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WORKING PAPER

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From:	General Secretariat of the Council
To:	Working Party on Competition
Subject:	Proposal for a Regulation on Foreign Subsidies distorting the Internal Market - Table for MS comments on document ST 8576/21 - Articles 1-16, Articles 34, Articles 36 to 39

Delegations will find attached two tables (one with all recitals of the proposal and one with the relevant articles) for written comments on Proposal for a Regulation on Foreign Subsidies distorting the Internal Market (ST 8576/21).

You are invited to send your comments on Articles 1-16, Article 34, Articles 36 to 39 and only on recitals that corresponds to those articles.

Please use **only** the attached table (Microsoft **WORD version**) to send us your comments.

You will also find attached explanations on how to use the tables.

Please send your comments to: Jan.Sitar@gov.si and Competition@consilium.europa.eu , **by Friday, 8 October 2021, cob at the latest** .

Kind regards,

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Table for MS comments on the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21 (Art. 1-16, 34, 36-39)

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21	MS Drafting suggestions	MS comments
Chapter 1: General provisions		
Article 1		
Subject matter and scope		
This Regulation lays down rules and procedures for investigating foreign subsidies that distort the internal market and for redressing such distortions. Such distortions may arise with respect to any economic activity, and in particular in concentrations and public procurement procedures.		
This Regulation addresses foreign subsidies granted to an undertaking engaging in an economic activity in the internal market. An undertaking acquiring control or merging with an undertaking established in the Union or an undertaking participating in a public procurement procedure is considered to be engaging in an economic activity in the internal market.		
Article 2		
Existence of a foreign subsidy		

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For the purpose of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides a financial contribution which confers a benefit to an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries.		
For the purpose of this Regulation,		
a financial contribution shall include:		
(i) the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling;		
(ii) the foregoing of revenue that is otherwise due; or		
(iii) the provision of goods or services or the purchase of goods and services;		
the financial contribution provided by the third country shall include the financial contribution provided by:		
(i) the central government and government		

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authorities at all other levels;		
(ii) foreign public entities, whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy; or		
(iii) any private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.		
Article 3		
Distortions on the internal market		
A distortion on the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include the following:		
the amount of the subsidy;		
the nature of the subsidy;		

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the situation of the undertaking and the markets concerned;		
the level of economic activity of the undertaking concerned on the internal market;		
the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.		
A foreign subsidy is unlikely to distort the internal market if its total amount is below EUR 5 million over any consecutive period of three fiscal years.		
Article 4		
Categories of foreign subsidies most likely to distort the internal market		
A foreign subsidy falling in any of the following categories is most likely to distort the internal market:		
a foreign subsidy granted to an ailing undertaking, that is to say which will likely go out of business in the short or medium term in the absence of any subsidy, unless there is a restructuring plan that is capable of leading to the long-term viability of that undertaking and includes a significant own contribution by the undertaking;		

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a foreign subsidy in the form of an unlimited guarantee for debts or liabilities of the undertaking, that is to say without any limitation as to the amount or the duration of such guarantee;		
a foreign subsidy directly facilitating a concentration;		
a foreign subsidy enabling an undertaking to submit an unduly advantageous tender, on the basis of which the undertaking would be awarded the public contract.		
Article 5		
Balancing		
The Commission shall, where warranted, balance the negative effects of a foreign subsidy in terms of distortion on the internal market with positive effects on the development of the relevant economic activity.		
The Commission shall take into account the balancing between the negative and positive effects when deciding whether to impose redressive measures or to accept commitments, and the nature and level of those redressive measures or commitments.		

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Article 6		
Commitments and redressive measures		
To remedy the distortion on the internal market actually or potentially caused by a foreign subsidy, the Commission may impose redressive measures. The undertaking concerned may also offer commitments.		
Commitments or redressive measures shall fully and effectively remedy the distortion caused by the foreign subsidy in the internal market.		
Commitments or redressive measures may consist of the following:		
offering access under fair and non-discriminatory conditions to an infrastructure that was acquired or supported by the distortive foreign subsidies unless such fair and non-discriminatory access is already provided for by legislation in force in the Union;		
reducing capacity or market presence;		
refraining from certain investments;		
licensing on fair, reasonable and non-discriminatory terms of assets acquired or developed with the help of foreign subsidies;		

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publication of results of research and development;		
divestment of certain assets;		
requiring the undertakings concerned to dissolve the concentration;		
repayment of the foreign subsidy, including an appropriate interest rate.		
The Commission may impose reporting and transparency requirements.		
If an undertaking offers commitments which fully and effectively remedy the distortion on the internal market, the Commission may accept them and make them binding on the undertaking in a decision with commitments according to Article 9(3).		
Where the undertaking concerned proposes to repay the foreign subsidy including an appropriate interest rate, the Commission shall accept such repayment as commitment if it can ascertain that the repayment is transparent and effective, while taking into account the risk of circumvention.		
Chapter 2: Ex Officio review of foreign subsidies		

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Article 7		
Ex officio review of foreign subsidies		
The Commission may on its own initiative examine information from any source regarding alleged distortive foreign subsidies.		
Article 8		
Preliminary review		
The Commission shall seek all the information it considers necessary to assess, on a preliminary basis, whether the financial contribution under examination constitutes a foreign subsidy and whether it distorts the internal market. To that end, the Commission may in particular:		
request information in accordance with Article 11;		
conduct inspections in and outside the Union in accordance with Article 12 or Article 13.		
Where the Commission, based on the preliminary review, considers that there are sufficient indications that an undertaking has been granted a foreign subsidy that distorts the internal market, it shall		
adopt a decision to initiate an in-depth		

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investigation ('decision to initiate the in-depth investigation'), which shall summarise the relevant issues of fact and law and shall include the preliminary assessment of the existence of a foreign subsidy and of the actual or potential distortion on the internal market;		
inform the undertaking concerned; and		
publish a notice in the Official Journal of the European Union, which invites interested parties, Member States and the third country concerned to express their views in writing within a prescribed period of time.		
Where the Commission, after a preliminary assessment, concludes that there are no sufficient grounds to initiate the in-depth investigation, either because there is no foreign subsidy or because there are no indications of an actual or potential distortion on the internal market, it shall close the preliminary review and inform the undertaking concerned.		
Article 9		
In-depth investigation		
During the in-depth investigation, the Commission shall further assess the foreign subsidy distorting the internal market that has been identified in the decision to initiate the in-		

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depth investigation, seeking all the information it considers necessary in accordance with Articles 11, 12 and 13.		
Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5, it may impose redressive measures ('decision with redressive measures').		
Where the Commission finds that a foreign subsidy distorts the internal market pursuant to Articles 3 to 5 and the undertaking concerned offers commitments, which the Commission deems appropriate and sufficient to fully and effectively remedy the distortion, it may by a decision make these commitments binding on the undertaking ('decision with commitments'). A decision accepting the repayment of a foreign subsidy in accordance with Article 6(6) shall be considered a decision with commitments.		
The Commission shall adopt a no objection decision where it finds that:		
the preliminary assessment as set out in its decision to initiate the in-depth investigation is not confirmed; or		
a distortion on the internal market is outweighed by positive effects within the meaning of Article 5.		

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Article 10		
Interim measures		
The Commission may take interim measures, where:		
there are indications that a financial contribution constitutes a foreign subsidy and distorts the internal market; and		
there is a serious risk of substantial and irreparable damage to competition on the internal market.		
Article 11		
Information requests		
The Commission may require an undertaking concerned to provide all necessary information.		
The Commission may also request such information from other undertakings or associations of undertakings.		
A request for information to an undertaking or an association of undertakings shall:		
state its legal basis and its purpose, specify what information is required and set an appropriate time limit within which the information is to be		

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provided;		
contain a statement that if the information supplied is incorrect, incomplete or misleading fines and periodic penalty payments provided for in Article 15 could be imposed;		
contain a statement that, pursuant to Article 14, a lack of cooperation from the undertaking concerned allows the Commission to take a decision on the basis of the facts that are available.		
At the request of the Commission, Member States shall provide it with all necessary information to carry out the duties assigned to it by this Regulation.		
The Commission may also request a third country concerned to provide all necessary information.		
Article 12		
Inspections within the Union		
The Commission may conduct the necessary inspections of undertakings.		
Where the Commission undertakes such an inspection, the officials authorised by the Commission to conduct an inspection shall be		

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empowered:		
to enter any premises and land of the undertaking concerned;		
to examine books and other business records and take, or request copies;		
to ask any representative or member of staff of the undertaking for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers;		
to seal any business premises and books or records for the period and to the extent necessary for the inspection.		
The undertaking concerned shall submit to inspections ordered by decision of the Commission. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a Commission decision:		
specifying the subject matter and purpose of the inspection;		
containing a statement that, pursuant to Article 14, a lack of cooperation from the undertaking concerned allows the Commission to take a		

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decision on the basis of the facts that are available;		
referring to the possibility to impose fines and penalties provided for in Article 15.		
In good time before the inspection, the Commission shall give notice of the inspection to the Member State in whose territory it is to be conducted.		
Officials of the Commission as well as officials authorised or appointed by the Member State in whose territory the inspection is to be conducted shall, at the request of the Member State or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.		
Where officials or other accompanying persons authorised by the Commission find that an undertaking opposes an inspection within the meaning of this Article, the Member State concerned shall provide them with the necessary assistance and shall request, where appropriate, the assistance of the police or of an equivalent enforcement authority so as to enable them to conduct their inspection.		
Upon request of the Commission, a Member State shall in its own territory carry out any		

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inspection or other fact-finding measure under its national law in order to establish whether there is a foreign subsidy distorting the internal market.		
Article 13		
Inspection outside the Union		
In order to carry out the duties assigned to it by this Regulation, the Commission may conduct inspections in the territory of a third country, provided that the undertaking concerned has given its consent and the government of the third country has been officially notified and has agreed to the inspection. Article 12(1), (2), and (3) points (a) and (b) shall apply by analogy.		
Article 14		
Non-cooperation		
The Commission may take a decision pursuant to Article 8 or Article 9 on the basis of the facts available, if an undertaking concerned or a third country:		
provides incomplete, incorrect or misleading information in response to an information request under Article 11;		
fails to provide the information requested within		

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the time limit prescribed by the Commission;		
refuses to submit to the Commission's inspection within or outside the Union ordered under Article 12 or Article 13; or		
otherwise impedes the preliminary review or the in-depth investigation.		
Where an undertaking or association of undertakings, a Member State or the third country has supplied incorrect or misleading information to the Commission, that information shall be disregarded.		
Where an undertaking concerned, including a public undertaking which is directly or indirectly controlled by the State, fails to provide the necessary information to determine whether a financial contribution confers a benefit to it, that undertaking may be deemed to have received such benefit.		
When applying facts available, the result of the procedure may be less favourable to the undertaking concerned than if it had cooperated.		
Article 15		
Fines and periodic penalty payments		
The Commission may impose by decision fines		

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and periodic penalty payments where an undertaking concerned or an association of undertakings, intentionally or negligently:		
supplies incorrect, incomplete or misleading information in response to a request made pursuant to Article 11, or does not supply the information within the prescribed time limit;		
produces the required books or other records related to the business in incomplete form during inspections under Article 12;		
in response to a question asked in accordance with Article 12(2), point (c),		
(i) gives an incorrect or misleading answer,		
(ii) fails to rectify within a time-limit set by the Commission an incorrect, incomplete or misleading answer given by a member of staff, or		
(iii) fails or refuses to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 12(3);		
refuses to submit to inspections ordered under Article 12 or has broken seals affixed in accordance with Article 12(2)(d).		

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Fines imposed in the cases referred to in paragraph 1 shall not exceed 1 % of the aggregate turnover of the undertaking or association of undertakings concerned in the preceding business year.		
Periodic penalty payments imposed in the cases referred to in paragraph 1 shall not exceed 5% of the average daily aggregate turnover of the undertaking or association of undertakings concerned in the preceding business year for each working day of delay, calculated from the date established in the decision, until it submits complete and correct information as requested by the Commission.		
Before adopting any decision in accordance with paragraph 1, the Commission shall set a final time limit of two weeks to receive the missing information from the undertaking or from the association of undertakings concerned.		
Where an undertaking concerned does not comply with a decision with commitments pursuant to Article 9(3), a decision ordering interim measures pursuant to Article 10 or a decision imposing redressive measures pursuant to Article 9(2), the Commission may impose by decision:		
finer not exceeding 10 % of the aggregate turnover of the undertaking concerned in the		

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preceding business year; and		
periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertaking concerned in the preceding business year for each day of non-compliance, starting from the day of the Commission decision imposing such penalty payments, until the Commission finds that the undertaking concerned complies with the decision.		
In fixing the amount of the fine or periodic penalty payment, regard shall be had to the nature, gravity and duration of the infringement, taking due account of the principles of proportionality and appropriateness.		
Article 16		
Revocation		
The Commission may revoke a decision taken pursuant to Article 9(2), (3) or (4) and adopt a new decision in any of the following cases:		
where the undertaking concerned acts contrary to its commitments or the redressive measures imposed;		
where the decision was based on incomplete, incorrect or misleading information.		

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Article 34		
Market investigation		
Where the information available substantiates a reasonable suspicion that foreign subsidies in a particular sector, for a particular type of economic activity or based on a particular subsidy instrument may distort the internal market, the Commission may conduct a market investigation into the particular sector, the particular type of economic activity or into the use of the subsidy instrument concerned. In the course of that market investigation, the Commission may request the undertakings or associations of undertakings concerned to supply the necessary information and may carry out the necessary inspections. The Commission may also request the Member State or third country concerned to supply information.		
The Commission may publish a report on the results of its market investigation into particular sectors, particular types of economic activity or particular subsidy instruments and invite comments from interested parties.		
The Commission may use the information obtained from such market investigations in the framework of procedures under this Regulation.		
Articles 11, 12, 13 and 15 of this Regulation		

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shall apply.		
Article 36		
Publication of decisions		
The Commission shall publish a summary notice of the decisions adopted pursuant to Article 8(2).		
The Commission shall publish the decisions adopted pursuant to Article 9(2), (3) and (4), Article 24(3), and Article 30(1), (2) and (3) in the Official Journal of the European Union.		
When publishing summary notices and decisions, the Commission shall take due account of the legitimate interests of undertakings in the protection of their business secrets and other confidential information.		
Article 37		
Addressees of decisions		
Decisions adopted pursuant to Articles 8, 9, 15, 24(3), 25, 30(1) and 32 shall be addressed to the undertakings or to the association of undertakings concerned. The Commission shall notify the decision to the addressee without delay and shall give the addressee the opportunity to indicate to the Commission which information it considers to be confidential. The		

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Commission shall provide the contracting authority or the contracting entity concerned with a copy of any Commission decision addressed to an undertaking participating in a public procurement procedure.		
Decisions adopted pursuant to Article 30(2) and (3) shall be addressed to the contracting authority or the contracting entity concerned. The Commission shall provide the undertaking to which the award of the public contract is prohibited with a copy of that decision.		
Article 38		
Disclosure and rights of defence		
The Commission shall, before adopting a decision pursuant to Articles 9, 15, 24(3) point (c), 25, 30(2) or 32 give the undertaking concerned the opportunity to submit observations on the grounds on which the Commission intends to adopt its decision.		
The Commission shall base its decision only on grounds on which the undertakings concerned have been given the opportunity to submit their observations.		
Article 39		
Professional secrecy		

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Information acquired under this Regulation shall be used only for the purposes for which it was acquired.		
The Commission, its officials and other persons working under its supervision shall not disclose information covered by the obligation of professional secrecy that they have acquired under this Regulation.		
Paragraphs 1 and 2 shall not prevent publication of statistics and reports which do not contain information allowing to identify specific undertakings or associations of undertakings.		
		<u>General comments</u>
END	END	END

Table for MS comments on the RECITALS of the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21 (116 rows)

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on foreign subsidies distorting the internal market – doc. 8576/21	MS Drafting suggestions	MS comments
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,		
Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 114 and 207 thereof,		
Having regard to the proposal from the European Commission,		
After transmission of the draft legislative act to the national parliaments,		
Having regard to the opinion of the European Economic and Social Committee ¹ ,		
Acting in accordance with the ordinary legislative procedure,		
Whereas:		
A strong, open and competitive internal market enables both European and foreign undertakings to compete on merits. The Union benefits from a sophisticated and effective system of State aid control, aiming at ensuring fair conditions for all		

¹ OJ C [...], [...], p. [...].

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undertakings engaging in an economic activity in the internal market. This State aid control system prevents Member States from granting State aid that unduly distorts competition in the internal market.		
At the same time, undertakings might receive subsidies from third countries, that provide public funds which are then used, for instance, to finance economic activities in the internal market in any sector of the economy, such as participation in public procurement tenders, or acquisitions of undertakings, including those with strategic assets such as critical infrastructure and innovative technologies. Such subsidies are currently not subject to Union State aid rules.		
Foreign subsidies can distort the internal market and undermine the level playing field for various economic activities in the Union. This could in particular occur in the context of concentrations entailing a change of control over Union undertakings, where such concentrations are fully or partially financed through foreign subsidies, or if undertakings benefiting from foreign subsidies are awarded public contracts in the Union.		
No existing Union instruments address distortions caused by foreign subsidies. Trade defence instruments enable the Commission to		

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act when subsidised goods are imported into the Union, but not when foreign subsidies take the form of subsidised investments, or when services and financial flows are concerned. Under the WTO Agreement on Subsidies and Countervailing Measures, the Union has the possibility to initiate State-to-State dispute settlement against certain foreign subsidies granted by WTO members and limited to goods.		
It is therefore necessary to complement existing Union instruments with a new tool to effectively deal with distortions in the internal market caused by foreign subsidies and ensure a level playing field. In particular, the new tool complements Union State aid rules which deal with distortions in the internal market caused by Member State subsidies.		
Rules and procedures to investigate foreign subsidies that actually or potentially distort the internal market should be laid down and, where relevant, those distortions should be redressed. Foreign subsidies could distort the internal market if the undertaking benefitting from the foreign subsidy engages in an economic activity in the Union. This Regulation should therefore establish rules for all undertakings engaging in an economic activity in the Union. Given the significance of the economic activities pursued by SMEs, and their contribution to the fulfilment of the Union's key policy goals, special attention		

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is given to the impact of this Regulation on them.		
To ensure a level playing field throughout the internal market and consistency in the application of this Regulation, the Commission should be the sole authority competent to apply this Regulation. The Commission should have the power to examine any foreign subsidy to the extent it is in the scope of this Regulation in any sector of the economy on its own initiative relying on information from all available sources. To ensure effective control, in the specific case of large concentrations (mergers and acquisitions) and public procurement procedures above certain thresholds, the Commission should have the power to review foreign subsidies based on a prior notification by the undertaking to the Commission.		
Foreign subsidy in the context of this Regulation should be understood as an intervention that meets three cumulative conditions.		
There should be a financial contribution provided, directly or indirectly, by the public authorities of a third country. The financial contribution may be granted through public or private entities. Whether a public entity provides a financial contribution should be determined on a case-by-case basis with due regard to elements such as the characteristics of the relevant entity		

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and the legal and economic environment prevailing in the country in which the entity operates including the government's role in the economy. Financial contributions may also be granted through a private entity if its actions can be attributed to the third country.		
Such a financial contribution should confer a benefit to an undertaking engaging in an economic activity in the internal market. A financial contribution that benefits an entity engaging in non-economic activities does not constitute a foreign subsidy. The existence of a benefit should be determined on the basis of comparative benchmarks, such as the investment practice of private investors, rates for financing obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service.. If no directly comparable benchmarks are available, existing benchmarks could be adjusted or alternative benchmarks could be established based on generally accepted assessment methods.		
The benefit should be conferred to an individual undertaking or industry or several undertakings or industries. The benefit could be established by law or in fact.		
Once the existence of a foreign subsidy is established, the Commission should assess whether the foreign subsidy distorts the internal		

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market. Unlike State aid granted by a Member State, foreign subsidies are not generally prohibited. Subsidies in the form of export financing may be a cause of particular concern because of their distortive effects. This is not the case if such financing is provided in line with the OECD Arrangement on officially supported export credits. The Commission should assess on a case-by-case basis whether a foreign subsidy distorts the internal market.		
The lack of transparency concerning many foreign subsidies and the complexity of the commercial reality may make it difficult to unequivocally identify or quantify the impact of a given foreign subsidy on the internal market. To determine the distortion, it therefore appears necessary to use a non-exhaustive set of indicators. When assessing the extent to which a foreign subsidy can improve the competitive position of the undertaking concerned and, in doing so, actually or potentially negatively affects competition in the internal market, the Commission could have regard to certain indicators, including but not limited to the amount and nature of the subsidy, the purpose and conditions attached to the foreign subsidy as well as its use in the internal market.		
When applying these indicators, the Commission could take into account different elements such as the size of the subsidy in		

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absolute terms or in relation to the size of the market or to the value of the investment. For instance, a concentration, in the context of which a foreign subsidy covers a substantial part of the purchase price of the target, is likely to be distortive. Similarly, 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. If a foreign subsidy is granted for operating costs, it seems more likely to cause distortions than if it is granted for investment costs. Foreign subsidies to small and medium-sized undertakings may be considered less likely to cause distortions than foreign subsidies to large undertakings. Furthermore, the characteristics of the market, and in particular the competitive conditions on the market, such as barriers to entry, should be taken into account. Foreign subsidies leading to overcapacity by sustaining uneconomic assets or by encouraging investment in capacity expansions that would otherwise not have been built are likely to cause distortions. A foreign subsidy to a beneficiary that shows a low degree of activity in the internal market, measured for instance in terms of turnover achieved in the Union, is less likely to cause distortions than a foreign subsidy to a beneficiary that has a more significant level of activity in the internal market. Finally, foreign subsidies not exceeding EUR 5 million should be deemed, as a general rule, unlikely to distort the internal market within the meaning of this		
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Regulation.		
Like certain types of State aid, also certain categories of foreign subsidies, such as unlimited guarantees, are likely to create distortions in the internal market because of their nature. Those categories should not require a detailed assessment based on indicators. An undertaking could in any event show that the foreign subsidy in question would not distort the internal market in the specific circumstances of the case.		
The Commission should take into account the positive effects of the foreign subsidy on the development of the relevant subsidised economic activity. The Commission should weigh these positive effects against the negative effects of a foreign subsidy in terms of distortion on the internal market in order to determine, if applicable, the appropriate redressive measure or accept commitments. The balancing may also lead to the conclusion that no redressive measures should be imposed. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects.		
Where the Commission examines a foreign subsidy on its own initiative, it should have the power to impose redressive measures on an undertaking to remedy any distortion caused by		

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a foreign subsidy in the internal market. Redressive measures should be proportionate and suitable to remedy the distortion at stake. They should include behavioural or structural remedies or the repayment of the foreign subsidy.		
The undertaking concerned should have the possibility to offer commitments in order to remedy the distortion caused by the foreign subsidy. If the Commission considers that the commitments offered fully and effectively remedy the distortion, it could accept them and make them binding by decision.		
The undertaking concerned could offer to repay the subsidy, together with appropriate interest. The Commission should accept a repayment offered as a commitment if it can ascertain that the repayment fully remedies the distortion, is executed in a transparent manner and is effective in practice, while taking into account the risk of circumvention of the objectives of this Regulation.		
Unless the undertakings concerned offer commitments that would fully and effectively remedy the identified distortion, the Commission should have the power to prohibit a concentration or the award of a public contract before it takes place. Where the concentration has already been implemented, notably in cases		

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where no prior notification was required because the notification thresholds were not reached, the distortion may nonetheless be so substantial that it cannot be remedied by behavioural or structural measures or by the repayment of the subsidy. In such cases, the Commission could decide to remedy the distortion by ordering the undertakings concerned to dissolve the concentration.		
The Commission should have the power, on its own initiative, to examine any information on foreign subsidies. To this end, it is necessary to establish a procedure consisting of two steps, namely a preliminary review and an in-depth investigation.		
The Commission should be given adequate investigative powers to gather all necessary information. It should therefore have the power to request information from any undertaking or association of undertakings throughout the whole procedure. In addition, the Commission should have the power to impose fines and periodic penalty payments for failure to timely supply the requested information or for supplying incomplete, incorrect or misleading information. The Commission could also address questions to Member States or to third countries. Furthermore, the Commission should have the power to make fact-finding visits at the Union premises of the undertaking, or, subject to		

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agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. The Commission should also have the power to take decisions on the basis of facts available if the undertaking in question does not cooperate.		
Furthermore, where necessary to restore competition in the internal market immediately and to prevent irreparable harm, the Commission should have the power to adopt interim measures.		
In all cases where, as a result of the preliminary review, the Commission has sufficient indications of the existence of a foreign subsidy distorting the internal market, the Commission should have the power to launch an in-depth investigation to gather additional relevant information to assess the foreign subsidy, and to allow the interested parties to exercise their rights of defence.		
The Commission should close the in-depth investigation by adopting a decision.		
The Commission should have appropriate instruments to ensure the effectiveness of commitments and redressive measures. If the undertaking concerned does not comply with a decision with commitments, a decision imposing redressive measures, or a decision ordering		

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interim measures, the Commission should have the power to impose fines and periodic penalty payments.		
In order to ensure the correct and effective application of this Regulation, the Commission should have the power to revoke a decision and adopt a new one, where the decision was based on incomplete, incorrect or misleading information, or where an undertaking acts contrary to its commitments or the redressive measures imposed.		
Given the potentially significant impact of concentrations on the internal market, the Commission should have the power, upon notification, to examine information on foreign financial contributions in the context of a proposed concentration. Undertakings should not be allowed to implement the concentration prior to the conclusion of the Commission's review.		
This examination by the Commission should follow the same procedure as the one where a foreign subsidy is reviewed on the Commission's initiative, subject to adjustments to reflect the specificities of concentrations.		
It is necessary to strike a balance between effective protection of the internal market and the need to limit the administrative burden on		

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undertakings subject to this Regulation. Therefore, only concentrations meeting combined thresholds as defined in this Regulation based on the size of the turnover in the Union and the size of the subsidy should be subject to mandatory prior notification.		
Below the notification thresholds, the Commission could require the notification of potentially subsidised concentrations that were not yet implemented or the notification of potentially subsidised bids prior to the award of a public contract, if it considers that the concentration or the bid would merit ex-ante review given their impact in the Union. The Commission should also have the possibility to carry out a review on its own initiative of already implemented concentrations or awarded public contracts.		
When reviewing a concentration, the assessment of whether there is a distortion in the internal market should be limited to the concentration at stake, and only foreign subsidies granted in the three years prior to the concentration should be considered in the assessment.		
The need to address distortive foreign subsidies is especially salient in public procurement, given its economic significance in the internal market and the fact that it is financed by taxpayer funds. The Commission should have the power, upon		

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notification prior to the award of a public contract or concession, to examine information on foreign financial contributions to the participating undertakings in the context of a public procurement procedure. Prior notifications should be mandatory above a threshold set in this Regulation to capture economically significant cases while minimising the administrative burden and not hindering the participation of SMEs in public procurement. That obligation of prior notification above a threshold should also apply to groups of economic operators referred to in Article 26(2) of Directive 2014/23/EU of the European Parliament and of the Council ² , Article 19(2) of Directive 2014/24/EU of the European Parliament and of the Council ³ and Article 37(2) of Directive 2014/25/EU of the European Parliament and of the Council ⁴ . It should also apply to the main subcontractors and the main suppliers of undertaking.		
When a foreign financial contribution is notified		

² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁴ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

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in the context of a public procurement procedure, the assessment should be limited to that procedure.		
It should be ensured that the principles governing public procurement, notably proportionality, non-discrimination, equal treatment, and transparency, are respected as regards all undertakings involved in the public procurement procedure, regardless of investigations initiated and pending pursuant to this Regulation.		
Foreign subsidies that enable an undertaking to submit a tender which is unduly advantageous in relation to the works, supplies or services concerned should be deemed to actually or potentially create a distortion in a public procurement procedure. Those distortions should therefore be assessed on the basis of the non-exhaustive set of indicators described in recitals 13 and 14 as well as the notion of unduly advantageous tender. The indicators should allow to determine how the foreign subsidy distorts competition by improving the competitive position of an undertaking and enabling it to submit an unduly advantageous tender. The opportunity should be given to undertakings to justify that the tender is not unduly advantageous, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU. The prohibition of the award		

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should only apply where the advantageous nature of the tender benefiting from foreign subsidies cannot be justified, the tender would be awarded the contract and the undertaking submitting the tender did not offer commitments considered appropriate and sufficient to fully and effectively remove the distortion.		
Taking into account the nature of the ex ante review mechanism for concentrations and public procurement awards, and the need for legal certainty regarding these specific transactions, a concentration or public procurement tender notified and assessed under the respective procedures cannot be reviewed again by the Commission on its own initiative. Financial contributions of which the Commission was informed through the notification procedure may however also be relevant outside the concentration or procurement procedure. In order to gather information on foreign subsidies, the Commission should have the possibility to launch investigations regarding specific sectors of the economy, particular types of economic activity or the use of particular foreign subsidy instruments.		
For the same reasons, it is appropriate to provide for limitation periods for the imposition and enforcement of fines and periodic penalty payments.		

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In the interest of transparency and legal certainty, it is appropriate to publish either in full or in a summary form all decisions adopted by the Commission.		
The Commission, when publishing its decisions, should respect the rules on professional secrecy, including the protection of all confidential information, business secrets and personal data, in accordance with Article 339 of the Treaty.		
In cases where information marked by the undertaking as confidential or business secret does not seem to be covered by obligations of professional secrecy, it is appropriate to have a mechanism in place according to which the Commission can decide the extent to which such information can be disclosed. Any such decision to reject a claim that information is confidential should indicate a period at the end of which the information will be disclosed, so that the respondent can make use of any judicial protection available to it, including any interim measure.		
The undertakings or associations of undertakings concerned by an investigation under this Regulation should have the opportunity of submitting their observations. While ensuring preservation of the rights of defence of the undertakings concerned, it is essential that business secrets be protected.		

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The implementation of this Regulation by the Union should comply with Union law, the WTO Agreement and be consistent with commitments made under other trade and investment agreements to which the Union or the Member States are parties.		
Restrictions to Articles 34, 49, 56 and 63 of the Treaty can be justified by the need to avoid unfair competition, provided that such restrictions, like other restrictions of fundamental freedoms comply with the general principles of Union law, such as proportionality, legal certainty, and with fundamental rights.		
The implementation of this Regulation may overlap with sectoral rules, in particular in the area of maritime and air transport. Therefore, it is necessary to clarify the relationship between this Regulation and sectoral instruments dealing with foreign subsidies, namely Regulation (EU) 2016/1035 of the European Parliament and of the Council ⁵ ; Council Regulation (EEC) 4057/86 ⁶ ; and Regulation (EU) 2019/712 of the European Parliament and of the Council ⁷ .		

⁵ Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels (OJ L 176, 30.6.2016, p. 1).

⁶ Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ L 378, 31.12.1986, p. 14).

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Where the Commission adopts a decision at the end of an in-depth investigation, Member States should be adequately involved prior to the decision making in an advisory procedure pursuant to Article 4 of Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁸ . The choice of this procedure is justified taking into account the role of Member States in competition and State aid instruments, which also aim at levelling the playing field in the internal market.		
In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission in accordance with Article 291 of the Treaty. Those powers should be exercised to set out the form and content of notifications of concentrations as well as of financial contributions in the context of public procurement procedures, details of disclosure, form and content of transparency requirements, calculation of time-limits, conditions and time-limits for commitments and detailed rules on the		

⁷ Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004 (OJ L 123, 10.5.2019, p. 4).

⁸ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

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procedural steps concerning investigations regarding public procurement procedures. Those powers should be exercised in accordance with Regulation (EU) No 182/2011.		
In order to ensure a level playing field on the internal market also in the long term, with a view to ensuring adequate coverage of cases investigated both through notifications as well as ex officio, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission in respect of amending the notification thresholds for concentrations and for public procurement procedures, exempting certain categories of undertakings from the notification obligations under this Regulation, as well as amending the time limits for the preliminary review and the in-depth investigations of notified concentrations or notified financial contributions in the context of a public procurement procedure. In relation to financial contributions in the context of a public procurement procedure, the power to adopt such acts should be exercised in a way that takes into account the interests of SMEs. It is of particular importance that the Commission carries out appropriate consultations during the preparations of those acts, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the		

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Interinstitutional Agreement of 13 April 2016 on Better Law-Making ⁹ . In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council should receive all documents at the same time as Member States' experts, and their experts systematically should have access to meetings of Commission expert groups dealing with the preparation of delegated acts.		
Where a concentration is notifiable pursuant to this Regulation, financial contributions to any of the parties to the concentration granted in the three years prior to the date of application of this Regulation should fall within the scope of this Regulation. In the context of a public procurement procedure, this Regulation should also apply to a financial contribution granted to an undertaking in the three years prior to the date of application of this Regulation,		
		General comments
END	END	END

⁹ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making (OJ L 123, 12.5.2016, p. 1).

Explanations for submitting drafting suggestions and comments using the table

Please use the attached table to send us your comments. Send the table as a WORD document.

Please note the following **important rules** when completing the table:

- **Column 1** is for information and **should not be modified at all**.
- Add your **drafting suggestions in column 2** in track changes
- For adding your suggestions DO NOT modify the text in column 1 - copy and paste the text from column 1 to column 2 and make your changes on the text in column 2
- Add your **comments related to the specific part of the text and your suggested changes in column 3**
- Please add any **general comments** at the **bottom of the table in column 3**.
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Thanks a lot for your collaboration !