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Delegations will find in annex the Commission Staff Working Document SWD(2024)201 on *Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market*



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COMMISSION STAFF WORKING DOCUMENT

**Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of
Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market**

COMMISSION STAFF WORKING DOCUMENT

Initial clarifications on the application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market

This Staff Working Document consists of questions and answers providing initial clarifications on the application of Article 4(1) of Regulation (EU) 2022/2560¹ concerning the existence of a distortion in the internal market caused by a foreign subsidy, the application of the balancing test set out in Article 6 of Regulation (EU) 2022/2560, and the assessment of a distortion in a public procurement procedure set out in Article 27(1) of Regulation (EU) 2022/2560.

This document has been prepared by the Commission services and is not binding on the European Commission as an institution. The views set out below are without prejudice to the interpretation of Regulation (EU) 2022/2560 by the Union Courts. The clarifications included in this Commission Staff Working Document are of a preliminary nature. They will be further developed through case practice and the Union Courts' case law and complemented with guidelines that, pursuant to Article 46 of Regulation (EU) 2022/2560, the Commission shall publish, at the latest, on 12 January 2026.

Questions on distortion

1. How should the concept of distortion under Article 4(1) of Regulation (EU) 2022/2560 be interpreted?

Article 4(1) of Regulation (EU) 2022/2560 sets out two conditions to determine when a foreign subsidy distorts the internal market.

The **first condition** is that the foreign subsidy is liable to improve the competitive position of an undertaking in the internal market. This condition embodies the need to establish a relationship between the foreign subsidy and the activities of the undertaking in the internal market. It is necessary not only that the undertaking benefitting from the foreign subsidy engages in an economic activity in the internal market but also that there is a relationship between the foreign subsidy and that activity. For instance, in the case of an interest-free loan provided by a third country directly to an EU entity active in the internal market, there is, *prima facie*, an apparent connection between the alleged subsidy and the activity in the internal market. In contrast, in the case of a foreign subsidy that has been granted to a subsidiary not active in the Union, where that subsidy has been granted and effectively used in order to develop the local activity of the subsidiary in a third country, the relationship with the internal market is not apparent. That being said, the Commission could examine, for instance, whether a certain subsidy with no apparent relationships with an activity in the internal market is used by the group to cross-subsidise activities in the internal market, such as an acquisition or the submission of a tender in public procurement procedures by a company belonging to the group.

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. 1-45 ('Regulation (EU) 2022/2560').

The **second condition** is that, by improving the competitive position of an undertaking in the internal market, the foreign subsidy actually or potentially negatively affects competition in the internal market. In that respect, Regulation (EU) 2022/2560 not only addresses distortions that are established with certainty, but also potential distortions that are liable to occur as a result of the foreign subsidies. The effects on competition could be assessed in relation to any of the activities in which the beneficiary is, or will likely be, active in the internal market, be it investments (e.g. acquisition of other undertakings or assets, or establishment of a production facility), or the provision or purchase of any goods or services, as long as competition in respect of that activity in the internal market is, or may be, negatively affected by the foreign subsidy.

The notion of “distortion of the internal market” and more precisely of negative effects on competition in the internal market will be developed through the Commission’s case practice. In this exercise, the Commission will take into account the aim of Regulation (EU) 2022/2560, which is “*to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field*”.² The notion of level playing field refers to the conditions in which undertakings compete with each other in the internal market based on merit. The level-playing field is not respected when the chances of succeeding in the market are unduly altered, for instance, by support from a third country in favour of one or more market players.

2. What is the role of the indicators mentioned in Article 4(1) of Regulation (EU) 2022/2560 in the assessment of distortion?

Article 4(1) of Regulation (EU) 2022/2560 specifies that a distortion in the internal market shall be determined on the basis of indicators. Regulation (EU) 2022/2560 (recital 18) clarifies that these indicators appear necessary since the lack of transparency of many subsidies and the complexity of commercial reality make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy. Importantly, the indicators listed in Article 4(1) of Regulation (EU) 2022/2560 are neither exhaustive nor mandatory for every case. The Commission will assess each case on its merits and will use the relevant indicators as appropriate to assess the distortive effect of the subsidy. However, a detailed assessment based on indicators is not required in the case of subsidies falling under Article 5 of Regulation (EU) 2022/2560 (see question 5 below).

3. What is the difference between the notion of “distortion in the internal market” under Article 4 of Regulation (EU) 2022/2560 and the notion of “distortion of competition” under Article 107(1) TFEU?

Under State aid rules, a distortion of competition within the meaning of Article 107(1) TFEU is found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. In this context, for aid to be considered as distorting competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.

By contrast, under Article 4 of Regulation (EU) 2022/2560, the Commission cannot presume that the foreign subsidy distorts the internal market just because its beneficiary is engaged in

² Regulation (EU) 2022/2560, recital 6.

an economic activity in a liberalised sector in the internal market. Rather, it will need to determine whether a distortion can be deemed to exist on the basis of indicators such as those listed in Article 4(1) of Regulation (EU) 2022/2560.

- 4. When assessing a concentration, what is the difference between the notion of “distortion in the internal market” under Article 4 of Regulation (EU) 2022/2560 and the notion of “significant impediment to effective competition” applied in the assessment of concentrations under the EU Merger Regulation?**

The scope of investigations under the EU Merger Regulation³ and under Regulation (EU) 2022/2560 are different. While under the EU Merger Regulation the Commission assesses the impact **brought about by the concentration** on competition in the relevant markets, under Regulation (EU) 2022/2560 the Commission analyses distortions in the internal market **caused by the foreign subsidy**.

Consequently, although the same concentration may be analysed under Regulation (EU) 2022/2560 and the EU Merger Regulation, the two Regulations pursue different objectives, so that a merger may be problematic under Regulation (EU) 2022/2560 but not under the EU Merger Regulation (and vice versa).

- 5. What is the Commission’s approach to subsidies falling under Article 5 of Regulation (EU) 2022/2560?**

For foreign subsidies falling within the categories of those most likely to distort the internal market, listed in Article 5 of Regulation (EU) 2022/2560, the Commission does not need to perform a detailed assessment based on indicators as set out in Article 4 of Regulation (EU) 2022/2560 on whether the foreign subsidy is liable to improve the competitive position of the beneficiary in the internal market and whether in doing so the foreign subsidy actually or potentially negatively affects competition in the internal market. In any event, the undertaking will always have the opportunity to show that the foreign subsidy in question, even if falling under one of the categories of Article 5 of Regulation (EU) 2022/2560, would not distort the internal market in the specific circumstances of the case.

In practice, foreign subsidies that fall under Article 5 of Regulation (EU) 2022/2560 will normally be considered distortive, unless the facts specific to the case show that there is unlikely to be a negative effect on competition in the internal market.

In any case, it is worth underlining that even if a subsidy falls under one of the categories of Article 5 of Regulation (EU) 2022/2560 and is considered distortive, the balancing test under Article 6 may still play a role in determining whether any redressive measures or commitments are necessary to address the distortion (see recital 21 of Regulation (EU) 2022/2560 and questions 9 and 10 below).

- 6. How does the Commission assess distortion under the public procurement module of Regulation (EU) 2022/2560?**

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22 (the ‘EU Merger Regulation’).

In the context of public procurement procedures, Article 27 of Regulation (EU) 2022/2560 provides that foreign subsidies that cause or risk causing a distortion in a public procurement procedure shall be understood as subsidies that enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. In this regard, the assessment pursuant to Article 4 of Regulation (EU) 2022/2560 of whether there is a distortion in the internal market, including the assessment of whether a tender is unduly advantageous, is limited to the public procurement procedure in question.

There are two conditions that must be met cumulatively: (1) the tender submitted by the subsidised economic operator must be unduly advantageous in relation to the works, supplies or services concerned and (2) there must be a link between the granting of the subsidy and the tender, demonstrating that the subsidy caused or risked causing a distortion in a public procurement procedure by enabling the undertaking, directly or indirectly, to submit an unduly advantageous tender.

First, in order to ascertain that the tender in question is “advantageous” in relation to the works, supplies or services concerned, the Commission will need to compare the tender with the other bids submitted in the tender procedure. In addition, the Commission will consult the documents used by the contracting authority in preparing the procurement documents including any research and the internal budget for the procurement to compare the tender with the contracting authority’s own estimate. Where the tender has been found to be advantageous, the undue nature of the advantage will be examined, taking into account whether the advantage can be justified by other factors that are not related to the subsidy itself (recital 53 of Regulation (EU) 2022/2560). Such other factors that can be adduced by the economic operator may concern, in particular, the elements listed in Article 69(2) of Directive 2014/24/EU or Article 84(2) of Directive 2014/25/EU to justify abnormally low tenders (recital 53 of Regulation (EU) 2022/2560), for example the particular cost-effectiveness of a production process, innovations or novel technical solutions, or exceptionally favourable conditions from which the economic operator benefits in the supply of goods or services. In this regard, the principles developed by the Union Courts regarding the explanation of prices in the context of analysing abnormally low tenders will be applied accordingly.

In its assessment of whether the tender is unduly advantageous, the Commission may also rely on other facts (such as general market information, information provided by competitors, etc.) or on the results of its own investigations.

In a second step, the link between the subsidy and the tender must be established, i.e. it must be shown, on the basis of the available information, that the foreign subsidy enabled or likely enabled, the economic operator to submit the unduly advantageous bid. This can be inferred directly from the information provided by the economic operator itself, or from the circumstances of the individual case and the information obtained during the investigation. If, for example, foreign subsidies were granted expressly with the aim of favouring the production of the goods in the European Union to be supplied under the public contract or the provision of the relevant services, this is a *prima facie* indication that the foreign subsidy enabled the submission of the unduly advantageous bid.

When assessing the existence of distortions in the internal market, the Commission shall take into account indicators which may include the (non-exhaustive) indicators set out in Article 4(1) of Regulation (EU) 2022/2560. In this regard, pursuant to recital (19) of Regulation (EU) 2022/2560, foreign subsidies covering a substantial part of the estimated value of a contract

to be awarded in a public procurement procedure are likely to cause distortions. In any case, for those foreign subsidies that are most likely to distort competition, such as those enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract, it is not necessary for the Commission to perform a detailed assessment based on indicators (recital 20).

7. What are the main types of distortion that the Commission may assess under the concentration module of the of Regulation (EU) 2022/2560?

Under Article 19 of Regulation (EU) 2022/2560, when evaluating whether a foreign subsidy in a concentration distorts the internal market as per Articles 4 or 5 of Regulation (EU) 2022/2560, the assessment is limited to the concentration concerned. Article 19 therefore requires that the internal market be distorted by the foreign subsidy through the concentration.

There are different ways in which foreign subsidies may distort the internal market. For example, foreign subsidies may lead to actual or potential negative effects on the acquisition process itself, affecting competition for acquiring the target. In this context, foreign subsidies received by the acquirer are particularly relevant as they may provide an advantage in the acquisition process, which the acquirer could use, for example, to outbid or discourage potential competitors. These foreign subsidies may consist of a variety of supporting measures, including a direct grant, an unlimited state guarantee or a loan below market terms to the acquirer. Subsidies granted to the target (or in some circumstances, even to the seller) may also be relevant. Moreover, while subsidies must be granted in the three years prior to the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest in the target to fall within the scope of Article 19 of Regulation (EU) 2022/2560, the distortion may not have materialised at the time that the concentration is completed. In that regard, it is not excluded that foreign subsidies lead to distortions with respect to the merged entity's activities.

8. How may the Commission assess distortions caused by unlimited guarantees?

Pursuant to Article 5(1)(b) of Regulation (EU) 2022/2560, *“a foreign subsidy in the form of an unlimited guarantee for the debts or liabilities of the undertaking, namely without any limitation as to the amount or the duration of such guarantee”* is one of the categories that is most likely to distort the internal market.

Unlimited guarantees extend to all obligations of their beneficiary and therefore are liable to improve the competitive position of that undertaking in various situations. For instance, an undertaking benefitting from an unlimited guarantee may receive a loan from a private bank that *prima facie* appears to be on market terms, but the conditions of which actually reflect the existence of that guarantee. In that respect, unlimited guarantees can take many forms and may go beyond an explicit statement or legal act referring to the undertaking concerned. For example, if an undertaking is able to obtain more favourable funding terms because, rather than being subject to standard bankruptcy laws, there are indications that the State might intervene in the case of illiquidity, which, in turn might increase the chances of creditors recovering sums owed to them than would otherwise be the case, this could indicate the existence of an unlimited guarantee.

In the context of a concentration, an unlimited guarantee can facilitate the concentration by enabling the acquirer to obtain financing from public or private banks below market terms so as to be able to offer the seller a higher purchase price for the target, thus improving the bidder's capacity to finance the transaction. Moreover, to the extent that a pre-existing unlimited guarantee would also extend to the merged entity, this could also potentially distort competition in the internal market if it is liable to improve the competitive position of the merged entity in the internal market and, in doing so, actually or potentially negatively affects competition in the internal market.

For the avoidance of doubt, the Commission's review under the concentration module does not concern foreign subsidies granted after the concentration. Rather, the Commission's assessment under the concentration module will only cover foreign subsidies that have been granted in the three years prior to the conclusion of the agreement, the announcement of the public bid or the acquisition of the controlling interest. Nevertheless, when assessing whether those foreign subsidies (granted prior to the concentration) are liable to distort the internal market, the Commission may assess distortions that materialise after the concentration has been completed.

Questions on balancing

9. *What is the Commission's approach to the balancing test under Article 6 of Regulation (EU) 2022/2560?*

At this early stage of implementation, the Commission has not yet gathered substantial experience on the application and interpretation of the balancing test pursuant to Article 6(1) of Regulation (EU) 2022/2560.

When conducting the balancing test, the Commission needs to take into account whether and to what extent the foreign subsidies distorting the internal market under consideration have positive effects on the "development of the relevant subsidised economic activity on the internal market". In addition, the Commission also has to "examine broader positive effects in relation to the relevant policy objectives, in particular those of the Union". Those policy objectives can include, for instance, considerations relating to a high level of environmental protection, social standards, or the promotion of research and development. More generally, where certain positive effects on the internal market have been acknowledged under the EU State aid rules, such positive effects would likely be taken into account in the assessment under Regulation (EU) 2022/2560. In public procurement procedures, the Commission should also consider the availability of alternative sources of supply for the goods and services concerned.

In "balancing" those positive effects, the Commission needs to weigh them against the distortion in the internal market caused by the foreign subsidies identified in a given case. The Commission will need to consider whether and to what extent the positive effects offset the negative effects caused by the foreign subsidies. Foreign subsidies that are most likely to be distortive under Article 5 of Regulation (EU) 2022/2560 are less likely to see their negative effects outweighed by positive effects.

When performing this assessment, the Commission will rely on the information received on possible positive effects. Such information may be provided by the undertakings under

investigation but also by Member States and other third parties. The Commission will therefore rely on submissions by all relevant stakeholders. Information which serves to evidence the positive effects may be submitted at any point during the investigation, but at the latest in due time to enable the Commission to adopt a decision closing an in-depth investigation in line with the procedural time limits. As regards notifiable concentrations, this is already clarified in the Form FS-CO published as Annex I to the Commission Implementing Regulation (EU) 2023/1441,⁴ which allows the notifying party to provide information on the existence of positive effects (Section 7 of Form FS-CO). As regards notifiable foreign financial contributions in public procurement procedures, this is already clarified in the Form FS-PP as Annex II to the Commission Implementing Regulation (EU) 2023/1441, which allows the notifying party to provide information on the existence of positive effects (Section 5 of Form FS-PP).

10. What impact can the balancing test have on the outcome of the investigation?

The application of the balancing test cannot, under any circumstances, lead to a less favourable outcome for undertakings under investigation than if the balancing test had not been applied. The application of the balancing test may lead to several outcomes. These include, first, the Commission adopting a “no objection decision” pursuant to Article 11(4)(b) of Regulation (EU) 2022/2560, if the positive effects identified fully outweigh the negative effects of the foreign subsidies. Second, if the negative effects outweigh the positive effects identified, and the Commission adopts redressive measures or accepts commitments from the undertaking, the balancing test may lead the Commission to adapt the nature and scope of those redressive measures or commitments, in order specifically to cater for those positive effects, while still ensuring that the negative effects are fully and effectively redressed. Third, the Commission may also come to the conclusion that the foreign subsidies do not have any, or only insignificant, relevant positive effects, so that remedies or commitments need not be adapted or that a concentration should be prohibited or that the award of the contract should be prohibited.

⁴ Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, OJ L 177, 12.7.2023, p. 1–44.