legal persons” are authorised to submit information on the positive effects of a foreign subsidy (Recital 21). It should be considered that the foreign countries granting the subsidy are likely entitled to request judicial review as individually and directly affected legal entities.³⁴ Consequently, information received by those foreign countries should be given high priority in the assessment in addition to the information received from the undertakings concerned. Further, it should also be possible for the Commission to consider information received from third parties such as complainants, competitors, EU Member States, and other foreign countries not granting the subsidy. Their procedural rights and potentially any obligations of the Commission vis-a-vis such third parties and Member States could also be usefully clarified in the Guidelines.

³³ Case C-88/03, Portugal v Commission, Judgment of 6 September 2006, ECLI: EU:C:2006:511, para. 99; Case 142/87, Belgium v Commission, Judgment of 21 March 1990, ECLI:EU:C:1990:125, para. 56.

³⁴ Case C-872/19 P, Venezuela v Council, Judgment of 22 June 2021, ECLI:EU:C:2021:507 paras 41 ff.

3. The application of the Commission’s power to request the prior notification of any concentration according to Article 21(5) of the FSR or foreign financial contributions received by an economic operator in a public procurement procedure according to Article 29(8) of the FSR

3.1. Factors relevant to request prior notification of concentrations...

(40) The turnover and financial contribution thresholds of the FSR generally provide good indicators of when a foreign subsidy is likely to have an impact justifying review under the FSR. That said, it is possible that foreign subsidy grants below the thresholds are used to bring or keep individual markets or entire economic sectors under foreign state control. In that regard, it may be relevant if:

- foreign subsidies have previously been used to influence the market conduct of the acquiring undertaking in a way evidencing a non-market based political strategy;³⁵ or
- the subsidised acquirer operates in a market that is shielded from competitive pressures by subsidies.³⁶

(41) Concentrations involving relatively small companies, especially startups where the parties’ combined EU turnover may not exceed the ex-ante notification thresholds because e.g. the subsidised acquirer has limited commercial activity in the EU and the target is an innovative startup company with no or limited turnover, may be cases that could be captured by the Commission powers under this provision. In certain strategically important sectors such as dynamic and innovation industries (e.g., digital, artificial intelligence, biotechnology, pharmaceuticals, etc.) for the EU’s leadership and competitiveness, the Commission may have an interest to proactively use its powers to “call-in” any problematic below-threshold transactions, request notification, and subject them to FSR review before the closing of the transaction where any ex post remedies may come either too late or be ineffective (e.g. given intervening market

³⁵ Cf. Commission Decision, 05.05.2008, M.4956 - STX/Aker Yards, paras. 121-122 (concluding that the allegation of a plan to subsidise the acquirer systematically was not corroborated).

³⁶ See Commission Decision, 17.12.2001, M. 10387 — Meridiam/Allianz/Neuconnect, para. 30; Commission Decision, 26.02.2019, M.8871 – RWE/E.ON Transfer Assets, para. 14.

developments or integration and exchange of competitive information between the merging parties whose effects are difficult to reverse).

(42) Indeed, “killer acquisitions” of EU innovative startups by foreign companies is a priority of the new Commission under President von Leyen.³⁷ By analogy to EU merger control, this could be a relevant scenario where sub-threshold enforcement and use of the Commission’s unconditional “call-in” power under the FSR may be justified in clearly delimited circumstances. In contrast to EU merger control, where the EU’s “call-in” powers under Article 22 EUMR depend on Member State action (upward referral of sub-threshold cases within their national competence),³⁸ this could be a more efficient and cost-effective solution when the Commission’s powers are framed by clear guidance.³⁹ In this regard, it is important for the Commission to clarify in Guidelines the circumstances which may trigger the Commission’s “call-in” powers (e.g. nature and characteristics of markets and undertakings involved) with a view to balancing the effectiveness of enforcement against the need for legal certainty, and the pursuit of optimal deterrence and internalisation of externalities.⁴⁰

3.2. Factors foreign financial contributions in public procurement...

No responses

3.3. “Suspicion” of foreign subsidies...

(43) Art. 21(5) requires a suspicion that the undertaking concerned received a subsidy, i.e. that it is benefiting from an economic advantage going beyond a financial contribution. This can be evidenced, e.g., by heavily undercutting the pricing of EU-based competitors in ways that are not otherwise explainable other than by subsidies financing the conduct of the undertaking concerned. However, no evidence is necessary that the suspected subsidy is having an impact beyond the undertaking concerned, notably that it is producing distortive effects.

3.4. Impact on the union and ex-ante review...

(44) To assess whether a concentration or tender has an ‘impact on the Union’ that requires ex-ante review, the threat of irreparable damage to the competitive conditions

³⁷ Ursula von der Leyen, Political Guidelines for the Next European Commission 2024-2029 (18 July 2024).

³⁸ Joined Cases C-611/22 P and C-625/22 P *Illumina v Commission and Grail v Commission*, Judgment of 3 September 2024, ECLI:EU:C:2024:677.

³⁹ Anna Tzanaki, 'Dynamism and Politics in EU Merger Control: The Perils and Promise of a Killer Acquisitions Solution Through a Law & Economics Lens' (2025) *Antitrust Law Journal*, forthcoming.

⁴⁰ *Ibid.*

in the internal market should be considered. As the impact of a suspected subsidised concentration is forward-looking and in case of transactions in dynamic industries inherently uncertain, the Commission may consider the magnitude of the harm in conjunction with its likelihood. In this regard, if the subsidy in question is more likely harmful in terms of distortive effects (size of effects), this consideration may counterbalance the uncertainty (lower probability) of such effects materialising.

(45) To identify the geographic scope of effects, the existence and size of externalities may be considered for the Commission to legitimately “call-in” cases with EU impact or significance rather than transactions with predominantly local (within Member States) or extraterritorial (outside the EU) effects.⁴¹

(46) Acquisitions of small or nascent innovative firms may be of particular interest (see Recital 2 of the Regulation, mentioning ‘the acquisition of undertakings, including those with strategic assets such as critical infrastructure and innovative technologies.’ In addition, ‘to address the risks of killer acquisitions by foreign companies’ figures among the Commissioner’s missions – see Mission Letter dated 17 September 2024, from President of the European Commission Ursula von der Leyen to the executive Vice-President for a Clear, Just and Competitive Transition Teresa Ribera Rodríguez). A *prima facie* analysis including the magnitude of the distortion could be particularly relevant. Different factors such as the value of the transaction, the position of the merging undertakings, and the industries in which the parties are active, may be relevant to take into account.

3.5. Specific sectors prone to distortive foreign subsidies...

(47) It is true that some sectors are more likely to benefit from subsidies than others. According to the OECD, these sectors include heavy industries (e.g., steel, aluminium), critical raw materials, infrastructure, transport and energy.⁴² The same may be true for defense because this sector is of high importance to national security.

(48) In the case of concentrations, alongside the industrial sector, the Commission could consider the characteristics of the acquired undertaking, e.g., a startup active in an innovative or strategic sector (such as semi-conductors, quantum computing, artificial intelligence, and sectors relevant to the EU’s Clean Industrial Deal). The operation may be below the applicable thresholds and affect negatively the internal

⁴¹ Ibid.

⁴² OECD ‘Government support in industrial sectors: A synthesis report’ TAD/TC(2022)8/FINAL, 18.

market in the long term (if it is a ‘killer acquisition’, for example). The Commission could use the *ex officio* tool to address this risk. Sectors prone to “killer acquisitions” of innovative startups, in particular EU startups, such as pharmaceuticals, biotechnology, and other high-tech or digital industries may be of particular concern in this context and a potential target of the Commission’s “call-in” powers.

4. The assessment of a distortion in a public procurement procedure according to Article 27 of the FSR

No responses

5. General remarks on the FSR guidelines and the overall FSR implementation

(49) Clear guidelines, transparent and participative procedures, procedural fairness, and effective protection of interested and third parties may guarantee the predictability and transparency of FSR enforcement and the accountability of the Commission’s actions and delimitation of its powers in the exercise of its discretion. This may also limit the potential for capture by special national or industrial interests.

* * *