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|  | EUROPEAN COMMISSIONDG COMPETITIONDG INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP AND SMEsCOMP K – Foreign Subsidies GROW C2 – Public procurement |

Brussels, 5 March 2025

COMP/PIF/VA/DMR/ GROW/EZ/BH

**Questionnaire: Targeted consultation on the FSR guidelines**

The [Foreign Subsidies Regulation](https://eur-lex.europa.eu/eli/reg/2022/2560/oj) (1) (‘FSR’) came into force on 13 July 2023. This regulation enables the Commission to address distortions in the internal market caused by foreign subsidies. It allows the EU to ensure a level playing field for all companies, while remaining open to trade and investment. Foreign subsidies can reach the internal market through participation of their beneficiaries in any economic activities and in any sector, such as: acquisitions of control over other undertakings (concentrations), participation in public procurements and other forms of direct investments.

Article 46 of the FSR mandates the Commission to develop by 13 January 2026 guidelines (the ‘FSR guidelines’) that should clarify the following concepts:

1. the application of the criteria for determining the existence of a distortion according to Article 4(1) of the FSR;
2. the application of the balancing test in accordance with Article 6 of the FSR;
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; and
4. the assessment of a distortion in a public procurement procedure according to Article 27 of the FSR.

With the aim of presenting the initiative to the general public and gathering useful information from stakeholders, on 5 March 2025 the Commission published a ‘Call for evidence’ on the [Have your say site.](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14516-Foreign-Subsidies-Guidelines_en) As described in the Call for evidence, the work leading to the adoption of the FSR guidelines will benefit from the feedback gathered in targeted consultations with Member States and selected stakeholders.

In the context of the targeted consultations, you are invited to reply to the following questions, providing examples and additional supporting documents as you deem necessary. Please provide the responses in a sequentially numbered stand-alone document (Q&A format responding separately to each question).

(1) Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

You have the possibility to provide the responses to this questionnaire on a confidential basis. Furthermore, if you consider that part of the information provided, including documents or parts of documents, contain business secrets or other confidential information, you are invited to identify such confidential information as well as the persons in relation to which that information is considered confidential, and substantiate your claim. In the absence of such indication, the information and documents will be considered as not containing business secrets or other confidential information.

Any personal data submitted in reply to this questionnaire will be processed in compliance with Regulation (EU) 2018/1725 (2).

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

Article 4(1) of the FSR defines the notion of distortion as follows: “*A distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market*”*.*

* 1. Are there any criteria and indicators that you see as decisive for determining whether “*a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market”* and whether *“that foreign subsidy actually or potentially negatively affects competition in the internal market”* in addition to the indicators already listed in Article 4(1) of the FSR? (3) If yes, please explain what those indicators are and why you deem them to be important. Should each of the indicators, listed in Article 4(1) of the FSR or additional ones, for assessing a distortion be assessed separately, without accounting for other relevant indicators, or collectively? Under which circumstances?

Since the wording in article 4 (1) is that “*a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market” and where “that foreign subsidy actually or potentially negatively affects competition in the internal market”, it is clear that the mere risk of competition being negatively affected is sufficient for the criterion to be met. Therefore,* the indicators provided in Article 4(1) are largely adequate for the purposes of determining the existence of a distortion of competition the internal market – as occurs *mutatis mutandis* in the State aid setting under Article 107(1) TFEU and respective legal criteria.

The difference compared to state aid rules is that these apply to EU Member States, and such aid is typically always given to companies that primarily or partially operate in the internal market. When it comes to foreign subsidies, these are sometimes given by third countries to companies that primarily or partially operate in those countries, but also on the internal market. This may therefore require additional attention regarding the economic cohesion between an operation in a third country receiving aid and another operation in the internal market that belongs to the same company or group. It may be necessary to clarify to what extent a company can ensure, within the framework of a group, to establish such accounting records so that the operations are separated and a subsidy in a third country cannot be considered to spill over to an operation in the internal market.

In addition, the temporal difference between when the foreign subsidy has been received by the company and the time when the company has entered or acted on the internal market could be considered for inclusion. A longer time span between the subsidy and the action on the internal market could reduce the risk of distortion in the internal market. A subsidy that directly precedes a transaction on the internal market has a greater risk of distorting competition than one that benefits the company several years earlier.

Ultimately, the densification of said indicators is dependent on the existence of public decisional practice by the Commission (publicly unavailable at this stage) subject, as applicable, to the EU’s General Court and Court of Justice subsequent judicial review and guidance on the material definition of said concepts.

1. Regulation (EU) 2018/1725 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39). If you consider that some documents included in your reply (or parts of some documents) contain "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership" or "genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation" ("special categories of personal data") (see Article 10(1) of Regulation (EU) 2018/1725, which is identical to Article 9(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR) (OJ L119, 4.5.2016, p.1)), please provide these documents in a separate submission identified as "SPECIAL CATEGORIES OF PERSONAL DATA" linking each document to the question number to which the document constitutes a reply. Please highlight the special categories of personal data in the document, and provide a motivation/indication as to the specific category, in case this is not immediately obvious from the highlight.
2. Article 4 of the FSR provides a non-exhaustive list of indicators. *“A distortion in the internal market shall be determined on the basis of indicators, which can include, in particular, the following: (a) the amount of the foreign subsidy; (b) the nature of the foreign subsidy; (c) the situation of the undertaking, including its size and the markets or sectors concerned; (d) the level and evolution of economic activity of the undertaking on the internal market; (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.”*

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* 1. In the assessment of whether *“a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market”*, what is your view on how to assess the possibility that the foreign subsidy could potentially be used in the internal market or could potentially improve the undertaking’s activity in the internal market? In your opinion, which elements are relevant for this assessment?

All foreign subsidies are in principle improving the competitive position of the undertaking receiving the subsidy, as it per definition grants a selective benefit to that undertaking. That typically also leads to an improved competitive position *in the internal market*, as the company can establish and act on the internal market from a position of increased financial strength. That does not mean that the subsidy “could potentially be used” in the internal market, as subsidies are often tied to specific investments or activities, perhaps in third countries. However, as it is sufficient that the competitive position is improved, this is not relevant. This presumption of the competitive position being improved could be rebutted if the undertaking can show that the economic activity on the internal market is separated from those activities that have received the subsidy.

The improvement of the competitive position can be more or less significant. A small subsidy, that is just above the *de minimis* threshold of 4 million Euro, can be a significant subsidy on a market where mainly small actors are present. The same subsidy could be less significant where only large, global actors are present with several billion in yearly turnover. Certain types of subsidies are also affecting the competitive position more than others. In addition to those listed in Article 5, subsidies in the form of grants or economic transactions below market value are generally improving the economic strength more than repayable forms such as loans or guarantees.

* 1. In the assessment of whether “*the foreign subsidy actually or potentially negatively affects competition in the internal market”*, what is your view on whether and how to consider the following elements: level playing field, consumer welfare, the competitive position of competitors, the competitive process and what level of importance to attribute to each of them? Should other elements be considered?

Striving for a more general playing field is one of the core objects of the regulation, in the sense that it should create more equal treatment when it comes to subsidies to companies regardless of their origin. The term should not be used in the literal sense that all players should be given equal conditions, as business conditions vary.

Using consumer welfare is sensible if the notion is used in the long term. In the near term, consumers will generally be better off with a low price, the one that a subsidized company is more able to provide. The long-term effect of the action of a subsidized company should be analyzed by taken inspiration from the predation theory: the criterion is whether the subsidized company will be able to kill competition and later, not recoup its losses like a predatory player since, thanks to the subsidies, there were no losses, but to increase its prices. However, since things are rarely black or white, the most relevant element to consider is the competitive process: whether the competitive position of the subsidized company is replicable, without subsidies (or easily available ones); if not, the competitive positions of the other market player will erode, which will impact the market in the near term, and the consumer welfare in the longer term.

All the elements mentioned are to some extent important purposes to uphold in order to create well-functioning markets, where companies can compete on their merits and create consumer benefits, drive innovation, and efficiency. However, whether they are useful in the more concrete assessment of a specific case is another story. There must be quite a low threshold for a foreign subsidy to *potentially* affect competition in a negative way, as competition typically and in the long run are best fostered when companies compete on the merits without interference from subsidies. That does not mean however that all subsidies that affect competition, potentially or actually, are problematic. In the subsequent balancing test, the Commission can take into account the extent which competition is impacted, or how high the risk is for an impact, and also weigh that against potential positive effects.

* 1. Based on your own experience, please provide examples of distortions that may occur in the internal market because of foreign subsidies.

ICC is not in a position to provide examples

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

Article 6(1) of the FSR describes the application of the balancing test as follows: “*The Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5 against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union*”*.*

2.1. What positive effects do you deem to be relevant for the assessment and how such effects should be measured? What other effects beyond “*the broader positive effects in relation to the relevant policy objectives, in particular those of the Union*” should be considered in this balancing exercise? Please explain why for each effect identified.

Companies receiving foreign subsidies should be able to do so in a similar fashion as companies are being able to receive state aid within the remit of the EU state aid rules, without being limited in their access to the internal market. Therefore, there should be an approximate similarity between these rules to a large extent. That means that companies should be able to receive state aid for investments in, for instance, decarbonization of production, research and development, risk capital, regional development and training and education of workers. That is regardless of whether the activities are being conducted in the EU or in third countries.

In addition, the Commission can consider additional beneficial effects in their assessment. Increasing trade flows and economic interaction with third countries is one such positive effect. For companies that are based in the EU or with a strong EU footprint, foreign subsidies helping them to invest and to develop in foreign markets should be seen as having a positive effect. Companies that invest in the EU, and might have received subsidies can also improve the competitive situation in a market. Where a market is oligopolistic with high barriers to entry, a company receiving foreign subsidies would become a useful new entrant, provided that the subsidies help it to enter the EU market but are not excessive as to allow it to distort competition manifestly and in the long term. Foreign subsidies leading to innovations that no other participant in the EU market is likely to achieve could also have a positive impact, provided that the lack of competitive innovators is independent of the existence of such subsidies. New entrants can furthermore improve the access to critical or strategical products or raw materials, where the EU is dependent on a single third country.

For companies, it would be beneficial to get more legal clarity in this aspect. In the field of state aid, there are numerous guidelines to inform stakeholders on how the Commission will assess aid with different objectives. Similar guidance in some form will be necessary for companies to understand the view of the Commission in these aspects.

2.2. The assessment of whether foreign subsidies enable an economic operator to submit an unduly advantageous tender shall be limited to the public procurement in question (Article 27 FSR). According to the FSR, the Commission should take into account the availability of alternative sources of supply. Based on your experience, how should the availability of alternative sources of supply be assessed in public procurement procedures? In particular, what is the link between the positive effects of a subsidy and the availability of alternative sources of supply?

 The existence of alternative sources of supply in public procurement procedures, not benefiting from a foreign subsidy, should be pondered as *indicia* that the positive effects of the foreign subsidy are irrelevant, as competing economic agents are available to provide the goods, render the services or works without benefiting from a foreign subsidy.

2.3. How should the positive effects of foreign subsidies be assessed in comparison to their negative effects? Could you give examples of positive effects that can, in your view, outweigh the negative effect of foreign subsidies? In its assessment of the balancing test, how should the Commission prioritise the information and characteristics of the undertaking(s) (e.g. financial structure, business plan, sector, etc.) and of the market where the undertaking operates?

The market, rather than the individual firm, should be the main field to investigate. Positive and negative effects cannot be compared by using simple figures, since there are dynamic effects (e.g., long term harm on competition) and non-quantifiable effects e.g., (innovation). Positive effects should not overcome durable negative effects leading to the disappearance or the irrelevance of existing non-subsidized competitors. In addition, the Commission can rely on the principles of state aid, i.e. whether the subsidy that the company received was necessary, appropriate and proportionate. Finally, the subsidies that are mentioned in Article 5 will be particularly difficult to accept, even though there would be substantial positive effects as well. Specific examples will be difficult to construct, since the balancing will depend on both the magnitude and character of the positive and negative effects.

2.4. Any interested party, including other parties beyond the undertaking(s) under investigation can provide evidence of the existence of positive and negative effects of a foreign subsidy. In your experience, what type of evidence and analysis could best serve this purpose?

Customers, NGOs and governments are best placed to provide input on the positive effects. Competitors are best placed to provide input on short term negative effects. Suppliers and customers are best placed to assess the long term negative effects.

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**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**

Article 21(5) of the FSR describes how the Commission can apply its power regarding concentrations as follows: “*The Commission may request the prior notification of any concentration which is not a notifiable concentration within the meaning of Article 20 at any time prior to its implementation where the Commission suspects that foreign subsidies may have been granted to the undertakings concerned in the three years prior to the concentration*”*.*

Similarly, Article 29(8) of the FSR describes how the Commission can apply its power in a public procurement procedure as follows: “*Without prejudice of the possibility for the Commission to start an ex officio procedure, where the Commission suspects that an economic operator may have benefitted from foreign subsidies in the three years prior to the submission of the tender or request to participate in the public procurement procedure, it may before the award of the contract request the notification of the foreign financial contributions provided by third countries to that economic operator in any public procurement procedure which are not notifiable under Article 28(1) or fall within the scope of Article 30(4)*”*.*

3.1. Which factors do you consider relevant for the application of the power to request the prior notification of concentrations below the notification thresholds under the FSR? Can you give any examples of concentrations where it would be or would have been appropriate – in your view – to assess the potential distortive effect in the internal market of foreign subsidies in the concentration? If yes, please explain in more detail.

First of all, requests based on articles 21(5) and article 29(8) should be absolutely exceptional, given their likely impact on the timing of the bidding process. The Commission should rely on clues that an unacceptable situation is arising, like an abnormal low number of bidders or a truly exceptional price difference between the subsidized and the non-subsidized bidder.

Regarding article 21(5), it could help to assess situations where the subsidized company has recently bought one of its rare competitors, leading to an abnormally low number of bidders, or one supplier that, as a consequence, has stopped to supply the other bidders, leading them to offer a costly or less attractive bid.

In general, the more information and views from competitors and business organizations that the Commission receives, the more inclined it should be to rapidly assess the situation and consider using the power to request a notification. If there is a history where the same company have been conducting similar transactions, and where competitors have complained, that could also be taken into account.

3.2. Which factors do you consider relevant for the application of the power to request the notification of foreign financial contributions in a public procurement procedure below the notification thresholds under the FSR? Can you give any example of public procurement procedures where it would be or would have been appropriate – in your view – to assess the potential distortive effect of foreign subsidies distorting the internal market in the context of public procurement procedures? If yes, please explain in more detail.

An exceptionally low price offered by the subsidized company, or suspicion that the bidder has received a high number of below-the-threshold subsidies. In addition, the same general comment as in response 3.1 is also valid here.

3.3. How would you assess whether a ‘suspicion’ of foreign subsidies exists? In your experience, what type of evidence should be found in order to meet this legal condition?

Denunciation by third parties is probably the best tool, provided the third parties provide circumstantial evidence, not just empty accusations. The best information is of course from public sources or perhaps insider information. In addition, industry knowledge on different business cases and costs related to specific projects can be valuable when assessing whether a bid or transaction is performed at market value, which in turn can be an indication on whether a foreign subsidy could be present.

3.4. How would you assess whether a concentration or a tender in a public procurement procedure has an ‘impact in the Union’ which merits an *ex-ante* review (recital 36 of the FSR)? What factors would you take into account?

 We interpret this mainly as an economic threshold, meaning that the transaction or investment that is affected by subsidy should be of a certain magnitude. This gives the Commission the privilege to prioritize the situations where the economic impact in the Union is more manifest.

3.5. In your view, are there specific sectors (both for concentrations and public procurement procedures) or specific types of public procurement procedures, which are more prone to distortive foreign subsidies and for which the power to request prior notifications below thresholds deserves to be applied more than in other sectors or types of public procurement procedures? If yes, please provide examples.

We have no specific view or information on this.

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

Article 27 of the FSR defines the notion of distortion of foreign subsidies in the context of public procurement procedures as follows: “*Foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. The assessment pursuant to Article 4 of whether there is a distortion in the internal market and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure in question*”*.*

4.1. How would you establish the link between the foreign subsidy and the capability of that foreign subsidy to allow an economic operator to submit an unduly advantageous tender? Please explain in more detail how this link can be established in your view and illustrate this with specific examples if possible.

First, the foreign subsidy must not had been spent on a identifiable project lacking any spillover effect that could have left available cash. Second, if the first condition is met, an offer below the average variable cost should be deemed unduly low, provided the subsidy is sufficient to plug the gap between the price and the said cost, with the company being able to rebut the presumption. Third, if no other competitor is able to replicate such offer without losses, and provided the subsidy is sufficient to plug the gap, another rebuttable presumption could appear.

**General remarks on the FSR guidelines and the overall FSR implementation**

5.1. Within the scope of Article 46 of the FSR, which elements, regarding the guiding principles, procedures and structure, should the FSR guidelines include in order to contribute to predictability of the FSR and to transparency as well as good administrative practice?

For each of the notions covered by article 46, the guidelines should provide explicit definitions, provide examples, explain what the Commission expects to find in the filings forms and provide examples on how to circumvent the difficulty to find evidence or data. Since a number of problems can only be solved by studying the market, not just the notifying company, the guidelines should explain what is expected from the notifying company, what the Commission is supposed to do to plug the information gap and how that could be done in the constrained time frame, especially for public procurement procedures.

5.2. When implementing these concepts, how can the Commission minimise administrative burden for companies?

It is important that alleviating the burden on the notifying companies does not translate into unduly increasing the burden on third parties through heavy RFIs. The Commission could rely on existing or on-purpose statistics for the markets that will be frequently assessed (especially for public procurement notifications). The Commission should use information gathered on the markets in merger control or other FSR procedures, requesting waivers when appropriate and using non-confidential information it has gathered in the past.

5.3. Please provide any other remarks on the FSR guidelines and the Commission’s implementation of the FSR, that you may have.

Even if article 46 invites the Commission to publish guidelines on the topics this article mentions (which ICC understands as binding on the Commission) nothing under EU law prevents the Commission from publishing guidelines on other aspects of the FSR. Indeed, many of the Commission’s guidelines are not based on explicit regulatory provisions but have been published ex-officio. Other aspects of the FSR could be clarified by the future guidelines, especially procedural aspects and notions such as “*financial contributions*” (especially as long as taxes are concerned) and the notion of financial contribution “*providing a benefit on an undertaking engaging in an economic activity in the internal market and with is limited, in law or in fact, to one or more undertakings or industries*”.

We would be grateful if you could provide your replies and any supporting document to the functional email address EC-FSR-Guidelines@ec.europa.eu by **2 April 2025**.

Based on your submission, the Commission services may decide to propose an in-person or online meeting to discuss your replies.

Contact: EC-FSR-Guidelines@ec.europa.eu

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